

Volume 3

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

BERNARD PAUL PARRISH, HERBERT)
ANTHONY ADDERLEY, WALTER ROBERTS)
III,)
)
Plaintiffs,)

VS.

No. C 07-0943 WHA

NATIONAL FOOTBALL LEAGUE PLAYERS)
ASSOCIATION and NATIONAL FOOTBALL)
LEAGUE PLAYERS INCORPORATED d/b/a)
PLAYERS INC,)
)
Defendants.)

San Francisco, California

Wednesday
October 22, 2008

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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P R O C E E D I N G S`

OCTOBER 22, 2008

7:34 A.M.

(The following proceedings were held in open court,
outside the presence of the jury.)

THE COURT: All right. I want you to know on the
Friss, I completely misunderstood the procedural context in
which this was coming up.

I thought this was something you were giving me that
the defense was propounding and was going to be read in as a
defense witness. And now I understand that the plaintiff is
the proponent of this witness.

So I'm not going to rule right now because I'm still
sorting this out, but -- just a minute. In the future, when
you give me these -- there was nothing on here that tells me
who was the proponent of the witness and whose objections I was
ruling on. I completely misunderstood the context.

Then I began to suspect that I had misled myself, and
I sent out that order yesterday to get this clarified. I now
have a better understanding. In fact, you, Mr. Hummel, are the
proponent of this witness.

MR. HUMMEL: Under the rules, Your Honor, we
designated certain testimony from Mr. Friss.

THE COURT: You are the proponent at trial.

MR. HUMMEL: We would call him as our witness if he

1 were here.

2 **THE COURT:** Yes, that's right. You are the
3 proponent.

4 **MR. HUMMEL:** Correct.

5 **THE COURT:** They are entitled to lead the witness.

6 **MR. HUMMEL:** No, Your Honor, not if he is an adverse
7 witness, respectfully.

8 **THE COURT:** He is a third party.

9 **MR. HUMMEL:** Correct.

10 **THE COURT:** He is a third party, and you are calling
11 him.

12 **MR. HUMMEL:** Right.

13 **THE COURT:** If this guy was called live at trial,
14 Mr. -- Kebble?

15 **MR. KESSLER:** Kessler.

16 **MR. HUMMEL:** Kessler, Your Honor.

17 **THE COURT:** -- would be allowed to lead all day long.

18 **MR. HUMMEL:** I disagree, Your Honor.

19 **THE COURT:** You're wrong. Now, just sit down. I'm
20 not going to entertain anymore argument.

21 I read the brief on it. I feel like I'm misled. I
22 misled myself. But you are the proponent of the witness. If
23 you call this guy live at trial you're saying he can't lead?

24 **MR. HUMMEL:** Correct.

25 **THE COURT:** You're wrong.

1 **MR. HUMMEL:** Your Honor --

2 **THE COURT:** He's a first party.

3 **MR. HUMMEL:** May I --

4 **THE COURT:** Yes, he went and got a declaration from
5 the guy.

6 **MR. HUMMEL:** Right.

7 **THE COURT:** Yes, he may have written it.

8 **MR. HUMMEL:** Yes.

9 **THE COURT:** That happens all the time. People go and
10 get statements from third parties all the time so they can
11 impeach them at trial.

12 **MR. HUMMEL:** Of course. So they could impeach him at
13 trial. What you wouldn't allow him to do at trial is to say:

14 "Mr. Friss, let me read you paragraph 1 of your
15 declaration."

16 **THE COURT:** You did not object on that ground,
17 unfortunately.

18 **MR. HUMMEL:** We did.

19 **THE COURT:** No, you didn't. You objected to it as
20 leading, but that's -- he can lead. He can lead, but he
21 cannot -- the proper objection would have been: It assumes
22 facts not in evidence. No one bothered -- I read that. No one
23 bothered to bring that up.

24 **MR. HUMMEL:** Your Honor, it's hearsay, as well. And
25 that objection is correct as to form, because the declaration

1 is an out-of-court statement by the witness.

2 **THE COURT:** The declaration is not going to come in.

3 **MR. HUMMEL:** So then why --

4 **THE COURT:** The declaration itself won't come in, but
5 the parts that were read in the question -- that would have
6 been a proper objection, but it was not made, and you waived
7 it.

8 **MR. HUMMEL:** Your Honor, we objected as to form --

9 **THE COURT:** No.

10 **MR. HUMMEL:** -- which is --

11 **THE COURT:** No. You objected, comma, leading. I
12 read it. I've got it right here. Do you want to see it in?

13 **MR. HUMMEL:** No. There are times when it was
14 "Objection, leading," that's correct.

15 **THE COURT:** You said:

16 "Object to the form, leading."

17 **MR. HUMMEL:** That's correct.

18 **THE COURT:** "Objection, leading. Objection, leading.
19 Objection, leading."

20 **MR. HUMMEL:** And, Your Honor --

21 **THE COURT:** Never: "Objection, assumes facts not in
22 evidence."

23 If you had said that, you would have given the lawyer
24 a chance to fix it. It's a very common mistake for young
25 lawyers who never tried a case to make. I'm not trying

1 to excuse what Mr. -- is Mr. Greenspan here today?

2 **MR. GREENSPAN:** I'm the --

3 **THE COURT:** Are you the guy who did this?

4 **MR. GREENSPAN:** The leading question.

5 **THE COURT:** Probably never tried a case. You should
6 have -- you should have -- you would have known not to proceed
7 in this manner.

8 But you didn't put him on notice that he was making a
9 mistake. You said it's leading. Yeah, it was leading. But
10 now that you are the proponent, he can lead.

11 **MR. HUMMEL:** Your Honor, we'll preserve this.

12 **THE COURT:** All right. That point is preserved for
13 appeal.

14 **MR. HUMMEL:** Thank you, Your Honor.

15 **THE COURT:** But there is a different problem. There
16 is a different problem here, and that's why I'm not ready to
17 completely rule on this.

18 Get this. I've already ruled on this. But I've got
19 to sort through it. It's not so easy. He puts it in the
20 present tense.

21 "It is Topps' understanding that" -- I've already
22 ruled the present tense doesn't matter. That's just an
23 opinion. What matters is the intent back at the time they were
24 doing the deal.

25 All right. So then I write in the margin:

1 "Today's understanding not relevant so I've
2 already ruled that out.

3 Except, then I get to the next page, and then he
4 says:

5 "Well, was this your understanding at the time?"

6 He says:

7 "Yes."

8 So he kind of fixes it up.

9 **MR. HUMMEL:** Your Honor --

10 **THE COURT:** I'm not finished going through this. Not
11 all of this is going to come in, but some of it is going to
12 come in, contrary to what I said the other day because I had
13 totally misunderstood the procedural context.

14 **MR. HUMMEL:** Your Honor, and to be clear, we
15 obviously reserve the right. If you rule that they can put in
16 what, in my mind, is obviously leading hearsay testimony, we
17 may not choose to read Friss affirmatively in our case. In
18 which case they would have to.

19 **THE COURT:** Then it would be a much different
20 problem, wouldn't it?

21 **MR. HUMMEL:** Correct. That's right.

22 **THE COURT:** Well, then, I wish you had told me that
23 and saved me a lot of pain and suffering overnight.

24 **MR. HUMMEL:** Your Honor, to me it was very clear that
25 that testimony --

1 **THE COURT:** Fair enough. Fair enough. I think --
2 listen. These are not easy evidentiary problems. And you had
3 a definite good faith basis to make these objections.

4 **MR. HUMMEL:** Yes, Your Honor.

5 **THE COURT:** There's no doubt about it.

6 **MR. HUMMEL:** Thank you.

7 **THE COURT:** But now that I understand the context and
8 that you're the proponent of the witness, which I didn't
9 understand until the thing got submitted last night -- I'm
10 looking at these different colored things. No one bothered to
11 tell me whose objections they are.

12 Now that I figured it out and went through and did
13 the Rosetta Stone code that you gave me last night, I
14 understand that you're the proponent of the witness.

15 **MR. HUMMEL:** And we may not be, Your Honor.

16 **THE COURT:** If you decide not to call him --

17 **MR. HUMMEL:** Right.

18 **THE COURT:** -- that is a different problem.

19 And you're going to be in trouble, Mr. Greenspan,
20 because of all these leading questions. If you're the
21 proponent then --

22 **MR. GREENSPAN:** No, Your Honor. The deposition
23 itself, which plaintiff subpoenaed, they were the ones that
24 marked the declaration --

25 **THE COURT:** Please, no. I'm telling you,

1 Mr. Greenspan, depositions are one thing. At trial I've got to
2 treat it as: Who is the proponent of the witness here? I
3 don't look to see who took the deposition. It's only in a rare
4 case that might have something to do with it.

5 But the principal thing is if -- I have to just say
6 if this guy was called as a witness live here at trial, would
7 these kind of questions be allowed on cross-examination?

8 Now, if you are the proponent of the witness, there
9 is no way I would allow you to lead like this.

10 **MR. GREENSPAN:** Even then, Your Honor, I will note
11 there are many questions in there that we believe are either
12 not leading or were not objected to for form at the deposition.

13 **THE COURT:** That would be a good point, except the
14 one I'm looking at right now were objected to precisely on that
15 ground.

16 **MR. KESSLER:** Your Honor, I think if we end up as a
17 proponent of the witness we will then redesignate those
18 portions we think are consistent with Your Honor's rulings.

19 We do think there are portions that will not be
20 subject to what Your Honor is saying, because either they did
21 not make the objection or the questions were not leading. And
22 we will go through that if we become the proponents.

23 **THE COURT:** When Mr. Greenspan took over there are a
24 couple of questions that are not leading. But 80 to 90 percent
25 of them are. It's like he doesn't know how to ask a nonleading

1 question. He's afraid of the answer or something.

2 So you -- look. I'm not going to fix it up for
3 somebody. I'm not finished with this yet. I will try to get
4 it done by, maybe -- I don't know, sometime today.

5 **MR. KESSLER:** Thank you.

6 **THE COURT:** That's going to be the ground rule.

7 I want to go back and emphasize that the
8 understanding today of what any of these -- that's just an
9 opinion. What matters is what the -- I already said this.
10 It's the objective test.

11 But because you're applying D.C. law and it does seem
12 to allow some subjective intent, I think the only subjective
13 intent that matters is what they thought at the time. And in
14 the contract and any subsequent actions like some other
15 contract was entered into because they thought it meant -- the
16 other contract meant X.

17 **MR. HUMMEL:** Your Honor?

18 **THE COURT:** Okay. We can allow that. But we're not
19 going to allow present-day opinions. And by "present day," I
20 mean when they ask him at the deposition:

21 "What do you think this means?" and they say:

22 "It means X," that's inadmissible.

23 All right.

24 **MR. HUMMEL:** Your Honor, I'd like to save the Court
25 some time. If you're inclined to let them lead if we were the

1 proponent, we will not call him in our case. So we will
2 redesignate. I want to save the Court time and not have you do
3 it, then.

4 **THE COURT:** You are not going to call Warren Friss?

5 **MR. HUMMEL:** We will not call him in our affirmative
6 case, if that's Your Honor's inclination.

7 **THE COURT:** That's my inclination for sure.

8 **MR. HUMMEL:** All right, Your Honor. Then, we will
9 take that back and redesignate. We don't want to waste the
10 Court's time on this.

11 **THE COURT:** Well, I have got a lot of preliminary
12 notes on there now. I can't give it back to you.

13 **MR. HUMMEL:** Okay.

14 **THE COURT:** Unless you really have to have it, and
15 then I'll have to --

16 **MR. HUMMEL:** We don't have to have it, but I'm giving
17 notice to the other side. And Mr. Kessler indicated he would
18 designate him.

19 **MR. KESSLER:** We would redesignate, Your Honor,
20 obviously.

21 **THE COURT:** Since this guy is your friend, why don't
22 you just call him as a witness in the case?

23 **MR. KESSLER:** He's not our friend. He's a third
24 party.

25 **THE COURT:** You wrote the declaration. Come on. You

1 could get this guy out here.

2 **MR. KESSLER:** As Your Honor knows, you can approach a
3 third party. You can get them to agree to submit a
4 declaration. They are a licensee of the company. He's on the
5 East Coast, and I don't know whether we can call him or not.

6 **THE COURT:** He has a contract with you that he's
7 supposed to help cooperate.

8 **MR. KESSLER:** I don't believe that kind of provision,
9 Your Honor, would require him to come to a litigation.

10 In any event, since they have --

11 **THE COURT:** It's your problem. Next time you better
12 teach your associates not to ask leading questions if they ever
13 want to get it in evidence at trial.

14 **MR. KESSLER:** We will go through the deposition
15 again, and if we decide to designate it in our case we will not
16 designate the ones that are leading. We will designate the
17 other portions.

18 **THE COURT:** It's been withdrawn from the plaintiff.
19 If you want to try your best to get some of that into evidence,
20 more power to you.

21 **MR. KESSLER:** We will look at that, Your Honor.

22 **MR. HUMMEL:** Thank you, Your Honor. I apologize for
23 the confusion.

24 **THE COURT:** Anything you want to bring up this
25 morning?

1 **MR. KESSLER:** Your Honor, I think EA is here and
2 filed a motion with the Court.

3 **THE COURT:** I read your motion. Who is this?
4 Slaughter.

5 **MR. SLAUGHTER:** Yes, Your Honor. James Slaughter
6 from Kecker & Van Nest.

7 **THE COURT:** You have an uphill battle here, but I'll
8 hear what you have to say.

9 **MR. SLAUGHTER:** Your Honor, we seek only to have very
10 minimal portions of this document redacted and kept
11 confidential.

12 EA is a third party to this action. They produced
13 documents pursuant to a subpoena. The document was produced on
14 a highly-confidential basis. They were expected to be
15 maintained on an attorneys' eyes only basis. And as far as we
16 understand, throughout the course of this litigation they have
17 been maintained on an attorneys' eyes only basis. They have
18 not been publicly disclosed.

19 We learned only yesterday, for the first time, that
20 the document might come into evidence unredacted and unsealed.
21 We don't seek to have the entire document sealed, as I
22 mentioned, Your Honor, but just solely the price terms, which
23 are EA's, you know, most confidential trade secret. This is
24 what they do with -- this is how they negotiate with their
25 third parties.

1 **THE COURT:** They are a public company, aren't they?
2 How could the amount of money they get be a trade secret?

3 **MR. SLAUGHTER:** The amount of money that they
4 negotiate with one licensor is going to directly affect how
5 they negotiate with other licensors. This is their business
6 practice.

7 If the other licensors know what EA is willing to
8 pay, that directly affects their business practices, Your
9 Honor. This is the exact kind of confidential financial
10 information that is normally kept secret.

11 And we're not -- as I mentioned, we're not asking the
12 entire document be kept secret, just those portions of the
13 document that relate to the pricing information.

14 I understand that the defendants support the request.
15 The plaintiffs do not; take the position with respect to the
16 request. And so we would request, Your Honor, that just those
17 portions of paragraph 6 of the Exhibit 80 be redacted relating
18 to the price.

19 **THE COURT:** The Court is now going to rule. This
20 motion is denied. I'm going to explain why it's denied.

21 The courts of the United States belong to the people
22 of the United States.

23 The Ninth Circuit, in a decision called Kamakana vs.
24 City and County of Honolulu -- which you did cite in your
25 memorandum, but you didn't cite it for the proper and most

1 pertinent proposition -- the Ninth Circuit has said when a case
2 goes to trial and/or on summary judgment, the public -- not
3 these parties -- the public has an additional interest in
4 knowing the operations and the workings of its federal courts.

5 And if somebody's case gets thrown out or not thrown
6 out, the public has a right to come in and see why so they can
7 look over the shoulder of the judge and see if the judge or the
8 jury is doing the right thing.

9 Now, so the Ninth Circuit specifically modified the
10 good cause test that you rely on, and imposed a compelling
11 reasons standard.

12 Your memorandum doesn't even mention the compelling
13 reasons standard. Doesn't even mention it. It relies on good
14 cause. Yeah, it's true for discovery purposes that would have
15 been enough to keep it under seal.

16 But for purposes of a trial and the ability of the
17 public to come in here and see how we operate, there is a much
18 higher standard, which you ignored in your memorandum.
19 Ignored. And, therefore, your motion is denied.

20 So the Court is sympathetic to the idea that you've
21 got some information there you don't want the competitors to
22 know about but, you know, that happens all the time in cases.
23 It happens all the time.

24 In order to get to the bottom and the truth and to
25 allow these parties to have their day in court, something has

1 got to give now and then.

2 And what's got to give in your case is that you
3 happened to do a deal with one of these parties. Your company,
4 I mean, not you. And your company is now stuck with the fact
5 that they are embroiled in somebody else's litigation and all
6 of this is going to be public.

7 Now, I don't see anything so -- I see that it's of
8 some passing interest, how much has been paid in this case by
9 your company. But it's not like the recipe of Coca-Cola.

10 **MR. SLAUGHTER:** It may not -- sorry, Your Honor.

11 **THE COURT:** I'm making my ruling now.

12 **MR. SLAUGHTER:** Fair enough, Your Honor. Appreciate
13 it.

14 **THE COURT:** The ruling has been made. The motion is
15 denied.

16 The public, as far as I'm concerned, as soon as this
17 comes into evidence they can come look at it, now that you've
18 drawn so much attention to it.

19 Thank you.

20 All right. Any more issues you want to bring up?

21 **MR. KESSLER:** Nothing from us, Your Honor.

22 **THE COURT:** Do we have our next witness ready to go?

23 **MR. KESSLER:** Is he in the courtroom? I believe
24 they're calling Mr. Doug Allen.

25 **THE COURT:** All right. Let's have our jury come in.

1 **THE CLERK:** We are missing one juror.

2 **THE COURT:** Everyone have a seat. I guess we'll take
3 a few moments. Come get me. Come get me as soon as they are
4 ready, Dawn.

5 (Proceedings in recess from 7:51 to 8:46 a.m.)

6 **THE COURT:** Our jurors are all here now.

7 Are we set to go out here? Are we all set out here?
8 Are we ready?

9 **MR. KESSLER:** Yes, we are, Your Honor.

10 **MR. PARCHER:** Yes.

11 **THE COURT:** Let's bring in the jury.

12 **MR. KATZ:** Your Honor, if need be, may I move over
13 there again?

14 **THE COURT:** Of course.

15 **MR. KATZ:** I'll just wait until they come in.

16 **THE COURT:** You can do that.

17 (Thereupon, the jury returned to the courtroom.)

18 **THE COURT:** Okay. Have a seat. I know all of you
19 tried very hard to get here on time. If it wasn't for that
20 terrible accident over there, everybody would have been here
21 even earlier than normal. So thank you for that continued
22 attention to your job in this case.

23 You will remember yesterday we had Mr. McNeil as a
24 witness. He is finished now. And the plaintiff is ready to
25 call their next witness. So please proceed.

1 **MR. PARCHER:** We called Doug Allen to the witness
2 stand, Your Honor.

3 **THE COURT:** All right. Mr. Doug Allen. Let's bring
4 him forward.

5 Does the camera work?

6 **THE CLERK:** I think so. I tried to change the
7 setting.

8 **THE COURT:** Mr. Allen, please raise your right hand
9 and the clerk will swear you in.

10 (Thereupon, the witness was sworn.)

11 **THE WITNESS:** I do.

12 **THE CLERK:** Okay. Thank you.

13 **THE COURT:** We're going to try and see if our camera
14 works today. And we need to take your picture for the closing
15 arguments.

16 **THE CLERK:** Yes, it worked.

17 **THE COURT:** Good. Thank you.

18 Go ahead, Mr. Parcher.

19 **MR. PARCHER:** Thank you, Your Honor.

20 **DOUGLAS ALLEN,**

21 called as a witness for the Plaintiff herein, having been first
22 duly sworn, was examined and testified as follows:

23 **DIRECT EXAMINATION**

24 **BY MR. PARCHER:**

25 **Q.** Good morning, Mr. Allen.

1 A. Good morning.

2 Q. I'm Peter Parcher. We haven't officially met before. I
3 shook your hand a moment ago.

4 A. Yes.

5 Q. I am one of the lawyers for the plaintiffs, and I'm going
6 to be questioning you this morning.

7 A. All right.

8 Q. Nice to meet you.

9 A. Nice to meet you.

10 **THE COURT:** Keep your voice up or lean forward. You
11 can adjust that mic. It's important that it catch your voice
12 so the jury can hear everything you say.

13 **THE WITNESS:** Yes, sir.

14 **BY MR. PARCHER:**

15 Q. So as I understand it, Mr. Allen, you're now an executive
16 with the Screen Actors Guild?

17 A. That's correct, I am.

18 Q. What is your position?

19 A. I am the national executive director and the chief
20 negotiator for the Screen Actors Guild.

21 Q. How long have you been with the Guild?

22 A. A little less than two years.

23 Q. And they're located in Hollywood?

24 A. In Los Angeles.

25 Q. Forgive me. I'm a New Yorker. Los Angeles?

1 **A.** That's right.

2 **Q.** There's a difference, right? Hollywood is just a part of
3 Los Angeles?

4 **A.** An important part.

5 **Q.** And as a director of the Screen Actors Guild I would
6 imagine, am I correct, that you have occasion to come in
7 contact with actors and actresses, directors and so forth?

8 **A.** I do on a daily basis, yes.

9 **Q.** On a daily basis. And how about their agents, do you have
10 occasion to come into contact with the agents of the actors and
11 actresses, directors and whatnot?

12 **A.** On occasion. Less often than my membership, but, yes.

13 **Q.** But you have a working familiarity, don't you, with the
14 agencies that represent talent?

15 **MR. KESSLER:** Your Honor, I'm going to object as to
16 relevance, what --

17 **THE COURT:** Where's the relevance, Mr. Parcher?

18 **MR. PARCHER:** The relevance is I'm going to ask the
19 witness if he knows the percentage that these talent agencies
20 customarily charge their talent.

21 **THE COURT:** Sustained. Not relevant.

22 **MR. PARCHER:** Yes, sir.

23 **BY MR. PARCHER:**

24 **Q.** You -- prior to being with the Screen Actors Guild, I
25 gather you spent quite a few years with the defendants

1 employed, correct?

2 **A.** I was with the NFL Players Association for 25 years.

3 **Q.** When you say you were with the Players Association, what
4 was your capacity?

5 **A.** Well, I had different titles and responsibilities during
6 the years. But when I left I was the assistant executive
7 director.

8 **Q.** And you had been there for several years?

9 **A.** About 20.

10 **Q.** Our relevant period in this case, although there are
11 occasions to go earlier and later, but our relevant period is,
12 I think, 2004 to 2007. You certainly were the executive person
13 at that time, correct?

14 **A.** Yes. I had that job title and responsibility during that
15 time. I did.

16 **Q.** Well, you actually had a second job title during those
17 years, didn't you?

18 **A.** I did.

19 **Q.** And would you tell Judge Alsup and the jury what that
20 title was?

21 **A.** I was the president of NFL Players Incorporated, which was
22 known as Players Inc.

23 **Q.** Now, at the time -- would it be fair to say that your
24 executive position with the union, the NFLPA, made you the
25 number two man in the organization?

1 A. Uhm, I was certainly described that way by some.

2 Q. Well, the president of the union was a Mr. Upshaw,
3 correct?

4 A. No, no. The -- he was the executive director of the
5 union.

6 Q. Oh, I've got it --

7 A. The president was always an active player.

8 Q. Okay. I guess I'm saying the wrong titles. I'm not doing
9 that deliberately.

10 A. No problem.

11 Q. No, but I just want to tell you I probably should know
12 better, but I don't.

13 So -- but for all practical purposes, Mr. Upshaw was
14 the number one man on a day-to-day basis with the union,
15 correct?

16 A. That's correct.

17 Q. And you were the number two man?

18 A. Uhm, I was certainly described that way by some. I'm not
19 trying to be difficult, but there were other people who had
20 responsibilities that were at the same level as mine.

21 Q. Okay. So you're saying you were number two along with
22 others, is that it? There were a bunch of number twos?

23 A. No, I'm thinking of our general counsel who was at the
24 same level I was at.

25 Q. But as far as an executive position as distinguished from

1 a legal position, you were the number two, weren't you?

2 **A.** Yes, I was.

3 **Q.** Right. And as the president of Players Inc -- withdrawn.

4 Mr. Upshaw was the chairman of Players Inc?

5 **A.** That's correct.

6 **Q.** And you were the president?

7 **A.** I was.

8 **Q.** So could we say number one and two there, as well?

9 **A.** Certainly.

10 **Q.** All right. Now, I'd ask you to take a look at -- the
11 exhibits should all be before you. I hope they are. I hope
12 they're organized properly.

13 I would ask you to take a look at Trial Exhibit 125.
14 I'll tell you what it is. It's the agreement between Players
15 Inc and the NFLPA, dated 9th of May, 1994.

16 Have you got it there, sir?

17 **A.** I do.

18 **Q.** Would you take a look at -- I think it would be the last
19 page. I just want to make sure that it's -- see the signature
20 page?

21 **A.** Yes, I do.

22 **Q.** Okay. I'll get it in evidence first. That's your
23 signature under "National Football League Players Inc?" That's
24 you, Douglas F. Allen?

25 **A.** That's correct.

1 Q. And the signature above, do you recognize that on behalf
2 of the National Football League Players Association by Eugene
3 T. Upshaw, Jr., Executive Director. Do you recognize that
4 signature?

5 A. Yes, I do.

6 MR. PARCHER: I'll move this trial exhibit into
7 evidence, Your Honor.

8 MR. KESSLER: No objection.

9 THE COURT: And the number again?

10 MR. PARCHER: It's trial Exhibit 125.

11 THE COURT: Very well.

12 Received.

13 MR. PARCHER: Thank you.

14 (Trial Exhibit 125 was received into evidence.)

15 BY MR. PARCHER:

16 Q. I'll turn your attention to page 6 of this exhibit.

17 MR. PARCHER: Put that up on the board.

18 (Document displayed.)

19 BY MR. PARCHER:

20 Q. It says in paragraph 5 (a) that there will be a royalty in
21 the amount of 37 percent of gross licensing revenues. Do you
22 see that there?

23 A. I do, yes.

24 Q. And that was the money that was going to go to the --
25 monies derived from licenses, that's the percentage of that

1 money that was going to go to the players; is that correct?

2 **A.** To the active players, that's correct.

3 **Q.** Okay. Now, did -- and none of this money was ever
4 intended, this 37 percent, none of that percentage was ever
5 intended to be paid over to retired players; is that -- excuse
6 me. I'm asking you a question. I shouldn't say, Is that what
7 you're saying?

8 Is that your position?

9 **A.** Could you repeat the question, please?

10 **Q.** Well, you've got 37 percent here. I gather it's
11 indisputable that that's the money that was supposed to go to
12 the active ballplayers who were in the union, right?

13 **A.** That's correct.

14 **Q.** Okay. Now, was any of that 37 percent ever intended, from
15 the first minute or the first second that this document was
16 negotiated, was it ever intended to go to the retired players?

17 **A.** No, sir, it wasn't.

18 **Q.** Okay. So there's nothing in this exhibit, the agreement
19 between the players' union and Players Inc, that suggested in
20 any manner, shape or form that the retired players were going
21 to get anything for licensing their names and likenesses under
22 group licenses, correct?

23 **A.** I haven't reviewed the document.

24 **Q.** You can review it, sir. This is a document that you
25 signed, correct, sir?

1 A. I'm sorry. Would you repeat?

2 Q. This is a document you signed?

3 A. That's correct.

4 Q. This is a document you had a strong hand in developing,
5 along with Mr. Upshaw, correct?

6 A. That's correct.

7 Q. In fact, the truth is it's you and Mr. Upshaw who decided
8 what would be in this document in the first instance, wasn't
9 it?

10 I'm not talking about the legal language, but the
11 substance?

12 A. Well, this was done -- this document was prepared in close
13 consultation with our tax counsel.

14 Q. Leaving aside tax counsel, the terms of this agreement
15 between the Players Association and Players Inc were decided
16 upon in the first instance by Gene Upshaw and Doug Allen,
17 correct?

18 A. They were based on --

19 Q. Could you say "yes" or "no"?

20 A. Well, it's hard for me to answer that question without an
21 explanation. I'd like to try to do that, if that's all right.

22 Q. I'll say this to you, sir. If you'll say "yes" or "no" --

23 MR. PARCHER: If I may do this, Your Honor.

24 BY MR. PARCHER:

25 Q. If you'll say "yes" or "no" for me, and an explanation is

1 required beyond that, your counsel has already said that he's
2 going to take quite a bit of time in asking you questions. And
3 you can explain it then.

4 **THE COURT:** No, not -- that's not the right ground
5 rule.

6 Can you answer the question "yes" or "no"?

7 **THE WITNESS:** Could you please repeat the question?

8 **MR. PARCHER:** Would you mind reading it back?

9 **THE COURT:** Here's the ground rule. This is
10 effectively cross-examination because you are on opposite
11 sides.

12 Mr. Parcher is entitled to get a "yes," or a "no" or
13 an "I don't remember," unless you just can't answer one of
14 those at all without putting in some short explanation.

15 If you've got to have an explanation, I'll let you
16 make one, unless I think you're abusing the privilege of doing
17 that.

18 So let's hear the question, and you tell me if you
19 think you can answer it, "yes", "no" or "I don't recall."

20 **THE WITNESS:** Yes, Your Honor.

21 **THE COURT:** Do you want to repeat it so the court
22 reporter doesn't have to go back?

23 **MR. PARCHER:** Oh, sure.

24 Pardon me. You got it?

25 (The question was read by the reporter as follows:)

1 **"QUESTION:** Leaving aside tax counsel, the
2 terms of this agreement between the Players
3 Association and Players Inc were decided upon
4 in the first instance by Gene Upshaw and Doug
5 Allen, correct?"

6 **THE WITNESS:** Yes.

7 **BY MR. PARCHER:**

8 **Q.** Thank you.

9 So Gene -- excuse me -- Gene Upshaw and Doug Allen
10 decided that at least in this agreement there would be no money
11 or no percentage of money set aside for retired football
12 players that signed group licensing authorizations, correct?

13 Yes or no, sir?

14 **A.** Yes.

15 **Q.** Now, I'd ask you to take a look at Trial Exhibit No. 132.
16 That's the -- if I'm correct, I'm led to believe that's the
17 constitution of the National Football League Players
18 Association.

19 Looks like you've got a blurred copy there because
20 you're holding it horizontally and mine is vertical.

21 **A.** The first page is horizontal.

22 **MR. PARCHER:** Could I, Your Honor?

23 **THE COURT:** Go ahead. Straighten it up, please.

24 **BY MR. PARCHER:**

25 **Q.** Maybe I'm on the second page and don't realize it. I will

1 point it out to you. If you don't mind, I'm just coming up to
2 show you where I'm at. This is the page I'm going to refer to,
3 okay (indicating)?

4 **A.** Yes, sir.

5 **Q.** Would you agree that it was the -- was this the
6 Constitution? Do you recognize it? I'll represent to you that
7 it's my belief that it is, if we can save some time.

8 **A.** Yes.

9 **THE COURT:** Look. Don't testify.

10 **MR. PARCHER:** No, sir.

11 **THE COURT:** Your belief doesn't matter. What matters
12 is what this witness says under oath.

13 **MR. PARCHER:** Yes, sir.

14 **THE COURT:** All right. Let's do it the right way.
15 You find the right page and answer the question.

16 **MR. PARCHER:** Sorry, Your Honor. I was just trying
17 to move it along.

18 **THE COURT:** I know you are.

19 **MR. PARCHER:** I'm not going to do it again.

20 **THE COURT:** You start going down that path, pretty
21 soon you lawyers from both sides will be laying all kinds of,
22 quote, beliefs before the jury, and they'll think that's
23 evidence.

24 **MR. PARCHER:** Yes, sir. Yes, sir.

25 **THE WITNESS:** It appears to me to be, but I will

1 point out that it's dated March, 2007, which is after I left
2 the NFLPA.

3 **BY MR. PARCHER:**

4 **Q.** Yes, but you were with the union for well over 20 years,
5 correct?

6 **A.** I was.

7 **Q.** Okay. Take a look at the page that I asked you to look
8 at. That's the Constitution of your union, isn't it?

9 **A.** Are you talking about the second page?

10 **Q.** That's correct.

11 **A.** Yes.

12 **MR. PARCHER:** I'll move this 132 into evidence, Your
13 Honor.

14 **MR. KESSLER:** No objection.

15 **THE COURT:** 132 is received.

16 (Trial Exhibit 132 was received into evidence.)

17 **BY MR. PARCHER:**

18 **Q.** Okay. It says there:

19 "We, the National Football League Players
20 Association, pay homage to our predecessors for their courage,
21 sacrifice and vision."

22 Would you agree that the "predecessors" are the
23 retired football players?

24 **A.** I would, yes.

25 **Q.** Do you believe -- did you believe at the time you were

1 part of the organization, the number two man, that the union
2 had a responsibility to pay homage to their retired players for
3 their courage, sacrifice and vision?

4 **A.** Yes, sir, I did.

5 **Q.** Matter of fact, you're a retired player yourself, right?

6 **A.** I am.

7 **Q.** Still are retired. I'm not trying to take it away from
8 you. You're still a retired player.

9 Then it says, to go on, that:

10 "The union pledges to preserve and enhance the
11 democratic involvement of our members, confirm our willingness
12 to do whatever is necessary for the benefit of our members."

13 Did you subscribe to that at the time you were part
14 of the organization?

15 **A.** Yes, sir, I do.

16 **Q.** So you believe you have a duty to do whatever is necessary
17 for the benefit of the retired players, correct?

18 **MR. KESSLER:** Objection, Your Honor, to the form of
19 the question, "duty."

20 **THE COURT:** No, the witness can -- no, that's a
21 proper question. Overruled.

22 Please answer.

23 **THE WITNESS:** I'm sorry. Could you repeat it.

24 **BY MR. PARCHER:**

25 **Q.** Yes. I'm asking if you believe -- believed at the time

1 you were there that you had a duty to see that the union
2 conducted itself, and you particularly conducted yourself to do
3 whatever was necessary for the betterment of the retired
4 players?

5 **THE COURT:** Just a second. This case is not a
6 Section 301 labor case, sir. So why are we going into the
7 union constitution?

8 **MR. PARCHER:** Because the union had a duty, in my
9 respectful opinion, Your Honor, to use its best efforts, as I
10 believe Your Honor has already told the jury. The union had a
11 duty to do what was right for the these players.

12 **THE COURT:** I never said -- when did I say that?
13 You're telling me I said that?

14 **MR. PARCHER:** Yes, sir.

15 **THE COURT:** I don't remember. If I said that, it
16 must have been in a different context. This case is about the
17 GLA.

18 **MR. PARCHER:** No.

19 **THE COURT:** Only the GLA. All these other documents
20 might have something to do with how that GLA gets constructed.

21 **MR. PARCHER:** I'm sorry, Your Honor.

22 **THE COURT:** But you cannot be trying to win this case
23 based on some theory that the constitution of the union imposed
24 a duty that -- unless it somehow gets read into the GLA.

25 **MR. PARCHER:** Yes, I --

1 **THE COURT:** But the --

2 **MR. KESSLER:** Your Honor --

3 **MR. PARCHER:** Excuse me, please. I would like to
4 respond to that.

5 **THE COURT:** Go ahead, Mr. Parcher. What do you say
6 to that?

7 **MR. PARCHER:** Well, I'm respectfully disagreeing.
8 Perhaps it's my fault because I'm making it look left when it's
9 center right.

10 There are two prongs to this case. One is breach of
11 contract, and the other is breach of fiduciary obligation.

12 **THE COURT:** Only as it relates to the GLA.

13 **MR. PARCHER:** Right. I'm saying there is a duty. It
14 began -- it began with the constitution in the union. It goes
15 through several other documents that I'm about to introduce
16 that clearly demonstrate that these men who spoke for this
17 union had a duty to do the right thing by these guys.

18 **THE COURT:** All right. I'm going to instruct the
19 jury.

20 I'm going to let you pursue this line of questioning,
21 but before this case ever started we had a lot of motions. And
22 the Court has already ruled that this case you've got to decide
23 is two issues, and they both are related to the GLA.

24 This case is not about a broad-ranging duty of
25 fairness by the union to its members. That would be a

1 different kind of a lawsuit.

2 This case is about the GLA that the class members
3 signed. And that's what hooks them all together, is this GLA.

4 The Court has previously said there are two issues
5 for you to decide: The meaning of the GLA and whether it was
6 violated by the defendants, and secondly, whether or not the
7 defendants violated any fiduciary duty as it relates to the
8 GLA.

9 **MR. PARCHER:** Okay.

10 **THE COURT:** Not as it might have related to the union
11 constitution.

12 **MR. PARCHER:** I accept that entirely.

13 **THE COURT:** All right. Well, then, I'm going to let
14 you pursue this line of questions based on the union
15 constitution.

16 **MR. PARCHER:** Right, right.

17 **THE COURT:** But at some point you've got to connect
18 it to the GLA.

19 **MR. PARCHER:** Right. Well, I'm just --

20 **THE COURT:** Fine.

21 **MR. PARCHER:** I've just begun.

22 **THE COURT:** All right. You're talking about duties
23 and so forth.

24 **MR. PARCHER:** I am talking about duties.

25 **MR. KESSLER:** Your Honor, again, just to add an

1 objection to this line, the evidence will show most of the
2 class members are not members of the union. They didn't join.
3 So I don't see how he can connect this to the constitution.
4 That's part of my objection.

5 **THE COURT:** I'm going to let him give it a try.

6 But I need to remind the jury, at the end of the day
7 the fiduciary duties that count have to be related to the GLA.
8 Otherwise, it's not in this case.

9 So, Mr. Parcher, you can have some flexibility to try
10 to connect up the union constitution to the GLA in some manner.
11 I'll give you that flexibility.

12 **MR. PARCHER:** I appreciate that, Your Honor.

13 **THE COURT:** That's an important distinction for all
14 to keep in mind.

15 Thank you.

16 **MR. PARCHER:** I've heard you clearly, Your Honor.

17 **THE COURT:** Go ahead.

18 **BY MR. PARCHER:**

19 **Q.** Is there a question before you? I think --

20 **THE COURT:** Please ask a fresh question.

21 **BY MR. PARCHER:**

22 **Q.** I can't ask you the exact question again without having it
23 read back. I'll just rephrase it.

24 **THE COURT:** Rephrase it.

25 **MR. PARCHER:** No, I'm saying I'm going to do that.

1 **BY MR. PARCHER:**

2 **Q.** Do you believe that it was the duty of your union to do
3 whatever was necessary for the benefit -- betterment of retired
4 players who were a member of the union?

5 **A.** Yes, I do.

6 **Q.** Thank you.

7 I'll call your attention to Trial Exhibit 5, not yet
8 in evidence. Do you have it there, sir?

9 **A.** Yes, I do.

10 **Q.** Now, that -- if I understand it correctly, this is a
11 replica of a Web site that NFLPlayers.com put out to provide
12 information to the retired players; is that right?

13 **A.** Yes.

14 **Q.** And do you recognize this as one -- as one -- as one -- as
15 a piece -- as a part of the Web site? You can look through it
16 if you want.

17 **A.** Yes, this is -- this is a -- a screen shot from the
18 NFLPlayers.com Web site.

19 **MR. PARCHER:** Move Trial Exhibit 5 be placed in
20 evidence.

21 **MR. KESSLER:** Your Honor, can we get a foundation for
22 what period of time this was? The Web site obviously changes
23 daily. I don't know what this is being offered for.

24 **THE COURT:** All right. Please lay a foundation for
25 the time period.

1 Does the witness know the time period?

2 **MR. PARCHER:** Thank you, Your Honor.

3 **THE COURT:** Tell us what time period the
4 Exhibit No. 5 was operative, roughly.

5 **THE WITNESS:** No, I don't.

6 **BY MR. PARCHER:**

7 **Q.** Well, if you -- I'm sorry to say neither do I. It's not
8 on the document itself, is it?

9 **A.** I --

10 **Q.** I don't see it, if it is.

11 **A.** I didn't see it, no.

12 **THE COURT:** Well, does it look like one that was
13 probably there whenever -- the time period of this lawsuit,
14 which is, what, 2002 to 2005, something like that?

15 **THE WITNESS:** Uhm --

16 **BY MR. PARCHER:**

17 **Q.** Let me go further. Look at page 2.

18 **MR. PARCHER:** Do you mind, Your Honor?

19 **THE WITNESS:** There is a -- there's a date on the
20 bottom of the second page.

21 **BY MR. PARCHER:**

22 **Q.** Yes. I don't see it. Tell us where it is.

23 **A.** "Copyright 2006, Players Inc."

24 **MR. PARCHER:** Thank you.

25 **THE COURT:** That's close enough. What is this

1 exhibit, number 5?

2 **MR. PARCHER:** Trial Exhibit No. 5, Your Honor.

3 **THE COURT:** Received.

4 (Trial Exhibit 5 was received into evidence.)

5 **BY MR. PARCHER:**

6 **Q.** Turn to the second page of trial Exhibit No. 5. Turn to
7 the first paragraph of the second page.

8 (Document displayed.)

9 **MR. PARCHER:** Could you move it up so we can see
10 the -- just the top line, too, the head thing. See "What is
11 Players Inc?" If you move it up just a little. That's it.
12 Thank you.

13 **BY MR. PARCHER:**

14 **Q.** It says that Players Inc -- I'm not reading it verbatim,
15 I'm summarizing it. It says that Players Incorporated,
16 officially known as Players Inc, is the for-profit licensing
17 and marketing subsidiary of the NFL Players Association.

18 That's correct, isn't it?

19 **A.** Yes.

20 **Q.** Formed in 1994. Its message is to take the helmets off
21 the players and market them as personalities as well as
22 professional athletes. Is that the mission?

23 **A.** Uhm, yes.

24 **Q.** So anybody who was retired, that was asked to sign a GLA
25 and signed the GLA, would have a right to believe that what

1 Players Inc was going to do for them is take the helmets off
2 the players and market them as personalities as well as
3 professional athletes, correct?

4 **A.** Well --

5 **Q.** Yes or no, sir?

6 **A.** Yes.

7 **Q.** Then it goes on to say:

8 "Players Inc, which represents more than 1800
9 active players" -- and that number was more or less the same
10 throughout the years, right, a little more, a little less, but
11 a vast majority of the active players, right?

12 **A.** That's correct.

13 **Q.** And over 3,000 retired players. -- "has been aggressive
14 in its efforts to expand player marketing opportunities,"
15 right?

16 **A.** Right.

17 **Q.** So any retired player who was being asked to sign a group
18 licensing authorization by the union would have a right to
19 believe from this that Players Inc had been aggressive on
20 behalf of retired players to expand their marketing
21 opportunities, right?

22 **A.** That's correct.

23 **Q.** Okay. And then, if you'll turn to trial Exhibit No. 5 --
24 excuse me. I'm giving you the same exhibit twice. My mistake.
25 Trial Exhibit 23. That's a letter of yours, sir.

1 Do you recognize your signature at the bottom?

2 **A.** Yes, I do.

3 **Q.** Is this a letter that you sent out to union members?

4 **A.** Uhm, that's correct.

5 **MR. PARCHER:** I move this entry into evidence, Your
6 Honor.

7 **THE COURT:** The number again?

8 **MR. PARCHER:** 23.

9 **MR. KESSLER:** No objection.

10 **THE COURT:** Received.

11 (Trial Exhibit 23 was received into evidence.)

12 **MR. PARCHER:** Thank you.

13 **BY MR. PARCHER:**

14 **Q.** Take a look at the first paragraph, first. 1990 --

15 "Dear NFLPA member: In 1994, the NFLPA created a
16 separate marketing and licensing subsidiary, Players Inc."

17 That's true, isn't it?

18 **A.** Yes, it is.

19 **Q.** "Since then, Players Inc has marketed NFL players, active
20 and retired, in a variety of ways."

21 Do you see that, sir?

22 **A.** I do.

23 **Q.** In terms of -- withdrawn.

24 Take a look at the next to last -- well it's actually
25 three from the last paragraph, the one that begins "Help us."

1 Do you see where it says there:

2 "Help us market retired players and show your support
3 for NFLPA and Players Inc by signing and returning the enclosed
4 GLA today."

5 So you were soliciting the retirees to sign this
6 group licensing authorization, weren't you?

7 **A.** Yes. We were asking them to sign the GLA.

8 **Q.** Right. And you -- and when I say "you," you collectively,
9 you, you the union, or you Players Inc, solicited the retired
10 players to sign GLAs often and in many different ways. That's
11 true, isn't it?

12 **A.** Yes, it is.

13 **Q.** So a retired player who got this letter in the mail, and
14 enclosed in a packet was a group licensing authorization, he
15 would be entitled to believe that you were asking him to sign a
16 group licensing authorization because Players Inc was an
17 organization that had marketed NFL players active and retired
18 in a variety of ways.

19 **A.** I'm sorry. Could you repeat that? I -- I lost the
20 question --

21 **Q.** The flow?

22 **A.** -- while I was looking at the document. I apologize.

23 **Q.** You don't have to apologize. My wife tells me all the
24 time: What did you say?

25 What I'm saying is -- what I'm saying is, one: You

1 solicited the retired ballplayers to sign the GLA in this
2 letter, right?

3 **A.** We asked retired players to sign this, in this letter.

4 **Q.** So excuse me. So the answer is "yes"?

5 **A.** Yes.

6 **Q.** Thank you.

7 And beyond that, before you asked them, before you
8 made your pitch for them to fill out the GLAs that you
9 enclosed -- you enclosed the GLA in the letter you sent, right?

10 **A.** That's right.

11 **Q.** So before you got to the point where you said "would you
12 please sign, you retired fellows, would you please sign a group
13 licensing authorization," you said to them in the first
14 paragraph, since 1994 Players Inc -- that's not the word but
15 you say since then:

16 "Players Inc has marketed NFL players, active
17 and retired, in a variety of ways," right?

18 **A.** Right.

19 **Q.** So you're telling these retired fellows in this letter and
20 in other solicitations, both before and after, you're telling
21 them: Sign up, because Players Inc is in the business of
22 marketing retired players, right? And you've done it in a
23 variety of ways.

24 **A.** Correct.

25 **Q.** Now, correct me if I'm wrong. The truth is that with a

1 very minor exception involving photos of some kind that I don't
2 understand, so I can't even ask the question properly, but with
3 a very minor exception Players Inc has never received a license
4 from any organization, from the beginning of Players Inc until
5 the time that you left, never received a license, according to
6 your side, from any licensee that included a group licensing of
7 retired players, correct?

8 **MR. KESSLER:** Objection. No foundation in the
9 evidence for that, Your Honor.

10 **THE COURT:** Overruled.

11 Please answer.

12 **THE WITNESS:** I'm sorry. With the objection I lost
13 the substance of the question.

14 **BY MR. PARCHER:**

15 **Q.** Very simple, sir. You've been with the organization
16 before you left to help out the actors and actresses, you --
17 you -- your career was the union and Players Inc, right?

18 **A.** That's correct.

19 **Q.** And as part of your responsibilities, number two man in
20 both organizations, you were out there encouraging, soliciting,
21 persuading, cajoling the retired players to sign group
22 licensing authorizations, right?

23 **A.** Yes.

24 **Q.** And in doing so, you were suggesting to them, amongst
25 other things -- I'm not saying that's all you were suggesting,

1 but amongst other things you were suggesting to them that since
2 1994, Players Inc marketed retired players in a variety of
3 ways, right?

4 **A.** Correct.

5 **Q.** Now, I'm saying to you, since 1994 and up to the time that
6 you left, isn't it true that never once did Players Inc, the
7 union, or anybody connected with Players Inc or the union, get
8 a license from any third party that including group licensing
9 of retired players, according to your position?

10 Yes or no?

11 **A.** No.

12 **Q.** "No," meaning they never did?

13 **A.** That's correct.

14 **Q.** Thank you.

15 Now, is there a reason, in 2006 -- you -- you weren't
16 intending to deceive any of the retired players when you were
17 encouraging them to sign GLAs, were you?

18 **A.** Absolutely not.

19 **Q.** And, by the way, I've handed you a -- you know, one
20 letter. But the fact is, from the inception of Players Inc
21 until the time you left, there was constant solicitation of the
22 retired persons, right, to sign GLAs?

23 **A.** We asked retired players to sign the retired players' GLA
24 on a regular basis, yes.

25 **Q.** And is there a reason that you didn't say to them up to a

1 point in time we've never been able -- you sign, but don't --
2 don't think you're going to get a share of any money. Never
3 mind what the contract says. Don't think you're going to get a
4 share of any money because we don't seem to be able to get you
5 into the license business?

6 Did you have a reason you didn't tell them that?

7 **A.** We did tell them that.

8 **Q.** When did you tell them that?

9 **A.** At the retired players conventions and chapter meetings on
10 a regular basis.

11 **Q.** Yes? Show me one single document. I have one. I don't
12 want to be disingenuous. I have a Touchback document. That's
13 your newsletter?

14 **A.** That's the retired players newsletter of the NFL Players
15 Association, yes.

16 **Q.** Right, right. I have a Touchback letter which I'm going
17 to get to later.

18 But you're saying on a regular basis you would go to
19 the retired guys and say, "I can't seem to get you a license"?

20 **A.** We would explain to them that we were attempting to
21 collect a sufficient number of retired players together who had
22 signed the retired players' GLA and offer those players to
23 licensees.

24 We had not been able to convince the licensees to use
25 the players on that basis. They used retired players in other

1 ways on an ad hoc basis, but they weren't interested in
2 securing the rights to all of the players, including players
3 like me, who had very short careers or didn't have any real
4 celebrity.

5 **Q.** Mr. Allen, most respectfully, sir, I'm going to ask you to
6 respect my process and answer my question. Just answer my
7 question.

8 **A.** I'm sorry, I really was trying to do that.

9 **Q.** Well, okay.

10 **THE COURT:** All right.

11 **BY MR. PARCHER:**

12 **Q.** We all have our own impressions of what you were trying to
13 do.

14 **THE COURT:** Be that as it may, ask a fresh question
15 and try to answer "yes", "no," "I don't recall," if it calls
16 for a "yes" "no" or "I don't recall."

17 Go ahead.

18 **BY MR. PARCHER:**

19 **Q.** Show me one single document of correspondence, memoranda,
20 minutes of a convention where you sat with retired players and
21 said, "We've been unsuccessful," other than the one document I
22 happen to have in my possession.

23 **A.** I personally did that myself.

24 **Q.** So we have to take your word for the fact that every time
25 you went to a convention you sat with the retired ballplayers.

1 Did you sit with one or two? Or did you get them all
2 together, make a speech? What did you do?

3 **A.** I mean, in my report to the entire convention, which would
4 be hundreds of retired NFL players, I described the Players Inc
5 programs and made that point to them whenever I was talking to
6 them, that we were trying to collect that group together and we
7 were going -- we were doing so diligently and continuing to try
8 to get the marketplace interested in -- in the collection of a
9 large number of retired players.

10 But we hadn't succeeded in getting someone to take
11 all of the players. They were taking the players they wanted
12 at the top of the celebrity pyramid and not further down with
13 retired players like me.

14 **Q.** My question to you is: Did you get the fellows together
15 in a group, or did you speak to them one-on-one? How did you
16 convey this information to them?

17 **A.** In my case, I was reporting to the convention from -- as
18 the president of Players Inc and the assistant executive
19 director of the NFLPA.

20 **Q.** So you made a speech to everybody in the room, right?

21 **A.** I described how it was working and made that point.

22 **Q.** Could you answer my question? Did you make a speech to
23 the room?

24 **A.** I did.

25 **Q.** And the speech would say, amongst other things:

1 "We've been trying like heck, but we can't get
2 the job done"?

3 **A.** Essentially, yes.

4 **Q.** Essentially. And this was repeated to them over and over
5 and over and over again so that none of them could have any
6 false hope, right?

7 **A.** It was explained to them on a regular basis, year in and
8 year out.

9 **Q.** Then, how it is it -- would you consider yourself, sir, in
10 addition to being an administrator, a super salesman?

11 **A.** Not particularly, no.

12 **Q.** You would not?

13 **A.** No.

14 **Q.** So how do you think -- I don't know what the facts are,
15 but how do you think you were able to -- from 1994 to 2007 you
16 never got these fellows one license?

17 **MR. KESSLER:** Objection, Your Honor, to the form of
18 that question.

19 **MR. PARCHER:** I haven't asked a question yet.

20 **THE COURT:** What about --

21 **MR. KESSLER:** It's a completely argumentative
22 question. It wasn't asking for any fact.

23 **MR. PARCHER:** I'm sorry. That is a fact, Judge.
24 It's not so, and I didn't finish my question.

25 **THE COURT:** All right. Ask it without things like

1 your lead-in, how do you think, "I don't know what the facts
2 are," and so forth. Just ask a normal question.

3 **MR. PARCHER:** I thought I was, Judge.

4 **THE COURT:** Well, you had a preparatory comment. It
5 wasn't a question.

6 **MR. PARCHER:** Yes, sir.

7 **THE COURT:** Try again.

8 **BY MR. PARCHER:**

9 **Q.** I'm trying to reframe it in my mind.

10 How many times, from 1994 -- I'm not asking you for
11 the exact number, just your best approximation. How many times
12 did you tell these retired players that you were having no
13 luck; in effect, nobody was interested, from the beginning of
14 your job doing it until the time you walked out the door?
15 Would you say hundreds of times?

16 **A.** Uhm, no.

17 **Q.** Dozens of times?

18 **A.** Yes.

19 **Q.** Many dozens of times?

20 **A.** Yes.

21 **Q.** Pick a number. I'm not holding you to it.

22 **A.** It would be a guess.

23 **Q.** Well, I'm not asking you to guess.

24 **A.** Many dozens of times is a reasonable estimate.

25 **Q.** 40, 50, 60 times?

1 A. Probably more than that.

2 Q. Probably more than that, right?

3 And, nevertheless, sir, you were successful year in
4 and year out in persuading these players to continue signing
5 GLAs, right?

6 A. Uhm, some of them. I mean, it varied from player to
7 player.

8 Q. But each year you'd keep asking?

9 A. That's correct.

10 Q. You had this sense of optimism, did you, that because of
11 your efforts it was all going to change one day, and they
12 better get on the gravy train?

13 A. I don't remember ever using the phrase "gravy train."

14 I was certainly optimistic and energetic in trying to
15 provide an opportunity for the GLAs to be marketed as a group.

16 Q. Okay.

17 A. As an entire group as opposed to ad hoc.

18 Q. I'm questioning you about your optimism, sir. Year one,
19 1994, you're unsuccessful, right?

20 A. Uhm, yes.

21 Q. You're optimistic, right?

22 Year two, you're unsuccessful, right?

23 A. Right.

24 Q. You're optimistic, right?

25 A. Yes.

1 Q. I don't want to make this a tortuous exercise, sir. So
2 we'll just say years three, four, five, six, seven, eight,
3 nine, 10, 11, 12, 13, 14, and how many it takes to go from 1994
4 to the time you left, each and every year you were
5 unsuccessful, and each and every year you were optimistic. Is
6 that what your testimony is to this court and jury?

7 A. Yes.

8 Q. Yes or no?

9 A. Yes.

10 Q. Yes.

11 And for that reason it didn't bother you at all to
12 continue soliciting these retired players to sign GLAs, is that
13 your testimony, yes, or not?

14 A. I'm sorry. Could you repeat the question?

15 Q. And for that reason, because you had this sense of
16 optimism, despite all these years of lack of success, it didn't
17 bother you at all to continue to ask these fellows to sign
18 GLAs.

19 A. We were --

20 Q. Could you just say "yes" or "no"?

21 A. I'm sorry. Repeat the question.

22 Q. Yes, sir.

23 MR. PARCHER: Your Honor doesn't want me to ask the
24 reporter?

25 THE COURT: If the reporter can find it quickly, go

1 ahead.

2 Go ahead, Katherine.

3 (The question was read by the reporter as follows:)

4 **"QUESTION:** And for that reason, because you
5 had this sense of optimism, despite all these
6 years of lack of success, it didn't bother
7 you at all to continue to ask these fellows
8 to sign GLAs?"

9 **THE WITNESS:** No.

10 **BY MR. PARCHER:**

11 **Q.** "No," meaning you're agreeing it didn't bother you?

12 **A.** That's correct.

13 **Q.** All right. Now, isn't it a fact, sir, that there was a
14 significant benefit -- withdrawn.

15 Players Inc is a for-profit company, right?

16 **A.** That's correct.

17 **Q.** And it was formed or caused to be formed by you and
18 Mr. Upshaw to be the licensing and marketing arm for the union,
19 right?

20 **A.** It was -- it was formed by the NFL Players Association
21 Board of Players Reps, or by an act of them, but, yes.

22 **Q.** Well, wait a minute. Wait a minute. I understand the
23 distinction, but for all practical purposes this was Upshaw and
24 Allen's brainchild, wasn't it?

25 **A.** There were many people involved in that. It wasn't just

1 Gene Upshaw and me.

2 Q. No, but you're not disclaiming --

3 A. Not at all.

4 Q. -- a significant role in this process, are you?

5 A. No, no, no.

6 Q. And you're not disclaiming on Mr. Upshaw's behalf a
7 significant role in this process, are you?

8 A. Not at all.

9 Q. You two fellows were the straw that stirred the drink,
10 right?

11 A. We were certainly among the straws. There were many
12 people involved in the formation and implementation of Players
13 Inc.

14 Q. You were just a worker amongst workers, right?

15 A. No, I wasn't suggesting that. I just didn't want to take
16 all of the credit.

17 Q. Yeah. Well, okay.

18 There was a significant benefit to Players Inc and
19 the union in getting a large number of retired players to sign
20 GLAs, wasn't there?

21 A. There was a hope that it would provide a productive
22 result, certainly.

23 Q. I'm not asking you that, sir. Perhaps it's my question.
24 Perhaps it's my question. Let me try to rephrase it.

25 There was a significant benefit -- leave aside the

1 players. So far you would agree the players that signed the
2 GLAs haven't gotten any money as a result directly from revenue
3 from a licensee, right?

4 **A.** There are players that have --

5 **Q.** No, from group licenses?

6 **A.** I'm trying to answer the question. There were players who
7 received money from licensees who also signed GLAs.

8 **Q.** Now, going back to -- I'm going to question you about ad
9 hocs. I promise you before you go back to Los Angeles to
10 resume your duties, I'm going to question you about ad hocs.
11 Right now I'm not questioning you about ad hocs.

12 **A.** Okay.

13 **Q.** Just so the jury understands, when you say "players who
14 happen to sign group licenses who also receive individual
15 money," when they receive that individual money you call them
16 "ad hocs," right?

17 **A.** That's correct.

18 **Q.** And when they receive that individual money, you didn't
19 commission 30 percent of it, did you?

20 **A.** No.

21 **Q.** Matter of fact, you took maybe a 1 percent administration
22 fee or 1.5 percent administration fee, correct?

23 **A.** It was something in that neighborhood.

24 **Q.** And that money, the ad hoc money, the monies received by
25 individuals because some licensee wanted their individual

1 license, that wasn't shared with anybody, was it?

2 **A.** Sorry. Say that again.

3 **Q.** The money that was received by an individual ad hoc.

4 **A.** Right.

5 **Q.** As a result of licensing his name or likenesses to a
6 licensee was not shared with anybody, was it?

7 **A.** No.

8 **Q.** It didn't go to the union and the union kept 63 percent or
9 the union and Players Inc kept 63 percent, correct?

10 **A.** Yes. It all went to the players involved.

11 **Q.** 37 percent didn't go to the active players?

12 **A.** No.

13 **Q.** Right? But nothing, of course, went to the retirees,
14 right?

15 **A.** If they were retired players receiving the money, they got
16 the money.

17 **Q.** I'm talking about the groups.

18 **THE COURT:** Well, just a second. Mr. Parcher --

19 **MR. PARCHER:** Yes, sir.

20 **THE COURT:** Sometimes I think you just don't say -- I
21 mean, you say it without referring to the groups or whatever.

22 **MR. PARCHER:** Yeah.

23 **THE COURT:** And then, the witnesses --

24 **MR. PARCHER:** Get confused.

25 **THE COURT:** No. The witness is answering the

1 question as you yourself have phrased it, and then you blame
2 him --

3 **MR. PARCHER:** Right.

4 **THE COURT:** -- because you didn't put the word
5 "group" in there.

6 **MR. PARCHER:** Okay.

7 **THE COURT:** So when he's answering a question, don't
8 interrupt him. Let him finish his answer.

9 **MR. PARCHER:** Yes, sir.

10 **MR. KESSLER:** Your Honor, I also have an objection to
11 Mr. Parcher throwing in the word "groups" as opposed to
12 referring to the retired player group licensing authorization
13 or the ad hocs, because the ad hocs could also be groups. And
14 it's creating a very confusing record on that issue.

15 I think he should either have the retired player
16 group licensing authorization or the ad hocs, but not use the
17 word "groups." It's not clear what he's referring to.

18 **THE COURT:** Just -- I am not going to rule on that
19 point until I hear the particular questions. But conceivably
20 there are circumstances where it would matter whether it was an
21 ad hoc group versus a GLA group.

22 In other words, a group under the GLA versus a group
23 under the ad hoc, possibly. I don't know. I guess that's the
24 distinction counsel is making.

25 **MR. PARCHER:** Yes, sir.

1 **THE COURT:** Conceivably, that can make a difference,
2 and be aware of that possibility.

3 **MR. KESSLER:** Thank you, Your Honor.

4 **BY MR. PARCHER:**

5 **Q.** I'll start afresh, sir, and certainly accept the Court's
6 admonition that probably I think I'm asking you question A, and
7 I'm phrasing it so it sounds like question Z. And then, I'm
8 saying: "Why don't you answer question A?"

9 If I'm doing that I can only tell you I'm not doing
10 it on purpose. Doesn't mean I'm not doing it. I'm not doing
11 it on purpose. I want your honest answers, and I assure you my
12 questions are all in good faith.

13 **A.** Thank you.

14 **Q.** Thank you.

15 When an individual athlete, retired football player,
16 receives an ad hoc license, none of that money is shared with
17 Players Inc, correct?

18 **A.** Yes.

19 **Q.** None of that money is shared with the union, correct?

20 **A.** Yes.

21 **Q.** None of that money is shared with the retired players who
22 signed group licensing authorizations, correct?

23 **A.** That's right.

24 **Q.** And that wouldn't matter whether the ad hoc was an active
25 player or a retired player. It wouldn't be part of the group

1 licensing arrangements, right?

2 **A.** Well, it would -- essentially, that's correct, yes.

3 **Q.** Right. And, quite often, the retired players who are
4 fortunate enough to be ad hocs have their own agents, don't
5 they?

6 **A.** Some do. Some don't.

7 **Q.** In which case they don't have to pay an agent commission,
8 do they?

9 **A.** I -- it depends on what their arrangement with the agent
10 is.

11 **Q.** If they don't have an agent.

12 **A.** That's right. They wouldn't be paying commissions to an
13 agent.

14 **Q.** And as a key executive of the Screen Actors Guild, it
15 wouldn't surprise you if they did have an agent they paid a
16 commission?

17 **A.** I miss the connection with the Screen Actors Guild.

18 **Q.** Well, you have a real familiarity with talent as a result
19 of your position in the Screen Actors Guild.

20 **MR. KESSLER:** Your Honor, I have my objection.

21 **THE COURT:** Sustained.

22 Look. We're not going to get into Hollywood and
23 Screen Actors Guild.

24 **MR. PARCHER:** Okay. Well, could I --

25 **THE COURT:** We've got enough on our plate to deal

1 with the football.

2 **MR. PARCHER:** I'm almost positive Your Honor --

3 **THE COURT:** Let's stick with football.

4 **MR. PARCHER:** I'm almost positive Your Honor is going
5 to say "no," but could I have a sidebar for a minute?

6 **THE COURT:** Not now, no. This witness will be on the
7 stand for a while.

8 **MR. PARCHER:** Yes, sir.

9 **THE COURT:** Whenever the jury takes their break we
10 will take it up then.

11 **MR. PARCHER:** Certainly isn't significant that I do
12 it now.

13 Thank you. I appreciate that.

14 **BY MR. PARCHER:**

15 **Q.** I'd like -- isn't it true that there is a significant
16 benefit to the union and to Players Inc, in having retired --
17 withdrawn.

18 Isn't it true that there's a significant benefit to
19 the union and Players Inc in having a large number of retired
20 players sign group licensing authorizations? Yes or no?

21 **A.** I can't answer that "yes" or "no." I don't believe so. I
22 need to be able to give you a short explanation.

23 **MR. PARCHER:** Before you do, Your Honor obviously is
24 going to rule.

25 **THE COURT:** Go ahead. Give your explanation.

1 **THE WITNESS:** It was certainly our hope that that
2 would be the case. We were not able to accomplish that.
3 Although, we were -- were persistent and diligent in trying to.

4 **BY MR. PARCHER:**

5 **Q.** Wait a minute. I'm talking about a benefit to the union
6 and Players Inc. I am not talking about or asking you about
7 benefit to group -- to retired players who signed a group
8 licensing authorization.

9 Isn't it true that the more players retired that you
10 signed, the greater critical mass that you were able to have
11 when you went out to speak to potential licensees?

12 **A.** If they were the right players.

13 **Q.** Wait a minute. You continued year in and year out to tell
14 the retired players it was important that they sign GLAs,
15 right?

16 **A.** Yes.

17 **Q.** That the union needed them to sign GLAs, right?

18 **A.** Yes.

19 **Q.** Did you ever say -- did you ever say that the reason it
20 was important was so that you could have a critical mass?

21 **A.** Yes.

22 **Q.** And that's the truth, isn't it?

23 **A.** Yes.

24 **Q.** Now, let's talk about what we mean by -- "we" meaning you,
25 right? And, also, your expert -- if you know this. I don't

1 know. You might have been a long way at sea [sic] by that
2 time.

3 **THE COURT:** He is not with the company anymore.

4 **MR. PARCHER:** Well, he may know this, though.

5 **THE COURT:** I think talking about experts is
6 premature. Stick with what he knows.

7 **MR. PARCHER:** He may know they had an expert, Your
8 Honor.

9 **THE COURT:** All right. You can lay a foundation and
10 see if he does.

11 **MR. PARCHER:** Thank you.

12 **BY MR. PARCHER:**

13 **Q.** You know that the defendants hired an expert in this case,
14 don't you?

15 **A.** No, I don't. I have no knowledge of that.

16 **Q.** Then I can't ask you a question. Should have listened to
17 the Court.

18 **THE COURT:** All right.

19 **BY MR. PARCHER:**

20 **Q.** Do you know a Roger Noll?

21 **A.** I know who Roger Noll is.

22 **Q.** What do you know about him?

23 **A.** He's an economist.

24 **Q.** Do you know whether or not he expressed any opinion about
25 the benefit of the union signing up large numbers of retired

1 players?

2 **A.** I have no idea.

3 **Q.** If he did, would you respect his opinion? Is he a man
4 whose opinion you respect?

5 **MR. KESSLER:** Your Honor, I object. He has no
6 foundation at all. He doesn't know anything about this
7 subject.

8 **MR. PARCHER:** Well, how do we know that?

9 **THE COURT:** Sustained. Sustained. We're not going
10 to --

11 **BY MR. PARCHER:**

12 **Q.** Have you ever hired Roger Noll?

13 **A.** Have I? No.

14 **Q.** "You," being the union.

15 **A.** I think the answer to that question is yes, in a
16 litigation in the, uhm, the -- that occurred in the late '80s
17 and early '90s.

18 **Q.** So when you were with the union you hired him as an
19 expert.

20 **A.** I didn't.

21 **Q.** Well, who did?

22 **A.** I -- well, I wasn't involved in that at all. That was
23 done by, uhm, our general counsel and litigation counsel.

24 **Q.** Well, do you respect the views of -- do you think your
25 litigation counsel was hiring somebody who didn't know what he

1 was doing?

2 **A.** I didn't participate in that.

3 **Q.** I'm asking you for your thought process. You're the
4 number two man in the company. You have a general counsel,
5 right?

6 **THE COURT:** This is argumentative. You're asking
7 him -- this is just an argument, Mr. Parcher. The Court is
8 going to sustain its own objection.

9 **MR. PARCHER:** Yes, sir.

10 **THE COURT:** Move to something more directly relevant
11 to the GLA.

12 **MR. PARCHER:** I'll respectfully -- well, yes, sir.
13 Yes, sir.

14 **BY MR. PARCHER:**

15 **Q.** So let's talk about a critical mass. At one time didn't
16 you say that one of the good things about having all the -- you
17 know, so many people sign up was that the Players Inc, the
18 NFLPA would become one-stop shopping?

19 **A.** That was certainly our hope.

20 **Q.** Well, to a large degree you became one-stop shopping,
21 didn't you?

22 **A.** In what respect? I'm not sure I understand --

23 **Q.** In being able to go over to licensees like Electronic Arts
24 and tell them, in effect, you're the only game in town. You
25 got loads and loads of ballplayers. And if they want to

1 license ballplayers, they ought to come to you. That respect.

2 **A.** Well, we certainly hoped that we would have -- with
3 respect -- you're asking me about retired players? I'm not
4 clear.

5 **Q.** Well, it's retireds and active. But retired players were
6 a big part of your critical mass, right?

7 **THE COURT:** Look. This is a fair question. And you
8 should give an answer to this.

9 Counsel is asking this: Wasn't there a benefit to
10 Players Inc to be able to hold yourself out to people like
11 Electronic Arts, that you had a large number of people signed
12 up for licenses to use their name and images?

13 **THE WITNESS:** No.

14 **THE COURT:** Okay.

15 There's your answer. Now, move on.

16 **MR. PARCHER:** I need that question and answer read
17 back, please, Your Honor.

18 **THE COURT:** Okay. Maybe I didn't understand what you
19 were getting at.

20 **MR. PARCHER:** Maybe you did.

21 **THE COURT:** Read it back. This is a relevant point,
22 and we're going to make sure that the questions and the answers
23 are fairly put and fairly answered.

24 Go ahead. Read it back.

25 (The reporter read as follows:)

1 **"THE COURT:** Counsel is asking this: Wasn't
2 there a benefit to Players Inc to be able to
3 hold yourself out to people like Electronic
4 Arts that you had a large number of people
5 signed up for licenses to use their name and
6 images?

7 **"THE WITNESS:** No."

8 **BY MR. PARCHER:**

9 **Q.** Are you telling this court and this jury that it wasn't
10 important to be able to announce to prospective licensees that
11 you had many, many ballplayers signed -- signed up with you?

12 **A.** They knew who we had, and they knew who we didn't have.
13 And the problem was we didn't have the ones they -- in every
14 instance the ones they wanted. We had the ones they didn't
15 want.

16 **Q.** I don't know what you're talking about. Are you talking
17 about ad hocs? What are you talking about?

18 **A.** I'm talking about the group of players who signed the
19 GLAs.

20 **Q.** That's not what Judge Alsup -- forgive me if I misstate
21 what I think the Court asked.

22 That's not what Judge Alsup asked you. Judge Alsup
23 asked you, isn't it true, isn't it true that with -- using EA
24 as an example -- doesn't have to be EA.

25 That with respect to prospective licensees it was

1 important to you fellows to be able to say you had a lot of
2 ballplayers to offer them if they wanted a license.

3 **MR. KESSLER:** Your Honor, objection. Could we get
4 retired or active combinations?

5 **MR. PARCHER:** It doesn't matter to me, and I don't
6 have to do that.

7 **THE COURT:** All right. You can answer the question
8 as phrased, but if it makes a difference in terms of retired
9 versus active you can give that by way of explanation.

10 Please give an answer.

11 **THE WITNESS:** It does make a difference if we could
12 hold out to a company like EA that we had essentially every
13 active player. We could not make that representation about
14 retired players.

15 We had -- some of them signed the GLAs. We had some
16 of them that we could convince to be involved in designated
17 programs, and we had some that we couldn't.

18 So it was not -- EA knew what the -- what the lay of
19 the land was and what our ability to deliver them was.

20 So it was -- we were interested in working with them
21 to get the retired players that they wanted, but we were not
22 able to say to them, essentially, that we have the same
23 capacity with retired players that we did with active players.

24 **BY MR. PARCHER:**

25 **Q.** So it was no benefit to you whatsoever to be able to say

1 you've got over 2,000 men that have retired that have signed
2 GLAs, as well as 1800 active players; is that what you're
3 telling this court?

4 **A.** They were --

5 **Q.** Yes or no? Yes or no? I'm entitled to that, sir.

6 **THE COURT:** Well, I'm going to let him say "yes" or
7 "no," but you can add an explanation. So do your best.

8 **THE WITNESS:** Uhm, it was a benefit with respect to
9 active players. It was -- it was not a benefit with respect to
10 retired players, because we didn't have everybody that they
11 wanted. And we had some that they didn't want.

12 **BY MR. PARCHER:**

13 **Q.** You -- you are the optimist, right?

14 **A.** Yes, I am, actually.

15 **Q.** Yes. And you're the guy that believes that despite the
16 fact of years and years of failure people are going to want
17 retired players, right? That's why you keep asking them to
18 sign GLAs, right? Yes or no?

19 **A.** Yes.

20 **Q.** Right. And so being an optimist you still say it's that
21 important to be able to tell the prospective licensee that
22 you've got lots of them? It's not a part of your pitch at all?
23 You don't even mention them? Yes or no?

24 **A.** We mentioned our access.

25 **Q.** Your what?

1 A. Our access.

2 Q. Right. And that would include over 2,000 retired players,
3 right?

4 A. To the extent they -- the players they wanted had signed
5 those GLAs.

6 Q. No --

7 A. Excuse me. I'm not finished.

8 To the extent that those players they wanted had
9 signed the group licensing authorization forms.

10 Q. Is there such a thing -- withdrawn.

11 Did you ever make this statement --

12 MR. KESSLER: Your Honor, could I have an objection
13 to counsel's behavior? He's making facial gestures and
14 movements in response to the witness's testimony. I don't
15 think it's appropriate.

16 MR. PARCHER: If Your Honor pleases, I need to
17 respond to that before Your Honor rules. May I? It's only
18 fair.

19 Thank you. I appreciate that.

20 I watched Counsel open to the jury in a
21 supplicant-kind-of-way explaining himself to them with certain
22 types of gestures and mannerisms. I sit there and watch it and
23 I say not a word.

24 I talk a certain way. I don't mean it
25 disrespectfully. And for him to do it, for him to do that is

1 very inappropriate.

2 Some people sit straight ahead stone faced. Some
3 people do what he does, and some people do what I do. That's
4 called "America."

5 I've got a license to practice law. I'm doing my
6 duty here like everybody else in this courtroom.

7 Sorry, I have said more than --

8 **THE COURT:** Wait. Look, the only thing -- your
9 gestures so far are okay.

10 **MR. PARCHER:** Thank you.

11 **THE COURT:** But your -- you make speeches ahead of
12 your questions. That's not proper. And I urge you to stick to
13 questions and not -- not make comments.

14 **MR. PARCHER:** I'm doing the best --

15 **THE COURT:** It's not your job to make commentary as
16 we go along.

17 **MR. PARCHER:** Yes, sir.

18 **THE COURT:** Do your best to stick to asking
19 questions. I don't think your facial expressions have gotten
20 out-of-hand. But even if they have, it's not going to mislead
21 the jury.

22 **MR. PARCHER:** My wife and Aunt Frances would both
23 appreciate that comment, Your Honor.

24 I'll order that portion of the transcript and send it
25 home this evening.

1 **THE COURT:** Very well. Go ahead.

2 **MR. PARCHER:** Thank you.

3 **BY MR. PARCHER:**

4 **Q.** Did you ever make this statement, sir:

5 "It had been our experience in the past that
6 the confusion made it more difficult for
7 competitors to secure a reliable critical
8 mass of players, and in our view was better
9 for the marketplace. It was procompetitive
10 to be a reliable provider of a critical mass
11 of those players because there were very few
12 places that could be accomplished
13 efficiently, reliably and the benefit of the
14 players involved"?

15 **A.** I believe so, yes.

16 **Q.** And was that true?

17 **A.** Yes.

18 **Q.** Do you have such a thing -- I may not have the right
19 title, and I want to give it to you. I'll tell you the trial
20 exhibit. That will help. It's Trial Exhibit No. 12.

21 **A.** Yes, I do.

22 **Q.** This is a -- you got it there?

23 **A.** I think so.

24 **Q.** Take your time.

25 **A.** Yes.

1 Q. At the top it would appear to be a memorandum that was
2 sent out to National Football League Players Association
3 contract advisors attending a 2006 seminar, correct?

4 A. Yes.

5 Q. Now, do you recognize that document? This is one of the
6 things you sent out, right?

7 A. Yes.

8 MR. PARCHER: Move its admission, Your Honor.

9 MR. KESSLER: No objection.

10 MR. PARCHER: This is trial Exhibit 12.

11 THE COURT: Received.

12 (Trial Exhibit 12 was admitted into evidence.)

13 MR. PARCHER: Thank you.

14 BY MR. PARCHER:

15 Q. Take a look at page 6. Well, first of all, who were the
16 contract advisors? Tell the Court and the jury that.

17 Who were you writing this to? Who are you talking to
18 here?

19 A. The NFLPA contract advisors were agents that represented
20 the players and were registered with the union in their
21 negotiations with NFL teams for their player contracts.

22 Q. So you're talking to the agents now, the guys that you're
23 hoping will help you persuade licensees to want a license from
24 you fellows, right?

25 A. I didn't understand that question. I'm sorry.

1 Q. You're talking in this document, Trial Exhibit 12, you're
2 referencing men and women whom you're hoping are in one way or
3 another going to be helpful to you in getting third parties to
4 want to ask for licenses from Players Inc and the union?

5 A. Well, the -- the purpose -- if I could explain.

6 Q. I don't want an explanation. You can tell one of the
7 tensions we're having is I want an answer to my question, if
8 you can give it.

9 Judge Alsup has told you if you can't apparently the
10 Court is willing to give you some latitude.

11 **THE COURT:** All right. That question, though, I
12 didn't understand the question.

13 So the fourth thing you can say is you don't
14 understand the question, or "please rephrase it" or something,
15 if it's true that you really can't understand it.

16 I don't understand that question.

17 **BY MR. PARCHER:**

18 Q. Do you understand my question?

19 A. I don't understand the question. If you would repeat it,
20 it would help.

21 Q. Yes. You sent Trial Exhibit 12 to a group of contract
22 advisors attending the 2006 seminar, right?

23 A. Yes.

24 Q. And these group of contract advisors, for the most part,
25 were players' agents?

1 A. Yes.

2 Q. And you were addressing them for what purpose?

3 A. To explain the NFL sponsorship agreement and its effect on
4 club sponsorships and agent obligations.

5 Q. One of the things you said here on page 6 of this exhibit,
6 if you'll take a look at it, starts with the word -- it's
7 paragraph Roman numeral II, "Value."

8 MR. PARCHER: If we could get it up on the board
9 there.

10 (Document displayed.)

11 Q. "The agreement between the NFL and Players Inc is a
12 valuable asset for sponsors interested in utilizing NFL
13 players."

14 Now, weren't you, in effect, selling them on a
15 thought that what you offered there was something valuable that
16 they ought to be listening to?

17 Yes or no, sir?

18 A. I'm sorry, I was -- I was familiarizing myself with the
19 document, and I apologize for that, because I wanted to make
20 sure I was refreshing my recollection about what it says.

21 Q. If you don't -- if you don't mind, obviously, if you want
22 to read the document I'm sure that the Court would say take
23 your time and read the whole document.

24 But I'm not questioning you about the whole document.
25 I'm questioning you right now about paragraph 2 on page 6 of

1 this Trial Exhibit 12.

2 Do you see it? I could point it out to you if you're
3 not clear?

4 **MR. PARCHER:** May I, Your Honor?

5 **THE COURT:** Go ahead.

6 **BY MR. PARCHER:**

7 **Q.** Here. This is what I'm reading to you.

8 **A.** Okay.

9 **Q.** Got it?

10 **A.** I was looking up here. This was part of my confusion.
11 "Value" is here as well as there.

12 **Q.** I'm not --

13 **A.** Thank you.

14 **Q.** I'm an adversary, so I don't want to say I'm trying to be
15 helpful, but I am trying to be helpful to a certain extent,
16 anyway.

17 Okay. You're with me now, right?

18 **A.** I see what part of the document you're talking about.
19 Could you repeat the question?

20 **Q.** Sure. I'll go again.

21 In this paragraph Roman numeral II on page 6 of Trial
22 Exhibit 12, it starts with the heading or the word:

23 "Value. The agreement between the NFL and
24 Players Inc is a valuable asset for sponsors interested in
25 utilizing NFL players."

1 Do you see that?

2 **A.** Yes, I do.

3 **Q.** And now I'm asking you -- I don't know how I phrased it
4 before, but the substance of my question to you is: By saying
5 that to them you're, in effect, pitching them. You're, in
6 effect, telling them:

7 "We got something of value. We've got something
8 of value here by the fact that we've got, you know, players
9 that are signed to us."

10 Right?

11 **A.** Pitching whom?

12 **Q.** These men and women that are attending the seminar.

13 **A.** If you'll -- if I could explain, if you'll note at the top
14 of the page it says:

15 "Agreed upon language which both the NFL and
16 Players Inc used to explain the sponsorship agreement to NFL
17 sponsors."

18 We were educating the player contract advisors, the
19 active player contract advisors on how the -- the terms of that
20 agreement would be explained to NFL sponsors so they would
21 understand it.

22 **Q.** Okay. But you're telling them here that it's okay to tell
23 people you're a good organization. You do -- you've got a good
24 thing going here, and for them to understand that as they go
25 out to do their jobs, right?

1 **A.** Well, the "value" referred to is the agreement between the
2 NFL and Players Inc. The agreement between the NFL and Players
3 Inc is a valuable asset for sponsors interested in utilizing
4 NFL players.

5 **Q.** Okay. Mr. Allen, I don't want to fence with you.

6 The agreement -- we've already established this. The
7 agreement between Players Inc and a professional association --
8 it's a trial exhibit, I could refer you back to it -- is an
9 agreement by which the union --

10 **MR. KESSLER:** Your Honor, I object. He's confusing
11 the agreements. This is between the National Football League
12 and Players Inc not between the NFLPA and Players Inc. He's
13 completely confusing the record on this.

14 It had nothing to do with the earlier testimony.

15 **MR. PARCHER:** Okay. I think that's a valid -- I
16 think that's valid.

17 **THE COURT:** Why don't you correct that point and move
18 on to something --

19 **MR. PARCHER:** Yes. Thank you. Sorry about that.
20 Right.

21 **BY MR. PARCHER:**

22 **Q.** The second line of that paragraph 2 says:

23 "Sponsors can take advantage of one-stop
24 shopping that is quick and convenient, without additional
25 agency fees."

1 Now, aren't you telling them by that sentence:

2 "'One-stop shopping' means we've got enough
3 players signed up that whoever the licensee is, prospective
4 licensee, doesn't have to go anywhere else," right? That's
5 what you're telling them?

6 **A.** Active players.

7 **Q.** Where does it say "active players" here?

8 **A.** The agreement between the NFL and Players Inc deals with
9 active players.

10 **Q.** Where does it say "active players" where you tell people
11 in a complete -- sir --

12 **MR. KESSLER:** Your Honor, now I object.

13 **MR. PARCHER:** Excuse me.

14 **MR. KESSLER:** It says it on the next paragraph.

15 There is no foundation for his question. The next to the last
16 paragraph says "active."

17 He shouldn't be asking that question, Your Honor.

18 It's misleading, Your Honor. I object.

19 **MR. PARCHER:** I respectfully disagree. I don't want
20 to get into a --

21 **THE COURT:** Well, do this. If it does say "active"
22 in the next paragraph, point that out to the witness, and then
23 ask him, if you believe that the statement does not pertain to
24 active or --

25 **MR. PARCHER:** Right. There's a third paragraph. We

1 can put it up for you to see. Make it easy for you, Your
2 Honor.

3 Is it possible to put both the paragraph that I'm
4 talking about and the following paragraph for the Court to see?
5 That's the paragraph I'm reading.

6 We'll put it more clearly. I'm reading the second
7 sentence of that paragraph. There's another paragraph below.

8 I'll read it to you, Judge. It will be easier for
9 you.

10 **THE COURT:** I don't see which one you're talking
11 about.

12 **MR. PARCHER:** Okay. Okay. So, here, I'll read it to
13 you.

14 **THE COURT:** He's blowing it up now. All right.
15 Let's see.

16 (Document displayed.)

17 **MR. PARCHER:** Right. That's a paragraph that follows
18 my paragraph.

19 **THE COURT:** All right. So now everyone sees that
20 paragraph.

21 **MR. PARCHER:** Refers to active.

22 **THE COURT:** Go back and put the -- so I want to make
23 sure the witness -- I want you to see this paragraph that
24 follows.

25 Are you seeing that one?

1 **THE WITNESS:** Yes, sir.

2 **THE COURT:** All right. Now, go back to the paragraph
3 you were asking about.

4 **MR. PARCHER:** Thank you.

5 **THE COURT:** And let's see --

6 **MR. PARCHER:** Right.

7 (Document displayed.)

8 **THE COURT:** All right. And your question is?

9 **MR. PARCHER:** On the second sentence of the first
10 paragraph, the value -- I shouldn't say the first paragraph.

11 The paragraph that has Roman numeral II, that begins
12 with the word "Value." I'm questioning this witness about the
13 second --

14 **THE COURT:** The issue is whether "NFL players," as
15 used in that sentence, refers to active players only.

16 **MR. PARCHER:** No. The issue is: Would you say in
17 the second sentence, "sponsors can take advantage of one-stop
18 shopping," et cetera, that that necessarily refers to active
19 players rather than all the players that he's got signed up?

20 **THE COURT:** All right. That's a fair question. Go
21 ahead and ask the question.

22 **BY MR. PARCHER:**

23 **Q.** It doesn't say that there, does it, sir? Yes or no?

24 That you surely can answer "yes" or "no" by just
25 looking at the board. No, it does not, right?

1 A. No.

2 Q. Now, is it your position -- how many people attend these
3 conventions? I'm not holding you to a precise number. On
4 average.

5 A. 300, 400, 500. This isn't a convention. It's an annual
6 required meeting of the registered contract advisors.

7 Q. Okay. Forgive me for saying "a convention."

8 So you get three, four, five hundred people that are
9 in the licensing business in a room. And is it your position
10 to Judge Alsup and this jury that you don't at all make
11 reference to retired players in that room when you're pitching
12 these guys?

13 Yes or no?

14 A. Yes, we make reference in those discussions to retired
15 players.

16 Q. But not in this document. Here you're only talking about
17 to them about actives when you say "one-stop shopping."

18 Is that your testimony?

19 A. That's correct.

20 Q. Show me one place in this document -- take your time.
21 Show me one place in this document where you refer to retired
22 players who have signed group licensing authorization.

23 Show me one place in this document that goes to four,
24 five hundred people that are in the business, that are in the
25 licensing business, when you made a reference to it.

1 You should say it's not there.

2 **A.** This document is a description of --

3 **Q.** Could you just show me where it is? It's very simple. If
4 you go through the document and look at a paragraph --

5 **THE COURT:** The document is the one we have on the
6 screen?

7 **MR. PARCHER:** Well, that's a part of it. I'll hand
8 it up so you know what I'm talking about.

9 **THE COURT:** What is the exhibit number?

10 **MR. PARCHER:** The exhibit is Trial Exhibit No. 12.

11 **THE COURT:** All right.

12 **MR. PARCHER:** It's an eight-page document entitled
13 "Memoranda," and it's directed to these three, four, five
14 hundred persons who were called "NFLPA contract advisors"
15 attending the 2006 seminar.

16 **THE COURT:** Okay. And the question is: Where in the
17 document is there a reference to the retired players' GLA?

18 **MR. PARCHER:** Yes.

19 **THE COURT:** All right. All right. Stop.

20 **MR. PARCHER:** Yes, sir. Yes, sir. Yes, sir.

21 **THE COURT:** Take your time and see if you can find
22 any such reference.

23 **MR. KATZ:** Your Honor, it's a little bit cold in the
24 courtroom. I don't know if Your Honor can adjust that or not.
25 I see a lot of people with their hands in their pockets.

1 **THE COURT:** That's their problem.

2 The -- how about my jury? Any members of the jury
3 cold?

4 (Jurors shaking heads negatively.)

5 **MR. KATZ:** It's just me, Your Honor. Sorry.

6 **THE COURT:** You're sitting too far away from the heat
7 that's being generated.

8 (Laughter)

9 **THE COURT:** I like it to be a little on the cold side
10 because, otherwise, people get drowsy. We also are saving
11 energy.

12 **MR. PARCHER:** Jimmy Carter used to insist -- probably
13 before Your Honor was born -- that it be 68 degrees in every
14 courtroom. And if you didn't like it, you had to bring a
15 sweater with you.

16 **THE COURT:** I was in the Justice Department when
17 Jimmy Carter was president, and believe me, we all wore
18 cardigan sweaters.

19 **MR. PARCHER:** I do.

20 **THE COURT:** We kept the temperature at 65.

21 **MR. PARCHER:** 65?

22 **THE COURT:** That's what he wanted.

23 **MR. PARCHER:** I thought it was 68.

24 **THE COURT:** No, 68 was the normal. 65 was -- this is
25 coming out of your time, so let's move on.

1 **MR. PARCHER:** I was a public defender representing
2 poor people accused of serious crimes when you were prosecuting
3 them, Your Honor.

4 **THE COURT:** Those were the days. Okay.

5 **MR. PARCHER:** Yes, they were.

6 **THE COURT:** Would you proceed with your next
7 question.

8 **BY MR. PARCHER:**

9 **Q.** Well, I'm waiting for an answer to this question.

10 **A.** I don't believe there is any reference.

11 **Q.** Thank you, sir.

12 **MR. PARCHER:** Now, I'd like to put -- I'm sure
13 there's no objection. I want to put the GLA up on the board.
14 I was going to put the Adderley one up, Trial Exhibit 110.

15 **THE COURT:** Any objection?

16 **MR. KESSLER:** No objection.

17 **THE COURT:** Received.

18 (Trial Exhibit 110 was received into evidence.)

19 **MR. PARCHER:** I misplaced my document.

20 **THE COURT:** We're going to take about ten more
21 minutes, and then take a recess for the jury unless someone
22 needs it sooner.

23 **MR. PARCHER:** I got it.

24 **THE COURT:** All right. Take about -- let's go about
25 ten more minutes before we recess.

1 All right. Go ahead.

2 MR. PARCHER: Yes, sir.

3 BY MR. PARCHER:

4 Q. This is -- do you have the right document before you,
5 Mr. Allen?

6 I can help you out.

7 A. This right?

8 Q. Still hit the jump shot.

9 Trial Exhibit 110. That's it.

10 Now, this -- I've selected this document, just so you
11 know. Take a look at this for a minute. This is the group
12 licensing authorization form that was in effect during the
13 period that we're talking about here, correct?

14 I happen to be giving you Mr. Adderley's, but there's
15 no magic to the fact I'm giving you his.

16 A. It's the Retired Players Group Licensing Authorization
17 Form.

18 Q. Right. It changes later on. I think it's 2005, right?
19 You made a change in the retired players authorization.

20 A. Changed in what respect?

21 Q. Okay. I'll show it to you. It's out of context. But I'm
22 just trying to establish that it's not just this document we're
23 talking about. We're talking generally about the group
24 licensing authorization form, okay?

25 A. All right.

1 Q. Fine. Thank you.

2 Now, the second paragraph -- well, let me just go
3 back a step. Do you have a general impression -- I don't
4 expect you to know two-thousand-some-odd people.

5 You understand that we're here representing 2,067
6 people who are members of the class? If you don't, tell me.
7 I'm just telling you that. I hope it's not going to be a
8 problem.

9 Okay. I understand that you probably don't know all
10 2,067 of these men personally. That's a fair assumption,
11 right?

12 A. Yes.

13 Q. Okay. But as a generalization, is it fair to say that you
14 don't picture the vast, vast majority of these men as Harvard
15 Ph.D.s or Rhodes scholars?

16 A. I wouldn't characterize them one way or the other. Some
17 of them are successful businessmen, very successful lawyers,
18 doctors, dentists. And some of them aren't. I mean, it's a
19 diverse group.

20 Q. Uhm. But for the most part -- but for the most part --
21 well, let me just say it this way. This GLA was prepared --
22 when I say "you," sometimes I mean "you," and sometimes I mean
23 "you" the number two person. You know, the editorial --
24 editorial you. You know, the defendants.

25 You prepared this document, correct?

1 A. You mean me, personally?

2 Q. No. I just got through saying that.

3 A. I wasn't sure which one you were ending with. I'm sorry.
4 Me personally or collectively?

5 Q. Well, did you personally prepare the GLA that got sent out
6 to all the retired players?

7 A. I -- you mean, did I actually -- you mean, you're talking
8 about the drafting of it?

9 Q. Well, did you have input into the language?

10 A. Yes.

11 Q. Of course you did. You're the number two guy there,
12 right?

13 A. Yes.

14 Q. Right. So you understood by the first paragraph -- I
15 guess we'll start with that -- wait, wait. Withdrawn.

16 Am I correct in saying that none of the GLAs that you
17 sent out were negotiated by a retired player before they
18 signed?

19 A. That's correct.

20 Q. To the best of your knowledge, none of the retired players
21 were represented by counsel prior to your -- prior to your
22 receiving their signature which you solicited in the mail,
23 correct?

24 A. Correct.

25 Q. To the best of your knowledge, as the union person, you

1 never told any of these players:

2 "Watch yourself. You better get a lawyer here.

3 There may be some technical language as a linebacker, you may
4 not be all that familiar with," did you?

5 **A.** Did I say that? No.

6 **Q.** You never told them:

7 "It might be a good idea to get lawyered up
8 before you sign this, because this language may not be a
9 monument of clarity," did you?

10 **A.** I didn't believe the last part of that sentence, and I
11 didn't use -- I didn't say the first part to the players.

12 **Q.** Okay. So now going to the second paragraph.

13 (Document displayed.)

14 Would you agree with this statement? That language:

15 "Group licensing programs are defined as
16 programs in which a licensee utilizes a total of six or more
17 present or former NFL player images in conjunction with, or on
18 products that are sold at retail or used as promotional or
19 premium items."

20 Would you agree that that sentence is perfectly
21 clear?

22 **A.** I think it's clear, yes.

23 **Q.** Do you see any ambiguity in that sentence?

24 **A.** No.

25 **Q.** So that if six or more present or former NFL player images

1 are licensed in conjunction with or on products sold at retail
2 then it's part of the group licensing program, correct?

3 **A.** Programs defined that way are group licensing programs.

4 **Q.** Yes, sir.

5 I'd like to turn your attention to the one, two,
6 three, four, fifth paragraph.

7 Just tell you, I was chastised by one of my
8 colleagues. Sometimes I call this the "group licensing
9 agreement." It's interchangeable with me, "group licensing
10 authorization, group licensing agreement."

11 I'm referring to the same document.

12 **MR. KESSLER:** Well, Your Honor, I just note the
13 documents are different. So he may refer to the words the
14 same, but there's one document that has this name, and there's
15 another document, as Your Honor knows, involving active players
16 that has a different name.

17 So if counsel is going to confuse them --

18 **MR. PARCHER:** I'll withdraw what I said. I'll
19 withdraw what I said.

20 **THE COURT:** You got in trouble making a speech. See,
21 you were making a speech, a preparatory speech, talking about
22 your colleagues were chastising you. And it was not a pending
23 question, and so then it just invited a speech by Mr. Kessler.
24 So --

25 **MR. PARCHER:** Since I'm not a masochist --

1 **THE COURT:** -- if you hadn't made the speech in the
2 first place, we would be to question number 14 by now.

3 **MR. PARCHER:** Since I'm not a masochist, I will try
4 not to do that again, because I'm feeling the -- I'm feeling
5 the wounds.

6 **THE COURT:** Just stick with this agreement and ask --
7 these are legitimate questions to ask. So stick with your --

8 **MR. PARCHER:** Yes, sir.

9 **THE COURT:** -- agreement on the screen, and let's
10 continue on.

11 **BY MR. PARCHER:**

12 **Q.** Okay. We're down to -- you see there, Mr. Allen:

13 "It is further understood"?

14 **A.** Are you talking about the last -- the next to the last
15 paragraph?

16 **Q.** Yes.

17 **A.** Right here. I see it.

18 **Q.** It's up there on the board, just so you can double-check.
19 I'll make sure.

20 **A.** Right here.

21 **MR. PARCHER:** I should ask, Your Honor. I'm
22 approaching the witness for a minute.

23 Yeah, that's it.

24 **THE WITNESS:** Thank you.

25

1 **BY MR. PARCHER:**

2 **Q.** "It is further understood that the monies generated by
3 such licensing of retired player group rights will be divided
4 between the player and an escrow account."

5 And then it goes on. I will get to the rest of the
6 sentence. I'm cutting you off just for question purposes.

7 Would you agree that from the first minute of the
8 first day that the first retired person signed a GLA, down to
9 the day that you left, that you never did establish an escrow
10 account?

11 **A.** That's correct.

12 **Q.** Now, to continue on with the sentence:

13 "Will be divided between the player."

14 "The player," presumably, is the person who signs the
15 GLA, right?

16 **A.** Yes.

17 **Q.** And "an escrow account for all eligible NFLPA members,"
18 those are the active fellows, right?

19 **A.** No.

20 **Q.** Wait a minute. Is there a retired player -- withdrawn.

21 What document of the union's -- I have just forgotten
22 the name. That's why I'm asking. I'm going to ask you
23 questions about it. I know what it says, but I don't remember
24 the name of the document.

25 What document of the union establishes who is an

1 eligible NFLPA member who has signed a group licensing
2 authorization form? What's it called? I think it's the
3 bylaws, but I don't want to mislead you.

4 **A.** I'm not sure I recall.

5 **Q.** Okay. Put it this way. Am I correct in saying that --
6 give me just a second.

7 **MR. PARCHER:** Can you, Your Honor?

8 **BY MR. PARCHER:**

9 **Q.** Am I correct in saying that there's nothing that you know
10 of that would have prevented the NFLPA from establishing
11 eligibility requirements that included the retired players?

12 **A.** I think that's correct.

13 **Q.** Didn't you ever say that exact thing?

14 **A.** It --

15 **MR. KESSLER:** Your Honor, he answered the question.

16 He said --

17 **MR. PARCHER:** Okay. Withdrawn. Withdrawn.

18 **BY MR. PARCHER:**

19 **Q.** Didn't you ever say that the NFLPA board of reps, in their
20 consideration of that issue, determined that wasn't
21 appropriate? Meaning that it wasn't appropriate to make
22 retired players eligible.

23 **MR. KESSLER:** Your Honor, I now have an objection
24 because he's -- he's reading testimony about the active player
25 pool fund.

1 **MR. PARCHER:** This is not fair, Judge.

2 **MR. KESSLER:** And he is mixing it now into this
3 subject, Your Honor. There's no foundation for that. It's
4 inappropriate.

5 **MR. PARCHER:** May I be heard, Judge?

6 **THE COURT:** It's time for our break, anyway. So
7 we'll let you go on with your break.

8 15 minutes. Please remember the admonition.

9 **THE CLERK:** All rise.

10 (Thereupon, the jury left the courtroom.)

11 **THE COURT:** All right. The witness can step down.
12 We don't need the witness, do we?

13 **MR. KESSLER:** Not right now, Your Honor.

14 **THE COURT:** You can take your 15-minute break, as
15 well.

16 **THE WITNESS:** Thank you, Your Honor.

17 **THE COURT:** Thank you, Mr. Allen.

18 Everyone else be seated.

19 The procedure that I like to use when depositions are
20 involved for impeachment is, as I said at the pretrial
21 conference, "do not do this," which lawyers abuse all the time.

22 They will say:

23 "In your deposition didn't you say the light was
24 green?"

25 And, in fact, in the deposition the question was

1 asked and they said:

2 "Well, somebody told me the light was green,"
3 which is different.

4 And if I let lawyers get away with that, they take
5 liberties, and they will not quote it exactly verbatim.

6 So the way you should do it is you just ask the
7 witness the question:

8 "Was the light green or red or yellow?"

9 And they say:

10 "The light was yellow."

11 And then, you can then read question and exact line
12 and so forth from the deposition in which they said something
13 to the contrary.

14 That way we will get the full context. If it said
15 "active" versus whatever, then that will be clear instead of
16 doing a memory test where you say:

17 "Didn't you say -- have you ever made the
18 following statement?"

19 And then, you read something, and we don't know
20 whether it's exact or not.

21 So that's the procedure that's going to be used. I'm
22 going to ask you to do it my way, Mr. Parcher. The way you're
23 doing it is in violation of my ground rules.

24 So, please, everyone has got to do this. I've
25 learned the hard way if I let the lawyers get away with asking

1 those kind of questions they take words out, they slip words
2 in, they paraphrase, and pretty soon it's just tricking the
3 witness.

4 **MR. PARCHER:** Right.

5 **THE COURT:** So that's the way we're going to handle
6 that. So if it turns out that it's true that the context makes
7 a distinction between active and retired that will come out
8 when you read the excerpt in.

9 **MR. PARCHER:** Sure. Obviously, I respect that
10 completely. No buts. And I follow the Court's admonition. I
11 just want to say at that moment in time -- it may be confusing
12 the way I do things -- I wasn't impeaching this witness. I was
13 trying to get him to confirm that that's his position. He
14 hadn't -- he hadn't said "that's not my position."

15 **THE COURT:** You just should ask him. It would be
16 perfectly permissible for you to say, "do you agree that"? And
17 then say A, B, C, whatever you want to lard in there. If he
18 says "No, I don't agree with that," you can read what he said
19 in the deposition.

20 What I don't like is whenever you are communicating
21 to the jury, the way you're doing it is that you're reading
22 from something.

23 **MR. PARCHER:** Right.

24 **THE COURT:** And that leaves the impression with the
25 jury that you're reading from the deposition. That may or may

1 not be what he actually said in the deposition.

2 **MR. PARCHER:** Your Honor --

3 **THE COURT:** That's the part that is borderline.

4 **MR. PARCHER:** I assure you, Your Honor, I'm not
5 arguing with the Court. I hope it doesn't sound like I am. I
6 respect that completely.

7 What's happening is I'm trying to -- when I say
8 "didn't you say, don't you agree," whatever it is that you want
9 me to do, I'm trying -- I'm literally doing it in reverse. I'm
10 trying to get it right. That's why I'm looking at the
11 document.

12 **THE COURT:** Well, you can --

13 **MR. PARCHER:** See what I mean?

14 **THE COURT:** If you -- you can just -- instead of
15 saying "haven't you previously said," the way to do it is --
16 because if it's coming out of the deposition that's not the way
17 to do it. The way to do it is:

18 "Do you agree with the statement?"

19 And then, you can read the statement.

20 **MR. PARCHER:** Thank you. I got it. Sorry about
21 that.

22 **MR. KESSLER:** Your Honor?

23 **THE COURT:** Yes.

24 **MR. KESSLER:** I had an additional objection, which is
25 that it does refer to deposition testimony in which a specific

1 document was placed before the witness, not the retired player
2 GLA, the active player pool eligibility criteria.

3 And so he was being questioned at his deposition
4 about those criteria. And what counsel has now done -- and I
5 don't think there's a foundation for this -- is that he's
6 asking the witness questions as if those statements about the
7 active player, which is a document that says "eligibility
8 criteria for the pool of active player money," has something to
9 do with this retired player form. And that's what I was
10 objecting to. He has to have an foundation for the question.

11 **MR. PARCHER:** First of all, I want to point out for
12 the record how my adversary is gesturing, just so we have that
13 clear.

14 **THE COURT:** Is what?

15 **MR. PARCHER:** So my Aunt Frances gets both sides of
16 the story here. That's not what I'm doing.

17 And you'll hear -- Your Honor will hear it when I do
18 it.

19 **THE COURT:** It is okay for -- the reason that
20 Mr. Kessler is wrong is that if the question by the person at
21 the podium is, "Do you agree with the statement XYZ?" that
22 question does not invoke any deposition. That question does
23 not necessarily mean that he's reading from the wrong contract.

24 The witness can protect himself and say either "yes"
25 or "no." And then --

1 **MR. KESSLER:** Of course, Your Honor.

2 **THE COURT:** -- if it turns out he has to resort to
3 the deposition to impeach, it will then become clear because
4 we're going to read literally the questions and answers what
5 was the underlying impeachment material.

6 And if it turns out that Mr. Parcher was trying to
7 pull a fast one, it will then become clear to the jury.

8 **MR. KESSLER:** Very good, Your Honor. Thank you.

9 **MR. PARCHER:** I want to say what counsel is saying is
10 so disingenuous. It's already established in this depo and in
11 this thing he is referring to active players as the ones that
12 are eligible. And this question says:

13 "But if you wanted to, you also could have made
14 retired players?"

15 Okay. That's it.

16 **THE COURT:** All right. You had something you wanted
17 to do at a sidebar. Is that moot now, or do you need to go
18 into it?

19 **MR. PARCHER:** I don't remember.

20 **THE COURT:** I think it had something to do with
21 Hollywood.

22 **MR. PARCHER:** Oh, everybody is saying hold my fire to
23 another moment.

24 **THE COURT:** I'm going to treat that as moot until you
25 bring it up later.

1 **MR. PARCHER:** Not moot. Just holding --

2 **THE COURT:** Well, I'm not going to have a sidebar
3 while the jury is here.

4 **MR. PARCHER:** No, no, no.

5 **THE COURT:** This is it. Withdrawn for now.
6 We'll take 15 minutes or so.

7 **MR. PARCHER:** Thanks for reminding me.

8 **THE COURT:** Here is the Glenn Eyrich transcript that
9 somebody asked me -- would you hand that to counsel?

10 I've ruled on those objections.

11 (Recess taken from 10:30 to 10:48 a.m.)

12 (The following proceedings were held in open court,
13 outside the presence of the jury.)

14 **THE COURT:** All right. Be seated, please.

15 What is the issue?

16 **MR. HUMMEL:** Your Honor, I have a short issue. We
17 have a concern, very quickly, about paragraph 29 of your
18 standing order, which is regarding speaking objections. We
19 have a strong view that Mr. Kessler has been making repeated
20 speaking objections, and we object to that.

21 **THE COURT:** Mr. Kessler, what do you say?

22 **MR. KESSLER:** Your Honor, I think my objections, when
23 they were speaking, were designed either because we had
24 speeches by counsel that I was responding to or, Your Honor,
25 since you don't want to have sidebars I have had to state the

1 basis for the objection.

2 I think I have to speak that way so Your Honor knows
3 the basis for the objection.

4 **THE COURT:** Well, the way to do it is to just say the
5 technical legal objection. You can say "Hearsay." You can say
6 something else.

7 But there was one time whenever I thought it was like
8 deposition conduct when were you throwing the witness a life
9 preserver, and you didn't need to do it. So just make the
10 legal objections.

11 Sometimes I will understand what you are getting at.
12 Other times I will ask you to elaborate. If I ask you to
13 elaborate, then it's fine. You can --

14 **MR. KESSLER:** Very good, Your Honor.

15 **MR. PARCHER:** I have a short one, too, Your Honor.

16 **THE COURT:** Yes.

17 **MR. PARCHER:** In the -- I understand that in this
18 convention that we were talking about, with the 500 agents,
19 that the union has a rule that if you want to be part of that
20 organization you can't charge a commission of more than -- I
21 think it's 3 percent, but I don't know the exact number. I
22 don't want to say that number. And I want to -- I want to get
23 him to acknowledge that, that the union itself is keeping the
24 agents --

25 **THE COURT:** What agents?

1 **MR. PARCHER:** Why?

2 **THE COURT:** What agents?

3 **MR. PARCHER:** The agents that attend the convention
4 all have to -- I'm using the number 3 percent. I could be
5 getting misinformation, so I don't want to represent --

6 **THE COURT:** How does that help? I don't understand
7 the relevance of that.

8 **MR. PARCHER:** Because these guys have charged
9 37 percent. It's outrageous. 63 percent.

10 **THE COURT:** Now --

11 **MR. PARCHER:** I'm representing to this court that in
12 the history of the world Colonel Parker charged Elvis Presley
13 50 percent, and it was outrageous. They charge 10 percent.
14 They charge 15 percent. They don't charge -- and you're going
15 to see before the case is over with they went up to 69 percent.

16 **MR. KESSLER:** Your Honor, the problem we have -- and
17 this is a perfect example -- Mr. Parker -- Parcher has no
18 understanding of the facts or evidence in this case.

19 The contract advisors he's referring to --

20 **MR. PARCHER:** Excuse me. The witness is here. Could
21 we ask him to step outside maybe?

22 **THE COURT:** Well, no, because I'm going to give you
23 the ruling. You can ask whatever questions that you want so
24 long as you have a good faith basis to ask them.

25 **MR. PARCHER:** Thank you.

1 **THE COURT:** And if the witness knows the answer he
2 has got to admit it. But then, if there's something that's
3 misrepresented and there's confusion you just have to bring it
4 up on your turn.

5 **MR. KESSLER:** Your Honor, can I make a 403 objection
6 and have the witness leave? I don't want to in any way put
7 anything in the witness's head, but I think you should rule on
8 this before he comes back.

9 **THE COURT:** All right. The witness will step
10 outside.

11 Okay. What is your 403?

12 **MR. KESSLER:** Okay. The contract advisors he's
13 referring to and the 3 percent fee he's referring to has
14 nothing to do with licensing. It is the fee -- they are the
15 advisors who negotiate NFL salaries with NFL teams.

16 They have nothing to do with licensing at all.
17 That's why they're here.

18 So he wants to conflate and confuse the jury with
19 salary percentages that the union sets. It has nothing to do
20 with licensing.

21 **THE COURT:** Is that true.

22 **MR. PARCHER:** I have no idea. What I do know --

23 **THE COURT:** Then, if you don't know, then I'm going
24 to sustain the objection.

25 **MR. PARCHER:** Please, Your Honor. That's not right.

1 **THE COURT:** Well, you better know something about it,
2 because if it's salaries, that's not licensing.

3 **MR. PARCHER:** That's not right.

4 **THE COURT:** Tell me why it's wrong.

5 **MR. PARCHER:** Yes, sir. The -- an agent -- an
6 agent -- I don't care if he's a man in the moon or a woman in
7 Mars agent, an agent charges -- and I'm very familiar with this
8 subject, which is not important to Your Honor, but I'm telling
9 you that I'm very familiar with this subject.

10 They charge 10 percent. Maybe they charge
11 15 percent. I'm talking about the best agents in the country
12 charge 10 or 15 percent.

13 Maybe you'll get it up in a rare instance where
14 there's a special thing between an agent and a particular
15 person, you'll get it up to 25 percent.

16 The idea of taking a 63 percent commission for
17 anything, if you're an agent, is completely, completely
18 inappropriate.

19 And to take that from men whom you're supposed to be
20 representing because you're their union, you're their Players
21 Inc, you're the ones -- he says it right in his document --

22 **THE COURT:** But they're taking it only from the
23 actives.

24 **MR. KESSLER:** Correct, Your Honor.

25 **MR. PARCHER:** Wait a minute.

1 **THE COURT:** What has that got to do with the
2 retirees?

3 **MR. PARCHER:** Wait a minute. He says that they're
4 taking it only from the actives. That contract, PAPI, doesn't
5 say he's taking it only from the actives.

6 If I was representing a retired person, I would
7 think -- I would think that they're taking 63 percent from me.
8 It's as if -- what are you saying? That they anticipated
9 before the contract began that they would never be able to do a
10 group licensing?

11 It's a whole construct on their part. That's not so.
12 It has everything to do with that.

13 **MR. KESSLER:** Your Honor, the specific issue that you
14 just ruled upon is whether or not the salary agent fees have
15 anything to do with licensing. Your Honor correctly ruled no.
16 And I believe --

17 **THE COURT:** I'm going to stand by my ruling. I don't
18 think it has anything to do with licensing. So bring back the
19 witness.

20 Let's not get into that.

21 **MR. PARCHER:** I'll just ask if it does have anything
22 to do with it, Judge. We haven't established it yet.

23 **THE COURT:** Why?

24 **MR. PARCHER:** I don't know that.

25 **THE COURT:** I've ruled it out.

1 **MR. PARCHER:** No, you haven't ruled it out. What
2 you've ruled out is asking the percentage if it turns out that
3 it has nothing to do with licensing. You haven't ruled out
4 that if it does -- if these do guys licenses, too, you haven't
5 ruled it out.

6 **THE COURT:** What is your offer of proof that it has
7 something to do with --

8 **MR. PARCHER:** I have no proof.

9 **MR. KESSLER:** Your Honor, I'm representing as an
10 officer of the Court the 3 percent only applies to salary
11 licensing. In fact, agents who do marketing deals of players
12 have no regulation.

13 As an officer of the Court Mr. Parcher has to have a
14 good faith basis for his question. He can't just make it up.

15 **THE COURT:** Are you bringing Mr. Allen back in your
16 case?

17 **MR. KESSLER:** No, Your Honor. In my direct
18 examination, which will be today, though, as we agreed we could
19 do it at one time. So he's going to have a long direct --

20 **THE COURT:** At the rate this is going we are not
21 going to finish by 12:30.

22 **MR. KESSLER:** I think so.

23 **THE COURT:** I'm sustaining the 403 objection. The
24 Court is going to find that this is so far afield of the
25 issues -- it has some tangential relevance, yes. But under

1 Rule 403 the probative value of the 3 percent for people who
2 are agents on salaried issues is so far afield of the issues
3 we've got for this jury it's going to confuse them, and it is
4 just not fair to get into it.

5 **MR. HUMMEL:** Your Honor --

6 **MR. PARCHER:** I can't tell you how strongly I
7 disagree.

8 **THE COURT:** You disagree with my ruling? All right.
9 Great. That is why we have the Ninth Circuit.

10 **MR. PARCHER:** No, I'm not interested in the Ninth
11 Circuit. I want to win the case here.

12 **THE COURT:** In ever trial a judge makes a hundred
13 mistakes. At least one of them you can probably get me
14 reversed on. I'm doing the best I can. So accept my ruling,
15 and let's move on.

16 **MR. PARCHER:** I do accept it, but I'm not interested
17 in the Ninth Circuit.

18 **MR. HUMMEL:** Your Honor, I'm going to come to the
19 help of my partner, Peter Parcher.

20 **THE COURT:** No, you're not. You're going to sit
21 down.

22 **MR. HUMMEL:** Your Honor, may I --

23 **THE COURT:** You can make a supplemental ruling later
24 and file an exception to whatever you want.

25 But I'm getting irritated. You lawyers never accept

1 my rulings.

2 **MR. HUMMEL:** Your Honor, the document that
3 Mr. Parcher was talking about is a licensing document. And
4 I'll show it to Mr. Kessler. It's Exhibit 12.

5 He just said it has to do with player salaries, and
6 I'm reading from it.

7 It says:

8 "The NFL and Players Inc, the licensing and
9 marketing subsidiary of the National Football League Players
10 Association, have entered into an agreement that allows the NFL
11 to convey to sponsors the exclusive right to utilize the group
12 licensing rights of NFL players as assigned by Players Inc."

13 It's not a salary document. And I apologize for
14 doing that to Your Honor, but I'm looking at Exhibit 12. It's
15 on page 6, and I would be happy to hand it to you.

16 **THE COURT:** Show me.

17 **MR. HUMMEL:** I will.

18 **MR. KESSLER:** Your Honor, Mr. Hummel, okay, in all
19 due respect, is not addressing the issue. The 3 percent
20 license fee, it's not a license fee. It's an agent commission.
21 It's not a license fee.

22 The agent commission has to do with salaries. That
23 3 percent agent commission is not referenced anywhere in this
24 document.

25 This was a meeting of the agents for active players

1 to explain to them how they were going to use active players in
2 sponsorship agreements for which, by the way, the agents charge
3 no money.

4 In other words, he's conflating the rule, which is a
5 rule of certified contract advisors, that for salary
6 negotiations, if you negotiate an active player's salary it's
7 3 percent.

8 It has nothing to do with what Mr. Hummel said. And
9 I'm shocked he would come in and try to mislead the court by
10 talking about this document.

11 **MR. PARCHER:** I withdraw the application, because I'm
12 irritating the Court, and I don't mean to do that. And the
13 Court is thinking I'm not obeying a ruling. I withdraw it. I
14 can live without it, regardless of my professional opinion.

15 **THE COURT:** Thank you. All right. Let's now move --

16 **MR. PARCHER:** And if I've annoyed you, I'm sorry.
17 That's all I can say.

18 **MR. KATZ:** Your Honor, can I address the Court for a
19 moment on a related subject?

20 **THE COURT:** No. If it's on this subject, the answer
21 is no. I've made a rule ruling, and we're going to move on.

22 **MR. KATZ:** No, I'm not trying to question the ruling.

23 **THE COURT:** What do you have to say? We've got a
24 room full of lawyers here. We've got more lawyers in the
25 courtroom than jurors.

1 And you lawyers are not being respectful of the
2 jury's time. Go ahead. We'll hear what you have to say.

3 **MR. KATZ:** Your Honor has said several times this
4 morning, most recently a few moments ago, that the 63 percent
5 comes out of the active players.

6 That is not our contention.

7 Our contention is that the escrow account is either
8 the monies that were supposed to go in there and didn't go in
9 there are the monies in the escrow account for the active
10 players, which is the only escrow account. 63 percent was
11 taken from those monies. Those monies were ours to share.

12 So it's -- it is -- that's our contention.

13 **THE COURT:** All right. All right. So, of course,
14 you can make that contention.

15 **MR. KATZ:** Right.

16 **THE COURT:** And I misunderstood your contention.

17 **MR. KATZ:** Right. That's all I wanted, Your Honor.
18 I think it will save us time as we go forward. I'm
19 respectful --

20 **THE COURT:** That's a fair point to have made.

21 **MR. KATZ:** Thank you.

22 **THE COURT:** I'm not accepting it. I'm not denying
23 it. That's going to be for others to decide.

24 **MR. KATZ:** We're going to be hearing from Mr. Kessler
25 on this point.

1 **THE COURT:** They're entitled to make the argument.

2 **MR. KESSLER:** They are, Your Honor, except in opening
3 argument Mr. Parcher told the jury there was no escrow account.
4 Mr. Katz just said their contention is there's an escrow
5 account. They can't have both contentions.

6 **MR. KATZ:** In Mr. Kessler's special world I can't
7 have both those contentions.

8 **THE COURT:** All right.

9 **MR. KATZ:** Fortunately, it doesn't correlate with the
10 real world.

11 **THE COURT:** Good. You made your point. Let's bring
12 back our witness and bring back our jury.

13 You used 96 minutes on this witness alone so far.
14 And in my judgment, a lot of the time was wasted. So don't
15 come back asking for more time later, Mr. Parcher. I would get
16 right to your points and move to your next witness.

17 I'm going to say to the witness say "yes," "no," "I
18 don't recall" or "I don't understand the question." And limit
19 your explanations to half a sentence so we can move this along.

20 **THE WITNESS:** Yes, Your Honor.

21 (The following proceedings were held in open court,
22 in the presence of the jury.)

23 **THE COURT:** Okay. Welcome back. Please have a seat.

24 Mr. Parcher, please continue.

25 **MR. PARCHER:** Thank you, Your Honor.

1 **THE WITNESS:** Excuse me. Which document -- are you
2 going back to the documents?

3 **THE COURT:** He's going to tell you.

4 Just ask a question, and then Mr. Parcher will make
5 it clear what document he's on.

6 **BY MR. PARCHER:**

7 **Q.** Am I correct in suggesting that it's your position that
8 under the union charter or regulations the eligible NFLPA
9 members who would sign a group licensing authorization form is
10 referring to active players not retired players?

11 **A.** I'm not sure what documents you're referring to.

12 **Q.** Oh, I'm sorry. We've got to go back then.

13 Trial Exhibit --

14 **MR. PARCHER:** May I approach, Your Honor?

15 **THE COURT:** Please. Mr. Adderley is 110, I think.

16 **BY MR. PARCHER:**

17 **Q.** It's Trial Exhibit 110.

18 **A.** All right.

19 **Q.** Mr. Adderley. It's the GLA.

20 **A.** Okay.

21 **Q.** And that's what's up on the board. You know that, right?

22 **A.** Yes.

23 **THE COURT:** In fairness to the witness, you didn't
24 say that. And on the cold record being transcribed we would
25 not know what was being referred to.

1 **MR. PARCHER:** Yes, sir.

2 **THE COURT:** And if this was referred to in the
3 closing arguments, it wouldn't be clear, either.

4 So the witness had a point.

5 **MR. PARCHER:** Yes, sir.

6 **THE COURT:** Let's be clear on what document we're
7 referring to.

8 **MR. PARCHER:** I agree with the witness, Your Honor.

9 **BY MR. PARCHER:**

10 **Q.** We're talking to Trial Exhibit 110. And in the fifth
11 paragraph, where it refers to "will be divided between the
12 player" that's the signatory, as you said, right?

13 **A.** Yes. I'm sorry.

14 **Q.** "An escrow account for all eligible NFLPA members who have
15 signed a group licensing authorization form."

16 Do you see it up there?

17 **A.** Yes, I do.

18 **Q.** Now, I believe -- correct me, if I'm wrong -- you don't
19 need the document to respond to this. I believe that it's your
20 position that the persons referred to as "eligible NFLPA
21 members who signed a group licensing authorization form" in
22 Trial Exhibit 110 are the active players.

23 Your lawyer has argued that, and I believe that's
24 your position, right?

25 **MR. KESSLER:** Objection. No foundation.

1 **THE COURT:** Sustained.

2 **MR. KESSLER:** Thank you.

3 **MR. PARCHER:**

4 **Q.** Is it your position --

5 **THE COURT:** Mr. Parcher, please don't mix it up with
6 what the lawyers -- just ask this witness -- ask him what he
7 thinks it means. You're trying to say that the lawyer has
8 argued some point.

9 How is this witness going to know? You're making a
10 speech again.

11 **MR. PARCHER:** I believe he said it. I believe he
12 said it, Your Honor.

13 **THE COURT:** I'm asking you to stick to -- stick to
14 asking the question.

15 **BY MR. PARCHER:**

16 **Q.** Is it true that by "eligible NFLPA member" you mean to
17 refer to active players?

18 **A.** No, it's not true.

19 **Q.** Who are you referring to?

20 **A.** This document refers to retired players and the monies
21 generated by such licensing of retired player group rights.

22 **Q.** So the retired players -- your position is that the
23 retired players are all -- are eligible and can be eligible
24 NFLPA members who have signed a group licensing authorization?

25 **A.** That refers to the escrow account.

1 Q. Do you -- do you -- are you saying that a retired football
2 player who signed a group licensing authorization form can be
3 eligible under your union's rules and regulations? Is that
4 your testimony?

5 MR. KESSLER: Objection, Your Honor, as, again,
6 eligible in this document? Is that the question? I just want
7 a clear record.

8 MR. PARCHER: I'm just asking the witness -- not to
9 make any speaking objections. Make his objections. Let the
10 Court rule.

11 THE COURT: It was a speaking objection. That was
12 not a legal objection.

13 The objection is overruled.

14 Is the question -- he said "eligible" as used up
15 there means "retired."

16 And I lost track, Mr. Parcher, what your follow-up
17 question was. But it's fair for you to have a follow-up
18 question, so please ask it again.

19 BY MR. PARCHER:

20 Q. Can a retired player, who signed a group licensing
21 authorization, be an eligible player, as that word is used in
22 the union rules and regulations?

23 Yes or no, sir?

24 A. Yes.

25 MR. PARCHER: I forgot how you told me to do it.

1 **BY MR. PARCHER:**

2 **Q.** At some point --

3 **THE COURT:** Just say:

4 "Do you agree with this statement?"

5 **BY MR. PARCHER:**

6 **Q.** Do you agree with this statement that paragraph 4(b) and
7 4(d) of the union rules and regulations would have excluded
8 retired players who didn't meet the eligibility requirements
9 established by the NFLPA board of player reps?

10 **MR. KESSLER:** Your Honor, objection. Misstates facts
11 in evidence. He's referring to the wrong documents. I can
12 explain, Your Honor.

13 **THE COURT:** If that's -- no. Please. You don't get
14 a chance to explain. This witness can protect himself, and if
15 he thinks not that's not a correct statement, then he can say
16 so.

17 So it's a fair question.

18 **THE WITNESS:** I don't know what document you're
19 referring to.

20 **BY MR. PARCHER:**

21 **Q.** Okay. Leave aside documents. Let's not look at
22 documents. Turn it over, or don't look at it, if you don't
23 mind. Right?

24 **A.** Okay.

25 **Q.** The union has eligibility requirements, correct?

1 A. For?

2 Q. Well, let's go back then. Let's go back then, if you
3 will, to the very first exhibit -- I have to get the number
4 out -- which is the PAPI agreement.

5 Have you got it? I have to give you the number, I'm
6 sure.

7 A. What number?

8 Q. Here it is. It's Trial Exhibit 125. That exhibit --

9 A. Excuse me. I don't have it yet.

10 Q. All right. Sorry.

11 A. I do now.

12 MR. PARCHER: Bear with me a moment, Your Honor.

13 Sorry, Judge.

14 BY MR. PARCHER:

15 Q. The agreement we're talking about now, sir, is the license
16 agreement between the NFLPA and Players Inc, that establishes
17 the right of Players Inc to do the licensing and marketing of
18 the players that the union gets to sign general license
19 authorizations, correct?

20 A. Uhm --

21 Q. That's what the document does?

22 A. Yes.

23 Q. Yes. And if you turn your attention to page 7 of that
24 trial exhibit, subdivision C, do you see it there, page 7 down
25 at the bottom?

1 **A.** Yes, I do.

2 **MR. PARCHER:** If we can blow it up a little bit.

3 (Document displayed.)

4 **BY MR. PARCHER:**

5 **Q.** "Licensor and the licensee shall establish eligibility
6 requirements, as mutually agreed to in writing from time to
7 time, upon which licenses shall make royalty payments to
8 players. Initial eligibility requirements are set forth in
9 attachment D."

10 Do you know what attachment D is?

11 **A.** I don't recall without seeing the document.

12 **Q.** Is there any rule or regulation, in other words in the
13 charter, the bylaws and regulations that talks about
14 eligibility requirements? Never mind what it references. That
15 talks about eligibility requirements that's promulgated by the
16 union?

17 **A.** Yes.

18 **Q.** What is that? Would you please tell His Honor and our
19 jury that.

20 **A.** The board of player representatives of the NFLPA
21 decided -- and it's reflected in minutes from the meeting at
22 which they first decided to establish eligibility provisions
23 for players to -- to get the royalty payments from Players Inc.

24 And those rules were established by the board of
25 player reps and in writing in the minutes of the meeting.

1 Q. And those eligibility requirements talk about players that
2 are going to receive monies from Players Inc. That's the
3 37 percent, right?

4 A. That's correct.

5 Q. Those players, you say, only refer to active players,
6 right?

7 A. That's correct.

8 Q. So that the eligibility requirements or rules promulgated
9 by the union exclude retired players that have signed the GLAs
10 in the rules?

11 A. That's right.

12 Q. Okay. Now, am I right in saying that there's nothing that
13 would have prevented the NFLPA from establishing eligibility
14 requirements that included the retired players? Do you agree
15 with that?

16 A. Yes, I do.

17 Q. So they could have done it if they wanted to, but they
18 chose not to, right?

19 A. That's right.

20 Q. Thank you.

21 Now, I would like to turn to Trial Exhibit 28, which
22 is the -- oh, before -- I'm sorry. Before I turn -- I was
23 going to return to Electronic Arts, but I'll get there in a
24 minute.

25 You never told the retired players, whether it was in

1 the group licensing or any other way, that they weren't
2 eligible under the rules promulgated by the union? You never
3 told them that?

4 **A.** Actually I did, often.

5 **Q.** You did? Where did you do that?

6 **A.** When I described the circumstances of the involvement of
7 retired players with Players Inc at the retired players'
8 conventions that I attended and reported to the players at, and
9 at retired players' chapter meetings.

10 **Q.** So you would tell thousands of retired players over the
11 years "you're not eligible, but sign this GLA anyway"? Is that
12 what your testimony is?

13 Yes or no.

14 **A.** Uhm, that's correct.

15 **Q.** Do you have any correspondence, memoranda or other
16 document that happens to memorialize the fact that you did this
17 at all the conventions or meetings or whatever it is that
18 you're referring to?

19 **A.** Uhm, I have no idea without checking the files.

20 **Q.** Well, I can tell you, sir, that all relevant information,
21 I believe, was subpoenaed by the law firms representing the
22 plaintiffs. And I, in good faith, have no knowledge of any
23 such document. Do you?

24 **MR. KESSLER:** Your Honor, I object.

25 **THE COURT:** Is this a speech?

1 **MR. PARCHER:** I don't mean it to be a speech.

2 **THE COURT:** But, look --

3 **MR. PARCHER:** Yes, sir. I'll move on.

4 **THE COURT:** You understand the problem. You're not
5 under oath. You're not a witness.

6 **MR. PARCHER:** Yes, sir.

7 **THE COURT:** What was produced in this case we're
8 not -- if we're going to get into that we're going to get into
9 it through proper witnesses.

10 **MR. PARCHER:** Yes, sir.

11 **THE COURT:** So lets --

12 **MR. PARCHER:** Yes, sir. I stand corrected.

13 **BY MR. PARCHER:**

14 **Q.** As you sit here today, you know of no such document,
15 correct?

16 **A.** I don't know whether there is or isn't.

17 **Q.** Okay. But as you sit here today you can't tell Judge
18 Alsup or anybody on the jury about such a document. You don't
19 know if it exists or not?

20 **MR. KESSLER:** Objection. Argumentative.

21 **THE COURT:** No, that's a fair point.

22 **THE WITNESS:** No, I don't recall.

23 **BY MR. PARCHER:**

24 **Q.** Wouldn't that be a pretty important point to tell these
25 retired fellows, your hopes and dreams for revenue from

1 royalties are in the GLA, but you're not eligible? Would that
2 be something important that you'd remember?

3 **MR. KESSLER:** Objection. Compound and argumentative.

4 **THE COURT:** Overruled.

5 **THE WITNESS:** Yes.

6 **BY MR. PARCHER:**

7 **Q.** But you still say you don't recall, right?

8 **A.** I said I can't recall a specific document in which I could
9 point you to that that was stated.

10 **Q.** Okay.

11 **A.** I don't know whether there is or isn't.

12 **MR. PARCHER:** Okay. Turn our attention to the
13 Electronic Arts agreement, which is Exhibit 28. I don't mean
14 to be presumptuous, but I assume I can just move that into
15 evidence?

16 **MR. KESSLER:** Could you tell me what it is?

17 **MR. PARCHER:** I said the Electronic Arts license
18 agreement.

19 **MR. KESSLER:** No objection.

20 **MR. PARCHER:** Which is Trial Exhibit 28.

21 (Trial Exhibit 28 was admitted into evidence.)

22 **BY MR. PARCHER:**

23 **Q.** Turn to page 15. Have you got it in front of you?

24 **A.** Yes, I do.

25 **Q.** Turn to page 15 for a minute.

1 That's your signature on page 15, signed as president
2 for National Football League Players Incorporated?

3 **A.** Yes, it is.

4 **Q.** And if you recognize it, the signature for Electronic Arts
5 is -- I can't read his --

6 **A.** Joel Linzner.

7 **Q.** Joel Linzner, who was what, the head of what?

8 **A.** Senior vice president of business affairs.

9 **Q.** At Electronic Arts --

10 **A.** That's right.

11 **Q.** -- during this time?

12 **A.** Yes.

13 **Q.** Now, look at the -- at the top of -- if you just don't
14 mind interchanging for a minute, go back to Trial Exhibit 110,
15 the GLA, retired players GLA.

16 **MR. PARCHER:** Can we go back for just a minute?

17 **BY MR. PARCHER:**

18 **Q.** You pointed this out yourself, didn't you?

19 Way up at the top so everybody can see it.

20 That document is headed "retired player group
21 licensing authorization form," correct?

22 **A.** That's right.

23 **Q.** Now, turn back your attention to the Trial Exhibit 28. Do
24 you see anywhere in the heading of Trial Exhibit 28 where it
25 says this is an active player GLA licensing agreement?

1 A. Do I see --

2 Q. At the top?

3 A. In the first paragraph?

4 Q. No. Excuse me. We'll get to the first paragraph in a
5 minute. I'm asking you to look at the heading. This says
6 "licensing agreement."

7 It does not say "active player group licensing
8 agreement."

9 You agree with that, right? Obviously, it speaks for
10 itself.

11 A. Says "license agreement," I agree.

12 Q. You didn't bother to reference the fact, so there would be
13 no ambiguity that this is only applying to actives or actives
14 and ad hocs, as you would say, correct?

15 A. It is --

16 Q. Just say "yes" or "no."

17 A. I was just trying to understand the question.

18 Q. The question is: You didn't find it necessary to avoid
19 any ambiguity -- withdrawn.

20 In the retired players group licensing authorization
21 you found it necessary -- you're one of the persons who had a
22 lot of input into the document, right?

23 Correct?

24 A. Yes.

25 Q. You found it necessary -- I don't have the exact words,

1 it's set up on the screen -- to label it "retired group players
2 authorization agreement," or whatever the words were, but to
3 make it clear what you were referring to, right?

4 **A.** Yes.

5 **Q.** Okay. You didn't find it necessary to do that in this
6 licensing agreement in the headnotes." Just --

7 **A.** That's correct.

8 **Q.** Thank you.

9 Now, if you turn your attention to paragraph 1(a).
10 And I might add 1(b), both. If you can do it. If not, I'll
11 break it down into two questions.

12 Would you agree that paragraphs 1(a) and 1(b) are,
13 for all practical purposes, boilerplate language that the union
14 or that Players Inc asserts into the license.

15 These are not negotiated clauses, 1(a) and 1(b), 1(a)
16 and 2, correct?

17 If that's not a clear question, I'll ask it again.
18 Sounds like I muddled it up.

19 **A.** I'm a little confused.

20 **Q.** I'm sorry. I'm sure -- I'm sure that I somehow garbled it
21 in the process. I'll break it down. I'm trying to do too much
22 at once.

23 Let's just go to 1(a) for just a minute, all right?

24 **A.** Okay.

25 **Q.** The language of 1(a) you -- "you" being Players Inc, "you"

1 being the union -- you're the author of that language, correct?

2 **A.** That's correct.

3 **Q.** This isn't language that Electronic Arts had any input
4 into. This is just what you're saying to them, right?

5 **A.** That's correct --

6 **Q.** Thank you.

7 **A.** -- in this paragraph.

8 **Q.** Now, I'm referring to paragraph 1(a).

9 Okay. Now, your answer would be the same
10 presumably -- correct me if I'm wrong -- about paragraph 2, the
11 so-called -- if we can get that up here for a minute,
12 underneath it.

13 (Document displayed.)

14 If we could get paragraph 2. That's the same thing.
15 It's not a negotiated clause. It's something that the union
16 writes into the license.

17 **A.** That's not correct.

18 **Q.** This is negotiated?

19 **A.** Yes.

20 **Q.** What part of the language was negotiated by
21 Electronic Arts?

22 **A.** Well, among the things are the description of the -- for
23 example, are the description of what games are covered as
24 described herein --

25 **Q.** Okay.

1 **A.** -- by the license.

2 **Q.** Okay. I'll take it back. I'll try to keep it -- I'll
3 make the question narrower. I appreciate it, sir. I wasn't
4 turning over to the other page. For some reason I'm fixated on
5 the paragraph that begins paragraph 2.

6 You're quite correct. It goes on.

7 My apologies. Just give me just one minute, okay?

8 Okay. Let's just go this far, all right?

9 I'm on 2 now, the granted license, subdivision (a).

10 "Upon the terms and conditions hereinafter set
11 forth, Players Inc hereby grants the licensee and licensee
12 hereby accepts the exclusive right, license and privilege of
13 utilizing the trademarks and names of Players Inc, which may be
14 amended from time to time by Players Inc and the names,
15 likenesses, including without limitation, numbers, pictures,
16 photographs, voices, facsimiles, signatures and/or biographical
17 information (hereinafter identified) of the NFL players
18 referenced in paragraph 1(a) above."

19 That's just strictly your language, right?

20 **A.** Yes.

21 **Q.** Okay. Thank you.

22 Now, let's turn to attachment A. Have you got it
23 there? It's at the very, very back. Here, I'll help you.

24 **MR. PARCHER:** May I, Your Honor?

25 **THE COURT:** Go ahead.

1 **THE WITNESS:** I've got it. It's right here.

2 **MR. PARCHER:** Got it?

3 Can we put that on the board, please?

4 Thank you.

5 (Document displayed.)

6 **BY MR. PARCHER:**

7 **Q.** This document -- it's your position, is it not, that this
8 document is strictly for active player -- strictly -- strictly
9 a form of an active player group licensing authorization; am I
10 correct about that?

11 **A.** Yes, you are.

12 **Q.** And I need to ask you a question before I get to my point.

13 When a dollar comes in to Players Inc from a
14 licensee, because of the utilization of six or more active or
15 retired players, but we'll limit it for a moment just to
16 actives. We'll just limit it for the moment.

17 Players Inc takes the dollar, keeps a certain portion
18 of it. Gives a certain portion over to the union. And the
19 balance, for most of your tenure, 37 percent gets divided
20 equally amongst the players, right?

21 **A.** Right.

22 **Q.** Now, amongst those players, how many -- how many players?
23 1800 players? I'm not holding you to the number.

24 Okay. Go ahead. Say what you wanted to say.

25 **A.** I'm sorry. I was starting to answer before you finished

1 the question.

2 **Q.** Yeah. And I said "1800." And it might be a little more
3 or a little less. I should have said I got that from other
4 documents. But I'm sure it's a fluid --

5 **MR. KESSLER:** Your Honor, I object. I don't know
6 what this is. It's not a question.

7 **THE COURT:** Let's just ask a fresh question.

8 **MR. PARCHER:** Whatever it is, it's not a joke.

9 **THE COURT:** Well, you did get off into talking about
10 1800. It was going on and on. So let's just ask a fresh
11 question.

12 **MR. PARCHER:** Yes, sir. Yes, sir, I will.

13 **BY MR. PARCHER:**

14 **Q.** Amongst the active players who signed group licensing
15 agreement, there are a number of active players whose names and
16 likenesses are never used by a particular licensee, correct?

17 **A.** By a particular licensee, yes, that's correct.

18 **Q.** So that there are times, whether it's the fellow who never
19 got into a game, or for whatever the reason is, there are a
20 number of men whose names and likenesses were not used in any
21 particular license. That's true, right?

22 **A.** That's right.

23 **Q.** Right. Nevertheless, when the union distributes the
24 37 percent, it distributes that 37 percent equally to every one
25 of the players, including the players who are actives whose

1 names and likenesses were never used, correct?

2 **A.** Yes.

3 **Q.** Now, would you agree that the decision to do that --
4 withdrawn.

5 Would you agree -- agree that there is no reference
6 in this attachment A, part of Trial Exhibit 28, to sharing the
7 money equally -- share and share alike -- between actives,
8 whether they're used or not used?

9 Yes or no?

10 **A.** In which document? I was confused.

11 **Q.** Oh, attachment A.

12 **A.** Attachment A?

13 **Q.** Wait a minute. I'm calling it "attachment A." We're
14 clear what we're talking about. We're talking about an active
15 group player license authorization. You understand that,
16 right, sir?

17 **A.** Yes.

18 **Q.** And attachment A is simply -- it's not clear on the board
19 up there but attachment A, if we can make it so everybody can
20 see it -- there you go.

21 Attachment A is simply an example of a group license
22 authorization form that's for actives, right?

23 **A.** That's right.

24 **Q.** Right. And I'm saying to you, would you agree with me,
25 that nowhere in this document does it say that when money comes

1 in from licensing it will be shared not only with the active
2 players whose names and licenses are used, but with the active
3 players whose names and likenesses are not used?

4 It doesn't appear there?

5 **A.** That's correct.

6 **Q.** So this is a decision -- whether it's correct or
7 incorrect, arbitrary or not -- this is a decision that's made
8 unilaterally by the -- by the union and Players Inc in
9 determining what it wants to do with the money.

10 Yes or no?

11 **A.** The decision is made by the NFL Players Association board
12 of player representatives, the governing body.

13 **Q.** Yes, but it's not an obligation. It's decision on your
14 part. And you and Mr. Upshaw -- correct me if I'm wrong,
15 you're the engines of these organizations, right? You are the
16 leaders. You're the trusted servants.

17 **MR. KESSLER:** I would object to the compound form of
18 that question.

19 **MR. PARCHER:** Yes.

20 **BY MR. PARCHER:**

21 **Q.** You're the leaders, are you not?

22 **A.** Is the question whether we are the leaders?

23 **Q.** Yes.

24 **A.** Yes, that was true.

25 **Q.** Thank you.

1 You're also the trusted servants, if I might say, the
2 person that everybody looks to, correct?

3 **A.** Sure.

4 **Q.** If they're part of it.

5 **A.** Sure.

6 **Q.** These men, whether they're actives or retirees, they don't
7 show up with lawyers, do they, and start negotiating with you
8 with respect to that -- with respect to whether all the actives
9 get it or just the actives whose names and likenesses were
10 actually used?

11 **A.** The decision of the governing body. They have advice of
12 counsel, and they make -- they make many decisions.

13 **Q.** The "advice of counsel" is the union's counsel, right?

14 **A.** Yes.

15 **Q.** And the advice of counsel is after consultation with you
16 and, of course, at the time, Mr. Upshaw, correct?

17 **A.** Certainly.

18 **Q.** And yet, you make the unilateral decision, notwithstanding
19 Trial Exhibit 110, the retired players GLA, that not one penny
20 of that money will be shared with them, because their name or
21 likeness wasn't used. Am I correct?

22 **MR. KESSLER:** I object, Your Honor. It's pure
23 argument. It's not even a question.

24 **THE COURT:** Overruled.

25 Please answer.

1 **THE WITNESS:** I'm sorry. It was at the end of the
2 question, and I couldn't get the whole question. I apologize
3 for that.

4 **BY MR. PARCHER:**

5 **Q.** You don't have to apologize. You don't have to. It could
6 just as easily be me as you. Believe me. I've gotten that
7 message.

8 **MR. PARCHER:** Would you mind reading it back so that
9 I don't garble it up?

10 (The question was read by the reporter as follows:)

11 **"QUESTION:** And yet, you make the unilateral
12 decision, notwithstanding Trial Exhibit 110,
13 the retired players GLA, that not one penny
14 of that money will be shared with them,
15 because their name or likeness wasn't used.

16 Am I correct?"

17 **BY MR. PARCHER:**

18 **Q.** Yes or no, sir?

19 **A.** If you mean by "you," you don't mean me, you mean the
20 board of player reps.

21 **Q.** The what?

22 **A.** The board of player reps. The governing body of the
23 National Football League Players Association, the board of
24 directors.

25 **Q.** You keep -- I want to ask you something about that. I

1 meant the union and Players Inc. But I want to ask you a
2 question about that.

3 This is -- several times during the course of this
4 cross-examination you've sought to distance yourself from the
5 decision of the board of player representatives, have you not?

6 **A.** No.

7 **Q.** These board of player representatives are advised by you,
8 are they not?

9 **A.** Sure.

10 **Q.** And they're advised by your -- "your" being the union's --
11 lawyer; are they not?

12 **A.** Yes.

13 **Q.** So they're not men who show up with the best trial lawyer
14 from San Francisco and say, okay, this is what you want to do;
15 let's have a discussion. They're relying on you -- "you" being
16 you and Mr. Upshaw and your general counsel, correct?

17 **A.** Certainly.

18 **Q.** Thank you.

19 Now, this attachment A, the active group licensing
20 authorization, not only does it say that the money that comes
21 in should be shared equally with the actives, but it also --
22 whether they're used or not -- but it doesn't say "don't share
23 it with the retirees," either, does it?

24 **A.** No.

25 **Q.** So regardless of fame or fortune, interest or lack of

1 interest, whoever you are if you're an active you get a
2 share -- you get a share of the revenue, right?

3 **A.** If you meet the eligibility rules.

4 **Q.** Well, the eligibility requirement -- we could go back and
5 look at it, but I don't want to take the time -- is not a very
6 big hurdle for most of the -- most of the men are eligible if
7 they've been playing for the team for a period of time, right?

8 **A.** I just meant it doesn't cover every single active player.

9 **Q.** Okay. But 98 percent of them, 99 percent of them?

10 **A.** I would have to do the math. I don't know.

11 **Q.** The vast majority of them?

12 **A.** That's fair.

13 **Q.** Right. Okay. Now, can I just ask you something?

14 **A.** Sure.

15 **Q.** Did it ever occur to you that you might have a conflict of
16 interest representing the retirees in trying to get them
17 licenses and the actives in trying to get them licenses, from
18 time to time? Did that ever occur to you?

19 **A.** No. I don't believe that's the case.

20 **Q.** So you walk up to somebody and you say:

21 "I'm desperate. I'm desperate for you to take
22 some of these retirees. Come on, you know. I've been giving
23 you exclusive licenses for years. I want you to take some of
24 these retirees so that they can make some dough, too."

25 Immediately, if you say that to them, if they put

1 them in you're taking money away from the actives, aren't you?

2 **A.** Uhm, I'm not understanding the question.

3 **Q.** Electronic Arts, it doesn't have to be Electronic Arts.

4 Could be anybody. I don't know why I'm focused on

5 Electronic Arts, you know.

6 A licensee, you go up to the licensee and you say:

7 "Take a license. I got a ton of guys, 1800 or
8 so actives, 2,000 or so retirees."

9 And they say to you:

10 "Ah, we prefer the actives to the retirees,"
11 right?

12 **A.** Yes.

13 **MR. KESSLER:** Your Honor, I would object to
14 hypothetical questions as opposed to facts that actually
15 happened. He's not an expert witness.

16 **THE COURT:** Well, this is going to your argument
17 about conflict of interest.

18 **MR. PARCHER:** Yes, sir.

19 **THE COURT:** Well, but the witness said he hadn't
20 considered any. So why isn't this just argument?

21 **MR. PARCHER:** Because I believe, sir, under
22 cross-examination I'm entitled to probe the credibility of that
23 answer and whether it's credible at the end of the day that he
24 never considered it. Or, more importantly, whether he has one
25 or not, i.e., a conflict.

1 Could I have just a little more latitude, please?

2 **THE COURT:** All right. Go ahead.

3 **MR. PARCHER:** Thank you.

4 **BY MR. PARCHER:**

5 **Q.** I know according to your position -- understand, it's not
6 ours -- but according to your position no money ever came in
7 for the retired players on a group licensing situation, right?

8 **A.** You mean, other than ad hoc?

9 **Q.** Ad hoc is not what we're talking about.

10 **A.** I'm only asking, sir.

11 That's correct.

12 **Q.** Right. But if it had, then it would have to be divided
13 between the retirees and the actives, right?

14 **A.** No.

15 **Q.** They keep it all to themselves?

16 **A.** It would be divided among the retired players.

17 **Q.** Not a penny would go to the actives?

18 **A.** No.

19 **Q.** Let's go back to Trial Exhibit 110. Let's go back to -- I
20 think it's paragraph 5. It's not numbered, but I think it's
21 the fifth paragraph.

22 (Document displayed.)

23 That paragraph says:

24 "It is further understood that the monies

25 generated by such licensing of retired player group rights will

1 be divided between the player, and an escrow account for all
2 eligible NFLPA members who have signed the group licensing
3 authorization form."

4 We've established that no retired player is an
5 eligible player under the rules and regulations.

6 **MR. KESSLER:** Objection, Your Honor. Misstates the
7 testimony of this witness today.

8 **THE COURT:** Well, I think that's correct. I think --
9 I'm not sure that that's correct. So let's ask the witness
10 again. Maybe it is correct.

11 Let's ask him if eligible NFLPA members, as used in
12 that agreement, refer to retired active or both.

13 **THE WITNESS:** Uhm, eligible NFLPA members referred to
14 in this document refers to retired players only.

15 **BY MR. PARCHER:**

16 **Q.** Where does it say that? You -- excuse me. Withdrawn.

17 You're coming to this court and you're saying that's
18 what it was. Did you -- where does it say that in there so we
19 can read it in plain English language, without a Ph.D. from
20 Berkeley? Where could we see that?

21 **A.** At the top, where it says, "Retired Player Group Licensing
22 Authorization Form." This is about retired players.

23 **Q.** So when you use the word "eligible" here, you mean it
24 completely differently than the word "eligible" when you made
25 your rules and regulations as directed by the licensing

1 agreement between Players Association and Players Inc; is that
2 what you're telling this court and this jury?

3 **A.** Yes, because --

4 **Q.** I don't need to hear the "because."

5 That's what you're telling this jury, that when you
6 were directed under the agreement that you and Mr. Upshaw
7 negotiated with you and Mr. Upshaw, to form eligibility
8 requirements, and you excluded the retired players, you were
9 not meaning for anybody reading this group licensing
10 authorization to think that an eligible NFLPA member who signed
11 a group licensing authorization form would be sharing -- would
12 be sharing in this; is that what you're saying?

13 **A.** Yes, sir, it is.

14 **Q.** In other words, "eligible" means this on the left,
15 "eligible" means that on the right. Is that what your position
16 is?

17 **A.** I'm not -- I don't understand the context of that
18 question.

19 **Q.** Well, the context of the question is: Isn't that a little
20 bit of -- trying to pick my word carefully here.

21 **THE COURT:** Mr. Parcher, he's acknowledged that he
22 has two different meanings in the two different contexts, or
23 the two contexts, whether they are different or not. But to
24 say "the left" and "the right," that's just gilding the lily in
25 argument, so --

1 **MR. PARCHER:** Okay.

2 **THE COURT:** That is --

3 **MR. PARCHER:** When I say "okay" I don't mean any
4 disrespect.

5 **THE COURT:** You can stick with this, but please don't
6 use those kind of argumentative questions.

7 **MR. PARCHER:** Yes, sir. Yes, Your Honor.

8 **BY MR. PARCHER:**

9 **Q.** So let me understand something. According to your -- by
10 the way, you never sat down with the retired players and
11 explained the meaning of this document to them, did you, line
12 by line, word by word, thought by thought?

13 **A.** Uhm, not in that way.

14 **Q.** And you never told the players, the retired players in
15 this document, what percentage of monies they would be getting
16 other than in this paragraph, right, where you don't refer to
17 percentages?

18 **A.** Because there wasn't any money. That's correct.

19 **Q.** No. You didn't know there wasn't going to be any money
20 when you drew paragraph 5 up, did you?

21 **A.** Well --

22 **Q.** Did you?

23 **A.** No.

24 **Q.** As a matter of fact, from 1994 to 2007, every single year
25 of your life you thought there was going to be money because

1 you kept chasing these guys down saying, "Please keep signing
2 these GLAs, it's important," right?

3 **A.** We -- we encouraged players to sign them on a regular
4 basis.

5 **Q.** Yes, sir.

6 So a dollar comes in from whomever, it doesn't
7 matter, a licensing dollar, gross revenue of a dollar comes in.
8 Three active players -- excuse me -- five active players, and,
9 he should be so lucky, one retired player are the group that
10 was licensed.

11 What happens to the dollar?

12 **A.** In the case you just described, that would be -- that
13 would be shared by all of the players. And it wouldn't be
14 retained by Players Inc.

15 **Q.** In other words, the Players Inc would take no commissions
16 at all, right?

17 **A.** If it's a 35 or fewer program, the royalties would be paid
18 directly to the players.

19 **Q.** Make it 36, 38. I don't know the technical rules of the
20 company. Make it some number that doesn't have some technical
21 rule that makes the answer to my question different.

22 **A.** Okay.

23 **Q.** 40 guys. I don't know the number, please. 40 guys and
24 one retired. What happens to the money?

25 **A.** Those would be ad hoc arrangements, and the retired player

1 would keep the money that was paid to the retired player.

2 **Q.** Excuse me. Not an ad hoc agent, so then we'll say three
3 retired players.

4 **A.** Those retired players would keep all of the money paid to
5 them.

6 **Q.** Because you say they would be ad hocs, they wouldn't be
7 part of a group?

8 **A.** That's right.

9 **Q.** So that -- go back to the second paragraph, please.

10 (Document displayed.)

11 So that notwithstanding the fact that group licensing
12 programs are defined as programs in which a licensee utilizes a
13 total of six or more present or former NFL player images in
14 conjunction, so on and so forth, you say that in a situation
15 where the actives and the retirees are combined, they're ad
16 hocs? Is that your position.

17 **A.** The retirees, yes.

18 **Q.** Okay. When I say "okay," sir, I mean, I hear what you
19 say.

20 Now, do you take the position that you -- and "you"
21 is the defendants -- used your best efforts, did everything you
22 could to market and license the retired players who signed
23 GLAs?

24 **A.** Yes.

25 **Q.** Uh-huh. As we sit here today, can you show the Court and

1 the jury one single marketing plan, one single written
2 marketing plan to market retired players? Just say can you?

3 **A.** Yes.

4 **Q.** Okay. Tell us about it.

5 **A.** There were, uhm, any number of presentations made to
6 licensees about retired players.

7 **Q.** Excuse me. I didn't ask you that. I'm being very clear.
8 You're a marketing and licensing person, aren't you?

9 **A.** Yes.

10 **Q.** That's your expertise.

11 **A.** Yes.

12 **Q.** Am I correct? Am I saying it right? I don't want to be
13 too much. I don't want to be too little here.

14 **A.** That's part of my experience, yes.

15 **Q.** Right. Well, it's a considerable part of your experience,
16 no?

17 **A.** Yes.

18 **Q.** It's an important part of your experience, no?

19 **A.** Right.

20 **Q.** Right. You know what a marketing plan is, don't you?

21 I understand you take the position that when you saw
22 a licensee you asked him to take retirees. That's your
23 position, right?

24 **A.** Yes.

25 **Q.** Now, you come back in the first year, everybody said "no."

1 Not to gild the lily, for 16 years they said "no."

2 Did you ever prepare a marketing plan:

3 "Okay, guys."

4 How many people are in the marketing department when
5 you were there? I'm not holding you to the exact number. You
6 don't have to --

7 **A.** Six, seven.

8 **Q.** Seven?

9 **A.** Six.

10 **Q.** Six or seven. It's okay. It's okay. A number of people,
11 right?

12 **A.** Yes.

13 **Q.** Did you ever come back and say: "Let's have a marketing
14 plan"?

15 They're saying "no." They're saying "no."

16 Maybe if they had a video of Herb Adderley doing
17 something great, maybe if they saw Clifton playing wide
18 receiver, and so on down the line -- I'm singling them out
19 because they're here testifying.

20 "Let's get a marketing plan going."

21 Withdrawn.

22 Let's just take an assumption.

23 **MR. KESSLER:** Your Honor, I would move to strike. He
24 made a speech, and then he withdrew it.

25 **MR. PARCHER:** Then, let's stick with it. Let's stick

1 with it.

2 **THE COURT:** Go ahead.

3 **BY MR. PARCHER:**

4 **Q.** You know what a marketing plan is, right?

5 **A.** I do.

6 **Q.** Okay. You produced a marketing plan for anyone in the 16
7 years, one that says:

8 "We're in trouble. Let's try this. Let's do
9 that. Let's pitch it this way. Let's make a video. Let's
10 something"?

11 **A.** We made a video.

12 **Q.** Excuse me. Can you produce a marketing plan?

13 **A.** The marketing retired players was built into the fabric of
14 everything we did as a company, including --

15 **Q.** Excuse me.

16 **A.** I'm not finished with my answer.

17 **MR. PARCHER:** I move to strike. I move to strike.
18 The witness can't just arbitrarily --

19 **THE COURT:** You are -- he's sitting up there right
20 now. He didn't bring a briefcase. He didn't bring a pile of
21 documents. It's unfair to ask him can he produce a marketing
22 plan.

23 So you can ask him can he describe one? Was one ever
24 written up? Those would be fair questions.

25 But to ask him to produce something cold like this.

1 You didn't subpoena this from him, and he doesn't even work at
2 the company anymore. I think that's an unfair question.

3 You have a fair point you're trying to get at, so you
4 should go about it with less ambiguous questions, like:

5 "Can you describe any marketing plan that was
6 directed toward the GLA for retired players?"

7 That would be a very fair question.

8 **MR. PARCHER:** I would like to call upon this court to
9 direct this witness -- apparently, we're not going to be
10 finished today. I don't say it arbitrarily, but apparently
11 we're not.

12 **THE COURT:** He doesn't work for the company.

13 **MR. PARCHER:** But he's under Your Honor's aegis right
14 now, and I assure you --

15 **BY MR. PARCHER:**

16 **Q.** How many hours did you spend, if at all, with Mr. Kessler
17 last night?

18 **MR. KESSLER:** Your Honor, I would object.

19 **THE COURT:** That's fair. That's fair. Goes to bias.
20 That's a legitimate question.

21 Please answer.

22 **THE WITNESS:** Maybe four.

23 **BY MR. PARCHER:**

24 **Q.** Maybe four?

25 **A.** (Nods head.)

1 Q. Did he twist your arm to do it?

2 MR. KESSLER: Your Honor, I object to that question.

3 THE WITNESS: Did he twist my arm to do what?

4 BY MR. PARCHER:

5 Q. To meet with him for four hours. You got a lot of
6 valuable time with the Screen Actors Guild and all.

7 Did you have to be pressed to spend four hours with
8 counsel?

9 A. Uhm, that's probably a fair description.

10 Q. You were pressed?

11 A. Yes.

12 Q. Right. I'm asking you --

13 A. In terms of my time. My time is particularly tight right
14 now, so that the amount of time that was allocated was a
15 significant issue for me.

16 Q. Yes. I understand that. I respect that.

17 The point that I'm trying to make is, you're capable,
18 if you wish, even though you're not with the company anymore,
19 of getting somebody in the company to give you the courtesy of
20 allowing you to receive the marketing plans that you say were
21 prepared and bring them with you next time you're -- next time
22 you come to court.

23 Can you do that?

24 A. Uhm, I have no idea. I don't work there anymore.

25 Q. Wait a minute. I know you don't work there anymore.

1 **MR. KESSLER:** Your Honor, I object to this line.

2 **MR. PARCHER:** Withdrawn.

3 **BY MR. PARCHER:**

4 **Q.** That was Judge Alsup's point. I'm making a different
5 point. You don't have enemies there, do you?

6 **A.** I have no idea.

7 **Q.** Really?

8 **A.** How can I answer that?

9 **THE COURT:** This is not a legitimate line of
10 questions. This witness does not work for the company anymore.

11 What counsel wants me to do is order him to go back
12 to the company -- where is the company located?

13 **MR. KESSLER:** In Washington, D.C.

14 **THE COURT:** Washington, D.C. Go there, go through
15 old files and see if he can find marketing plans.

16 **MR. PARCHER:** No.

17 **THE COURT:** They may or may not exist. What Counsel
18 is trying to show is that they never existed and they can't
19 produce them.

20 I don't know if that's true or not, but as a
21 concession to the shortness of life --

22 (Laughter)

23 **THE COURT:** -- litigation has got to come to end at
24 some point, and there's no way the Court is going to order this
25 witness to do that.

1 **MR. PARCHER:** Okay.

2 **THE COURT:** This is out of line, Counsel.

3 **MR. PARCHER:** I'm sorry. I didn't hear that.

4 **THE COURT:** This is out of line.

5 **MR. PARCHER:** Line.

6 **THE COURT:** Stick to something -- we're taking up the
7 time of ten people here.

8 **MR. PARCHER:** I believe that I'm doing that in good
9 faith here to make my point.

10 **THE COURT:** You're going to get me upset. I am
11 sorry. I apologize to you. Stick to something this witness
12 can answer as opposed to would he go back to Washington,
13 D.C. --

14 **MR. PARCHER:** No, no.

15 **THE COURT:** -- when he's employed by somebody else,
16 and start sifting through old documents.

17 **MR. PARCHER:** Right. Most respectfully -- I know
18 Your Honor is annoyed at me. Most respectfully, I'm not asking
19 him to go back to Washington, D.C.

20 I'm asking him, by the sake of Mr. Kessler, to pick
21 up the telephone.

22 **THE COURT:** The answer is no. The answer is no. And
23 the jury is going to disregard this whole line.

24 That is way out of line.

25 **MR. PARCHER:** Okay.

1 **THE COURT:** We're not going to ask this witness to go
2 do that. He's here to give his testimony under oath at your
3 request. I ordered him to be here.

4 **MR. PARCHER:** Yes, sir.

5 **THE COURT:** For you.

6 **MR. PARCHER:** Yes, sir.

7 **THE COURT:** So just take advantage of the answer that
8 he can give under oath from personal knowledge.

9 **MR. PARCHER:** Okay.

10 **THE COURT:** I'm going to bring this to an end if you
11 don't hurry up and start asking questions.

12 **MR. PARCHER:** Yes, sir.

13 **THE COURT:** All right. Come to your next question.

14 **MR. PARCHER:** Yes, sir.

15 **BY MR. PARCHER:**

16 **Q.** I'd like to read to you a series of questions and answers
17 that were put to Mr. Upshaw under oath in his deposition some
18 time ago. It was several months ago. I don't remember when it
19 was.

20 **MR. KESSLER:** Your Honor, I object. I don't think
21 this is appropriate use of deposition.

22 **THE COURT:** It's appropriate. It was a party
23 admission -- party deposition. It can be used for any purpose.

24 Read it exactly. Give us page and line.

25 **MR. PARCHER:** Okay. This is page 99, line 7.

1 **THE COURT:** Any objection?

2 **MR. PARCHER:** I'm just going to read the deposition
3 page, Your Honor.

4 Does Your Honor have his own copy?

5 **THE COURT:** No. You didn't give it to me yet. If
6 you think I need it, you should give it to me.

7 **MR. PARCHER:** I just think you should know what we're
8 talking about. I assume Your Honor wants it.

9 **THE COURT:** If there's an objection, I've got to rule
10 on it. So far there's no objection.

11 **THE CLERK:** Thanks.

12 **THE COURT:** All right. Page 99?

13 **MR. PARCHER:** Yes, sir.

14 **THE COURT:** What's the line number?

15 **MR. PARCHER:** Line 7.

16 **THE COURT:** Through? Line 15, is that what you want
17 to read?

18 **MR. PARCHER:** Yes. I would actually like to start --
19 you have the whole transcript. Is that it, Judge?

20 **THE COURT:** I do.

21 **MR. PARCHER:** I would like to start on page 98, line
22 10. I'm not going to read everything. Some of it. It's the
23 Upshaw deposition.

24 **THE COURT:** All right. The Court is going to allow
25 you to do this.

1 Is there an objection?

2 **MR. KESSLER:** There is going to be errata, Your
3 Honor. There was a correction to this, Your Honor. If he
4 reads line 15, he should read the corrected version.

5 **MR. PARCHER:** Mr. Kessler, I intend to read the
6 original answer and then the corrected version.

7 **THE COURT:** All right. Read both, and I'll explain.

8 Remember I told you about depositions? Well,
9 Mr. Upshaw was also deposed on February of this year, and he
10 gave the following answers and testimony in part. Then, he had
11 the opportunity to do a correction, and he did. But both can
12 be laid before the jury to assess the testimony.

13 Then, presumably this is going to be foundation for
14 some subsequent question with this witness. But this is okay.
15 You can do this.

16 Go ahead.

17 **BY MR. PARCHER:**

18 **Q.** I'm asking you whether you -- going to ask you whether you
19 believe these answers are accurate and conform to your
20 understanding of the situation. Just bear with me and you'll
21 see what I mean.

22 **MR. KESSLER:** Well, Your Honor, I might have an
23 objection to that question, because I think this is -- we don't
24 know the witness has a foundation to know. There's a lot he
25 proposes to read.

1 **MR. PARCHER:** Okay. I will find out. I'll read it
2 first.

3 **THE COURT:** This is a short enough segment that this
4 is a fair question. I read it myself. If the witness doesn't
5 believe -- it's up to him to decide and up to the jury to
6 evaluate the witness's answer on that.

7 **MR. PARCHER:** Yes, sir.

8 **THE COURT:** I want you to read it exactly, warts and
9 all. Any mistakes in this transcript they stick in the
10 transcript.

11 **MR. PARCHER:** Of course.

12 **THE COURT:** Go ahead.

13 **MR. PARCHER:** Right. So this is on page 98, line 10.

14 **"QUESTION:** Okay.

15 It's by our side questioning Mr. Upshaw.

16 **"QUESTION:** Okay. And do you make efforts to
17 get the licensees to designate retired
18 players?

19 **"ANSWER:** It's up to the licensee. It's
20 their business. They determine what's best
21 for their business. We have no input
22 whatsoever in telling them who they should
23 use and who they should not use. They have
24 their own company. We just facilitate as
25 much as we possibly can to help.

1 **"QUESTION:** But you don't make any
2 affirmative efforts to sell them the images
3 of retired players as a group or
4 individually?

5 **"ANSWER:** I don't run any licensees' company.
6 That's up to them."

7 **BY MR. PARCHER:**

8 **Q.** Was Mr. Upshaw accurate in his statement in his
9 deposition, yes or no?

10 **A.** I couldn't understand the word you said before "that's up
11 to them," the last part.

12 **Q.** Oh?

13 **A.** You were pretty close to the microphone.

14 **Q.** Wait a minute.

15 **THE COURT:** I'll read it.

16 **"ANSWER:** I don't run any licenses" --

17 **MR. PARCHER:** "Licensees."

18 **THE COURT:** -- "licensees' company. That's up to
19 them."

20 That was the answer given by Mr. Upshaw.

21 Now, was any part of that in the errata?

22 **MR. KESSLER:** No.

23 **MR. PARCHER:** No.

24 **THE COURT:** The question is: Do you agree with
25 what -- the testimony given by Mr. Upshaw as read just now?

1 **THE WITNESS:** Yes.

2 **MR. PARCHER:** Now, on page 99, if Your Honor pleases,
3 line 7:

4 **"QUESTION:** And do you make any efforts with
5 respect to selling the images of retired
6 players to companies that request -- that
7 make requests for NFL player services?

8 **"ANSWER:** If they're making a request it's
9 pretty much sold.

10 **"QUESTION:** Right. But do you make efforts
11 to sell that prior to them making a request?"

12 Now, here is a correction. First, I'm going to read
13 you what Mr. Upshaw said at the deposition. And then, sometime
14 later -- it's not dated, but sometime later these corrections
15 were made.

16 They certainly weren't made at the deposition. I'm
17 reading it again.

18 This is from line 11 -- line 33.

19 **"QUESTION:** Right. But do you make efforts
20 to sell that prior to them making a request?

21 **"ANSWER:** Not really."

22 Then, time went by. The deposition was sent to
23 counsel, made available to Mr. Upshaw --

24 **THE COURT:** Just read the errata.

25 **MR. PARCHER:** And then the errata said -- crossing

1 out "not really," it said:

2 "If they make a request there is no need to
3 make an effort, so no, not really."

4 **BY MR. PARCHER:**

5 **Q.** Do you agree with that?

6 **A.** As --

7 **THE COURT:** Well, is your question does he agree with
8 everything or just that last part?

9 **MR. PARCHER:** Everything there was said there.

10 **THE COURT:** All right. Well --

11 **MR. KESSLER:** I think it would be helpful, Your
12 Honor, if the witness had a copy of the deposition, and maybe
13 questions to be directed to specific lines. There's a lot of
14 material being put in here.

15 **THE COURT:** Well, I'm going to let you reread it,
16 just this passage. And then, if the witness thinks -- the
17 witness can read my copy.

18 **MR. PARCHER:** I'm sure we have an extra copy for,
19 Your Honor. That doesn't feel right.

20 **MR. KESSLER:** Your Honor, I can hand up my copy.

21 **THE COURT:** I know what it says.

22 Go ahead. Read it again.

23 **MR. PARCHER:** Just this last --

24 **THE COURT:** No, the whole last, second segment, about
25 half a page.

1 **MR. PARCHER:** Okay. I'm sorry. I'm just asking
2 where you're asking me to read.

3 **THE COURT:** It was the second set of questions and
4 answers.

5 **MR. PARCHER:** Yeah. I think it's just -- you want to
6 go --

7 **MR. HUMMEL:** Line 7.

8 **THE COURT:** To the top of page 9.

9 **MR. PARCHER:** Oh, sure. Thanks. So we're on 99,
10 line 7:

11 **"QUESTION:** And do you make any efforts with
12 respect to selling images of retired players
13 to companies that request -- that make
14 requests for NFL player services?

15 **"ANSWER:** If they make a request it's pretty
16 much sold.

17 **"QUESTION:** Right. But do you make efforts
18 to sell that prior to them making requests?

19 **"ANSWER:** Not really."

20 **BY MR. PARCHER::**

21 **Q.** Do you see that?

22 **A.** Yes.

23 **Q.** Okay. Stop there.

24 Did you agree with that?

25 **A.** No.

1 Q. Then, after the deposition it gets sent to the lawyers, it
2 changes -- by the way, is that Mr. Upshaw's handwriting, do you
3 know?

4 A. Where?

5 MR. KESSLER: Objection, Your Honor. This was done
6 by counsel on both sides. He knows that Mr. Upshaw has nothing
7 to do with doing that.

8 MR. PARCHER: I know no such thing. Maybe someone
9 else --

10 THE WITNESS: There is no --

11 THE COURT: Did Mr. Upshaw sign it? Did he sign it?

12 MR. KESSLER: Yes, Your Honor, he signed it.

13 THE COURT: If he signed it, I'm going to sustain the
14 objection, then. It doesn't matter who wrote it. What matters
15 is did he sign it.

16 MR. PARCHER: Okay. I just want to check --

17 THE WITNESS: There's no handwriting on my copy.

18 MR. PARCHER: I don't have any -- are you
19 representing -- may I ask, inquire?

20 THE COURT: No.

21 MR. PARCHER: Is that a representation that he signed
22 it? Because I don't have it on mine.

23 MR. KESSLER: Yes, there's a representation of
24 signing the errata (indicating).

25 THE COURT: All right. Then forget about whose

1 handwriting it is.

2 **MR. PARCHER:** Fine. That's okay. Yes, sir, right.

3 And then, the answer is changed to read:

4 **"QUESTION:** If they make a request, there is
5 no need to make an effort, so not really."

6 **BY MR. PARCHER:**

7 **Q.** Do you agree with that?

8 **A.** Not entirely.

9 **Q.** Now --

10 **THE COURT:** Now, we're not going to do this. I
11 thought you had just a short segment.

12 **MR. PARCHER:** That's it.

13 **THE COURT:** We're not going to go through his
14 deposition.

15 **MR. PARCHER:** That's it.

16 **THE COURT:** And flyspeck it to see how much of it
17 this witness agrees with.

18 Are you done with the deposition?

19 **MR. PARCHER:** Yes.

20 **THE COURT:** All right.

21 New question.

22 **MR. PARCHER:** Just bear with me one minute, Your
23 Honor. I just said "yes," and I want to make sure I meant it.
24 Okay.

25

1 **BY MR. PARCHER:**

2 **Q.** Now, am I correct in saying that your position and
3 Mr. Upshaw's position with the union and Players Inc depends
4 upon the support of the players, right?

5 **A.** Yes.

6 **Q.** In other words, these are my words, but you work for them?

7 **A.** Well, we certainly worked on their behalf. I reported to
8 Mr. Upshaw.

9 **Q.** Right.

10 **A.** He reported to the governing body of the union board of
11 player reps.

12 **Q.** Now, the active players who signed GLAs they get to vote,
13 right?

14 **A.** That's correct.

15 **Q.** And if the active players were to vote that they didn't
16 want you or Mr. Upshaw to run their organization anymore, you
17 would be out, right?

18 **A.** That's correct.

19 **Q.** The retired players have no vote, right?

20 **A.** That's correct.

21 **Q.** And so whether they like what you're doing or not like
22 what you're doing, whether they think you're fair or unfair,
23 whether they think you're helping them or hurting them, they've
24 got no say. You're there, right?

25 **A.** They don't vote on that.

1 Q. They have no say.

2 A. No, that's not correct.

3 Q. They can speak, but they can't vote. They can't decide.

4 Let's put it that way.

5 A. That is correct.

6 Q. Do you think that once you got these retired players to

7 sign the GLA, and got yourself your critical mass, did you

8 think that it was okay to just take it and put it in the

9 drawer, the GLA, forget about it?

10 A. We didn't get the critical mass. We never achieved that.

11 That was the point.

12 Q. Once you got them to sign it, did you think it was okay to

13 just stick it in the drawer?

14 A. I don't know what you mean by that.

15 Q. You don't know what I mean by sticking it in the drawer?

16 Take it, put it in the drawer, never look at it again. Okay.

17 I got it. That's done. Next.

18 A. I don't know what that means, and that's not what

19 happened.

20 MR. PARCHER: May I read from page 155 of

21 Mr. Allen's deposition?

22 THE COURT: Why are you doing this?

23 MR. PARCHER: Stick it in the drawer.

24 THE COURT: Let me see the deposition, please.

25 MR. PARCHER: I'll hand it up to you. Here. Yes.

1 **THE COURT:** May I borrow this back?

2 Just a moment.

3 155 --

4 **MR. PARCHER:** Lines 11 through 16.

5 **MR. KESSLER:** Your Honor, it's not proper
6 impeachment.

7 **MR. PARCHER:** I said "Mr. Allen's deposition."

8 **THE COURT:** 155 what?

9 **MR. PARCHER:** You've got Mr. Allen's deposition,
10 right, Your Honor?

11 **THE COURT:** No. I've got Gene Upshaw's.

12 **MR. PARCHER:** No, no. It was Mr. Allen's.

13 **THE COURT:** Oh, I thought you were referring to
14 Upshaw.

15 **MR. PARCHER:** My apologies.

16 **THE COURT:** I got. All right. 155. What's the line
17 again?

18 **MR. PARCHER:** Lines 11 through 16.

19 **MR. KESSLER:** Objection, Your Honor. This is not
20 proper impeachment. He's not a party witness.

21 **THE COURT:** When his deposition was taken was he --

22 **MR. KESSLER:** No, Your Honor, he was already long
23 gone from the players' union.

24 **THE COURT:** All right. I agree with the defense.
25 This is not proper impeachment.

1 So, objection sustained. Plus, it's a highly
2 argumentative question. I'm looking at 155.

3 **MR. PARCHER:** Yes, you've got the right page.

4 **THE COURT:** 11 through 16.

5 **MR. PARCHER:** Yes.

6 **THE COURT:** Objection sustained.

7 **MR. PARCHER:** Yes, sir.

8 **BY MR. PARCHER:**

9 **Q.** There's a magazine called Touchback. Could you tell the
10 Court and the jury what it is.

11 **A.** Touchback is a newsletter that the National Football
12 League Players Association sends out for retired players. It's
13 also distributed to active players and to the leadership of the
14 board of player representatives. But it's primarily intended
15 for retired players.

16 **Q.** I just want to go back. Before I do this I want to go
17 back to a statement that you made before. You said: We tried
18 for the critical mass, but we didn't quite get it.

19 Words to that effect. I'm not quoting. I don't
20 have --

21 **A.** We didn't get the critical mass.

22 **Q.** You didn't get the critical mass.

23 Is it your testimony that there were other
24 significant competitors with respect to the group licensing of
25 active or retired players? Group licensing.

1 A. I don't know what you mean by "competitors."

2 Q. You don't know what I mean by the word "competitors"?

3 A. In that context. I'm trying to understand.

4 Q. I'm older than you, but it's like Gimbels and Macy's. I
5 don't know if that makes any sense to anybody.

6 Competitors. Senator Obama and Senator McCain are
7 competitors.

8 A. You mean was there another NFL players' union that was --

9 Q. Anybody. Was there any competitor out there that was
10 cutting into your territory with respect to GLAs, group
11 licensing authorizations, from either retired players or active
12 players?

13 A. There were people who were getting name and image rights
14 from -- from retired players.

15 Q. I didn't ask you that. I said "group licensing
16 authorizations." Did you have any competitors?

17 Withdrawn, before you answer that.

18 That's what you were selling to licensees, wasn't it?
19 "We are a one-stop-shop. We have the most players." Isn't
20 that what you were selling? "Come to us for your license."

21 A. We --

22 Q. Yes or no?

23 A. Uhm, we did not claim to represent every player.

24 Q. Excuse me, sir. I'm not asking you that. I didn't
25 suggest that you claim to represent every player.

1 I'm asking you specifically whether it's true that
2 part of what you were selling to prospective licensees is that
3 you had had a great many retired and active player group
4 licensing authorizations so they ought to come to you, not look
5 elsewhere to make a deal?

6 That was what you did, wasn't it?

7 **A.** Yes.

8 **Q.** And you were quite successful in that, weren't you?

9 **A.** Not for retired players.

10 **Q.** But you were quite successful in getting the licensees to
11 come to you, prospective licensees to come to you?

12 **A.** Yes.

13 **Q.** There wasn't a lot of competition out there for group --
14 for group -- for group -- not saying the word right.

15 There wasn't a lot of competition out there for
16 players who were signing group licenses, was there? You were
17 the only game in town, weren't you, for groups?

18 **A.** I believe the Hall of Fame got rights from players, as
19 well.

20 **Q.** Weren't you the big cheese?

21 **A.** I'm just trying to answer the question.

22 **Q.** No, no. You know more than that, don't you, sir?

23 **A.** Sorry?

24 **Q.** You know more than that, don't you, sir?

25 Wasn't your organization by far the most significant

1 organization in getting football players to sign group
2 licensing authorizations?

3 **MR. KESSLER:** Objecting to preparatory comments by
4 counsel to his questions.

5 **THE COURT:** That's sustained. But please answer the
6 question as framed.

7 **THE WITNESS:** Uhm -- uhm, yes. We were significant
8 in that respect.

9 **BY MR. PARCHER:**

10 **Q.** I would like you to take a look at Trial Exhibit 2046.
11 It's one of the Touchbacks, to help you know what I'm shooting
12 for here.

13 **A.** I have it.

14 **Q.** This is one of the publications that you -- "you" being
15 the editorial you -- caused to send out to retired players; am
16 I correct?

17 **A.** Yes.

18 **MR. PARCHER:** I would move its admission, Your Honor.
19 It's Trial Exhibit 2046.

20 **MR. KESSLER:** No objection.

21 **THE COURT:** All right. 2046 received.

22 (Trial Exhibit 2046 was admitted into evidence.)

23 **BY MR. PARCHER:**

24 **Q.** Have you got it there in front of you, sir?

25 **A.** Yes.

1 Q. Okay. You see here in --

2 MR. PARCHER: Put up the second paragraph, if you
3 don't mind.

4 (Document displayed.)

5 BY MR. PARCHER:

6 Q. Do you see the heading there, "group licensing essential"?

7 A. Yes.

8 Q. So this is a June 2004 exhibit, sir.

9 In 2004 -- let's see, now. You started when, 1994,
10 right?

11 A. Started.

12 Q. Players Inc?

13 A. Players Inc, that's right.

14 Q. Right. So for ten years, year in and year out, you're
15 striking out when it comes to group licensing of retired
16 players, right?

17 A. If by that you mean the GLAs and having that be the basis
18 for a license agreement, yes.

19 Q. You don't know what I mean by "striking out"?

20 Oh, that's baseball.

21 Okay. I'll withdraw it. I'll withdraw it.

22 After all those years of failure, you're writing to
23 the retired players and you're telling them group licensing is
24 essential; are you not?

25 A. That's correct.

1 Q. Now, you're not going to say that when you say "group
2 licensing essential" when you're writing to retired players
3 that you're referring to active players here, are you?

4 A. I haven't read this in a while, so I would want to read it
5 to get the context.

6 Q. Wait. Okay.

7 A. It's four years old.

8 THE COURT: Let's let the witness take a look at it
9 so he can answer the questions.

10 MR. PARCHER: Yes, sir.

11 THE WITNESS: Okay.

12 THE COURT: What's the question?

13 BY MR. PARCHER:

14 Q. I just want to set the predicate, Mr. Allen. This is --
15 just to be clear, this Touchback is being sent out to the
16 retired players, right?

17 A. That's correct.

18 Q. In fact, that's who the publication is for. The jury
19 won't be able to read it, or the judge. But right at the top
20 it says:

21 "Publication for retired NFL players," right?

22 A. That's right.

23 Q. Okay. Now --

24 MR. PARCHER: You can take that off. Publication is
25 off. Okay.

1 (Document displayed.)

2 **BY MR. PARCHER:**

3 **Q.** Now, do you see right at the top of the lead article, the
4 first article on the first page of this communication to
5 retirees, you're saying group licensing is essential, are you
6 not?

7 **A.** Yes.

8 **Q.** And I'm asking you to confirm for Judge Alsup and the
9 jury, that there when you're referring to the essentialness,
10 the significance, the importance of group licensing, you're
11 referring to retired player group licensing authorizations,
12 aren't you?

13 **A.** Yes.

14 **Q.** Now, if you go down away, you tell -- I would say in the
15 second paragraph. In June of 2004, we have a Touchback where
16 you tell the retired players that you've worked hard -- I'm
17 paraphrasing now. I'm not reading it literally, although I
18 can, if you want me to.

19 You've worked hard to secure licensing for games
20 using retired players' names and images, but the response has
21 been restrained. Meaning to say you're not doing well with it,
22 right?

23 **A.** It means that the response by the companies has been
24 restrained.

25 **Q.** Now, if you have been telling them that every time you see

1 them for convention after convention after convention after
2 convention, or if I'm not using the right word when I say
3 "convention," whatever the gatherings are, do you know?
4 Chapters or whatever the word is, why is it so necessary to
5 remind them of that again, that you're trying, but you're not
6 doing so good?

7 **A.** Because we didn't give up. We were -- we were -- we were
8 hoping to take advantage of achieving that critical mass, and
9 hoping that the marketplace would respond to that critical
10 mass.

11 But that hadn't happened and didn't happen in the
12 time that I was there.

13 **Q.** So, in other words, if you've got more retired players
14 that nobody wanted for your critical mass, you would do better
15 for them?

16 **A.** Well, we were --

17 **Q.** For another thousand or two retirees that nobody wanted
18 signed up with you --

19 **A.** If we had --

20 **Q.** Excuse me. Let me finish this question. Your contention
21 for this court and this jury is you would do better for them?
22 You would have a better shot at it if you had another 2,000
23 guys that nobody cared about?

24 **A.** Well, it's not just asking the retired guys who nobody
25 cares about. It's asking everybody who's a retired player to

1 sign. Saying that every single member, and that that includes
2 players that companies do care about.

3 **Q.** Yes. And those players are the Joe Montanas, the Joe
4 Namaths of the world, right?

5 **A.** That's two of them.

6 **Q.** Pardon me?

7 **A.** That is two of them, yes.

8 **Q.** You say "two of them." I mean, they're the stars.
9 They're the famous ones. They are the well-known ones.

10 **A.** Sometimes. I mean, sometimes those players have signed
11 GLAs, and sometimes they have not.

12 **Q.** I understand. But that's who you're referring to. Not
13 the ordinary Joe who signs the GLA hoping to be getting part of
14 a group licensing deal. Right?

15 **MR. KESSLER:** I object to that question. I'm not
16 sure what the question is referring to.

17 **THE COURT:** I've lost a little bit of track myself.

18 What I think I hear the witness saying, or maybe what
19 yours, is that the celebrities -- not very many celebrity
20 retired players have signed GLAs; is that correct?

21 **THE WITNESS:** That's a fair statement.

22 **THE COURT:** Is that the point that you were trying to
23 make?

24 **MR. PARCHER:** I was working up to it, but that's the
25 point.

1 **THE COURT:** We need to take a break now. If you have
2 a key point you need to make --

3 **MR. PARCHER:** No, no.

4 **THE COURT:** As I said, we're going to stop at 12:30
5 today. I actually have to be at a meeting at 12:30, and I need
6 to dash there. But we're going to not be in session tomorrow,
7 nor on Friday. Remember, we have the rest of the week off.
8 But we will resume on Monday morning. And I ask you to please
9 be here at 7:45.

10 Everyone is doing a great job being here on time.
11 You should not be doing any homework about the case. You
12 should not be talking with anyone about the case or letting --
13 or reading any news stories about the case or listening to any
14 news stories. I've gone through all that. I don't think I
15 need to repeat it.

16 One thing, though, I would like to say is, you know,
17 I have to make objections -- not objections. I have to rule on
18 objections. I did make one objection, and I sustained it. So
19 I was lucky on that one.

20 (Laughter)

21 But I don't want you to think that I'm in any way
22 indicating to you how this case should come out. These are
23 excellent lawyers. They have strong views about the case.
24 They get carried away sometimes. And my job is to kind of be
25 like the referee on the football field and make sure it's a

1 fair fight. So you know that I'm not trying to suggest
2 anything about the strength or weaknesses of the cases if I
3 call a penalty on one of these lawyers. So remember that. I
4 know you will. It's the only other way this system could
5 possibly work. Keep all that in mind.

6 Anything more the lawyers want me to admonish the
7 jury about before we let them go for the weekend?

8 **MR. KESSLER:** Yes, Your Honor. Maybe a reminder
9 about the press, television or newspapers.

10 **THE COURT:** I did say that. But, again, please, that
11 would be very problematic if anybody were to listen to a TV
12 show or radio show or listen -- or read something or -- don't
13 talk to the press, of course. Do you all understand all that?

14 (Jurors respond affirmatively.)

15 **THE COURT:** I know you do.

16 See you back here on Monday now, Monday, 7:45 a.m.

17 **THE CLERK:** All rise.

18 (Jury excused. The following proceedings were held
19 in open court, outside the presence of the jury.)

20 **THE COURT:** All right. Mr. Allen, you need to be
21 back here on Monday, as well. All right. Sorry we didn't
22 finish you today, but what can I say?

23 **THE WITNESS:** Are you asking me or telling me?

24 (Laughter)

25 **THE COURT:** I'm telling you.

1 **THE WITNESS:** Then, I don't know why you're waiting
2 for an answer.

3 **THE COURT:** I'm just waiting for you to say "I
4 understand."

5 **THE WITNESS:** I understand.

6 **THE COURT:** All right. See you then.

7 **MR. KESSLER:** Your Honor, I would just like some
8 clear guidance.

9 Obviously, the witness is on cross-examination. No
10 one will discuss with him. And the witness should understand
11 he should discuss with no one any issue in this case or
12 anything about his testimony, or anything else. But I also
13 assume it's all right, Your Honor, that the witness -- like,
14 for example, we can ride in the car with him and have a social
15 conversation. As long as it has nothing to do with this case,
16 we don't have to shun him for the weekend or the day.

17 I assume that's correct, Your Honor?

18 **THE COURT:** All right. As long as you're honest and
19 you have no discussions about this case or the facts involved
20 in this case, that would be okay.

21 **MR. KESSLER:** Absolutely not, Your Honor.

22 **MR. KATZ:** Your Honor, I think the witness should be
23 sequestered from his lawyers. We have no way of knowing what
24 is being said.

25 **THE COURT:** You can --

1 **MR. PARCHER:** I don't mean to interrupt. I have a
2 lot of disagreements with Mr. Kessler, but his good faith is
3 not one of them.

4 **MR. KESSLER:** Thank you, Mr. Parcher.

5 **MR. PARCHER:** He's been instructed by you he's not
6 going to talk. He says he's not going to talk. I got it. I
7 think we can live with that comfortably. I hope everybody
8 would do the same for me.

9 **THE COURT:** You can have a drink, but you have to
10 stay sober enough that you don't talk about this case.

11 (Laughter)

12 **THE WITNESS:** I understand.

13 **MR. PARCHER:** And don't talk about me, either.

14 **THE COURT:** All right. I've got to run. You are
15 free to go right now.

16 **THE WITNESS:** Thank you.

17 **THE COURT:** Anything, very quickly, before we break
18 for the day?

19 **MR. KESSLER:** Nothing, Your Honor. Have a good four
20 days off.

21 **THE COURT:** That's what I'm going to do. It's work,
22 but it will be somewhat fun.

23 All right. See you here, then, 7:30 on Monday
24 morning. Let me give you your time. The plaintiffs have
25 used -- I'll just give you the numbers: 45, 32, 96, 60 and 22.

1 Whatever that adds up to.

2 **MR. KESSLER:** 60 and 22, Your Honor, six-oh?

3 **THE COURT:** 45, 32, 96, 60, plus 22. That's what I
4 have written down for time lapsed on the plaintiffs. And 42
5 minutes for the defendants.

6 **MR. PARCHER:** Excuse me, Judge. What's the fourth
7 number you're saying? Six-zero?

8 **THE COURT:** I'll start all over. 45, 32, 96, 60.

9 **MR. HUMMEL:** Thank you.

10 **THE COURT:** Plus 22.

11 **MR. HUMMEL:** Thank you, Your Honor.

12 **THE COURT:** See you on Monday.

13 **MR. PARCHER:** Have a nice weekend, Judge.

14 **THE COURT:** Thank you.

15 (Thereupon, this trial was continued until Monday,
16 October 27, 2008 at 7:30 o'clock a.m.)

17 - - - -

18 **CERTIFICATE OF REPORTER**

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled matter.

21 DATE: Wednesday, October 22, 2008

22 s/b Katherine Powell Sullivan
23 _____

24 Katherine Powell Sullivan, CSR #5812, RPR, CRR
25 U.S. Court Reporter

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PLAINTIFF WITNESS**DOUG ALLEN**

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