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12 *Attorneys for Plaintiffs*

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

16
17 BERNARD PAUL PARRISH, HERBERT
ANTHONY ADDERLEY, and WALTER
18 ROBERTS III, on behalf of themselves and
all others similarly situated,

19 Plaintiffs,

20
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' RESPONSE BRIEF RE:
"COURT'S DRAFT CHARGE TO THE
JURY" PROVIDED OCTOBER 31, 2008**

1 Plaintiffs respond to Defendants’ brief on the Court’s proposed instructions as follows:

2 **I. Description of Plaintiffs’ Claims**

3 The jury has heard, over and over, that Plaintiffs are not seeking to recover monies that
4 had been paid to individual active and retired players pursuant to ad hoc agreements. Rather,
5 Plaintiffs are suing based on *Defendants’* breaches of contract and breaches of fiduciary duty, and
6 seek a proportionate share of the shared group licensing revenue, of which Defendants retained
7 over 60%. To the extent the Court wishes to clarify this point, Plaintiffs suggest the following
8 instruction:

9 Plaintiffs’ claims are against Players Inc and the NFLPA. As a result, Plaintiffs
10 only claim that they are entitled to shared licensing revenue that has been
11 distributed to either the NFLPA or Players Inc. Plaintiffs do not claim that they
12 are entitled to any licensing revenue that has been distributed to retired players or
13 active players.

14 Defendants’ proposed instructions as to this point, at 2:1-8 of their brief, are inaccurate.
15 Plaintiffs claim that Defendants failed to include the class in the distribution of shared licensing
16 revenue. Although Plaintiffs’ decision to license retired players pursuant to ad hoc licenses is not,
17 in and of itself, a breach of the GLA, the jury is entitled to consider that decision in determining
18 whether Defendants breached their contractual duties under the GLA, their fiduciary duties,
19 and/or their duty of good faith and fair dealing in deciding how to characterize the licensing
20 revenue, and in deciding that no licensing revenue involving retired players was ever classified as
21 “shared.”

22 Additionally, for the reasons stated in section one of Plaintiffs’ brief filed on Sunday,
23 Defendants’ proposed instructions at pages 2:9-18 are inaccurate. The jury, in interpreting the
24 GLA, need not find that the GLA *required* that “retired player group rights” be licensed for
25 monies to be shared with the GLA signatories, as the second paragraph of the GLA references
26 “six or more *present or former* NFL player images.” (emphasis added).

27 **II. Control Is Not the Preeminent Factor in All Types of Agency**

28 As noted in Plaintiffs’ brief, agency is a broad concept. *See* Restatement (Third) of
Agency, § 1.01 (“Agency encompasses a wide and diverse range of relationships and

1 circumstances. . . . Authors, performers, and athletes often retain specialized agents to represent
2 their interests in dealing with third parties. Some industries make frequent use of nonemployee
3 agents to communicate with customers and enter into contracts that bind the customer and a
4 vendor. . . . Some common forms of agency have a personal and noncommercial flavor,
5 exemplified by the relationship created by a power of attorney that confers authority to make
6 decisions regarding an individual's health care, place of residence, or other personal matters.”).
7 Defendants understand this and argue that factors which specifically apply to one context should
8 not apply to a broad understanding of agency. *See* Defs.’ Br. at 3:19-20.

9 As a further example of the breadth of agency, the Second Circuit examined the metes and
10 bounds of an advertiser-advertising agency relationship in *Columbia Broadcasting Systems, Inc.*
11 *v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 374-77 (2d Cir. 1975). In that case, the Court
12 recognized that findings of agency and authority are not governed exclusively by the same
13 considerations as the employee/independent contractor dichotomy. *See id.* at 375 (“We also are
14 fully aware that an independent contractor, one who is not subject to the right of another to
15 control his physical conduct in the performance of an undertaking, may or may not be an agent.”).
16 In the context of this particular relationship, the Court noted that “professional agents can
17 properly assume that they have the authority usually exercised by others in the same field.” *Id.* at
18 376.

19 Defendants’ control instruction is improper. Defendants’ instruction mistakenly cabins
20 agency as including only the master/servant relationship. As agency encompasses relationships --
21 such as brokers, sports agents, those that enter contracts on behalf of another, and powers of
22 attorney -- where the principal does not have the same level or expectation of control as a master
23 in the master/servant relationship, Defendants’ instruction is improper.

24 Finally, testimony elicited at trial shows an agency relationship:

25 Q. Is it true that you understood that they acted as a sort of agent to get merchandising or
26 licensing deals for retired players?

27 A. Well, at least with respect to us they did. I don’t know about other entities.
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1 Tr. at 1246 (Testimony of Joel Linzner).

2 Q. And is that how you thought of the NFLPA in connection with this deal?

3 A. Yes.

4 Q. They would be acting on your behalf?

5 A. Yes.

6 Tr. at 980. (Testimony of Bruce Laird). Based on such testimony, the text of the GLA,
7 and the parties' course of dealing, a reasonable jury could find an agency relationship. *See also*
8 *Hampton Tree Farms v. Jewett*, 892 P.2d 683, 694 (Ore. 1995) (finding that a question of agency
9 survived summary judgment where the purported agent stated that he was to find a buyer for the
10 purported principal's mill, without relying on other indicia of control).

11 **III. Defendants' Professed Understanding of Their Contracts is Not Dispositive**

12 Defendants' proposed instruction as to the weight to give the Defendants' and licensees'
13 professed understanding of the contract is incorrect. In effect, Defendants argue that the third-
14 party licenses can only mean what Defendants and the licensees tell the jury they mean,
15 contradicting the plain words of the licenses, and other objective indicia of the licenses' meaning.
16 These licenses, however, directly affect Plaintiffs' economic interests. As such, courts allow
17 Plaintiffs to seek a legitimate contract interpretation, based on the express terms of the contract
18 and supporting evidence. For example, in *Shafford v. Otto Sales Co.*, 119 Cal. App. 2d 849, 859-
19 60 (1953), where a third-party broker's commission was at stake, the court allowed the non-party
20 broker to submit evidence as to the meaning of that contract, noting that "mere words, and the
21 ingenuity of contractual expression dreamed up by ingenious businessmen or their lawyers cannot
22 be used to prevent a showing of the real nature of the transaction." *Id.* at 860.

23 Furthermore, the jury is entitled to question Defendants' credibility. If liability hinges on
24 Defendants' employees' understanding of the third-party licensing agreements, a bias is apparent.
25 A jury is free to disregard Defendants' testimony on these points as biased, intentionally or
26 unintentionally, in favor of the objective text of the contract. The jury need not accept
27 Defendants' litigation-driven testimony as dispositive of the licenses' meaning, even if
28

1 Defendants' testimony meshes with that of third-party witnesses, especially if that testimony
2 contradicts the express language of the agreements. *See Hercules & Co. v. Shama Restaurant*
3 *Corp.*, 613 A.2d 916, 927 (D.C. 1992) ("The first and most important step in ascertaining [the
4 intent of the contracting parties] is examination of the contract itself.").

5 **IV. Plaintiffs Are Not Required to Prove Individual Injury and Damages**

6 Defendant's contention that Plaintiffs must "come forward with proof of individual injury
7 and damages for each member of the GLA Class" undermines the purpose of class actions. A
8 recognized commentator has noted that an aggregate damages finding is often the preferable
9 method of determining damages in a class action. *See* 3 Newburg on Class Actions ("Newburg")
10 § 10.02 at 477 (4th ed. 2002) ("[T]he ultimate goal in class actions is to determine the aggregate
11 sum, which fairly represents the collective value of claims of individual class members.") (citing
12 *Peterson v. Davenport Community School Dist.*, 626 N.W.2d 99 (Iowa 2001)); *id.* at 479 ("[I]t is
13 not unusual, and probably more likely in many types of cases, that aggregate evidence of the
14 defendant's liability is more accurate and precise than would be so with individual proofs of
15 loss."). In fact, the same commentator noted that damages common to a class are often computed
16 as an aggregate sum. *See id.* § 10.03 at 479 ("One acknowledged occasion for aggregate proof of
17 monetary relief is the situation in which monetary liability can be demonstrated by a
18 mathematical computation based on a formula common to an identified class."); *see also*
19 *Allapattah Servs. v. Exxon Corp.*, 157 F. Supp. 2d 1291, 1313 (S.D. Fla. 2001) ("The case law
20 supports the calculation of compensatory damages . . . through a common mathematical factor in
21 a class context."); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (rejecting
22 individualized damages "in cases where the fact of injury and damage breaks down in what may
23 be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula
24 calculation'").

25 Here, Plaintiffs' damages are demonstrated by a mathematical computation based on a
26 formula common to an identified class. Such class-wide calculations are clearly appropriate, and
27 should be reflected in the jury instructions.

1 **V. Defendants’ “Reasonableness” Instruction is Not Helpful**

2 Defendants’ “reasonableness” argument is not helpful to the jury, as both parties will
3 likely argue that their respective interpretation is reasonable in light of the surrounding facts and
4 circumstances. The balance of the contract instructions are sufficient for the jury to come to an
5 appropriate construction of the GLAs and the third-party licenses (if necessary).

6 **VI. Plaintiffs Agree That Responses Are Appropriate**

7 Plaintiffs agree that, for the sake of fairness and balance, where any contentions of the
8 parties are identified in the instructions, each parties’ contention should be presented. Plaintiffs
9 will be prepared to identify such portions of the instructions at the time of the charging
10 conference.

11 Additionally, Plaintiffs believe an instruction that a fiduciary duty does not arise from
12 Defendants’ status as a union is appropriate, in order to focus the jury’s attention on the duties
13 arising under the GLA. This is not to say, however, that the NFLPA’s relationship with the
14 players, as their present or former union, is wholly irrelevant to Plaintiffs’ breach of fiduciary
15 duty claim. The fact that the football players’ union, as compared to a completely unrelated third
16 party, is the contracting party for the GLA, is a fact common to the class that makes it more likely
17 that the GLAs created an agency relationship, and were not just bare licenses.

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Respectfully submitted,

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