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12 *Attorneys for Plaintiffs*

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

17 BERNARD PAUL PARRISH, HERBERT  
ANTHONY ADDERLEY, and WALTER  
18 ROBERTS III, on behalf of themselves and  
all others similarly situated,

19 Plaintiffs,

21 NATIONAL FOOTBALL LEAGUE  
22 PLAYERS ASSOCIATION, a Virginia  
corporation, and NATIONAL FOOTBALL  
23 LEAGUE PLAYERS INCORPORATED  
d/b/a PLAYERS INC, a Virginia  
24 corporation,

25 Defendants.  
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CIVIL ACTION NO. C07 0943 WHA  
**PLAINTIFFS' BRIEF RE: "COURT'S  
DRAFT CHARGE TO THE JURY"  
PROVIDED OCTOBER 31, 2008;  
OBJECTIONS THERETO**

1 Plaintiffs respectfully request the following changes to the Court’s proposed instructions:

2 **I. The GLA Should Be the Focus of the Breach of Contract Instructions.**

3 Plaintiffs contend that Defendants breached the GLA. Under the GLA, Plaintiffs contend  
4 that Defendants owed a contractual duty to pay GLA signatories if Defendants engaged in “group  
5 licensing,” which was defined in the GLA as programs that involved “six or more present or  
6 former NFL player images.” If Defendants engaged in such group licensing, the “players” who  
7 signed the GLA should have been paid a share of distributed proceeds from such group licensing  
8 from an escrow account. If the jury agrees, the interpretation of the GLA is dispositive of  
9 Plaintiffs’ contract claim, regardless of the interpretation of the third-party license agreements:  
10 Defendants concede that the shared group licensing revenue was funded by third-party licenses  
11 that use six active players, which would necessarily entail the use of “six or more *present or*  
12 *former* NFL player images.” The Court should instruct the jury on this specific theory, which is  
13 supported by the plain language of the GLA and the evidence provided to the jury.

14 As a result, the jury may not need to focus on the terms of the third-party license  
15 agreements. Despite this, the instructions place undue weight on the interpretation of third-party  
16 license agreements. Paragraph 31 suggests that the jury *must* consider whether third-party license  
17 agreements generated retired player group licensing money. Similarly, at paragraph 20, the  
18 instructions read “Whether any such money was due under the RPGLA by any third-party  
19 licensing depends on the coverage of the GLA *as well as the coverage of the third-party*  
20 *licenses.*” In these instances, the Court seems to suggest that any interpretation of the GLA  
21 requires an interpretation of third-party licensing agreements. In contrast, in paragraph 30, the  
22 instructions read that the jury *may* have to decide the meaning of third-party license agreements.

23 For these reasons, Plaintiffs request that the Court provide specific instructions on duty,  
24 breach, and damage under the GLA. Early in the instructions, the Court should instruct the jury  
25 as follows:

26 You must determine, in light of the text of the GLA and the evidence produced at  
27 trial, the specific contractual duties, or obligations, imposed on Defendants by the  
28 GLA. Plaintiffs contend that those duties include (1) the creation of an escrow  
account, (2) the inclusion of shared group licensing revenue in that account, and  
(3) the sharing of that revenue with Plaintiffs. If Defendants failed to perform a

1 duty owed under a contract, then Defendants have breached the contract. If you  
2 find that Defendants breached the GLA, then Defendants are liable to the GLA  
3 Class members for damages in an amount Plaintiffs must prove as I will later  
4 instruct you.

5 Without such an instruction, the jury will be left with the erroneous impression that the  
6 third-party licenses govern this claim. Plaintiffs respectfully suggest that the Court provide  
7 instructions about the duties imposed on Defendants by the GLA, especially in light of the  
8 instructions at paragraph 30 on the parties' contrasting positions on third-party licenses.  
9 Additionally, the Plaintiffs suggest that the Court change paragraphs 20 and 31, such that the jury  
10 is not *required* to interpret the third-party agreements, but instead, *may* do so, depending on the  
11 jury's construction of the GLA.

12 Additionally, at selected paragraphs throughout the contract instructions, the Court makes  
13 factual statements which are not conclusively supported by the evidence. First, at paragraph 16,  
14 the Court states that the GLAs are "nonexclusive," such that the "retired player retained a right to  
15 make his own deals." This is an incorrect characterization, given that Defendants prevented  
16 third-party licensees from directly contracting with the retired players through the third-party  
17 license agreements, and given the third paragraph of the GLA, which states that the signatory  
18 retains rights to use his image in conjunction with five or less present or former players. Second,  
19 at paragraph 19, the instructions read that Defendants treated the third-party licensing revenue as  
20 "active" money, which implicitly creates an active/retired dichotomy. Plaintiffs contend there  
21 was no such dichotomy; rather, Plaintiffs contend that Defendants used a "shared/ad hoc"  
22 dichotomy, and that the third-party licensing revenue was treated as "shared" money. Third, at  
23 paragraph 19, the Court states that 75 third-party licenses are in evidence. In fact, there are more  
24 than 200 such licenses, and 95 of them are in evidence. Finally, because the parties have  
25 consistently referred to the contract at issue as the "GLA" throughout the trial, Plaintiffs request  
26 that the Court refer to the GLA as such, instead of the "RPGLA."

27 At the Court's request, Plaintiffs will propose specific alternative instructions for the  
28 breach of contract instructions, including those at paragraphs 16, 19, 20, and 31.

1 **II. The Court Should Instruct the Jury about the Duty of Good Faith and Fair Dealing**

2 An implied duty of good faith and fair dealing exists in every contract, under D.C. law.  
3 *See Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 321 (D.C. 2008). This duty means that  
4 “neither party shall do anything which will have the effect of destroying or injuring the right of  
5 the other party to receive the fruits of the contract.” *See id.*

6 Defendants have entered into GLAs with the Plaintiffs, such that Plaintiffs would be paid  
7 subject to, as a practical matter, (1) Defendants’ classification of shared revenue generated by  
8 active and retired group licensing, (2) Defendants’ definition of “eligibility,” (3) Defendants’  
9 efforts in marketing the class members, and (4) Defendants’ ability and willingness to package  
10 and promote retired player group licensing rights with active player group licensing rights. D.C.  
11 law does not allow Defendants to sign these contracts and file them away; rather, the duty of good  
12 faith and fair dealing required Defendants to license the class members where appropriate, and to  
13 classify received shared group licensing revenue such that Plaintiffs could enjoy the fruits of  
14 these contracts. As a result, Plaintiffs respectfully request that the Court instruct the jury as to  
15 this duty.

16 **III. The Court Should Instruct the Jury about the Duty of Loyalty**

17 D.C. Courts recognize that an agent owes his principal a duty of loyalty. *See, e.g., Gov’t*  
18 *of Rwanda v. Rwanda Working Group*, 227 F. Supp. 2d 45, 64 (D.D.C. 2002) (“Like other agents,  
19 lawyers owe their clients a duty of loyalty and a duty of care.”) This duty of loyalty requires that  
20 the agent act solely for the benefit of his principal in matters within the scope of that agency, and  
21 that the agent avoid conflicts of interest. *See Riggs Inv. Mgmt. Corp. v. Columbia Partners, LLC*,  
22 966 F. Supp. 1250, 1264 (D.D.C. 1997) (“[A]s an agent, von Pentz had a duty to act solely for the  
23 benefit of his employer in all matters within the scope of his employment and to avoid conflicts of  
24 interest between his duty to his employer and his own self interest.”).

25 Defendants have not upheld this duty of loyalty. Defendants advanced the interest of the  
26 active players, the NFLPA, and Players Inc over the class members in determining how to  
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1 classify, share, and distribute group licensing revenue. As such, Plaintiffs are entitled to an  
2 instruction on the duty of loyalty.

3 As a corollary, Plaintiffs are entitled to claim disgorgement as a proper measure of  
4 damages if Plaintiffs show that Defendants violated their duty of loyalty to the GLA Class.  
5 *Hendry v. Pelland*, 73 F.3d 397, 401-03 (D.C. Cir. 1996). Thus, Plaintiffs request that the Court  
6 provide a disgorgement instruction.

#### 7 **IV. The Control Instruction Does Not Reflect the Broad Nature of Agency**

8 Under D.C. law, agency is a broad concept. Agency covers the employer/employee  
9 relationship, and in that context, control is often a key distinction between an employee and an  
10 independent contractor. *See Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 860 (D.C. 1982)  
11 (emphasizing control in the determination of a master/servant relationship). Agency also covers  
12 the broker/investor relationship, where a determination of agency is *more* likely if the investor  
13 does not control the day-to-day activities of the broker, and instead, the broker retains control  
14 over those activities. *See Merrill Lynch v. Cheng*, 901 F.2d 1124, 1128 (D.C. Cir. 1990) (“A  
15 broker is an agent who owes his principal a duty to act only as authorized.”); *Lieb v. Merrill*  
16 *Lynch*, 461 F. Supp. 951, 954 (E.D. Mich. 1978) (considering whether the broker had “usurped  
17 actual control over a technically non-discretionary account” in determining the extent of duties  
18 owed to the investor); *Robles v. Consolidated Graphics, Inc.*, 965 S.W.2d 552, 557 (Tex. App.  
19 1997) (“Clearly, Robles was hired by both CCI and Gulf Printing on a commission basis to make  
20 or negotiate bargains or contracts on their behalf in matters of trade and commerce. Accordingly,  
21 Robles was acting as an agent and broker for both Gulf Printing and CCI.”).

22 Here, Defendants were authorized, through the GLAs, to enter into group licensing  
23 agreements on the Plaintiffs’ behalf. The jury should properly consider whether the 2,000 class  
24 members could, in theory or in practice, influence the group licensing activities of Defendants, in  
25 determining whether or not an agency relationship was created via the GLA. The absence or  
26 presence of control, however, does not definitively cut for or against a finding of agency. If the  
27 class members have a high degree of control, a jury could find agency as in an  
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1 employer/employee relationship. If the class members do not have this ability, the jury could  
2 nonetheless find that the class members entered into an agency relationship of the brokerage ilk,  
3 such that the class members authorized Defendants to manage the licensing of Plaintiffs' images,  
4 and Defendants were not to misuse those rights.

5 Given the broad nature of agency, the Court's present instruction at paragraph 38  
6 incorrectly reflects the law. While the absence of control cuts against a finding of agency in a  
7 master/servant context, agency as a whole is not so limited. Indeed, although the absence of  
8 control *may* support a finding that the GLA is a "mere license," it may also show that Defendants'  
9 increased control over Plaintiffs' rights led to a corresponding responsibility to manage those  
10 rights prudently, as in a brokerage-type relationship, which supports a finding of agency.

11 **V. Plaintiffs' Claimed Breach of Fiduciary Duty Is Not Limited to a Failure to Market**

12 As drafted, paragraph 32 of the instructions suggests that Plaintiffs' *only* claimed breach  
13 of fiduciary duty is Defendants' "failure to make reasonable efforts to market the RPGLA class  
14 members' images and identifies." This is not the case. Plaintiffs claim that Defendants have  
15 breached their fiduciary duty by (1) failing to fully disclose their actions, (2) defining "eligibility"  
16 such that the retired players are deprived of shared group licensing money, (3) failing to establish  
17 an escrow account, (4) failing to accurately report group licensing revenues to the GLA Class, (5)  
18 failing to distribute revenues to the GLA Class to which it was entitled, (6) failing to distribute to  
19 retired players an equal share of shared group licensing revenue, (7) misappropriating funds  
20 totaling eight million dollars or more that should have been paid, in part, to the GLA Class as  
21 shared group licensing revenue, (8) misappropriating 64-69% of the shared group licensing  
22 revenue for themselves instead of distributing it as revenue to the players, (9) failing to include  
23 the retired players who signed a GLA in group licenses; and (10) placing themselves in a position  
24 of conflict of interest and acting adversely to the interest of the GLA class.

25 Plaintiffs request that the Court remove, from paragraph 32 or otherwise, any suggestion  
26 that Plaintiffs' claim that Defendants breached their fiduciary duties hinges on proving that  
27 Defendants failed to adequately market the class members.

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Respectfully submitted,

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