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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
 NOVEMBER 5, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

MANATT, PHELPS & PHILLIPS
 1001 PAGE MILL ROAD, BUILDING 2
 PALO ALTO, CALIFORNIA 94304

BY: RONALD S. KATZ, ESQ.
RYAN S. HILBERT, ESQ.

MANATT, PHELPS & PHILLIPS
 7 TIMES SQUARE
 NEW YORK CITY, NEW YORK 10036

BY: L. PETER PARCHER, ESQ.

MANATT, PHELPS & PHILLIPS
 11355 WEST OLYMPIC BOULEVARD
 LOS ANGELES, CALIFORNIA 90064

BY: CHAD HUMMEL, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

APPEARANCES CONTINUED:

ALSO FOR PLAINTIFFS:

MCKOOL SMITH
300 CRESCENT COURT
SUITE 1500
DALLAS, TEXAS 75201

BY: LEWIS T. LECLAIR, ESQ.
JILL ADLER NAYLOR, ESQ.
ANTHONY GARZA, ESQ.
BRETT CHARHON, ESQ.

FOR DEFENDANTS:

DEWEY & LEBOEUF
1301 AVENUE OF THE AMERICAS
NEW YORK CITY, NEW YORK 10019-6092

BY: JEFFREY L. KESSLER, ESQ.
DAVID GREENSPAN, ESQ.
DAVID G. FEHER, ESQ.
ROY TAUB, ESQ.
MOLLY DONOVAN, ESQ.
JASON CLARK, ESQ.

WEIL, GOTSHAL & MANGES LLP
767 FIFTH AVENUE
NEW YORK, NEW YORK 10153-0119

BY: BRUCE S. MEYER, ESQ.

REPORTED BY:

KATHERINE POWELL SULLIVAN, CSR # 5812
OFFICIAL REPORTER - U.S. DISTRICT COURT

P R O C E E D I N G S

NOVEMBER 5, 2008

7:30 A.M.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: GOOD MORNING.

MR. KESSLER: GOOD MORNING.

MR. PARCHER: GOOD MORNING, YOUR HONOR.

MR. KATZ: GOOD MORNING, YOUR HONOR.

MR. HUMMEL: GOOD MORNING, YOUR HONOR.

THE COURT: HOW IS EVERYBODY?

(COUNSEL RESPONDED AFFIRMATIVELY.)

THE COURT: HAVE A SEAT. I HOPE YOU GOT TO SEE SOME
OF THE ELECTION EXCITEMENT AND NOT JUST TO WORK ON THIS CASE.
BUT HERE WE ARE BACK AT WORK.

OKAY. WHAT DO YOU HAVE FOR ME THIS MORNING?

MR. KESSLER: I THINK, YOUR HONOR, JUST TWO ISSUES
AND A QUESTION.

THE FIRST ISSUE IS WE FILED A BRIEF LAST NIGHT. I
DON'T KNOW IF YOUR HONOR HAS SEEN IT.

THE COURT: I HAVE SEEN IT. I HAVEN'T READ IT ALL
YET, BUT I STARTED READING IT.

MR. KESSLER: AND THE ISSUE IS THE FOLLOWING: WE
BELIEVE THAT THE HYPOTHETICAL THAT PLAINTIFFS GOT INTO WITH
PROFESSOR NOLL ABOUT WHETHER OR NOT IF THERE WAS A MONOPOLY

1 POWER IN ACTIVE PLAYER LICENSING, WHICH WAS THE HYPOTHETICAL,
2 YOU KNOW: COULD THEY HAVE USED THE ACTIVE PLAYER LICENSING
3 INDUCING EA TO FORCE THEM TO TAKE RETIRED PLAYERS, IN FACT,
4 WOULD VERY LIKELY BE ILLEGAL TYING.

5 AND WE THINK THAT IT'S NOW BEEN SUGGESTED TO THE JURY
6 THAT IT COULD BE A POSSIBLE BREACH OF DUTY THAT PLAYERS INC
7 DIDN'T DO SOMETHING THAT WOULD BE ILLEGAL. AND WE THINK
8 THERE'S A LOT OF CASE LAW THAT WE CITED THAT THAT'S NOT
9 CORRECT.

10 AND YOUR HONOR DID GIVE A DIRECTION YOU WEREN'T
11 SUGGESTING IN YOUR QUESTIONS THAT IT WAS A DUTY, BUT YOU LEFT
12 OPEN THE POSSIBILITY THAT THE JURY COULD FIND IT COULD BE A
13 DUTY.

14 AND FOR US TO NOW HAVE TO GO TO CLOSING ARGUMENT AND
15 EXPLAIN IT'S ILLEGAL AND THERE'S NO EVIDENCE OF THAT, THIS IS A
16 HUGE 403 MESS.

17 IT'S SO FAR AFIELD OF THE GLA ISSUE THAT'S IN THIS
18 CASE OR ANYTHING, FRANKLY, EVEN IN THEIR BREACH OF FIDUCIARY
19 DUTY CLAIMS, THAT WE THINK WE'RE ENTITLED TO AN INSTRUCTION TO
20 THE JURY THAT THEY SHOULD GIVE NO REGARD TO ANY TESTIMONY
21 CONCERNING, YOU KNOW, WHETHER OR NOT PLAYERS INC COULD HAVE
22 FORCED EA TO TAKE RETIRED PLAYERS BY USING ITS POWER OVER
23 ACTIVE, BECAUSE THAT WOULD BE VERY LIKELY ILLEGAL, AND,
24 THEREFORE, THEY SHOULD DISREGARD IT. SOMETHING TO THAT EFFECT.

25 AND THAT'S WHAT OUR BRIEF SAYS, YOUR HONOR.

1 **THE COURT:** ALL RIGHT. WHAT DO YOU SAY TO THAT,
2 MR. HUMMEL?

3 **MR. HUMMEL:** FIRST AND FOREMOST, I HAVEN'T READ THEIR
4 BRIEF. I WILL DO SO AND WILL FILE A BRIEF ON IT TODAY.

5 SECOND POINT, YOUR HONOR, IS THIS: JUST LISTENING TO
6 MR. KESSLER, AND WITHOUT HAVING THE BENEFIT OF THE BRIEF, THE
7 POINT IS NOT TYING.

8 THE POINT WAS -- OF THE CROSS EXAMINATION WAS TO
9 REBUT MR. KESSLER'S POINT THAT THERE'S NO -- AND THE WITNESS'S
10 TESTIMONY THAT THERE'S NOT LEVERAGING IN THE CASE, OR THE
11 POSSIBILITY OF LEVERAGING.

12 LEVERAGING CAN BE PERFECTLY LEGAL IN MANY
13 CIRCUMSTANCES. THERE'S NO QUESTION ABOUT THAT. AND OUR
14 PRIMARY POINT WAS THAT THE UNION DID HAVE THE ABILITY
15 THROUGH -- THROUGH THE POWER THAT THEY HAD BY HAVING A
16 SIGNIFICANT GROUP OF RETIRED PLAYERS AND ALL THE ACTIVE PLAYERS
17 TO SAY TO THE LICENSEES:

18 "HEY, TAKE OUR GUYS. PUT THEM IN THE LICENSE."

19 AND THAT MAY HAVE BEEN A QUESTION OF ALLOCATION OF
20 THE REVENUES DERIVED FROM THOSE GROUP LICENSING, OR IT MAY HAVE
21 BEEN SIMPLY MARKETING THEM IN THE APPROPRIATE WAY, WHICH THEY,
22 OBVIOUSLY, GIVEN ALL THE WEIGHT OF THE EVIDENCE HERE, FAILED TO
23 DO.

24 BUT, YOUR HONOR, I'LL TAKE A LOOK AT THEIR BRIEF. I
25 WOULD LIKE THE COURT NOT TO RULE ON IT NOW, OBVIOUSLY, WITHOUT

1 OUR HAVING THE BENEFIT OF LOOKING AT IT.

2 AND IF YOUR HONOR IS INCLINED TO DO SOMETHING ON IT,
3 CLEARLY THE POINT'S NOT TYING. AND THIS WOULD NOT BE AN
4 ILLEGAL TIE.

5 NOBODY ON THAT SIDE, INCLUDING MR. KESSLER, WHO IS AN
6 ANTITRUST LAWYER -- AND I'VE TRIED TYING CASES MYSELF -- WOULD
7 SUGGEST THAT WHAT I TOLD PROFESSOR NOLL WOULD BE AN ILLEGAL
8 TYING. THAT WAS NOT THE IMPORT OF MY QUESTIONS, NOR WAS IT THE
9 IMPORT OF YOUR QUESTIONS.

10 **THE COURT:** ARE YOU GOING TO ARGUE TO THE JURY -- AND
11 IF NOT, WHY SHOULDN'T I JUST GO AHEAD AND TELL THEM -- THAT THE
12 JURY OR THAT THE DEFENDANTS HAVE A DUTY TO SAY TO EA:

13 "YOU CAN'T HAVE ANY OF THE ACTIVES UNLESS YOU
14 TAKE ALL OF THE RETIREDs"?

15 **MR. PARCHER:** IT'S AN ISSUE FOR THE JURY. THAT'S AN
16 ISSUE FOR THE JURY.

17 **THE COURT:** SO YOU WANT TO LEAVE THAT OPEN?

18 **MR. PARCHER:** OF COURSE.

19 **MR. KESSLER:** AND THAT'S ILLEGAL, YOUR HONOR. THAT'S
20 EXACTLY MY POINT.

21 **THE COURT:** THEN, WHAT MR. HUMMEL TOLD ME WAS NOT
22 TRUE.

23 **MR. HUMMEL:** NO. MAY I LOOK --

24 **THE COURT:** EITHER WE TAKE IT -- LOOK. I'M NOT
25 SAYING IT IS AN ANTITRUST VIOLATION.

1 **MR. HUMMEL:** RIGHT.

2 **THE COURT:** BUT YOU CAN'T WAFFLE THROUGH THIS TRYING
3 TO HAVE DOUBLESPEAK.

4 **MR. HUMMEL:** I AGREE.

5 **THE COURT:** SO EITHER YOU WANT THE JURY TO BE ABLE TO
6 HAVE THAT ISSUE ON THE TABLE OR NOT. AND I'M GOING TO
7 DISREGARD WHAT YOU TOLD ME --

8 **MR. HUMMEL:** WHAT I TOLD YOU?

9 **THE COURT:** YEAH, BECAUSE MR. PARCHER ADMITTED THAT
10 HE WANTS THE JURY TO HAVE THAT ON THE TABLE. AND YOU TRIED TO
11 REPAINT IT.

12 BUT IF YOU WANT THAT ISSUE ON THE TABLE, THEN IT
13 CAN'T -- IT -- YOU'VE GOT TO BRIEF IT.

14 **MR. HUMMEL:** ALL RIGHT. WE'LL BRIEF IT.

15 **THE COURT:** I'M NOT GOING TO GIVE ANY PRELIMINARY
16 INSTRUCTION ON THIS, MR. KESSLER.

17 **MR. KESSLER:** OKAY, YOUR HONOR.

18 **THE COURT:** THIS IS NOT SO IMPORTANT THAT IT HAS TO
19 BE DEALT WITH RIGHT NOW. IT CAN BE DEALT WITH IN THE FINAL
20 INSTRUCTIONS.

21 SO YOUR BRIEF IS GOING TO BE DUE AT 4:00 P.M. TODAY.

22 **MR. HUMMEL:** THANK YOU.

23 **MR. KESSLER:** THANK YOU.

24 VERY BRIEF, YOUR HONOR. THE SECOND ISSUE IS --

25 **THE COURT:** I HAVE GOT A QUESTION FOR YOU.

1 **MR. KESSLER:** YES.

2 **THE COURT:** COULD EA HAVE GONE TO EACH OF THE
3 INDIVIDUAL ACTIVE PLAYERS -- ACTIVE PLAYERS, NOW -- AND GOTTEN
4 A LICENSE?

5 **MR. KESSLER:** I DIDN'T UNDERSTAND, YOUR HONOR. I'M
6 SORRY.

7 **THE COURT:** COULD EA HAVE NEGOTIATED DIRECTLY WITH AN
8 ACTIVE PLAYER?

9 **MR. KESSLER:** INDIVIDUALLY IN GROUPS OF LESS THAN
10 SIX. IN OTHER WORDS, THE ACTIVE PLAYERS GIVE THEIR EXCLUSIVE
11 RIGHT -- UNLIKE THE RETIRED, THE ACTIVE PLAYERS GIVE THEIR
12 EXCLUSIVE RIGHTS TO THE UNION IN GROUPS OF SIX OR MORE.

13 SO IF YOU WANTED SIX OR MORE ACTIVE PLAYERS YOU DID
14 HAVE TO COME -- YOU DID HAVE TO COME TO PLAYERS INC FOR THAT.
15 AND THAT WAS THE BASIS OF HIS HYPOTHETICAL.

16 AND, BY THE WAY, DR. RASCHER ADMITTED HE NEVER
17 STUDIED WHETHER THERE WAS ANY MARKET POWER IN THEM. SO THE
18 WHOLE HYPOTHETICAL HAS NOW SUGGESTED EVIDENCE, WHICH
19 MR. PARCHER WOULD LIKE TO ARGUE IN CLOSING THAT'S NOT EVEN IN
20 THE RECORD, WHICH IS TO SUGGEST THAT THERE'S EVIDENCE THAT
21 THERE'S MARKET POWER IN ACTIVE PLAYERS, AND THAT PLAYERS INC
22 SHOULD HAVE USED THAT MARKET POWER TO FORCE EA TO TAKE RETIRED
23 PLAYERS THEY DIDN'T WANT.

24 AND THAT'S THE WHOLE PROBLEM WE HAVE. YOUR HONOR, I
25 STATED IN OUR BRIEF IT WOULD BE ILLEGAL, IF THAT'S TRUE.

1 **MR. PARCHER:** IF YOUR HONOR PLEASES, I'M NOT
2 COMMITTING TO WHAT I WOULD OR WOULD NOT LIKE TO ARGUE AT THIS
3 MOMENT. I WOULD LIKE YOUR HONOR TO MAKE A RULING, FIRST OF
4 ALL, AFTER YOU'VE HEARD FROM US.

5 **THE COURT:** YOU JUST WANT --

6 **MR. PARCHER:** THEY ARE ALSO --

7 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY; NOT
8 REPORTABLE.)

9 **THE COURT:** YOU DON'T WANT TO ANSWER MY QUESTION.
10 YOU JUST WANT TO SEE WHAT I RULE SO THEN YOU CAN THEN TELL THE
11 NINTH CIRCUIT:

12 "OH, I WOULD HAVE ARGUED" --

13 **MR. PARCHER:** NO.

14 **THE COURT:** TELL ME IF YOU'RE GOING TO ARGUE IT OR
15 NOT.

16 **MR. PARCHER:** I'M NOT INTERESTED IN THE NINTH
17 CIRCUIT. YOUR HONOR KEEPS SAYING IT. I'M INTERESTED IN WHAT I
18 CAN AND CAN'T SAY TO THE JURY.

19 **THE COURT:** WHY DON'T YOU TELL ME IF YOU WANT TO SAY
20 TO THE JURY THAT THEY HAD A DUTY TO TIE.

21 **MR. PARCHER:** RIGHT. OR FOR THEM TO CONSIDER WHETHER
22 THEY HAD A DUTY.

23 **THE COURT:** THEY DON'T HAVE TO CONSIDER SOMETHING
24 THAT'S ILLEGAL.

25 **MR. PARCHER:** I NEED -- I BELIEVE THAT I NEED TO

1 PHRASE SOME TYPE OF SENTENCE TO THE JURY THAT ALLOWS THEM TO
2 CONSIDER WHETHER THE RIGHT THING TO DO FROM THE GET-GO WAS TO
3 OFFER EA A LICENSE FOR EVERYBODY.

4 THEY NEVER DID THAT. THE TESTIMONY IS VERY CLEAR IN
5 THIS CASE THAT MR. ALLEN NEVER PRESENTED MR. LINZNER WITH A
6 LIST OF 2100 GLA'S.

7 NOW, HOW I FASHION THAT, OR WHAT I CAN OR CAN'T SAY,
8 DEPENDS IN PART UPON WHAT YOUR HONOR IS THINKING. I'M NOT
9 GOING TO SAY TO THE JURY "ILLEGAL TYING." THAT WOULD BE SILLY,
10 IF IT IS AN ILLEGAL TYING.

11 BUT I DON'T WANT TO SKIP OUT THE GRAY AREAS BECAUSE
12 OF WHAT -- BECAUSE OF THE STYLE.

13 **THE COURT:** YOU NEED TO PUT IN A BRIEF AND YOU NEED
14 TO COVER THE PARTS ABOUT MARKET POWER AND SO FORTH THAT WOULD
15 HELP ADDRESS THIS ISSUE. AND KEEPING IN MIND WHAT YOUR OWN
16 EXPERT TESTIFIED TO AND DID NOT TESTIFY TO.

17 **MR. PARCHER:** AND THERE MAY BE A BETTER WAY TO SAY IT
18 THAN ALL OF THAT, YOU KNOW.

19 **THE COURT:** LET'S BE CLEAR ON THE DISTINCTIONS THAT I
20 THINK IS IN PLAY HERE, IN CASE THE NINTH CIRCUIT EVER READS
21 THIS TRANSCRIPT.

22 IT'S ONE THING TO SAY THAT THE DEFENDANTS SHOULD HAVE
23 GONE TO EA AND AFFIRMATIVELY OFFERED THE ENTIRE GROUP OF
24 RETIRED PLAYERS, WITHOUT TYING IT IN ANY WAY TO THE ACTIVE
25 PLAYERS.

1 THAT'S WHAT I THOUGHT THE THEORY OF YOUR CASE WAS,
2 THAT -- THAT IRRESPECTIVE OF WHETHER EA TOOK THE ACTIVE PLAYERS
3 AS A GROUP, THAT THE DEFENDANTS SHOULD HAVE, IN ADDITION,
4 ATTEMPTED TO MARKET EXPRESSLY -- AND MAYBE THEY DID -- BUT
5 ATTEMPTED TO MARKET THE GROUP OF RETIRED PLAYERS AS A
6 STANDALONE GROUP.

7 **MR. PARCHER:** NO, YOUR HONOR.

8 **THE COURT:** NOW, IF YOU'RE MOVING BEYOND THAT TO SAY
9 AND THEY SHOULD NEVER HAVE -- THEY SHOULD HAVE TIED THE ACTIVE
10 PLAYERS AND THE RETIRED PLAYERS TOGETHER, SUCH THAT IT'S ALL OR
11 NOTHING -- IS THAT WHAT YOU WANT TO ARGUE?

12 **MR. PARCHER:** IT'S NOT NECESSARILY ALL OR NOTHING.

13 YOU SEE, WE THINK THE BUSINESS OF AN ACTIVE PLAYERS
14 GROUP AND A RETIRED PLAYERS GROUP IS AN ARTIFICIAL CONSTRUCT,
15 CONSTRUCTED BY THE DEFENDANTS FOR THIS CASE.

16 WE THINK THAT IF SIX OR MORE CURRENT OR FORMER
17 PLAYERS, WHETHER THEY ARE ALL AD HOC -- WHETHER THEY'RE ALL
18 ACTIVES OR WHETHER THEY ARE ALL RETIRED, IF SIX OR MORE ARE
19 LICENSED FOR UTILIZATION TO ANY LICENSEE, WE THINK WE'RE
20 ENTITLED TO BE PAID.

21 WHETHER WE'RE IN THE CONTRACT OR NOT, WHETHER THEY
22 HAD A DUTY TO PUT US IN THE CONTRACT OR THEY DIDN'T, WE THINK
23 IT'S A BREACH OF CONTRACT AND A BREACH OF FIDUCIARY DUTY.

24 BUT EVEN IF IT WEREN'T, WE THINK WE'RE ENTITLED TO BE
25 PAID. NOW, HOW THAT PLAYS ITSELF OUT IS SOMETHING TO CONSIDER

1 IN ARGUING TO THE JURY.

2 BUT WE DON'T THINK THEY EVER SHOULD HAVE GONE AND
3 JUST OFFERED RETIRED PLAYERS, PERIOD. IT'S NOT A SEPARATE
4 GROUP. IT'S NOT A SEPARATE CLASS OF PEOPLE.

5 **THE COURT:** YOU SEE, THAT ARGUMENT TURNS ON YOUR
6 INTERPRETATION OF THE GLA.

7 **MR. PARCHER:** CORRECT.

8 **THE COURT:** YOU MAY BE WRONG ABOUT THAT.

9 **MR. PARCHER:** THAT'S TRUE.

10 **THE COURT:** BUT EVEN IF YOU'RE WRONG ABOUT THAT,
11 THERE COULD BE A FIDUCIARY DUTY THAT ARISES OUT OF THE GLA, AND
12 YOU'RE CONFOUNDING THOSE TWO THINGS.

13 IF YOU LOSE ON THE CONTRACT CLAIM, THEN THE ISSUE
14 COMES UP: WELL, WHAT, IF ANYTHING, SHOULD -- DID THEY HAVE A
15 FIDUCIARY DUTY? AND IF SO, WHAT SHOULD -- WHAT MORE SHOULD THE
16 DEFENDANTS HAVE DONE THAN THEY ACTUALLY DID --

17 **MR. PARCHER:** YES, SIR.

18 **THE COURT:** -- TO TRY TO MARKET THEM.

19 AND IF ONE OF THE ARGUMENTS YOU'RE GOING TO MAKE IS,
20 HAVING LOST ON THE CONTRACT CLAIM, THAT THE DEFENDANTS SHOULD
21 HAVE TIED THE ACTIVES AND THE RETIRED TOGETHER AS A
22 TAKE-IT-OR-LEAVE-IT PROPOSITION, THEN WE ARE LOOKING SQUARELY
23 AT A POSSIBLE ANTITRUST VIOLATION.

24 I'M NOT SAYING IT IS AN ANTITRUST VIOLATION, BUT I
25 KNOW ENOUGH ABOUT ANTITRUST LAW TO KNOW THERE'S AN ISSUE HERE.

1 AND SO YOU BETTER WRITE A GOOD BRIEF.

2 **MR. LECLAIR:** YOUR HONOR --

3 **THE COURT:** NO POINT IN ARGUING THIS NOW. I WANT TO
4 SEE YOUR BRIEF.

5 **MR. LECLAIR:** I AGREE, YOUR HONOR. AND I WANT TO SAY
6 WE ARE NOT TRYING TO DO SOMETHING THAT PUTS YOUR HONOR IN A
7 POSITION WHERE WE'RE SAYING WE'RE GOING TO WAIT ON. WE WILL
8 TAKE A VERY CLEAR POSITION ON THIS. WE WILL SAY WHAT WE WANT
9 TO DO.

10 **THE COURT:** IN YOUR BRIEF.

11 **MR. LECLAIR:** IN OUR BRIEF. AND LET YOUR HONOR RULE
12 ON IT.

13 **THE COURT:** THANK YOU.

14 **MR. KESSLER:** THE SECOND ISSUE, YOUR HONOR, IS I WILL
15 GIVE YOU SOME NEWS, WHICH I HOPE WILL MAKE THE COURT HAPPY.

16 **THE COURT:** IS MR. NOLL SUPPOSED TO BE HERE?

17 **MR. KESSLER:** MR. NOLL, JUST WAIT OUTSIDE.

18 **THE WITNESS:** TOLD ME TO BE HERE AT 7:00.

19 **THE COURT:** THANK YOU. JUST WAIT OUTSIDE, THOUGH.

20 **MR. KESSLER:** IT DOESN'T REALLY CONCERN PROFESSOR
21 NOLL, BUT I'M HAPPY TO HAVE HIM WAIT OUTSIDE.

22 YOUR HONOR, AFTER PROFESSOR NOLL HAS CONCLUDED WE'RE
23 GOING TO BE READING THE DEPOSITION OF GENE UPSHAW, AND THEN
24 WE'RE ACTUALLY GOING TO BE CLOSING OUR CASE. WE'VE DECIDED
25 THAT WE HAVE ENOUGH EVIDENCE IN THIS CASE TO DECIDE THIS.

1 WE'VE HEARD FROM PLAINTIFFS THAT THEY WOULD LIKE TO
2 PUT TWO DEPOSITIONS IN IN REBUTTAL. OKAY. AND WE DON'T
3 BELIEVE EITHER ARE REBUTTAL, SO WE NEED TO HAVE THAT DECIDED
4 NOW. AND THERE'S ALSO DESIGNATIONS INVOLVED.

5 THE FIRST REBUTTAL THEY WANT TO PUT IN IS MR. HOWARD
6 SKALL, WHO THEY SAY IS REBUTTAL TO TESTIMONY OF PAT ALLEN. THE
7 PROBLEM WITH THAT, YOUR HONOR, IS PAT ALLEN WAS CALLED IN THEIR
8 CASE.

9 THERE'S NO CONCEIVABLE THEORY I KNOW OF, YOUR HONOR,
10 IN WHICH THEY CAN HAVE REBUTTAL TO A WITNESS CALLED --

11 **THE COURT:** WHAT DO YOU SAY TO THAT?

12 **MR. KESSLER:** -- IN THEIR CASE.

13 **THE COURT:** WHAT DO YOU SAY TO THAT?

14 **MR. LECLAIR:** YOUR HONOR, WE'RE PUTTING IN A VERY
15 SMALL EXCERPT FROM HOWARD SKALL WHERE HE SAID HE DIDN'T KNOW
16 ABOUT ANY LIST OF RETIRED PLAYER GROUP LICENSE PEOPLE.

17 THE REASON WE'RE ENTITLED TO DO THAT, YOUR HONOR, IS
18 THE ONLY REASON -- IF WE HAD CALLED PAT ALLEN IN OUR CASE --

19 **THE COURT:** IT HAS TO BE REBUTTAL TO SOMETHING IN
20 THEIR CASE.

21 **MR. LECLAIR:** CAN I EXPLAIN MY POSITION, YOUR HONOR?

22 **THE COURT:** ALL RIGHT.

23 **MR. LECLAIR:** LET'S ASSUME THAT PAT ALLEN HAD
24 TESTIFIED DURING OUR CASE AS WE WANTED HER TO DO, WE WOULD HAVE
25 BEEN ENTITLED TO PUT IN MR. SKALL'S DEPO AFTER SHE SAID IN HER

1 DEPOSITION:

2 "WELL, WE HAD A LIST." WE'D HAVE BEEN ENTITLED
3 TO PUT IT IN IN OUR CASE.

4 SHE THEN SAYS -- AND WHEN SHE'S CALLED, SHE'S CALLED
5 NOT JUST IN OUR CASE. WE AGREED THAT SHE COULD TESTIFY BEYOND
6 THE SCOPE AND WOULD BE A WITNESS IN THEIR CASE AND OUR CASE.

7 WHEN SHE SAYS IN HER TESTIMONY:

8 "THERE WAS A LIST, AND, GEE, I THINK WE SENT IT
9 AROUND," WE'RE ENTITLED TO REBUT THAT BY SAYING FROM HOWARD
10 SKALL'S DEPOSITION:

11 "I DIDN'T KNOW ABOUT A LIST."

12 **THE COURT:** ALL RIGHT. WHO WAS IT THAT REQUESTED SHE
13 COME LATE?

14 **MR. LECLAIR:** THEY DID, YOUR HONOR.

15 **THE COURT:** THERE'S A POINT OF FAIRNESS HERE. WHAT
16 DO YOU SAY TO THAT, MR. KESSLER?

17 **MR. KESSLER:** YOUR HONOR, THEY ORIGINALLY NOTICED
18 MR. SKALL IN THEIR CASE, THESE SAME EXCERPTS.

19 THE TESTIMONY THEY ELICITED FROM PAT ALLEN ABOUT THE
20 LIST WAS THEIR QUESTIONING, NOT MY QUESTIONING.

21 SO WHAT HAPPENED HERE IS, THEY KNEW -- AND IT WAS IN
22 THEIR CASE -- THEY KNEW THAT THEY WERE GOING TO ASK THESE
23 QUESTIONS OF PAT ALLEN.

24 THEY WERE ANSWERS SHE HAD ALREADY GIVEN IN HER
25 DEPOSITION. SO THEY KNEW WHAT THE ANSWERS WERE GOING TO BE,

1 OKAY?

2 AND THEY DELIBERATELY WITHHELD MR. SKALL. AFTER
3 NOTICING HIM FIRST IN THEIR CASE, THEY THEN SAID: "OH, NO,
4 WE'RE NOT CALLING MR. SKALL," SIMPLY SO STRATEGICALLY THEY
5 COULD PLAY IT AT THE END AS IF IT'S REBUTTAL, WHEN IT'S
6 REBUTTAL TO QUESTIONS THEY ASKED OF A WITNESS IN THEIR OWN
7 CASE.

8 I DIDN'T ELICIT THIS INFORMATION. THEY ELICITED THIS
9 INFORMATION. SO IT MAKES ABSOLUTELY NO SENSE.

10 **THE COURT:** HOW LONG IS THIS WHOLE DEPOSITION GOING
11 TO BE?

12 **MR. LECLAIR:** OUR EXCERPT IS FIVE LINES, YOUR HONOR.

13 **MR. KESSLER:** AND, YOUR HONOR, IF THEY DO THAT WE
14 HAVE A LOT TO DESIGNATE FROM MR. SKALL, BECAUSE ONCE THEY DO
15 THAT THE JURY HAS TO UNDERSTAND A LOT MORE THAN FIVE LINES OF
16 MR. SKALL. AND YOUR HONOR WOULD HAVE TO REVIEW THOSE NOW. WE
17 HAVE THEM. BUT WE DO NOT THINK THIS IS PROPER REBUTTAL.

18 **THE COURT:** I'M GOING TO ALLOW IT, GIVEN THAT THE
19 DEFENSE ASKED SHE BE OUT-OF-TURN, AND IT'S PLAUSIBLE WHAT
20 MR. LECLAIR SAYS.

21 SO I THINK IF SHE HAD TESTIFIED IN THE NORMAL COURSE,
22 PROBABLY THE PLAINTIFF WOULD HAVE ALLOWED -- WOULD HAVE ASKED
23 FOR THIS IN THEIR OWN CASE-IN-CHIEF.

24 SO THE ANSWER IS: I'M GOING TO ALLOW THAT.

25 **MR. KESSLER:** YOUR HONOR, CAN I MAKE ONE MORE POINT?

1 **THE COURT:** YES.

2 **MR. KESSLER:** PAT ALLEN WAS HERE IN COURT SEVERAL
3 DAYS DURING THEIR CASE. THEY CHOSE NOT TO CALL HER IN THAT
4 ORDER.

5 IN OTHER WORDS, THEY ASKED FOR HER TO COME, AND THEY
6 DIDN'T GET TO HER. THE ONLY REASON SHE WAS OUT-OF-TURN IS
7 BECAUSE AT THE END OF THEIR CASE SHE HAD TO GO TO HER 60TH
8 BIRTHDAY PARTY. YOUR HONOR LET HER GO.

9 BUT, AGAIN, IT WAS THEIR STRATEGIC DECISION HOW THEY
10 DID THIS WITH THE WITNESS, AND I DON'T THINK IT'S FAIR.

11 **THE COURT:** ALL RIGHT. OBJECTION OVERRULED. THAT
12 WON'T BE ALLOWED.

13 WHAT'S NEXT?

14 **MR. KESSLER:** THE SECOND ONE IS THEY DESIGNATED
15 MR. FRISS, AGAIN. YOUR HONOR HAS BEEN THROUGH THIS BEFORE,
16 OKAY?

17 THIS WAS THE TOPPS PERSON. YOU'VE BEEN THROUGH THAT
18 DEPOSITION. AND THEY'RE CLAIMING THAT BECAUSE OF A QUESTION
19 THAT YOUR HONOR SUSTAINED THE OBJECTION TO FOR ROGER NOLL, WHEN
20 ROGER NOLL -- I ASKED HIM. THEY SAID:

21 "DID YOU EVER TALK TO ANY LICENSEES?" THEY
22 ASKED IN THEIR CROSS EXAMINATION. OKAY.

23 AND I THEN SAID:

24 "YOU DIDN'T TALK TO THEM, BUT DID YOU READ THEIR
25 DEPOSITIONS?"

1 AND I STARTED TO ASK HIM ABOUT MR. FRISS. THEY
2 OBJECTED AND SAID IT WASN'T IN EVIDENCE, WHICH IT WASN'T. IT
3 WASN'T. BUT YOUR HONOR SUSTAINED THE OBJECTION, SO THERE WAS
4 NOTHING IN IT ABOUT MR. FRISS.

5 NOW THEY WANT TO PLAY MR. FRISS'S DEPOSITION AS
6 REBUTTAL BECAUSE OF A SUSTAINED OBJECTION. AND WE NEVER GOT
7 INTO MR. FRISS WITH RESPECT TO THAT.

8 **THE COURT:** THIS IS VERY UNCLEAR TO ME. TELL ME --
9 GO THROUGH THAT AGAIN. I DIDN'T UNDERSTAND IT.

10 **MR. KESSLER:** OKAY. IN THEIR CROSS EXAMINATION OF
11 ROGER NOLL, THEY SAID TO MR. NOLL:

12 "DID YOU EVER INTERVIEW ANY LICENSEES?"

13 **THE COURT:** I REMEMBER THAT, YES.

14 **MR. KESSLER:** HE SAID: "NO."

15 AND THEY MADE THAT A BIG POINT.

16 **THE COURT:** ALL RIGHT.

17 **MR. KESSLER:** ON MY REDIRECT I SAID:

18 "DID YOU EVER READ THE DEPOSITIONS OF ANY
19 LICENSEES?"

20 **THE COURT:** YES, I REMEMBER THAT.

21 **MR. KESSLER:** OKAY. AND HE FIRST SPOKE ABOUT
22 MR. LINZNER, AND THAT WAS FINE.

23 AND THEN, I SAID:

24 "DID YOU READ MR. FRISS?"

25 THEY SAID:

1 "OBJECTION, NOT IN EVIDENCE."

2 OKAY? BECAUSE NO ONE PUT IN MR. FRISS. OKAY.

3 AND YOUR HONOR SAID:

4 "SUSTAINED."

5 SO I SAID:

6 "OKAY."

7 I MOVED ON. IN OTHER WORDS, WE DIDN'T ASK ABOUT
8 MR. FRISS.

9 **THE COURT:** WHY DID I SUSTAIN THAT?

10 **MR. KESSLER:** YOU SUSTAINED IT BECAUSE YOU DIDN'T
11 THINK -- I DON'T KNOW. YOUR HONOR SUGGESTED IF IT WASN'T IN
12 EVIDENCE, I COULDN'T ASK ABOUT IT, SO I DIDN'T.

13 **THE COURT:** NO, NO, THEY ARE TWO DIFFERENT THINGS.

14 IT WOULD HAVE BEEN OKAY FOR HIM TO SAY: "I DIDN'T
15 READ THE GUY'S DEPOSITION."

16 BUT PROBABLY WHAT YOU DID WAS EMBELLISH IT BY SAYING:

17 "DID YOU READ MR. FRISS WHEN HE SAID A, B AND
18 C?"

19 **MR. KESSLER:** YES, I DID, YOUR HONOR.

20 **THE COURT:** WELL, THAT'S THE IMPROPER PART.

21 **MR. KESSLER:** OKAY. I'M NOT ARGUING THE OBJECTION
22 AGAIN. YOUR HONOR SUSTAINED IT. I ACCEPT THAT.

23 I'M SAYING THE ONLY THING MR. NOLL TESTIFIED TO IS
24 THAT I READ MR. FRISS. THAT'S THE ONLY THING THAT CAME IN. ON
25 THE BASIS OF THAT, THEY NOW WANT TO PUT IN THE FRISS

1 DEPOSITION, WHICH, AGAIN, I DON'T THINK THAT'S PROPER REBUTTAL
2 TO PUT IN THAT THING, JUST BECAUSE HE SAID HE READ THE
3 DEPOSITION. THERE'S NO OTHER INFORMATION GIVEN TO THE JURY
4 ABOUT IT.

5 **THE COURT:** WELL, IS THE PART THAT YOU WANT TO READ
6 IN LIMITED STRICTLY TO THE POINT THAT WAS BEING ASKED OF THIS
7 WITNESS?

8 **MR. LECLAIR:** YES, YOUR HONOR. AND, ACTUALLY, HE'S
9 TALKING ABOUT THE WRONG QUESTION. THERE WAS A QUESTION TO
10 MR. NOLL IN WHICH HE WAS ASKED:

11 "DID YOU LOOK AT EVERYTHING, AT ANY DOCUMENT OR
12 ANY DEPOSITION IN THE CASE? DID YOU EVER SEE ANYTHING
13 SUGGESTING THAT RETIRED PLAYERS WERE MARKETABLE AS A GROUP?"
14 OKAY?

15 AND HE SAID:

16 "NO, I DIDN'T SEE ANYTHING IN ANYTHING I EVER
17 READ."

18 OKAY? SO WE'RE ENTITLED TO PUT IN SNIPPETS OF
19 TESTIMONY FROM MR. FRISS THAT IMPEACH WHAT MR. NOLL SAID.

20 **THE COURT:** AND WHAT IS THAT TESTIMONY?

21 **MR. LECLAIR:** IT'S TESTIMONY THAT HE DIDN'T KNOW
22 ABOUT THE GLA'S. AND I'M NOT THE ONE WHO --

23 **THE COURT:** I DON'T REMEMBER WHO HE IS. WHO IS HE?

24 **MR. LECLAIR:** I'M SORRY, YOUR HONOR. HE WAS A TOPPS
25 EXECUTIVE.

1 **THE COURT:** ALL RIGHT. SO HE WOULD TESTIFY TO WHAT?

2 **MR. LECLAIR:** HE'S -- THE SNIPPET OF TESTIMONY -- AND
3 I WISH -- I'M NOT THE PERSON WHO KNOWS THE MOST ABOUT IT.

4 HE WOULD HAVE ACCEPTED THE RETIRED PLAYERS AS A
5 GROUP, IS WHAT THE TESTIMONY IS.

6 **THE COURT:** HAND IT TO DAWN SO SHE CAN HAND IT TO ME.

7 **MR. LECLAIR:** THERE YOU GO.

8 **THE COURT:** ALL RIGHT. THE QUESTION IS -- THIS IS A
9 DEPOSITION OF MR. FRISS, APRIL 4TH OF THIS YEAR:

10 **"QUESTION:** AND THE FACT IS THAT YOU HAD NO
11 IDEA THAT PLAYERS INC HAD ALREADY GOTTEN
12 RIGHTS FROM A LARGE NUMBER OF RETIRED PLAYERS
13 BECAUSE THEY DIDN'T TELL YOU THAT, DID THEY?

14 **"ANSWER:** I DON'T KNOW WHETHER THEY HAVE
15 RIGHTS, SO --"

16 AND THEN SOMEBODY INTERRUPTS THE ANSWER AND SAYS:

17 **"QUESTION:** SO, IN FACT, IF IN 2004 AND 2007
18 PLAYERS INC HAD SAID 'WE'VE ALREADY GOT ALL
19 THESE RIGHTS,' YOU WOULD HAVE BEEN HAPPY TO
20 GET THEM GRANTED IN THE LICENSE AGREEMENT,
21 WOULDN'T YOU?

22 **"ANSWER:** YES.

23 **"NO FURTHER QUESTIONS."**

24 SO THIS IS A THEORY THAT IF THE RETIRED HAD BEEN
25 THROWN IN FOR FREE THEY WOULD HAVE TAKEN THEM?

1 **MR. KESSLER:** YES.

2 **THE COURT:** WELL, WHAT GOOD IS THAT? ANYBODY WILL
3 TAKE ANYTHING FOR FREE.

4 **MR. LECLAIR:** YOUR HONOR, THAT'S EXACTLY THE POINT,
5 WHICH IS THIS GOES TO OUR FIDUCIARY DUTY THEORY, YOUR HONOR,
6 WHICH IS THEY REPRESENT THE WHOLE GROUP.

7 AND THEY HAD A DUTY EITHER TO OFFER THE GROUP OR TO
8 SAY:

9 "YOU KNOW, MAYBE WE HAVE A CONFLICT OF INTEREST.
10 MAYBE WE HAVE A CONFLICT OF INTEREST HERE. IF WE'RE NOT GOING
11 TO OFFER THE WHOLE GROUP, IF WE'RE PICKING AND CHOOSING AMONG
12 OUR GROUP, MAYBE WE OUGHT TO LET THE PEOPLE WE ARE LEAVING OUT
13 BE ON THEIR OWN."

14 THAT'S WHY IT'S RELEVANT TO OUR FIDUCIARY DUTY CLAIM,
15 YOUR HONOR.

16 **MR. KESSLER:** AND, YOUR HONOR, I DON'T THINK --

17 **THE COURT:** THEN, WHAT WOULD HAVE HAPPENED TO THE
18 ACTIVES? THEN, THE ACTIVES WOULDN'T HAVE GOTTEN AS MUCH AS
19 THEY OTHERWISE WOULD HAVE.

20 **MR. LECLAIR:** HERE'S THE POINT, YOUR HONOR. THEY HAD
21 TWO CHOICES. ONE WAS TO SAY:

22 "TAKE THE WHOLE GROUP. WE REPRESENT A GROUP
23 THAT INCLUDES ACTIVES AND CERTAIN RETIRED. AND YOU KNOW WHAT?
24 TAKE THE WHOLE GROUP."

25 **THE COURT:** WHAT DO YOU MEAN "CERTAIN"? IT WOULD BE

1 THE ENTIRE CLASS.

2 **MR. LECLAIR:** THAT'S NOT ALL THE RETIRED, IS WHAT
3 I'M SAYING.

4 "WE REPRESENT A GROUP OF RETIRED" --

5 **THE COURT:** YOU REPRESENT ALL ACTIVES AND THOSE
6 RETIRED WHO --

7 **MR. LECLAIR:** -- SIGNED A GLA. AND CHOICE ONE IS:

8 "WE HAVE A GROUP. WE'LL GIVE YOU THE GROUP.

9 THE OTHER CHOICE WAS:

10 "YOU KNOW WHAT? IF WE'RE GOING TO HAVE TO PICK
11 AND CHOOSE ..."

12 AND, BY THE WAY, OUR EVIDENCE WILL BE, YOUR HONOR,
13 THIS WAS ALL DONE WITH A MOTIVE TO DEPRIVE THE RETIRED PLAYERS
14 OF SHARING IN THE GROUP MONEY. AND WE HAVE EVIDENCE TO SHOW
15 THAT. BUT IF --

16 **THE COURT:** I DIDN'T HEAR THAT EVIDENCE --

17 **MR. LECLAIR:** YOUR HONOR --

18 **THE COURT:** -- IN YOUR CASE-IN-CHIEF.

19 **MR. LECLAIR:** WELL, YOUR HONOR, THAT'S GOING TO TAKE
20 A WHILE FOR ME TO ITEMIZE THAT.

21 **THE COURT:** IS THAT IN EVIDENCE NOW?

22 **MR. LECLAIR:** YES, IN EVIDENCE IN THE CASE. I CAN
23 TELL YOU EXACTLY WHAT THE EVIDENCE IS AND HOW IT FITS TOGETHER.
24 BUT WE'RE GOING TO DO THAT IN CLOSING, FOR SURE.

25 **THE COURT:** LET'S GO THROUGH IT. I MISSED IT IF IT

1 CAME IN.

2 **MR. LECLAIR:** YOUR HONOR, OKAY. THEY REPRESENT --
3 THEY GO OUT AND SOLICIT RETIRED PLAYERS YEAR AFTER YEAR AFTER
4 YEAR AND SAY:

5 "WE'RE GOING TO DO GROUP LICENSING."

6 BUT THE REALITY IS THERE WASN'T ANY GROUP LICENSING
7 FOR RETIRED PLAYERS. IT WAS ENTIRELY INDIVIDUAL.

8 IF YOU LOOK AT ALL OF THEIR MATERIALS, IF YOU LOOK AT
9 ALL THEIR MARKETING MATERIALS, WHAT YOU SEE IS: IT'S ALL ABOUT
10 YOU CAN BE A RETIRED PLAYER. AND IF YOU CAN STAND ON YOUR OWN
11 AND SOME LICENSEE WANTS TO PICK YOU OUT, YOU CAN BE -- MAYBE
12 GET AN AD HOC PAYMENT.

13 BUT THERE WAS NEVER ANY INTENTION TO LICENSE THE
14 GROUP. THERE'S NOT A SHRED OF EVIDENCE IN THE RECORD THAT
15 SUGGEST THEY EVEN OFFERED THE GROUP AS A WHOLE.

16 THERE IS TESTIMONY BY PAT ALLEN --

17 **THE COURT:** MR. ALLEN TESTIFIED THAT HE DID EXACTLY
18 THAT.

19 **MR. LECLAIR:** YOUR HONOR --

20 **THE COURT:** YOU MAY SAY IT WAS A LIE.

21 **MR. LECLAIR:** WELL, YOUR HONOR, I THINK HIS TESTIMONY
22 CAN BE READ DIFFERENTLY. AND THERE MAY BE A QUESTION FOR THE
23 JURY ABOUT EXACTLY WHAT HE SAID AND WHAT HE MEANT. AND I
24 THINK -- I THINK THAT WE'RE GOING TO HAVE EVIDENCE THAT WILL
25 SUGGEST THEY DIDN'T OFFER THE GROUP OF RETIRED PLAYERS WHO

1 SIGNED GLA'S.

2 THEY MAY HAVE SAID:

3 "WE HAVE -- WE HAVE PLAYERS AVAILABLE." BUT
4 WHAT THEY DIDN'T DO, WE BELIEVE WE'RE ENTITLED TO ARGUE TO THE
5 JURY, THEY DIDN'T OFFER THE GROUP.

6 AND OUR POINT IS, IF YOU ASSUME FOR A MOMENT THAT
7 THEY ARE FIDUCIARIES, THEY SHOULD HAVE EITHER OFFERED THE
8 ENTIRE GROUP, OR THEY SHOULD HAVE SAID:

9 "YOU KNOW, WE MAY HAVE A CONFLICT OF INTEREST
10 HERE."

11 WE'RE KIND OF SETTING UP A SITUATION WHERE THE
12 SITUATION IS THE ACTIVE PLAYERS -- ALWAYS THE GROUP MONEY IS
13 THE ACTIVE PLAYERS. AND THEN, THE ACTIVES GET A BUNCH OF AD
14 HOC INDIVIDUAL PAYMENTS, AND RETIRED PLAYERS GET TO ADD ON WITH
15 AD HOC INDIVIDUAL PAYMENTS.

16 BUT THAT WASN'T IN THE BEST INTEREST OF THE RETIRED
17 PLAYERS. WHAT THEY SHOULD HAVE DONE WAS GRANTED A LICENSE
18 WHICH SAID:

19 "YOU CAN HAVE THIS GROUP OF ACTIVE PLAYERS. YOU
20 CAN HAVE -- AND THIS GROUP OF RETIRED PLAYERS."

21 THE GROUP MONEY SHOULD HAVE BEEN SHARED. AND
22 EVERYBODY COULD HAVE HAD AD HOCS BEYOND THAT. THE MONEY WOULD
23 HAVE FLOWED IN EXACTLY THE SAME WAY, EXCEPT IN ONE RESPECT,
24 WHICH IS THE GROUP MONEY WOULD HAVE BEEN SHARED. THAT'S OUR
25 THEORY.

1 AND IF THEY WEREN'T GOING TO DO THAT, YOUR HONOR, IF
2 THEY WERE NOT GOING TO SAY:

3 "WE'RE GOING TO DO IT AS A GROUP, BECAUSE WE HAVE
4 TOLD EVERYBODY GROUP LICENSING IS ESSENTIAL. IT'S A GROUP. DO
5 THE GROUP. SIGN UP. SIGN UP. SIGN UP. SIGN UP."

6 IF THEY AREN'T GOING TO SAY:

7 "WE'RE MARKETING THIS ENTIRE GROUP THAT WE HAVE
8 SOLICITED TOGETHER," THEY SHOULD HAVE SAID:

9 "YOU KNOW WHAT? MAYBE WE DO HAVE A CONFLICT OF
10 INTEREST, BECAUSE, BY THE WAY, IF WE DO IT AS ALL ACTIVE IN THE
11 BIG GROUP LICENSE, WE GET TO KEEP 64 PERCENT OF IT TO FUND OUR
12 OPERATIONS."

13 IF WE THROW THE RETIRED INTO THE GROUP, WE GOT A
14 PROBLEM, WHICH IS WHY MR. BERTHELSEN TESTIFIED:

15 "WE HAD TO KEEP THEM ENTIRELY SEPARATE."

16 BUT THAT BEING ENTIRELY SEPARATE WAS THEIR CHOICE TO
17 BENEFIT THEMSELVES AT THE EXPENSE OF THE RETIRED PLAYERS.

18 **THE COURT:** HAS THERE BEEN ANYONE WHO -- SO LET ME
19 JUST -- THERE ARE 2,000-PLUS GLA MEMBERS. AND HOW MANY -- HOW
20 MANY ACTIVES ARE THERE IN ANY GIVEN SEASON?

21 **MR. LECLAIR:** 2,000.

22 **THE COURT:** SO, ROUGHLY, IT WOULD HAVE REDUCED BY
23 ONE-HALF. WHATEVER THE ACTIVE PLAYERS GOT, THEY WOULD HAVE
24 GOTTEN HALF OF THAT.

25 **MR. PARCHER:** NO.

1 **THE COURT:** YEAH, THEY WOULD.

2 **MR. LECLAIR:** YOUR HONOR, THAT'S NOT NECESSARILY
3 TRUE.

4 **THE COURT:** WHY IS THAT NOT TRUE?

5 **MR. LECLAIR:** BECAUSE THEY COULD -- AS WE'VE SAID,
6 THEY COULD HAVE TAKEN THE MONEY OUT OF THE 64 PERCENT.

7 **THE COURT:** WELL, BUT WHATEVER -- IN OTHER WORDS,
8 WHETHER THE -- SO, BASICALLY, YOUR THEORY COMES DOWN TO -- THIS
9 IS GOING TO BE A HARD SELL FOR A JURY. IT COMES DOWN TO YOU
10 SAY TO THOSE ACTIVE PLAYERS -- WHO RUN THE UNION, BY THE WAY,
11 THE ACTIVE PLAYERS ARE ON THE BOARD -- YOU SAY:

12 "YOU CAN'T HAVE A STRIKE FUND. YOU'VE GOT TO
13 TAKE AWAY FROM YOUR STRIKE FUND AND GIVE IT TO THE RETIRED
14 PLAYERS, OR TAKE IT OUT OF YOUR OWN WHATEVER PERCENTAGE YOU'RE
15 GOING TO GET."

16 **MR. LECLAIR:** OR, YOUR HONOR, THEY COULD HAVE SAID:

17 "YOU KNOW WHAT? MAYBE WE HAVE A CONFLICT OF
18 INTEREST. MAYBE WE DON'T REPRESENT THE BEST INTERESTS OF THE
19 RETIRED PLAYERS BECAUSE" --

20 **THE COURT:** WHERE WOULD THAT HAVE LED -- THEN, UNDER
21 THE GLA, THERE WOULDN'T HAVE BEEN -- NOBODY -- NO RETIRED
22 PLAYER WOULD HAVE GOTTEN A PENNY, BECAUSE THEY WOULDN'T HAVE
23 DONE THE GLA PROGRAM AT ALL.

24 **MR. LECLAIR:** YOUR HONOR --

25 **THE COURT:** OF COURSE, THEY DIDN'T GET A PENNY,

1 ANYWAY.

2 **MR. KATZ:** IF THEY DID DO IT.

3 **THE COURT:** IF THEY DID DO IT. THEY DID DO IT.

4 **MR. KATZ:** THEY MADE A PROMISE.

5 **THE COURT:** IT'S A FAIR QUESTION, I ACKNOWLEDGE THIS
6 PART. IT'S A FAIR QUESTION WHY THEY UNDERTOOK TO DO THIS IF
7 NOT ONE PENNY OF IT EVER CAME TO FRUITION. THAT'S A GOOD
8 QUESTION.

9 **MR. KATZ:** THAT IS THE QUESTION.

10 **MR. LECLAIR:** BECAUSE THEY DIDN'T WANT IT TO COME TO
11 FRUITION, YOUR HONOR. I'M SORRY. I INTERRUPTED YOU, YOUR
12 HONOR. I APOLOGIZE.

13 **THE COURT:** HERE'S THE OTHER ISSUE. AND THIS IS JUST
14 A FACT ISSUE. AND THAT IS, MR. KESSLER MADE A POINT THE OTHER
15 DAY, WHICH IS PROBABLY A GOOD ONE ON THE FACTS. IT DOESN'T
16 MEAN AS A MATTER OF LAW HE WINS ANYTHING.

17 BUT WITHOUT ANY QUESTION, IF THE GRAVY TRAIN WAS MADE
18 AVAILABLE TO EVERY RETIRED PLAYER -- HOW MANY ARE THERE,
19 11,000?

20 **MR. KESSLER:** 13,000.

21 **THE COURT:** YOU WOULD HAVE HAD 13,000 SIGN UP
22 IMMEDIATELY, BECAUSE THEY WOULD HAVE SAID:

23 "HEY, YOU KNOW, WITHOUT PUTTING IN A PENNY WE
24 GET A SHARE OF THIS GIGANTIC FUND."

25 SO EVERYONE WOULD HAVE SIGNED UP FOR THAT THING. SO

1 PRETTY SOON, THE ACTIVES WOULD HAVE BEEN GETTING 2/15THS OF
2 WHATEVER WAS DISTRIBUTED AFTER WHATEVER -- NOW, YOU GOT A GOOD
3 TABLE FULL OF LAWYERS OVER THERE, AND YOU MIGHT BE ABLE TO SELL
4 THAT. BUT I THINK IT'S A HARD SELL.

5 **MR. LECLAIR:** CAN I TELL YOU THE RESPONSE TO THAT,
6 YOUR HONOR?

7 **THE COURT:** GO AHEAD.

8 **MR. LECLAIR:** WHO WAS IN CHARGE OF THIS PROGRAM?
9 THEY WERE. WE DIDN'T PICK WHO THEY SOLICITED. THEY COULD HAVE
10 DECIDED AT ANY TIME THEY DIDN'T WANT TO SHARE. THEY DIDN'T
11 HAVE TO SOLICIT THESE PEOPLE TO SIGN UP. THEY COULD HAVE
12 PICKED A SMALLER GROUP.

13 THEY HAD THE ENTIRE CONTROL OF THIS PROGRAM. FOR
14 THEM TO COME IN AND SAY:

15 "WE'VE LOST CONTROL, 13,000 PEOPLE ARE GOING TO
16 COME IN," THAT'S BOGUS, YOUR HONOR. THEY HAVE THE ENTIRE
17 CONTROL OF WHO THEY SIGN UP.

18 AND THEY CHOSE TO DO IT. THEY JUST DIDN'T WANT TO
19 LIVE UP TO THEIR OBLIGATIONS.

20 **THE COURT:** LET ME ASK YOU THIS. IN HOLLYWOOD WHEN
21 SOMEBODY, AN AGENT, REPRESENTS SEVERAL STARS -- WE DON'T HAVE
22 ANY EVIDENCE OF THIS IN THE RECORD -- BUT HOW DO THEY GO ABOUT
23 RESOLVING ANY CONFLICTS?

24 LET'S SAY YOU REPRESENT THREE PEOPLE, ALL OF WHOM
25 WOULD BE EXCELLENT FOR THE PART.

1 **MR. LECLAIR:** THEY HAVE A LOT OF PROBLEMS, YOUR
2 HONOR. THAT'S THE VERY PROBLEM THEY HAVE. THEY HAVE FIDUCIARY
3 DUTIES AND BIG PROBLEMS, AND THEY GET SUED SOMETIMES FOR THAT
4 VERY REASON.

5 **MR. KESSLER:** AND THEY ALWAYS WIN, YOUR HONOR. IT'S
6 VERY SIMPLE. IT'S VERY SIMPLE.

7 **THE COURT:** WHAT'S THE SIMPLE ANSWER?

8 **MR. KESSLER:** THE SIMPLE ANSWER IS DISCLOSURE, WHICH
9 IS THAT RETIRED KNOW THAT THEY ALSO REPRESENT ACTIVES.
10 ACTIVES KNOW WE'RE DOING RETIRED. RETIRED KNOW THE ACTIVE
11 PLAYERS HAVE THE VOTE AND CONTROL OF THE UNION.

12 IN OTHER WORDS, THE SAME THING FOR THE AGENTS.

13 WHEN YOU'RE A HOLLYWOOD AGENT, YOU KNOW YOU'RE
14 REPRESENTING MULTIPLE STARS. HAPPENS IN SPORTS, TOO. AND
15 EVERYONE IS COMFORTABLE WITH THAT, THAT THE INTERESTS -- AS MR.
16 ARMSTRONG TESTIFIED, THE INTERESTS OF THE RETIRED AND ACTIVES
17 ARE ALIGNED, NOT IN CONFLICT.

18 AND WHAT THEY'RE REALLY SUGGESTING IS THAT WE
19 SHOULDN'T HAVE TRIED TO HELP THE RETIRED PLAYERS AT ALL.

20 WE'RE VERY COMFORTABLE HAVING THAT DEBATE BEFORE THE
21 JURY.

22 **MR. PARCHER:** IF YOUR HONOR PLEASES, ONE OF THE
23 PROBLEMS THAT I'M HAVING -- NOT THAT YOUR HONOR HAS MADE UP
24 YOUR MIND ABOUT ANYTHING. I DON'T THINK THAT, SO DON'T
25 MISUNDERSTAND ME. I THINK YOU HAVE TO GO BACK TO THE VERY

1 BEGINNING AND THE PREMISE OF WHETHER THEY WERE ACTUALLY TRYING
2 TO HELP RETIRED PLAYERS OR NOT.

3 AT THE BEGINNING OF THIS VENTURE, THE UNION MADE A
4 DECISION WHICH WAS QUITE UNUSUAL, AND THAT IS TO GO INTO THE
5 LICENSING AGENCY BUSINESS ON THEIR OWN. NOT TO FARM IT OUT TO
6 ANYONE IN WHAT YOU CALL "HOLLYWOOD AGENCIES." I WILL TELL YOU
7 THERE ARE A FEW OF THEM IN NEW YORK, TOO, BECAUSE I REPRESENT
8 SOME OF THEM.

9 AND AT THAT MOMENT IN TIME THEY HAD NO EXPERIENCE IN
10 THAT FIELD. THEY HAD NO CREDIBILITY IN THAT FIELD. AND THEY
11 WERE ABOUT TO STEP INTO A VERY LUCRATIVE, POTENTIALLY LUCRATIVE
12 SITUATION: THE REPRESENTATION OF FOOTBALL PLAYERS.

13 AND THEY NEEDED TO DO SEVERAL THINGS:

14 ONE, GAIN CREDIBILITY IN THE MARKETPLACE.

15 TWO, STAVE OFF COMPETITION SO THE PEOPLE WHO WERE
16 INTERESTED IN GETTING A LICENSE FOR THEIR BRAND WOULD COME TO
17 THEM AS A ONE-STOP SHOP.

18 WHEN THEY STARTED OFF, WHAT THEY DID WAS THEY
19 SOLICITED AS MANY ATHLETES, FOOTBALL PLAYERS, AS THEY POSSIBLY
20 COULD. AND IT WAS DESPERATELY IMPORTANT TO THEM TO GET WHAT
21 THE ECONOMISTS -- AND I DON'T GIVE A FIG ABOUT THE ECONOMISTS,
22 TO BE BLUNT -- WHAT THE ECONOMISTS CALL "A CRITICAL MASS."

23 WHAT THEY NEEDED TO DO WAS GET CREDIBILITY TO, RIGHT
24 FROM THE BEGINNING, GET A HOME RUN WITH THE BASES LOADED, AND
25 ANNOUNCE TO THE WORLD THEY HAD 5,000 OR 4000 WHATEVER THE

1 NUMBER WAS, PLAYERS.

2 "AND IF YOU EVER WANTED A FOOTBALL PLAYER FOR
3 YOUR BRAND, OR YOU EVER WANTED A GROUP OF FOOTBALL PLAYERS FOR
4 YOUR BRAND, COME TO US. DON'T GO TO CAA, TRACE ARMSTRONG'S
5 COMPANY, OR ANY ONE OF THE POWERFUL COMPANIES. YOU'VE GOT TO
6 COME TO US."

7 AND FOR THAT THEY SOLICITED RETIRED FOOTBALL PLAYERS,
8 MEN WHO WERE NOT BANDED INTO A GROUP, INDIVIDUAL MEN WHO,
9 EXCEPT FOR THE STARS, HAD SEEN THEIR DAYS PASS. AND THEY
10 SOLICITED THEM VORACIOUSLY. IT WAS AS IF SIGNING WITH THE
11 NFLPA WAS THEIR PATRIOTIC DUTY.

12 AND THE RESULT OF THESE MEN SIGNING -- AS A RESULT OF
13 THESE MEN SIGNING, THEY GOT WHAT THEY WERE FIGHTING FOR, WHICH
14 IS THEY BECAME A ONE-STOP SHOP.

15 AND WHAT THE MEN GAVE THEM, ALL OF THESE MEN WHO
16 INDIVIDUALLY -- MR. KESSLER, WHO'S A VERY FINE LAWYER CALLS
17 "WORTHLESS," WHAT THEY WERE -- WHAT THEY WERE GIVEN WAS THE
18 COLLECTIVE IDENTITY OF ALL 2100 OF THESE PERSONS IN THE CLASS,
19 WHO WERE THE ONLY ONES WHO CHOSE TO SIGN. AND AS A RESULT OF
20 THAT, THEY GOT THEMSELVES IN THE POSITION WHERE THEY BROUGHT IN
21 HUNDREDS OF MILLIONS OF DOLLARS.

22 THIS GLA -- AND I DIDN'T GO TO THE HARVARD LAW
23 SCHOOL. I WENT TO ST. JOHN'S LAW SCHOOL AND DROVE A PEPSI-COLA
24 TRUCK TO GET THROUGH IT.

25 BUT THIS GLA IS VERY CLEAR. THERE'S NO AMBIGUITY IN

1 IT WHATSOEVER.

2 AND THE INVENTION OF MR. ALLEN THAT RETIRED OR
3 ACTIVES DON'T MEAN "RETIRED" OR "ACTIVES," THEY MEAN 2,062
4 RETIRED, AND "ELIGIBLE" DOESN'T MEAN "ELIGIBLE," AND ALL OF
5 THAT, IS NOT, IN MY OPINION, WITH ANY LUCK AT ALL, GOING TO BE
6 BOUGHT BY THIS JURY WHO'S GOING TO BRING THEIR COMMON SENSE TO
7 IT.

8 AND I WOULD URGE YOUR HONOR TO UNDERSTAND THAT FROM
9 THE BEGINNING WHAT MR. KESSLER, WHO IS A VERY ABLE LAWYER, HAS
10 DONE IS CREATE AN ARTIFICIAL CONSTRUCT HERE, WHICH IS THAT
11 THESE RETIRED PLAYERS GAVE NOTHING. IT COST THEM NOTHING.

12 GUESS WHAT? IT DIDN'T COST THE UNION ANYTHING BUT A
13 POSTAGE STAMP TO GET 2100 GUYS TO SIGN AND GET THEMSELVES IN A
14 POSITION WHERE THEY COULD RUN THE FOOTBALL WORLD.

15 **MR. KESSLER:** AND, YOUR HONOR --

16 **MR. PARCHER:** AND FROM THAT STEMS OBLIGATIONS UNDER
17 THE CONTRACT, FIDUCIARY OBLIGATIONS. AND THESE UNION PEOPLE,
18 UNDER THE GUISE OF HELPING THEM -- FOR GOD'S SAKE, LEAVING
19 ANTITRUST ASIDE FOR A MINUTE, HERE YOU GET A MADDEN GAME WITH
20 147 VINTAGE TEAMS. AND YOU THINK YOU'D SAY TO YOURSELF:

21 "OH, MY GOD. FINALLY, WE'VE GOT A SHOT.
22 FINALLY, WE'VE GOT A SHOT TO MARKET THESE GUYS."

23 AND INSTEAD, LASHUN -- I FORGOT HER LAST NAME --
24 SENDS THAT KIND OF LETTER WHICH SAYS:

25 "DON'T YOU DO THAT."

1 IT'S DISGRACEFUL. IT'S DISGRACEFUL.

2 YOU GET A BEAUTIFUL YOUNG MAN LIKE TRACE ARMSTRONG,
3 AND GET THEM REPRESENTING THESE 2100 PLAYERS, THERE WILL BE
4 PLENTY OF A MARKET FOR THEM.

5 THE IDEA THAT YOU CAN'T MARKET THESE FELLOWS IF YOU
6 REALLY TRY, AND THAT THESE FELLOWS CAN'T ATTRACT SOME OF THEIR
7 AD HOCS WHO PLAYED BALL WITH THEM TO GO TO ANOTHER AGENCY OR
8 SOME OF THE ACTORS TO REBEL IF THEY ONLY UNDERSTOOD WHAT
9 HAPPENED, JUST ISN'T FAIR, AND IT ISN'T RIGHT.

10 IN SOME WAY, WE NEED TO ARGUE THAT TO THE JURY. AND
11 I DON'T THINK IT'S A THEORY. I THINK IT'S A FACT.

12 THANKS FOR LISTENING TO ME.

13 **THE COURT:** ALL RIGHT. THE COURT IS GOING TO RULE
14 NOW ON THE IMMEDIATE MOTION, WHICH IS MR. FRISS.

15 THE COURT WILL ALLOW THE FIRST QUESTION, BUT NOT THE
16 SECOND.

17 **MR. KESSLER:** YOUR HONOR --

18 **THE COURT:** THE QUESTION --

19 **MR. KESSLER:** I'M SORRY.

20 **THE COURT:** MR. KESSLER, I'M GOING TO MAKE A RULING
21 NOW.

22 **MR. KESSLER:** OKAY.

23 **THE COURT:** PAGE 77, LINE 2 THROUGH 7 CAN BE READ.

24 THE COURT IS GOING TO FIND THAT THAT'S SUFFICIENT
25 REBUTTAL -- I MEAN, THAT IS REBUTTAL TO MR. NOLL. BUT THE

1 QUESTION 8 THROUGH LINES 14 WHICH READS:

2 "SO, IN FACT, IF IN 2004 AND 2007 PLAYERS INC
3 HAD SAID, 'WE'VE ALREADY GOT ALL THESE
4 RIGHTS, ' YOU WOULD HAVE BEEN HAPPY TO GET
5 THEM GRANTED IN THE LICENSE AGREEMENT,
6 WOULDN'T YOU?

7 **"MR. GREENSPAN:** OBJECTION. FORM.

8 **"ANSWER:** YES."

9 ALL RIGHT. THERE ARE TWO OF THEM.

10 THE OBJECTION TO FORM IS SUSTAINED. THE QUESTION
11 IS -- THE QUESTION IS HYPOTHETICAL, CALLS FOR SPECULATION AND
12 IS A LEADING QUESTION.

13 MR. LECLAIR ASKED -- MR. LECLAIR IS THE PROPONENT OF
14 THE WITNESS. NOT ONLY DID HE TAKE THE DEPOSITION AND STARTED
15 IT OFF, BUT, IN ADDITION, HE IS A PROPONENT OF THE TESTIMONY
16 HERE AT TRIAL. SO THAT'S A LEADING QUESTION. IT SHOULD NOT
17 HAVE BEEN ASKED IN THAT FORM.

18 SO THE FIRST -- THE FIRST -- THE ANSWER:

19 "I STILL DON'T KNOW WHETHER THEY HAD RIGHTS
20 SO" -- AND THE ANSWER GOT CUT OFF, THAT PART
21 CAN BE READ, BUT NOT THE SECOND PART.

22 **MR. KESSLER:** I'M SORRY, YOUR HONOR. I DIDN'T MEAN
23 TO INTERRUPT YOU. MY QUESTION IS: WE HAVE OTHER DESIGNATIONS
24 WHERE THERE ARE OBJECTIONS AND THINGS --

25 **THE COURT:** I THOUGHT THIS WAS THE ONLY ONE.

1 **MR. KESSLER:** NO, THAT'S THEIR'S. WE'VE ACTUALLY
2 COUNTER-DESIGNATED.

3 **THE COURT:** YOU WANT TO HAVE COUNTER-DESIGNATIONS TO
4 THIS ONE POINT?

5 **MR. KESSLER:** IF THEY ARE GOING TO ASK THAT, THERE IS
6 SOME MATERIAL THAT WE BELIEVE --

7 **THE COURT:** YOU BETTER HURRY UP, AND GET IT TO ME.

8 **MR. LECLAIR:** IT'S RIGHT HERE, YOUR HONOR.

9 **MR. KESSLER:** THEY HAVE IT, YOUR HONOR. THAT'S --

10 **MR. LECLAIR:** AND WE REJECT IT. MOST OF IT IS WAY
11 BEYOND THE SCOPE.

12 **THE COURT:** I WILL DO MY BEST TO GET -- THE GREEN
13 TAGS ARE WHAT? GREEN TAGS ARE THE ONES --

14 **MR. KESSLER:** IT WAS PREPARED BY PLAINTIFFS, YOUR
15 HONOR.

16 **MR. LECLAIR:** THOSE ARE OUR OBJECTIONS, YOUR HONOR,
17 TO THEIR DESIGNATIONS.

18 **THE COURT:** ALL RIGHT. I'LL LOOK AT IT WHEN I CAN.

19 OKAY. WHAT'S NEXT?

20 **MR. KESSLER:** THAT'S IT, YOUR HONOR. THIS GETS A
21 QUESTION WHICH CAN BE ANSWERED ANYTIME.

22 I LOOKED AT YOUR HONOR'S INSTRUCTIONS, AND IT
23 INDICATED TO THE JURY THAT YOU'D LIKE COUNSEL TO BE IN THE
24 COURT WHILE THEY'RE DELIBERATING?

25 IS THAT YOUR HONOR'S POLICY.

1 **THE COURT:** YOU'VE GOT TO BE VERY -- YOU'VE GOT TO BE
2 IN THE BUILDING. WHAT IF THEY HAVE A QUESTION?

3 **MR. KESSLER:** I JUST WANT TO KNOW.

4 **THE COURT:** THE ANSWER IS: YOU'VE GOT TO BE IN THE
5 COURTHOUSE SOMEWHERE AND BE HERE WITHIN TWO MINUTES IF THEY
6 HAVE A QUESTION.

7 **MR. KESSLER:** I JUST WANTED TO KNOW WHAT YOUR HONOR'S
8 PREFERENCE IS.

9 **THE COURT:** YOU CAN'T BE DOWN AT THE LOCAL BAR.

10 **MR. KESSLER:** NOT THE BAR. I GUESS IN OTHER CASES
11 I'VE BEEN IN OUR OFFICE TEN MINUTES AWAY, IF THAT'S ALL RIGHT.

12 **THE COURT:** NO. TEN MINUTES IS A WASTE OF TIME.

13 **MR. KESSLER:** OKAY.

14 **THE COURT:** THE JURY WILL LIKELY HAVE QUESTIONS, AND
15 WE WANT TO BE ABLE TO RESPOND QUICKLY TO THEM. SO WHAT I DO IS
16 AS SOON AS THE QUESTION COMES OUT, DAWN CALLS YOU. YOU GET
17 HERE. LOOK AT THE QUESTION AND DECIDE HOW TO ANSWER IT.

18 **MR. KESSLER:** OKAY. WE WILL DO WHATEVER YOUR HONOR
19 WANTS, OF COURSE.

20 **THE COURT:** ANYTHING MORE BEFORE WE GET STARTED?
21 OKAY. LETS IT'S BRING IN OUR JURY.

22 **THE CLERK:** OKAY.

23 **THE COURT:** BRING IN THE WITNESS.

24 READY?

25 (THEREUPON, THE JURY RETURNED TO THE COURTROOM.)

1 **THE COURT:** WELCOME BACK.

2 ALL RIGHT. WELCOME BACK. WE HAD AN EXCITING
3 ELECTION DAY YESTERDAY. AND THANK YOU FOR BEING BACK AND ON
4 TIME.

5 SO NOW THE COUNTRY HAS TAKEN PART OF ARTICLE I OF THE
6 CONSTITUTION, AND ARTICLE II, WHICH IS THE EXECUTIVE AND THE
7 LEGISLATIVE BRANCHES.

8 BUT NOW WE ARE BACK TO ARTICLE III, WHICH IS THE
9 COURT SYSTEM. AND I WANT TO THANK YOU. YOU'RE THE BACKBONE --
10 THE JURY IS THE BACKBONE OF ARTICLE III, IN MY OPINION.

11 EVERYONE OVER THERE IS DOING A GREAT JOB PAYING
12 ATTENTION. SO KEEP UP THE GOOD WORK.

13 ALL RIGHT. MR. KESSLER, WHERE ARE WE?

14 **MR. KESSLER:** WE'RE ON REDIRECT EXAMINATION, YOUR
15 HONOR.

16 **THE COURT:** ALL RIGHT. I THINK THAT'S WHAT I
17 REMEMBER, TOO.

18 SO YOU WILL REMEMBER THAT MR. NOLL HAD BEEN EXAMINED
19 ON DIRECT AND CROSS, AND NOW WE'RE BACK TO THE REDIRECT.

20 OKAY. GO RIGHT AHEAD.

21 **MR. KESSLER:** THANK YOU, YOUR HONOR.

22 ROGER NOLL,

23 CALLED AS A WITNESS FOR THE DEFENDANTS HEREIN, HAVING BEEN
24 PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED FURTHER AS
25 FOLLOWS:

REDIRECT EXAMINATION RESUMED

1
2 **BY MR. KESSLER:**

3 **Q.** GOOD MORNING, PROFESSOR NOLL.

4 **A.** GOOD MORNING.

5 **MR. KESSLER:** GOOD MORNING, LADIES AND GENTLEMEN.

6 **BY MR. KESSLER:**

7 **Q.** PROFESSOR NOLL, YESTERDAY YOU WERE QUESTIONED BY COUNSEL
8 ABOUT THE EA MADDEN GAME. YOU RECALL THAT LINE OF QUESTIONING?

9 **A.** YES.

10 **Q.** OKAY. AND YOU WERE QUESTIONED ABOUT EVIDENCE THAT YOU'VE
11 LOOKED AT CONCERNING PLAYERS INC'S NEGOTIATIONS AND DISCUSSIONS
12 WITH EA.

13 DO YOU RECALL BEING ASKED ABOUT THAT?

14 **A.** YES.

15 **Q.** OKAY. PROFESSOR NOLL, DID YOU SEE ANY EVIDENCE IN YOUR
16 REVIEW OF THE RECORD THAT EA WAS WILLING TO PAY ANY MONEY AT
17 ALL FOR THE ENTIRE GROUP OF RETIRED PLAYERS WHO SIGNED GLA'S,
18 THE WHOLE GROUP AS A WHOLE?

19 **A.** I SAW NO SUCH EVIDENCE. IN PARTICULAR, I SAW WITHIN THE
20 CONTRACTS FOR ALL THE LICENSEES, INCLUDING EA, NO EVIDENCE THAT
21 ANYBODY ACTUALLY LICENSED EVEN ENTIRE TEAMS OF RETIRED PLAYERS.

22 **Q.** NOW, DID YOU SEE EVIDENCE THAT OCCASIONALLY EA WAS
23 INTERESTED IN SPECIFIC RETIRED PLAYERS?

24 **A.** WELL, THE DEPOSITION TESTIMONY FROM EA SAID THAT THEY
25 ACTUALLY DECIDED IN THEIR OWN GAME DEVELOPMENT DEPARTMENT WHICH

1 PLAYERS THEY WANTED.

2 **Q.** NOW, HAVE YOU ALSO EXAMINED WHETHER OR NOT MOST OF THE
3 STAR RETIRED PLAYERS SIGNED RETIRED PLAYER GLA'S OR NOT?

4 **A.** YES, I OBSERVED THAT ALMOST NONE OF THE TOP STARS SIGNED
5 GLA'S.

6 **Q.** NOW, AS AN ECONOMIST, BASED ON WHAT YOU OBSERVED, THAT
7 MOST OF THE STAR RETIRED PLAYERS DO NOT SIGN GLA'S; THAT
8 THERE'S NO EVIDENCE EA WAS WILLING TO PAY FOR THE ENTIRE GROUP,
9 BUT WAS WILLING TO PAY FOR CERTAIN RETIRED PLAYERS, WHAT
10 CONCLUSIONS DO YOU DRAW ABOUT THAT AS AN ECONOMIST?

11 **A.** THE CONCLUSION I DRAW FROM THAT FACT, COMBINED WITH THE
12 FACT THAT ONLY 2,000 OF THE 13,000 RETIRED PLAYERS ACTUALLY
13 SIGNED GLA'S, IS THAT THIS GOAL OF CREATING A ONE-STOP SHOPPING
14 PLACE FOR RETIRED PLAYERS AND ACHIEVING THESE ECONOMIES OF
15 SCALE BY HAVING THE COMPLETE PACKAGE WERE NEVER ACHIEVED.

16 AND CONSEQUENTLY IT TELLS ME TWO THINGS: THERE'S
17 REALLY NO MARKET FOR THE PACKAGE AS A PACKAGE BECAUSE YOU
18 COULDN'T EVEN CONSTRUCT AN ENTIRE TEAM OUT OF IT IF YOU WANTED
19 TO; AND, SECONDLY, THE BASIS FOR THAT IS, IN PART, THAT FOR A
20 VERY LARGE NUMBER OF PEOPLE WHO SIGNED GLA'S THERE'S SIMPLY NO
21 MARKET DEMAND FOR THE USE OF THEIR IMAGE.

22 **Q.** AND IF THERE'S NO MARKET DEMAND FOR THE USE OF YOUR IMAGE,
23 AS AN ECONOMIST WHAT DOES THAT MEAN THE ECONOMIC VALUE IS FOR
24 THE USE OF THE IMAGE?

25 **A.** ZERO. IT MEANS THAT IF YOU ATTEMPT TO SELL IT YOU'LL

1 GENERATE NO REVENUE.

2 **Q.** NOW, PROFESSOR NOLL, YOU ALSO GOT ASKED SPECIFICALLY ABOUT
3 THE SCRAMBLING ISSUE IN EA?

4 **A.** YES.

5 **Q.** OKAY. AS AN ECONOMIST, THE FACT THAT EA WAS NOT WILLING
6 TO PAY FOR THE NAMES AND IMAGES, BUT SHOWED NO NAMES AND NO
7 PICTURES, DOES THAT TELL YOU ANY -- DID YOU DRAW ANY
8 CONCLUSIONS FROM THAT AS AN ECONOMIST?

9 **A.** WELL, THE CONCLUSION I DRAW IS THAT GOING TO THE NEXT STEP
10 AND SHOWING THE ACTUAL PICTURES OF THE PLAYERS AND PUTTING THE
11 NAMES ON THE JERSEYS AND ADVERTISING THEM AS SPECIFIC PLAYERS
12 HAS SO LITTLE INCREMENTAL VALUE THAT IT'S NOT EVEN WORTH SORT
13 OF THE TRIVIAL AVERAGE LICENSE FEE THAT MOST OF THE GLA PEOPLE
14 RECEIVED.

15 I MEAN, IF YOU LOOK -- REMEMBER THAT TABLE I
16 PRESENTED, THE VAST MAJORITY OF THEM WOULD HAVE BEEN BETTER OFF
17 AT \$25 OR SOMETHING LIKE THAT. AND NOT EVEN THAT AMOUNT IS
18 WORTH IT.

19 IF IT WOULD HAVE BEEN WORTH IT, EA WOULD HAVE SAID:

20 "GET US THE WHOLE TEAM. WE'LL TAKE 25 BUCKS A
21 POP."

22 **Q.** NOW, YOU ALSO GOT ASKED SOME QUESTIONS ABOUT WHETHER THE
23 AGREEMENTS BETWEEN PLAYERS INC AND THE NFLPA WOULD BE ARM'S
24 LENGTH FROM AN ECONOMIC STANDPOINT.

25 DO YOU RECALL THAT?

1 **A.** YES.

2 **Q.** AND I THINK YOU TESTIFIED THAT ANYTIME A COMPANY DEALS
3 WITH ITS MAJORITY-OWNED SUBSIDIARY AS AN ECONOMIST YOU WOULD
4 SAY IT'S NOT ARM'S LENGTH, CORRECT?

5 **A.** THAT'S CORRECT.

6 **Q.** TELL THE JURY, DOES THE FACT THAT IT'S NOT ARM'S LENGTHS
7 HAVE ANY IMPACT AT ALL AS TO WHETHER OR NOT THE TERMS OF THE
8 AGREEMENT ARE ECONOMICALLY REASONABLE OR NOT?

9 **A.** NO. IT JUST MEANS THAT THE ONLY THING THAT HAPPENS WHEN
10 YOU HAVE A TRANSACTION LIKE THAT IS THAT YOU GO TO EXTERNAL
11 PIECES OF EVIDENCE TO DETERMINE REASONABLENESS. IT DOESN'T
12 MEAN THAT IN PRINCIPLE IT'S NOT REASONABLE.

13 **Q.** NOW, DR. RASCHER DID AN ANALYSIS OF THE AGREEMENTS IN
14 TERMS OF HOW IT DIVIDED THE MONEY, 23 PERCENT, 40 PERCENT,
15 37 PERCENT, CORRECT?

16 **A.** CORRECT.

17 **Q.** WHAT WAS YOUR OPINION OF DR. RASCHER'S ANALYSIS? DID HE
18 DEMONSTRATE THAT THE DIVISION OF MONIES WAS UNREASONABLE?

19 **A.** NO.

20 **MR. HUMMEL:** OBJECTION, LEADING.

21 **THE WITNESS:** HE DID NOT DEMONSTRATE THAT IT WAS
22 UNREASONABLE.

23 **THE COURT:** IT IS -- BE MINDFUL. OVERRULED, BUT
24 THAT'S TENDING TOWARD A LEADING QUESTION.

25 **MR. KESSLER:** I'LL BE CAREFUL, YOUR HONOR.

1 **THE COURT:** SO YOU SHOULD BE AWARE WHEN YOU GET ON TO
2 SOMETHING THAT REALLY IS IN CONTROVERSY, TRY NOT TO LEAD.

3 **BY MR. KESSLER:**

4 **Q.** HAVE YOU STUDIED -- I BELIEVE YOU TESTIFIED IN YOUR DIRECT
5 THAT YOU DID STUDY --

6 **MR. KESSLER:** THIS IS JUST PRELIMINARY, YOUR HONOR.

7 **BY MR. KESSLER:**

8 **Q.** -- AS TO WHETHER OR NOT THE PERCENTAGE OF REVENUES
9 RETAINED FROM PLAYER LICENSING BY NFLPA AND PI, WHETHER OR NOT
10 IT WAS ECONOMICALLY REASONABLE. DID YOU STUDY THAT?

11 **A.** YES. I DID STUDY IT, YES.

12 **Q.** AND WHAT DID YOU CONCLUDE?

13 **A.** AS I TESTIFIED IN DIRECT THAT THERE'S NO SUBSTANTIAL
14 DIFFERENCE IN A STATISTICAL SENSE.

15 IF WE WERE GOING TO DO A TEST OF STATISTICAL
16 SIGNIFICANCE, WE WOULDN'T FIND THAT THE BEHAVIORS OF THE THREE
17 MAJOR PLAYERS ASSOCIATIONS IN PROFESSIONAL SPORTS WERE ANY
18 DIFFERENT.

19 **MR. KESSLER:** LET'S TAKE A LOOK AT TRIAL EXHIBIT
20 2399, IF WE CAN, ALREADY IN EVIDENCE.

21 **BY MR. KESSLER:**

22 **Q.** YOU SHOULD HAVE IT IN FRONT OF YOU, PROFESSOR NOLL.

23 **A.** WHICH ONE?

24 **Q.** 2399. IT'S ONE OF YOUR EXHIBITS.

25 **MR. KESSLER:** SEEMS LIKE WE'VE HAVING A TECHNICAL

1 PROBLEM. WE'LL USE THE ELMO.

2 THANK YOU.

3 COULD YOU ZOOM OUT A LITTLE BIT SO THEY COULD SEE THE
4 WHOLE THING, JASON?

5 THE OTHER WAY. THAT'S IT. GREAT. THAT'S FINE.

6 OKAY.

7 (DOCUMENT DISPLAYED.)

8 **BY MR. KESSLER:**

9 **Q.** AND PROFESSOR NOLL, JUST REMIND THE JURY, IS THIS AN
10 EXHIBIT THAT YOU HAD PREPARED AT YOUR DIRECTION?

11 **A.** YES. THIS ACTUALLY IS FROM -- YEAH, I DID HAVE THIS
12 PREPARED FROM THE DATA THAT'S AVAILABLE IN BOTH MY REPORT AND
13 DR. RASCHER'S REPORT.

14 **Q.** OKAY. AND WHAT THIS EXHIBIT SHOWED WAS THAT IN 2003,
15 2004, 2005, 2006, 2007, EVERY YEAR YOU CALCULATED, DID THE
16 PLAYERS RECEIVE MORE OR LESS THAN 60 PERCENT IN EVERY SINGLE
17 YEAR, THE PLAYERS, OF ALL THE LICENSING REVENUES?

18 **A.** THEY ALWAYS RECEIVED MORE THAN 60, YES.

19 **Q.** OKAY. AND DID YOU REACH ANY JUDGMENT, BASED ON COMPARING
20 TO THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, WHETHER THIS
21 PERCENTAGE OF REVENUE KEPT WAS REASONABLE OR NOT?

22 **A.** YES, I BELIEVE THAT IT IS REASONABLE. I WOULD ALSO ADD
23 THAT I DO NOT BELIEVE THE FACT THAT THE MAJOR LEAGUE BASEBALL
24 PLAYERS ASSOCIATION IN MOST OF THESE YEARS PAID OUT LESS MEANS
25 THEY WERE UNREASONABLE.

1 I THINK THEY BOTH BEHAVED REASONABLY GIVEN THE
2 CIRCUMSTANCES THEY WERE IN.

3 **Q.** EXPLAIN TO THE JURY WHY THERE WOULD BE DIFFERENCES IN
4 BEHAVIOR EACH YEAR BY A SPORTS UNION AS TO HOW MUCH MONEY IT
5 KEPT IN LICENSING REVENUES.

6 **A.** THE FIRST REASON WOULD BE: WHAT'S THE MAGNITUDE OF THE
7 LICENSING REVENUE RELATIVE TO THE COST OF RUNNING A UNION?

8 AND THE SECOND WOULD BE THE COLLECT BARGAINING
9 CIRCUMSTANCES. ARE YOU FACING THE POSSIBILITY OF A STRIKE OR A
10 LOCKOUT, WITH THE EXPENSES ASSOCIATED WITH THAT OR NOT?

11 AND, ACTUALLY, THAT SECOND FACTOR IS BY FAR THE MOST
12 IMPORTANT IN TERMS OF DETERMINING HOW UNIONS DEAL WITH THEIR
13 LICENSING REVENUES.

14 **Q.** AND, IN FACT, IF YOU LOOK AT YOUR DATA YOU'LL SEE THAT
15 STARTING IN 2006, THE PERCENTAGE KEPT BY THE PLAYERS, AS
16 OPPOSED TO GIVING THE UNION, DECREASES A LITTLE BIT COMPARED TO
17 THE EARLIER YEARS.

18 DO YOU KNOW, BASED ON YOUR STUDY OF THIS INDUSTRY,
19 WHAT MIGHT HAVE HAPPENED BETWEEN 2006 GOING FORWARD, IN TERMS
20 OF THE LABOR SITUATION IN THE NFL?

21 **MR. HUMMEL:** OBJECTION. BEYOND THE SCOPE. AND THAT
22 OPINION IS NOWHERE DISCLOSED IN HIS EXPERT REPORT.

23 **THE COURT:** WELL, IS THIS -- THE ONLY IMMEDIATE ISSUE
24 IS WHETHER OR NOT IT'S WITHIN THE SCOPE OF THE DIRECT AND CROSS
25 EXAMINATION.

1 WHY IS THIS WITHIN THE SCOPE?

2 **MR. KESSLER:** THERE WAS A SUGGESTION BY COUNSEL THAT
3 BECAUSE THEY WERE NOT ARM'S LENGTH, BECAUSE ONE OWNS THE OTHER,
4 THAT THE REASONABLENESS OF THESE FIGURES COULD BE CALLED INTO
5 QUESTION MERELY BECAUSE THEY'RE NOT ARM'S LENGTH IN AN ECONOMIC
6 SENSE.

7 AND I'M HAVING THE WITNESS ACTUALLY GO TO THE REAL
8 ISSUE AS TO WHETHER OR NOT ARM'S LENGTH AFFECTS THIS ISSUE.
9 AND THAT'S WHAT I'M GOING TO COME BACK TO ON THIS, YOUR HONOR.

10 **MR. HUMMEL:** YOUR HONOR, HE ALSO TESTIFIED ON MY
11 CROSS EXAMINATION THAT HE WAS NOT OFFERING ANY OPINION ONE WAY
12 OR THE OTHER ABOUT THE REASONABLENESS OF THE AMOUNTS THAT WERE
13 RETAINED BY THE UNION.

14 SO THIS IS AN ATTEMPT TO GET AN ANALYSIS THAT HE
15 EXPRESSLY DISCLAIMED ON CROSS EXAMINATION AND IN THE
16 DEPOSITION.

17 **MR. KESSLER:** AND I DISAGREE WITH THAT, YOUR HONOR.
18 I DO NOT BELIEVE THAT WAS THE TESTIMONY.

19 **THE COURT:** HOW LONG IS THIS GOING TO BE?

20 **MR. KESSLER:** TWO MORE MINUTES.

21 **THE COURT:** ALL RIGHT. THE OBJECTION IS OVERRULED.

22 **MR. KESSLER:** THANK YOU.

23 **BY MR. KESSLER:**

24 **Q.** DO YOU HAVE KNOWLEDGE AS TO WHAT HAPPENED IN FOOTBALL IN
25 THE LABOR SITUATION IN THE LATER YEARS?

1 **A.** YES. I MEAN, IN 2006, THE OWNERS DECLARED THEY WERE GOING
2 TO TERMINATE THE COLLECTIVE BARGAINING AGREEMENT AS PER ITS
3 PROVISIONS FOR CANCELLATION AND EARLY TERMINATION. SO THE
4 NFLPA IS BUILDING UP A STRIKE FUND.

5 **Q.** IN THAT REGARD, TO CLOSE THIS LINE, DOES WHETHER OR NOT
6 YOU'RE ARM'S LENGTH HAVE ANYTHING TO DO WITH WHETHER OR NOT THE
7 AMOUNTS RETAINED ARE REASONABLE OR NOT FROM AN ECONOMIC
8 STANDPOINT?

9 **A.** NO. THE -- THE POINT IS, AS I SAID BEFORE, THE UNION IS
10 THE PLAYERS. THE PLAYERS DECIDE HOW TO ALLOCATE THEIR
11 LICENSING REVENUE BETWEEN BUILDING UP A STRIKE FUND AND PAYING
12 IT OUT TO THE PLAYERS.

13 AND ANY DECISION THEY MAKE, I THINK, WOULD BE VERY
14 DIFFICULT FOR ANY OUTSIDER AND CERTAINLY AN ECONOMIST TO
15 SECOND-GUESS.

16 **Q.** AND ONE FINAL QUESTIONS ON THIS. YOU STUDIED FINANCIAL
17 STATEMENTS OF THE NFLPA AND PLAYERS INC IN CONNECTION WITH YOUR
18 WORK?

19 **A.** YES, OF COURSE.

20 **Q.** THERE'S BEEN SOME ISSUES RAISED ABOUT DESIGNATED FUNDS
21 VERSUS UNDESIGNATED FUNDS OF 60 MILLION-PLUS-MILLION-DOLLARS.

22 FROM YOUR STUDY OF THE FINANCIAL STATEMENTS, IS THERE
23 ANY DIFFERENCE ONE WAY OR THE OTHER, WHETHER IT'S DESIGNATED OR
24 UNDESIGNATED, WHETHER OR NOT THOSE FUNDS COULD BE USED TO
25 SUPPORT THE UNION DURING A STRIKE OR A LOCKOUT OR A WORK

1 STOPPAGE?

2 **MR. HUMMEL:** OBJECTION. BEYOND THE SCOPE OF THE
3 CROSS.

4 **THE COURT:** OVERRULED.

5 PLEASE ANSWER.

6 **THE WITNESS:** NO. THE POINT OF THE FUNDS, FUND A AND
7 FUND B, IS, IN FACT, TO PREPARE FOR THE POSSIBILITY OF A WORK
8 STOPPAGE OR LITIGATION.

9 **BY MR. KESSLER:**

10 **Q.** AND WOULD THAT BE TRUE OF ANY FUNDS THE UNION HAD
11 AVAILABLE TO IT?

12 **A.** OF COURSE.

13 **Q.** NOW, PROFESSOR NOLL, YOU ALSO GOT ASKED A QUESTION WHERE
14 YOU SPOKE ABOUT IN THE MADDEN GAME, THAT CERTAIN PAYMENTS WERE
15 MADE TO THE TEAMS BY EA.

16 DO YOU RECALL THAT?

17 **A.** YES.

18 **Q.** JUST SO THE JURY UNDERSTANDS --

19 **A.** YES.

20 **Q.** -- ARE THE TEAMS THE PLAYERS OR THE OWNERS? WHO WERE "THE
21 TEAMS" WHEN YOU TESTIFIED ABOUT THAT?

22 **A.** THAT WHOLE LINE WAS SO CONFUSING. WHAT I WAS TALKING
23 ABOUT WAS LICENSING TEAMS IN THE SENSE OF THE IMAGES OF THE
24 INDIVIDUAL MEMBERS OF THE TEAMS. THAT'S WHAT'S RELEVANT IN
25 THIS CASE. THAT'S THE EVIDENCE I'VE SEEN WITH REGARD TO THE

1 LICENSES THAT WERE SIGNED BY PLAYERS INC.

2 AND THAT'S TO BE DISTINGUISHED FROM LICENSING THE
3 TEAM LOGO AND THE TEAM IDENTIFICATION FROM THE NFL.

4 **Q.** LET ME JUST MAKE SURE, BECAUSE I AGREE WITH YOU IT WAS
5 CONFUSING.

6 WHEN YOU HAVE A HISTORIC TEAM WITH NO PLAYER NAMES
7 AND NO PLAYER PICTURES, OKAY? WHO DID EA PAY LICENSING MONEY
8 TO FOR THAT TYPE OF A GAME: NO PLAYER NAMES, NO IMAGES? WHO
9 GOT THAT MONEY?

10 **A.** JUST THE NFL.

11 **Q.** THE NFL ARE THE OWNERS?

12 **A.** THE OWNERS. THE OWNERS OF THE TEAMS. THE LEAGUE IS THE
13 ONE WHO ACTUALLY DOES THE LICENSING THROUGH NFL PROPERTIES.
14 AND THEN, TO THE EXTENT THEY MAKE MONEY OFF OF THAT THAT
15 EXCEEDS THE COST OF DOING THE LICENSING, IT'S DISTRIBUTED AMONG
16 THE TEAMS.

17 **Q.** AND WHO DOES EA PAY MONEY TO WHEN IT'S LICENSING THE NAMES
18 OF PLAYERS?

19 **A.** PLAYERS INC, FOR THE IMAGES AND IDENTITIES OF THE PLAYERS.

20 **Q.** OKAY. THERE'S BEEN SOME DISCUSSION IN YOUR EXAMINATION
21 ABOUT EA POSSIBLY TAKING RETIRED PLAYERS FOR FREE. DO YOU
22 REMEMBER THAT?

23 **A.** YES.

24 **Q.** OKAY. AS AN ECONOMIST, OKAY, WOULD IT MAKE ANY SENSE FOR
25 PLAYERS INC TO THROW IN RETIRED PLAYERS FOR FREE?

1 **A.** NO. IT WOULD MAKE NO SENSE AT ALL TO GIVE AWAY SOMETHING
2 FOR FREE.

3 **Q.** WHY NOT?

4 **A.** MOREOVER --

5 **Q.** WHY NOT?

6 **A.** FIRST OF ALL, YOU ONLY LET PEOPLE TO HAVE ACCESS TO THINGS
7 WHEN YOU'RE GETTING COMPENSATED FOR IT, OBVIOUSLY. THE RETIRED
8 PLAYERS, AGAIN, REMEMBERING THAT MOST OF THEIR INCOME IS BEING
9 DERIVED FROM LICENSES THAT DO NOT COVER ALL -- ANY MORE THAN A
10 HANDFUL OF PLAYERS, YOU KNOW, GIVING IT ALL AWAY, SO TO SPEAK,
11 THOSE RETIRED PLAYERS WHO ARE GETTING PAID NOW SUBSTANTIAL
12 AMOUNTS OF MONEY WOULD JUST BOLT. AND THEY WOULDN'T LET
13 PLAYERS INC HANDLE THEIR -- THEIR LICENSING IF THEY HAD TO
14 SHARE THE REVENUES THAT WERE CREATED BY SIX OR SEVEN PLAYERS
15 WITH 2,000.

16 BY THE SAME TOKEN, THE NFL PLAYERS' UNION, THE ACTIVE
17 PLAYERS' UNION WOULD NEVER AGREE TO SHARE ITS REVENUES WITH
18 13,000 RETIRED PLAYERS. YOU KNOW, THAT IS TO SAY THERE'S LESS
19 THAN 2,000 ACTIVE PLAYERS.

20 THEY HAVE CREATED A UNION WITH EXCLUSIVE RIGHTS TO
21 LICENSE THEIR STUFF. IF 2,000 PLAYERS THAT ARE ACTIVE VERSUS
22 13,000 THAT AREN'T, IF YOU BUNDLED IT ALL TOGETHER AND SAID YOU
23 HAD TO TAKE IT ALL OR NOTHING, ALMOST ALL THE MONEY WOULD GO TO
24 RETIRED PLAYERS, AND THE UNION WOULD JUST FOLD. IT WOULD JUST
25 NO LONGER BE IN THE LICENSING BUSINESS BECAUSE THE PLAYERS

1 WOULDND'T STAND FOR IT.

2 **Q.** PROFESSOR NOLL, YOU GOT ASKED SOME QUESTIONS ABOUT AD HOC
3 LICENSING AND THE -- VERSUS -- I THINK THEY CALLED IT "SHARED
4 VERSUS UNSHARED LICENSING."

5 DO YOU REMEMBER THOSE QUESTIONS?

6 **A.** I DO.

7 **Q.** OKAY. NOW, FOR THE ACTIVE PLAYERS, ARE YOU FAMILIAR WITH
8 THE 35-AND-UNDER RULE?

9 **A.** YES.

10 **Q.** OKAY. AND WHEN YOU EXPLAIN -- WHEN PLAYERS INC LICENSES
11 35 OR FEWER ACTIVE PLAYERS, IS THAT MONEY SHARED WITH ALL THE
12 ACTIVE PLAYERS OR SOME PARTICULAR GROUP; DO YOU KNOW?

13 **A.** IT'S JUST -- NO, IT'S NOT SHARED WITH EVERYONE.

14 **Q.** WHO IS IT SHARED WITH?

15 **A.** JUST THE GUYS WHO GET LICENSED. YOU CAN GET GROUP
16 LICENSES FROM PLAYERS INC FOR ANY NUMBER OF ACTIVE PLAYERS YOU
17 WANT. AND THERE'S TWO PARTS TO THE STORY.

18 THE FIRST PART IS TYPICALLY THESE LICENSES THAT ARE
19 FOR A SUBSET ARE A FAIRLY SMALL SUBSET, AND THEY ARE LIMITED TO
20 THE PEOPLE IN THAT GROUP.

21 SECONDLY, THE PAYOUTS, EVEN WITHIN THAT SUBSET, DON'T
22 HAVE TO BE EQUAL. IN FACT, MOST OF THEM AREN'T. THEY PAY
23 DIFFERENT AMOUNTS TO DIFFERENT PLAYERS.

24 **Q.** AND TALKING ABOUT THE GROSS LICENSING REVENUE POOL YOU
25 WERE ASKED ABOUT, THAT IS SHARED TO ELIGIBLE ACTIVE PLAYERS?

1 **A.** THAT'S SHARED AMONG THE ELIGIBLE ACTIVE PLAYERS.

2 **Q.** DO YOU KNOW, IS THERE ANY RETIRED PLAYER LICENSING MONEY
3 AT ALL IN THAT GLR POOL?

4 **A.** NOT THAT I'M AWARE OF.

5 **Q.** YOU ALSO GOT ASKED ABOUT WHETHER YOU DID ANY REAL WORLD
6 ANALYSIS, OKAY?

7 LET'S TAKE A LOOK AT TRIAL EXHIBIT 2397, IF WE CAN.

8 **MR. KESSLER:** I DON'T KNOW. WE HAVE A TECHNICAL
9 PROBLEM TODAY, SO USE THE ELMO. THAT'S WHY WE HAVE IT.

10 (DOCUMENT DISPLAYED.)

11 **BY MR. KESSLER:**

12 **Q.** REMIND THE JURY WHAT DATA THIS EXAMINES.

13 **A.** THIS IS THE ACTUAL LICENSING REVENUES TO RETIRED PLAYERS
14 BY PLAYERS INC. A DISTRIBUTION OF THE PAYOUT, ACCORDING TO HOW
15 MUCH MONEY EACH RETIRED PLAYER WAS PAID, AMONG THOSE WHO SIGNED
16 A GLA.

17 **Q.** OKAY.

18 **A.** NOW, THAT'S ONLY ABOUT A QUARTER OF THE TOTAL AMOUNT OF
19 MONEY THAT WENT TO RETIRED PLAYERS, BUT THAT'S FROM AMONG THOSE
20 THAT SIGNED A GLA.

21 **Q.** OKAY. NOW, IS THIS THEORETICAL EVIDENCE OR REAL WORLD
22 EVIDENCE?

23 **A.** WELL, THAT'S REAL TRANSACTIONS. I MEAN, THOSE ARE ACTUAL,
24 HONEST-TO-PETE LICENSES. THAT'S MONEY THAT WAS ACTUALLY PAID
25 TO THE PLAYERS ON THE BASIS OF REAL LICENSES, REAL

1 TRANSACTIONS.

2 **Q.** AND WHAT ECONOMIC CONCLUSIONS DID YOU DRAW ABOUT THE VALUE
3 OF THOSE RETIRED PLAYERS WHO SIGNED GLA'S FROM THIS REAL WORLD
4 EVIDENCE?

5 **A.** THAT THE VAST MAJORITY OF THEM HAVE NO MARKET VALUE. NO
6 ONE WANTS TO PAY ANYTHING FOR THEIR LICENSE, TO LICENSE THEIR
7 IMAGE.

8 **MR. KESSLER:** THANK YOU, PROFESSOR NOLL. I HAVE NO
9 FURTHER QUESTIONS.

10 **THE WITNESS:** OKAY.

11 **THE COURT:** ANYTHING MORE?

12 **MR. HUMMEL:** YES, YOUR HONOR.

13 **THE COURT:** GO AHEAD.

14 **MR. HUMMEL:** THANK YOU VERY MUCH, YOUR HONOR.

15 **REXCROSS EXAMINATION**

16 **BY MR. HUMMEL:**

17 **Q.** GOOD MORNING, DR. NOLL.

18 **A.** GOOD MORNING.

19 **Q.** LET'S CLEAR UP ONE THING IN TERMS OF THE TIMING RIGHT NOW,
20 BECAUSE I WANT TO BE VERY CLEAR AS TO WHAT YOU WERE ASKED TO DO
21 IN THIS CASE AND WHAT YOU -- WHAT YOU WERE LOOKING AT.

22 YOUR ASSIGNMENT WAS TO STUDY, AND THEN, I GUESS, TO
23 CRITIQUE, IF THERE WAS ANY CRITIQUE APPROPRIATE, PROFESSOR
24 RASCHER'S REPORT; IS THAT RIGHT?

25 **A.** WELL, IN PART. IT WAS ALSO THE -- THE ASPECT OF

1 MR. ROWLEY'S REPORT TO THE DEGREE IT WAS LINKED TO
2 DR. RASCHER'S REPORT.

3 **Q.** ALL RIGHT.

4 **A.** THE LINKAGE BETWEEN THE TWO.

5 **Q.** OKAY. BUT LET'S FOCUS ON PROFESSOR RASCHER'S REPORT,
6 OKAY?

7 AND ISN'T IT TRUE, SIR, THAT IN DR. RASCHER'S REPORT
8 THERE WAS AN OPINION THAT THERE WAS SUBSTANTIAL VALUE FOR
9 LICENSING REVENUES TO THE GLA CLASS BASED ON THE EXISTENCE OF
10 THE MADDEN GAME WHICH INCLUDED HISTORIC TEAMS?

11 **A.** YES. HE -- HE SAID "TEAMS," AND I THOUGHT WHAT HE MEANT
12 BY THAT WAS TEAM IMAGES. BUT IT TURNS OUT THAT'S NOT WHAT HE
13 MEANT. WHAT HE MEANT IS JUST THE TEAM PART OF THE LICENSE.

14 **Q.** SO WHEN MR. KESSLER GOT UP HERE YESTERDAY AND SAID, WELL,
15 THIS WAS SOME NEW ISSUE IN THE CASE THAT YOU DIDN'T KNOW ABOUT,
16 THIS MADDEN GAME, THIS MADDEN FOOTBALL GAME, IN FACT, THAT
17 ISSUE, WHETHER THE MADDEN FOOTBALL GAME BY ELECTRONIC ARTS USES
18 RETIRED PLAYERS IN THE GAME WHICH INDICATES THAT THERE IS VALUE
19 TO EA IN HAVING RETIRED PLAYERS IN THE GAME, YOU KNEW THAT WAS
20 IN DR. RASCHER'S REPORT, RIGHT?

21 **MR. KESSLER:** YOUR HONOR, I OBJECT. MISSTATES -- MY
22 QUESTION WAS ABOUT SCRAMBLING. THIS HAS NOTHING TO DO WITH
23 SCRAMBLING. SO HE MISSTATED MY QUESTION. IT'S AN IMPROPER
24 QUESTION.

25 **THE COURT:** I DON'T REMEMBER THE EXACT WORDING OF THE

1 QUESTION. THE JURY, I'M SURE, WILL. AND YOU WILL HAVE TO TAKE
2 INTO ACCOUNT ANY DISCREPANCIES, IF YOU THINK THEY EXIST,
3 SUBJECT TO THAT.

4 THE OBJECTION IS OVERRULED. THE WITNESS WILL ANSWER.

5 **THE WITNESS:** I THOUGHT THE ISSUE IN DR. RASCHER'S
6 REPORT, WHEN I READ IT, WAS THAT THERE WERE TEAMS, HISTORICAL
7 TEAMS IN THE MADDEN GAME IN WHICH THE IMAGES OF ALL THE MEMBERS
8 OF THAT TEAM WERE PRESENT.

9 AND THEN, I INVESTIGATED THE LICENSES, AND I
10 DISCOVERED IT WASN'T TRUE. SO THAT PARAGRAPH REFERS TO
11 LICENSES FOR TEAMS FROM THE NFL, NOT TO LICENSES OF THE IMAGES
12 OF ALL THE PLAYERS ON THOSE TEAMS.

13 **BY MR. HUMMEL:**

14 **Q.** DO YOU REMEMBER WHAT IT SAYS IN THE PARAGRAPH, SIR?

15 **A.** YES. YOU JUST READ IT TO ME. IT SAYS ABOUT TEAM -- THE
16 PRESENCE OF TEAMS IN THE MADDEN GAME, HISTORICAL TEAMS,
17 INDICATES A POSITIVE VALUE FOR RETIRED PLAYERS, IN GENERAL.
18 ALL RIGHT?

19 AND I DO NOT BELIEVE THAT A LICENSE FOR A TEAM LOGO
20 AS OPPOSED TO THE INDIVIDUAL IMAGES PROVES THAT THE INDIVIDUAL
21 IMAGES HAVE MARKET VALUE.

22 **Q.** ACTUALLY, SIR, THE PARAGRAPH I READ JUST DOESN'T HAVE THE
23 WORD "TEAM" IN IT AT ALL.

24 CAN I SHOW IT TO YOU --

25 **A.** SURE.

1 Q. -- TO REFRESH YOUR RECOLLECTION?

2 A. SURE.

3 MR. HUMMEL: SO I'M SHOWING HIM IN THE RASCHER
4 REPORT, PAGE 5, LINES 2 THROUGH 4.

5 Q. AND COULD YOU READ WHAT I'VE UNDERLINED TO REFRESH YOUR
6 RECOLLECTION, TO THE JURY, PLEASE?

7 A. YOU WANT ME TO READ THE WHOLE THING?

8 Q. NO, JUST WHAT I'VE UNDERLINED, AND SEE IF IT REFRESHES
9 YOUR RECOLLECTION.

10 A. YOU WANT ME TO READ IT OUT LOUD?

11 Q. YES, PLEASE.

12 A. DO YOU WANT ME TO OR NOT?

13 Q. PLEASE READ WHAT I'VE UNDERLINED TO THE JURY.

14 A. YOU HAVEN'T UNDERLINED ANYTHING. YOU PUT A BRACKET AROUND
15 SOMETHING.

16 "SEE FIRST WAVE OF" --

17 Q. NO. NO.

18 MR. HUMMEL: I'M SORRY, YOUR HONOR.

19 BY MR. HUMMEL:

20 Q. I'VE UNDERLINED IT.

21 A. OH, UP HERE.

22 Q. YES, IN THE TEXT OF THE REPORT.

23 A. I WAS READING THE FOOTNOTE TO THAT.

24 "IN THE MADDEN FOOTBALL GAME BY ELECTRONIC ARTS
25 IT IS POSSIBLE TO USE RETIRED PLAYERS IN THE GAME, WHICH

1 INDICATES THAT THERE IS VALUE TO EA IN HAVING THE RETIRED
2 PLAYERS IN THE GAME."

3 OKAY? SO THAT IS ACTUALLY ABOUT ANOTHER FEATURE OF
4 THE GAME, YES.

5 **Q.** AND YOU DIDN'T LOOK AT THAT FEATURE, RIGHT?

6 **A.** NO, THAT'S NOT TRUE, BECAUSE YOU WERE ASKING ME ABOUT
7 TEAMS. THE QUESTIONS YOU WERE ASKING ME, BOTH IN MY DEPOSITION
8 AND IN MY CROSS EXAMINATION, WERE ABOUT TEAMS, HISTORICAL
9 TEAMS.

10 **Q.** OKAY. WELL, THE JURY HAS THE TESTIMONY. THEY'LL READ IT.
11 THEY'LL DECIDE.

12 **MR. KESSLER:** OBJECTION. MOVE TO STRIKE COUNSEL'S
13 NON-QUESTION ARGUMENT.

14 **BY MR. HUMMEL:**

15 **Q.** THE TRUTH IS, SIR --

16 **MR. KESSLER:** COUNSEL'S --

17 **THE COURT:** PLEASE. THAT'S JUST ARGUMENT.

18 **MR. HUMMEL:** YOU'RE RIGHT.

19 **BY MR. HUMMEL:**

20 **Q.** THE TRUTH IS, SIR, WHEN YOU GAVE YOUR DEPOSITION IN THIS
21 CASE YOU HAD NO IDEA THAT THE MADDEN EA GAME HAD HISTORIC TEAMS
22 IN IT, CORRECT?

23 **A.** I DID NOT KNOW HOW MANY THERE WERE AND WHAT THEIR -- AND
24 WHAT IT WAS. I KNEW THERE WERE NOT IMAGES OF ENTIRE TEAMS OF
25 HISTORICAL NATURE IN THE MADDEN GAME. ALL RIGHT? THAT'S WHAT

1 I KNEW.

2 YOU KNOW, I DID NOT KNOW HOW MANY TEAMS WERE
3 LICENSED, NO. I KNEW THERE WERE RETIRED PLAYERS, AS I TOLD YOU
4 IN MY DEPOSITION, AND I KNEW THAT THERE WERE SOME HISTORICAL
5 TEAMS LICENSED AS TEAMS.

6 AND I ALSO KNEW THAT NO HISTORICAL TEAM HAD THE
7 IMAGES OF ALL THE PLAYERS ON THAT TEAM.

8 **Q.** AND ISN'T IT TRUE, SIR, THAT BECAUSE YOU DIDN'T KNOW THAT
9 THE MADDEN GAME HAD HISTORIC TEAMS, THAT YOU CANDIDLY ADMITTED
10 IN YOUR DEPOSITION THAT IF SUCH A GAME EXISTED, THAT WOULD
11 PROVIDE A SIGNIFICANT SOURCE OF REVENUE FOR THE RETIRED CLASS
12 MEMBERS?

13 **A.** I AGREED. IF A GAME EXISTED THAT HAD THE IMAGES OF ALL
14 THE PLAYERS THAT WERE HISTORICAL TEAMS ON IT, THEY WOULD HAVE
15 TO PAY A LICENSE FEE FOR THAT, AND THE RETIRED PLAYERS WOULD
16 GET THAT, YES.

17 **Q.** ALL RIGHT. NOW, LET'S MOVE ON.

18 MR. KESSLER ASKED YOU IF YOU'VE SEEN ANY EVIDENCE, IN
19 HIS REDIRECT, IF YOU HAVE SEEN ANY EVIDENCE IN THIS CASE THAT
20 ANY LICENSEE WAS INTERESTED IN LICENSING THE ENTIRE GLA GROUP
21 OF RETIRED PLAYERS.

22 DO YOU RECALL THAT?

23 **A.** YES.

24 **Q.** ALL RIGHT. AND YOU SAID THAT, "NO," YOU'VE SEEN NO SUCH
25 EVIDENCE, CORRECT?

1 **A.** I HAVEN'T SEEN ANY SUCH EVIDENCE.

2 **Q.** NOW, SIR, HAVE YOU SEEN ANY EVIDENCE THAT LICENSEES WERE
3 INTERESTED IN LICENSING SIX OR MORE PRESENT OR FORMER PLAYERS?

4 **A.** OF COURSE.

5 **Q.** RIGHT. AND, IN FACT, ISN'T EVERY SINGLE LICENSE IN THIS
6 CASE PROOF POSITIVE --

7 **MR. HUMMEL:** STANDING UP?

8 **BY MR. HUMMEL:**

9 **Q.** ISN'T EVERY SINGLE LICENSE IN THIS CASE EVIDENCE OF A
10 SIGNIFICANT ECONOMIC DEMAND FOR A GROUP THAT INCLUDES SIX OR
11 MORE PRESENT OR FORMER PLAYERS?

12 **A.** OF COURSE, YES. THERE'S SIGNIFICANT DEMAND FOR GROUP
13 LICENSES OR ELSE PLAYERS INC WOULDN'T EXIST.

14 **Q.** YOU ADMIT THAT, THAT EVERY SINGLE LICENSE IN THIS CASE IS
15 ECONOMIC EVIDENCE THAT THERE IS SIGNIFICANT DEMAND FOR GROUPS
16 OF SIX OR MORE ACTIVE OR RETIRED PLAYERS?

17 **A.** YES.

18 **Q.** HA, OKAY.

19 NOW, IF A LICENSEE FROM THE YEARS 2003 TO 2008
20 DESIRED A GROUP LICENSE THAT INCLUDED ALL PRESENT PLAYERS AND
21 SOME FORMER RETIRED PLAYERS, THAT LICENSEE HAD NO CHOICE, NO
22 VIABLE ECONOMIC ALTERNATIVE, BUT TO DEAL WITH PLAYERS INC;
23 ISN'T THAT TRUE?

24 **MR. KESSLER:** OBJECTION, YOUR HONOR. AND THIS IS
25 GETTING INTO EXACTLY THE SUBJECT WE DISCUSSED BEFORE THE JURY

1 CAME IN.

2 **MR. HUMMEL:** NOT AT ALL, YOUR HONOR.

3 **THE COURT:** OVERRULED.

4 PLEASE ANSWER.

5 **THE WITNESS:** MY UNDERSTANDING OF THE LICENSES IS
6 THAT FOR THE SAME PRODUCT, IF IT'S GOING TO BE THE SAME
7 PRODUCT, THEN PLAYERS INC IS -- HAS THE RIGHT TO BE THE
8 LICENSEE FOR ALL, BOTH ACTIVE AND RETIRED PLAYERS WHO ARE PART
9 OF THAT PRODUCT. THAT'S MY UNDERSTANDING OF THE NATURE OF THE
10 LICENSE.

11 **BY MR. HUMMEL:**

12 **Q.** OKAY. BUT THAT WASN'T MY QUESTION.

13 **A.** OKAY. WELL, THEN, I DON'T KNOW WHAT YOUR QUESTION --

14 **Q.** LET'S ASSUME HYPOTHETICALLY THAT A LICENSEE WANTS TO
15 LICENSE ALL ACTIVE PLAYERS, AND THEY ALSO WANT RETIRED PLAYERS,
16 OKAY?

17 DO YOU HAVE MY HYPOTHETICAL IN MIND?

18 **A.** OKAY.

19 **Q.** ALL RIGHT. BETWEEN 2003 AND 2008, DID THE LICENSEE HAVE
20 ANY CHOICE OF WHERE TO GO TO GET THAT SORT OF DEAL, OTHER THAN
21 TO THE DEFENDANTS?

22 **A.** I DON'T KNOW HOW TO ANSWER IT OTHER THAN TO SAY IF IT'S
23 FOR THE SAME PRODUCT THEY DON'T HAVE A CHOICE. IF IT'S FOR
24 MULTIPLE PRODUCTS, THEY DO HAVE A CHOICE.

25 **Q.** WHAT WAS THEIR CHOICE? IF THEY WANTED A LICENSE FOR ALL

1 ACTIVE PLAYERS, WHERE WOULD THEY GO?

2 **A.** THEY WOULD GET THE ACTIVE PLAYERS FROM PLAYERS INC, BUT
3 THEY WOULDN'T NECESSARILY GET THE RETIRED PLAYERS FROM PLAYERS
4 INC UNLESS IT WAS GOING TO BE PART OF THE SAME PRODUCT.

5 **Q.** YOU'RE MISSING MY POINT. THEY WANT A LICENSE FOR ALL
6 ACTIVES AND SOME RETIRED. WHERE DO THEY GO? THEY WANT THAT
7 LICENSE, THAT GROUP LICENSE. WHERE DO THEY GO OTHER THAN
8 PLAYERS INC?

9 **A.** THEY COULD ONLY GET ACTIVE PLAYERS FROM PLAYERS INC.

10 **Q.** SO THEY HAVE NO CHOICE, RIGHT?

11 **A.** NO CHOICE ON THE ACTIVE PLAYERS AT ALL.

12 **Q.** ALL RIGHT. NOW, SIR, HAVE YOU HEARD OF A COMPANY CALLED
13 "TAKE TWO"?

14 **A.** I HAVE HEARD OF TAKE TWO.

15 **Q.** YOU HAVE HEARD OF THEM? WHAT DO THEY DO?

16 **A.** THEY ARE A COMPETITOR TO EA. THEY MAKE COMPUTER GAMES.

17 **Q.** ARE YOU AWARE, SIR, IN YOUR STUDY -- I THINK IN CONNECTION
18 WITH YOUR REPORT YOU REVIEWED THE AFFIDAVIT OF ANDREW FEFFER,
19 RIGHT?

20 **MR. KESSLER:** YOUR HONOR, EXCEEDS THE SCOPE OF THE
21 REDIRECT EXAMINATION LATE TODAY OR YESTERDAY.

22 **MR. HUMMEL:** ALL THIS HAS TO DO WITH HIS OPINION,
23 WHICH WAS BROUGHT OUT ON REDIRECT, THAT THERE WAS NO DEMAND FOR
24 RETIRED PLAYERS, RETIRED GROUP LICENSES.

25 **MR. KESSLER:** I DON'T THINK --

1 **THE COURT:** OVERRULED.

2 **MR. HUMMEL:** THANK YOU, YOUR HONOR.

3 **BY MR. HUMMEL:**

4 **Q.** NOW, YOU'VE HEARD OF THIS COMPANY CALLED "TAKE TWO"?

5 **A.** IT'S IN MY REPORT. I WROTE ABOUT IT IN MY REPORT.

6 **Q.** OKAY, GOOD. SO YOU'RE AWARE -- AND WE TALKED ABOUT IT IN
7 YOUR CROSS -- LET ME SET THIS UP SO THE JURY UNDERSTANDS WHERE
8 I AM.

9 ELECTRONIC ARTS, EA, ENTERED INTO AN EXCLUSIVE
10 LICENSE WITH PLAYERS INC IN 2004, CORRECT?

11 **A.** YES, EXCLUSIVE IN THE SENSE THAT THE FOOTBALL GAME, THE
12 MADDEN GAME, WOULD ONLY HAVE IMAGES IN IT THAT WERE LICENSED
13 THROUGH PLAYERS INC.

14 **Q.** AND THAT EXCLUSIVE LICENSE REPRESENTED A DYNAMIC CHANGE IN
15 THE MARKET. IN OTHER WORDS, IT TOOK -- THIS IS HARD TO SAY --
16 IT TOOK TAKE TWO OUT OF THE MARKET FOR A COMPETING VIDEO GAME
17 THAT INCLUDED ACTIVE PLAYERS, CORRECT?

18 **A.** IT TOOK EVERYBODY OUT OF THE MARKET WHO WANTED TO DO THAT,
19 YES.

20 **Q.** RIGHT. AND TAKE TWO FOUGHT BACK, RIGHT?

21 **A.** THAT'S -- WELL, "FOUGHT" IS A STRANGE WORD. THEY CREATED
22 THEIR OWN PRODUCT TO COMPETE WITH EA.

23 **Q.** WELL, YOU'VE READ THE PRESS, HAVE YOU NOT, ABOUT THIS
24 WHOLE SCENARIO?

25 **A.** I HAVE READ THE PRESS. I'M JUST SAYING I WOULDN'T AS AN

1 ECONOMIST USE THE WORD "FOUGHT." BUT THAT'S OKAY.

2 **Q.** FAIR ENOUGH.

3 **A.** YEAH.

4 **Q.** THEY ARE A COMPETITOR. HOW ABOUT THIS: THEY WANTED TO
5 TAKE -- THEY THOUGHT ABOUT HOW TO MAKE A COMPETITIVE REACTION.
6 THAT'S AN ECONOMIC TERM, RIGHT?

7 **A.** YES. THEY FIGURED OUT A WAY TO ENTER THE FOOTBALL GAME
8 MARKET DESPITE THE EXCLUSIVE LICENSE.

9 **Q.** LET'S SET THE TIME FOR THE JURY. THE EXCLUSIVE'S IN 2004.
10 WHEN WAS TAKE TWO ABLE TO COME BACK IN THE MARKET?

11 **A.** JULY, 2007.

12 **Q.** '07. '07. THREE YEARS, RIGHT?

13 **A.** THAT'S CORRECT.

14 **Q.** NOW, THE WAY THEY CAME BACK INTO THE MARKET WAS TO OFFER A
15 GAME THAT INCLUDED ONLY WHAT?

16 **A.** 240 RETIRED PLAYERS, SUPERSTAR RETIRED PLAYERS.

17 **Q.** RETIRED PLAYERS, RIGHT?

18 **A.** YES.

19 **Q.** OKAY. SO HERE'S MY QUESTION: DURING THAT THREE-YEAR
20 PERIOD WHEN TAKE TWO IS THINKING ABOUT A COMPETITIVE REACTION,
21 WHAT, IF ANYTHING, PREVENTED THESE DEFENDANTS FROM GOING TO
22 TAKE TWO AND SAYING:

23 "WE'VE GOT 2100 RETIRED PLAYERS UNDER GLA'S.
24 THAT'S A HECK OF A COMPETITIVE OPTION FOR YOU. WHY DON'T YOU
25 TAKE THESE GUYS?"

1 **MR. KESSLER:** YOUR HONOR, I'M GOING TO OBJECT.
2 THERE'S NO EVIDENCE IN THE RECORD ABOUT THIS THAT THE
3 PLAINTIFFS HAVE PRESENTED AT ALL, ABOUT THIS SUBJECT OF TAKE
4 TWO. SO WE HAVE A HYPOTHETICAL AND NO FOUNDATION TO ANYTHING.

5 **THE COURT:** OVERRULED.

6 PLEASE ANSWER.

7 **THE WITNESS:** NOTHING PREVENTED TAKE TWO FROM GOING
8 TO PLAYERS INC AND -- AS FAR AS I KNOW.

9 **BY MR. HUMMEL:**

10 **Q.** DIFFERENT QUESTION. WHAT PREVENTED PLAYERS INC. FROM
11 GOING TO TAKE TWO?

12 **A.** NOTHING.

13 **Q.** NOTHING. FOR A THREE-YEAR PERIOD THAT A COMPETITOR IS
14 FOISTING AROUND FOR A WAY TO GET BACK IN THE MARKET. THEY
15 ULTIMATELY DECIDED TO DO IT WITH RETIRED PLAYERS, BUT NOTHING
16 PREVENTED THEM IN THE INTERIM FROM DOING THAT, RIGHT? "THEM"
17 BEING THE DEFENDANTS.

18 **A.** THE PLAYERS THEY HAD TO OFFER WEREN'T, FOR THE MOST PART,
19 THE PLAYERS THAT TAKE TWO USED.

20 **Q.** YOU DON'T KNOW THAT.

21 **A.** I DO KNOW THAT BECAUSE THE GLA'S -- I KNOW WHO THE GLA'S
22 ARE. AND MOST OF THE TOP STARS OF RETIRED PLAYERS HAVE NOT
23 SIGNED GLA'S.

24 **Q.** HOW MANY GLA'S SIGNATORIES ARE IN THE GROUP THAT TAKE TWO
25 TOOK?

1 **A.** I DON'T KNOW WHAT THE NUMBER IS, BUT I DO KNOW THAT THE
2 FAMOUS STAR PLAYERS, FOR THE MOST PART, HAVEN'T SIGNED GLA'S.

3 **Q.** MORE THAN SIX, RIGHT?

4 **A.** OH, YEAH. YOU COULD HAVE GOTTEN A GROUP LICENSE FOR SOME
5 OF THEM THROUGH PLAYERS INC, YES, BUT YOU COULDN'T HAVE GOTTEN
6 ALL 240 UNLESS PLAYERS INC HAD, IN FACT, NEGOTIATED SOME SORT
7 OF ARRANGEMENT WITH THOSE PLAYERS, JUST LIKE TAKE TWO DID.

8 **Q.** OKAY. NOW, WITH RESPECT TO EA, YOU TESTIFIED YESTERDAY
9 THAT IT WAS EA'S DECISION TO LICENSE ALL THE CURRENT PLAYERS IN
10 THE MADDEN GAME AND ONLY SELECT CERTAIN STAR RETIRED PLAYERS;
11 THAT'S WHAT YOU SAID, RIGHT?

12 **A.** THAT'S WHAT THE TESTIMONY OF -- I FORGET HIS NAME -- THE
13 MAN FROM EA IS.

14 **Q.** AND YOU SAID YESTERDAY THAT IN YOUR VIEW THAT WAS A
15 BUSINESS DECISION BY EA, AND THAT YOU, AS AN ECONOMIST,
16 UNDERSTOOD THE REASON FOR IT, RIGHT?

17 **A.** YES. I MEAN, I UNDERSTAND WHY HE DID IT, YES.

18 **Q.** OKAY. WELL, HAVE YOU REVIEWED DOCUMENTS IN THE CASE WHICH
19 SHOW THAT IT WAS EA'S PERSONNEL'S BELIEF THAT EA -- EXCUSE
20 ME -- THAT PLAYERS INC DID NOT WANT EA TO INCLUDE ANY RETIRED
21 PLAYERS IN THE GAME?

22 **MR. KESSLER:** OBJECTION, YOUR HONOR. MISSTATES FACTS
23 IN EVIDENCE. THIS IS THE TESTIMONY CONCERNING THE --
24 CONCERNING THE SCRAMBLING ISSUE. HAS NOTHING TO DO WITH THIS.

25 AND I THINK HE'S PRESENTED AN INCOMPLETE SET OF

1 FACTS. THERE'S NO BASIS FOR THE QUESTION.

2 MR. HUMMEL: I HAVE THE E-MAIL IN MY HAND. I'M HAPPY
3 TO --

4 (COUNSEL SPEAKING SIMULTANEOUSLY; NOT REPORTABLE.)

5 MR. KESSLER: -- HYPOTHETICAL YOUR HONOR.

6 MR. HUMMEL: HAS NOTHING TO DO WITH SCRAMBLING.

7 THE COURT: THIS IS SOMETHING -- WE'VE GONE OVER
8 THIS, AND I'VE TOLD YOU WHICH PARTS ARE ADMISSIBLE AND NOT.

9 MR. HUMMEL: RIGHT.

10 THE COURT: AND DO NOT -- DO NOT GET INTO ANYTHING
11 THAT THE COURT HAS RULED OUT OF EVIDENCE.

12 MR. HUMMEL: ABSOLUTELY NOT, YOUR HONOR. ABSOLUTELY
13 NOT.

14 THE COURT: ALL RIGHT.

15 MR. KESSLER: AND, YOUR HONOR, HE IS.

16 MR. HUMMEL: NO, I'M NOT. OKAY. COULD YOU PUT THE
17 FIRST PAGE OF --

18 THE COURT: THE PART THAT WAS ALREADY SHOWN TO THE
19 JURY, THAT -- IS THIS THAT E-MAIL CHAIN WE SHOWED TO THE JURY?

20 MR. HUMMEL: YES, IN REDACTED FORM, CONSISTENT WITH
21 THE COURT'S ORDER.

22 THE COURT: DON'T GET INTO ANYTHING THAT WAS
23 REDACTED.

24 MR. HUMMEL: ABSOLUTELY NOT.

25 THE COURT: IT WAS INADMISSIBLE.

1 **MR. HUMMEL:** RIGHT.

2 **BY MR. HUMMEL:**

3 **Q.** SO LET'S GO TO THE THIRD PAGE OF THIS DOCUMENT, SIR, AND
4 I'M GOING TO ASK YOU IF YOU CONSIDERED THIS IN FORMULATING YOUR
5 OPINION THAT IT WAS EA THAT MADE THE DECISION.

6 **MR. HUMMEL:** NOW, COULD YOU HIGHLIGHT, PLEASE --
7 (DOCUMENT DISPLAYED.)

8 **THE WITNESS:** I CAN'T READ THAT FROM HERE. I'M
9 SORRY.

10 **BY MR. HUMMEL:**

11 **Q.** I UNDERSTAND. I'LL HAND IT TO YOU.

12 **MR. HUMMEL:** COULD YOU HIGHLIGHT, PLEASE, THIS
13 PARAGRAPH, AND HIGHLIGHT THE SECOND SENTENCE (INDICATING).
14 (DOCUMENT DISPLAYED.)

15 **BY MR. HUMMEL:**

16 **Q.** DO YOU KNOW WHO JEREMY STRAUSSER IS, SIR?

17 **A.** I DON'T RECALL, NO. THE NAME IS FAMILIAR, BUT I WOULDN'T
18 WANT TO TESTIFY AS TO WHAT HE IS.

19 **Q.** DO YOU KNOW HIM TO BE AN EA EMPLOYEE?

20 **A.** I DON'T REMEMBER WHO HE IS.

21 **Q.** YOU DIDN'T INTERVIEW EA EMPLOYEES, SO YOU PROBABLY DIDN'T
22 TALK TO JEREMY STRAUSSER, RIGHT?

23 **A.** I DIDN'T INTERVIEW ANYBODY. I READ DEPOSITIONS, AND I
24 READ E-MAILS AND THINGS LIKE THAT, DOCUMENTS. I DIDN'T
25 INTERVIEW ANYBODY.

1 Q. NOW, THE PREMISE OF YOUR ENTIRE OPINION ON EA WAS THAT EA
2 DIDN'T WANT RETIRED PLAYERS IN THE GAME THAT THEY DIDN'T HAVE A
3 LICENSE TO, RIGHT?

4 BUT HERE, SIR, DID YOU CONSIDER --

5 **THE COURT:** WAIT, WAIT, WAIT. ARE YOU ASKING THAT,
6 OR ARE YOU NOW SAYING THAT?

7 **MR. HUMMEL:** I'LL WITHDRAW THAT, YOUR HONOR.

8 **THE COURT:** A PRELIMINARY QUESTION WOULD BE DID HE,
9 IN PREPARING HIS OPINIONS, REVIEW THE E-MAIL YOU HAVE ON THE
10 SCREEN.

11 **MR. HUMMEL:** RIGHT. THAT'S WHAT I WAS GOING TO ASK.

12 **THE COURT:** WHY DON'T YOU ASK THAT QUESTION?

13 **MR. HUMMEL:** I WILL.

14 **BY MR. HUMMEL:**

15 Q. DR. NOLL, IN CONNECTION WITH FORMULATING YOUR OPINIONS
16 ABOUT EA, DID YOU CONSIDER JEREMY STRAUSSER'S E-MAILS IN WHICH
17 HE WROTE:

18 "I KNOW PLAYERS INC DOESN'T WANT US TO INCLUDE
19 ANY 'RETIRED PLAYERS,' QUOTE, IN THE GAME"?

20 A. I'VE SEEN THIS E-MAIL BEFORE, YES. AND I DO NOT THINK
21 THAT MEANS THEY DIDN'T WANT -- I THINK IT'S WITHIN THE CONTEXT,
22 IF THAT'S YOUR INTERPRETATION OF IT, CORRECT. BUT, YES, I'VE
23 SEEN THAT E-MAIL.

24 Q. DOESN'T MEAN WHAT IT SAYS?

25 **MR. HUMMEL:** I HAVE NOTHING FURTHER.

1 **THE WITNESS:** THERE ARE RETIRED PLAYERS IN THE GAME,
2 AND THEY'VE PAID FOR IT. I MEAN --

3 **THE COURT:** ALL RIGHT.

4 **MR. HUMMEL:** NOTHING FURTHER, YOUR HONOR.

5 **THE COURT:** THAT'S ENOUGH. YOU'VE MADE ENOUGH OF AN
6 EXPLANATION.

7 ALL RIGHT.

8 **MR. KESSLER:** I HAVE A LITTLE MORE, YOUR HONOR.

9 **THE COURT:** LOOK. THIS HAS GOT TO COME TO AN END.
10 HOW MUCH DO YOU NEED?

11 **MR. KESSLER:** FIVE MINUTES ON THE NEW THINGS HE PUT
12 UP.

13 **THE COURT:** FIVE MINUTES.

14 **MR. KESSLER:** YES.

15 **FURTHER REDIRECT EXAMINATION**

16 **BY MR. KESSLER:**

17 **Q.** MR. HUMMEL JUST SHOWED YOU AN E-MAIL DOCUMENT WITH -- FROM
18 AN EA INTERNAL DOCUMENT TALKING ABOUT THAT THEY THOUGHT PLAYERS
19 INC DIDN'T WANT THEM TO USE RETIRED PLAYERS.

20 **A.** YES.

21 **Q.** FIRST OF ALL --

22 **THE COURT:** WAIT. THAT E-MAIL WAS TO PLAYERS INC,
23 WASN'T IT?

24 **MR. KESSLER:** YEAH. WELL, THERE'S A CHAIN.
25

1 **BY MR. KESSLER:**

2 **Q.** AND SAID THEY DIDN'T WANT TO USE. THAT WAS A DISCUSSION,
3 WAS IT NOT -- DID YOU LOOK -- DID YOU HAVE A CHANCE TO REVIEW
4 THE DOCUMENT?

5 **A.** HE FLIPPED IT AWAY FROM ME.

6 **MR. KESSLER:** PUT IT UP, PLEASE.

7 **THE WITNESS:** I DON'T HAVE TO IT, SO I HAVE TO READ
8 IT.

9 **MR. HUMMEL:** I HAVE IT.

10 **MR. KESSLER:** WHY DON'T YOU GIVE IT TO THE WITNESS?

11 **BY MR. KESSLER:**

12 **Q.** IS THAT A DISCUSSION, SIR, OF USING HISTORICAL FACTS
13 WITHOUT PLAYER NAMES AND IMAGES?

14 **A.** EXACTLY. THIS IS BASICALLY GETTING AROUND THE REQUIREMENT
15 TO HAVE A LICENSE TO BE ABLE TO USE INFORMATION ABOUT RETIRED
16 PLAYERS WITHOUT LICENSING THEM.

17 **Q.** SO DOES THIS HAVE ANYTHING TO DO WITH PAYING FOR RETIRED
18 PLAYER IMAGES?

19 **A.** IF IT DOES, I CERTAINLY DON'T SEE WHAT IT HAS TO DO WITH
20 IT.

21 **Q.** NOW, DID YOU KNOW THAT MR. LINZNER WAS ASKED AT THIS TRIAL
22 AS FOLLOWS:

23 **"QUESTION:** AND HE WROTE ON BEHALF OF EA,
24 YOUR COMPANY, IN THE SECOND PARAGRAPH: 'I
25 KNOW THAT PLAYERS INC DOESN'T WANT US TO

1 INCLUDE ANY RETIRED PLAYERS IN THE GAME.

2 HOW DID HE KNOW THAT?"

3 AND THE ANSWER FROM MR. LINZNER IS:

4 **"QUESTION:** DID YOU KNOW THAT?

5 **"ANSWER:** THAT'S NOT CORRECT."

6 SO DID YOU KNOW THAT MR. LINZNER SAID THAT IT WASN'T

7 CORRECT?

8 **MR. HUMMEL:** OBJECTION. ARGUMENTATIVE.

9 **THE COURT:** LOOK --

10 **MR. KESSLER:** HE RAISED THIS, YOUR HONOR.

11 **THE COURT:** THIS IS ALL AFTER HE DID HIS REPORT. HOW

12 IS HE SUPPOSED TO KNOW THIS?

13 **MR. KESSLER:** WELL, HE DIDN'T SEE THIS DOCUMENT,

14 EITHER. WHAT MR. HUMMEL DID IS HE PUT BEFORE THE WITNESS --

15 NEVER SHOWED HIM THE DOCUMENT, SAYS SOMETHING HAPPENED. HE

16 KNOWS MR. LINZNER CAME UP TO THIS STAND BEFORE THIS JURY AND

17 SAID IT'S NOT CORRECT. AND HE TRIED TO CONVINCING THE WITNESS

18 THAT SOMETHING HAPPENED THAT HE KNOWS IS FALSE.

19 I THINK I'M ENTITLED TO BRING THAT OUT, YOUR HONOR.

20 **THE COURT:** THERE'S A DIFFERENCE. THE DOCUMENT, THE

21 E-MAIL CHAIN IS IN EVIDENCE AND IS SOMETHING THAT THIS WITNESS

22 REVIEWED PRIOR TO GIVING HIS REPORT. SO IT WAS OKAY FOR

23 MR. HUMMEL TO ASK HIM WHETHER OR NOT THAT SUPPORTED HIS OPINION

24 OR NOT.

25 THAT'S A DIFFERENT QUESTION. IT IS A DIFFERENT

1 QUESTION WHETHER OR NOT MR. HUMMEL'S INTERPRETATION OF THAT
2 DOCUMENT WAS A FAIR ONE OR NOT. THAT'S FOR THE JURY.

3 WHAT YOU'RE GETTING AT IS THE LATTER QUESTION, AND
4 NOT -- YOU'RE JUST ARGUING OVER THE INTERPRETATION OF THIS
5 E-MAIL CHAIN.

6 **MR. KESSLER:** I'M --

7 **THE COURT:** AND YOU STARTED DOWN THAT LINE OF
8 QUESTIONS, AND THAT WAS PROPER. BUT NOW TO GET INTO TRIAL
9 TESTIMONY AND ASK THIS WITNESS, "DID YOU KNOW THAT," WELL, HE
10 DIDN'T KNOW THAT.

11 THE TRIAL HAS HAPPENED AFTER THE REPORT. THERE'S NO
12 WAY ANY EXPERT COULD KNOW WHAT HAPPENED AT THE TRIAL OF OTHER
13 WITNESSES. THIS IS JUST AN OPPORTUNITY FOR ARGUMENT.

14 **MR. KESSLER:** YOUR HONOR, I UNDERSTAND YOUR HONOR'S
15 RULING. BUT MR. HUMMEL KNEW THAT, WHETHER THE WITNESS KNEW IT
16 OR NOT.

17 TWO MORE POINTS, YOUR HONOR.

18 **BY MR. KESSLER:**

19 **Q.** HE ASKED YOU WHETHER A LICENSE FOR SIX OR MORE PRESENT OR
20 FORMER PLAYERS HAD A SIGNIFICANT VALUE. AND YOU SAID "YES,
21 SIR," CORRECT?

22 **A.** WHETHER THE LICENSES DO HAVE VALUE, AND OF COURSE THEY DO.

23 **Q.** WERE YOU TALKING ABOUT ACTIVE PLAYER LICENSING IN THAT
24 ANSWER, RETIRED PLAYER LICENSING? WHAT WERE YOU TALKING ABOUT?

25 **A.** I WAS TALKING ABOUT ANY LICENSE THAT CURRENTLY EXISTS. WE

1 HAVE, YOU KNOW, THIS HUGE STACK OF LICENSES, OF GROUP LICENSES,
2 ALL OF WHICH INVOLVE SIX OR MORE PLAYERS.

3 THAT IS CONCLUSIVE PROOF THAT THERE EXISTS POSITIVE
4 MARKET DEMAND FOR SOME TYPES OF LICENSES. IT DOES NOT MEAN
5 THAT THERE IS POSITIVE MARKET DEMAND FOR ANY CONCEIVABLE
6 COMBINATION OF SIX PLAYERS YOU WANT TO PUT TOGETHER. IT DOES
7 MEAN THAT THERE ARE COMBINATIONS OF SIX OR MORE PLAYERS THAT
8 HAVE POSITIVE MARKET VALUE, SOME OF WHICH INCLUDE RETIRED
9 PLAYERS.

10 **Q.** JUST A COUPLE MORE QUESTIONS.

11 HAVE YOU SEEN ANY EVIDENCE THAT THERE IS ANY ECONOMIC
12 VALUE FOR A LICENSE TO ALL OF THE RETIRED PLAYERS IN THIS CLASS
13 WHO SIGNED THE GLA AS A GROUP?

14 **A.** NO. THERE IS NO SUCH EVIDENCE.

15 **Q.** AND, FINALLY, HE ASKED YOU QUESTIONS ABOUT WHAT WAS IN
16 MR. RASCHER'S REPORT ABOUT THE MADDEN GAME.

17 **A.** YES.

18 **Q.** OKAY. DID THAT HAVE TO DO WITH THE HALL OF FAME FEATURE?
19 DID YOU READ THE FOOTNOTE?

20 **A.** YEAH, THE FOOTNOTE THAT I THOUGHT HE WAS GETTING ME TO
21 READ IS ABOUT THAT, YES. I HAVE -- HE HAS TWO MARKS ON THIS
22 PAGE: ONE UP HERE IN THE TEXT, AND ONE IN THE FOOTNOTE. AND I
23 STARTED TO READ THE FOOTNOTE. THAT'S NOT WHAT HE WANTED.

24 **Q.** WOULD YOU READ THE FOOTNOTE NOW, SIR?

25 **A.** "SEE FIRST WAVE OF MADDEN INVASION HITS AS EA SHIPS MADDEN

1 NFL 2001 FOR THE PLAY STATION. MARKET WIRE AUGUST 2000. THE
2 2007 VERSION OF THE GAME WAS AVAILABLE AS A HALL OF FAME
3 EDITION WHERE GAMERS COULD PLAY AS THEIR FAVORITE HISTORICAL
4 TEAM OR PLAYER."

5 **Q.** WAS THE HALL OF FAME EDITION AN AD HOC LICENSE OF SPECIFIC
6 RETIRED PLAYERS?

7 **MR. HUMMEL:** OBJECTION. FOUNDATION.

8 **BY MR. KESSLER:**

9 **Q.** DO YOU KNOW?

10 **A.** YES.

11 **MR. HUMMEL:** CONCLUSION.

12 **THE COURT:** DO YOU KNOW THAT? IN OTHER WORDS, IS
13 THAT SOMETHING YOU KNOW, OR ARE YOU JUST TAKING COUNSEL'S WORD
14 FOR IT?

15 **THE WITNESS:** IT'S IN MY REPORT, ACTUALLY.

16 **THE COURT:** ALL RIGHT. OVERRULED.

17 YOU MAY ANSWER.

18 **BY MR. KESSLER:**

19 **Q.** EXPLAIN TO THE JURY WHAT WAS THE HALL OF FAME LICENSE WITH
20 RETIRED PLAYERS?

21 **A.** IT WAS PLAYERS INC, AGAIN, BECAUSE PLAYERS INC HAS THIS
22 RIGHT TO APPROVE ANYTHING THAT GOES INTO THE GAME, IN THE
23 MADDEN GAME. IF EA WANTED TO ADD RETIRED PLAYERS IT HAD TO
24 DEAL WITH PLAYERS INC.

25 WHAT IT WANTED TO DO WAS ADD 168 MEMBERS OF THE

1 FOOTBALL HALL OF FAME, ALMOST ALL OF WHICH ARE PLAYERS, A FEW
2 OF WHICH ARE COACHES.

3 AND IN ORDER TO DO THAT, THEY HAD TO GO TO PLAYERS
4 INC. BUT THEN, PLAYERS INC JUST TURNED AROUND AND ACTED AS THE
5 AGENT FOR HALL OF FAME. AND, ACTUALLY, WHAT THEY DID WAS
6 LICENSE IT FROM HALL OF FAME.

7 SO THERE WAS A PAYMENT THAT WENT FROM PLAYERS INC,
8 WENT FROM -- EXCUSE ME, WENT FROM EA TO PLAYERS INC, AND THEN
9 WENT FROM PLAYERS INC TO THE HALL OF FAME FOR \$400,000. AND
10 THEN, THESE 168 PEOPLE WHO ARE IN THE GAME AS HALL OF FAME
11 MEMBERS WERE EACH PAID \$2,000 EACH. THE DIFFERENCE BETWEEN
12 400,000 AND WHAT THEY WERE PAID WAS KEPT BY THE HALL OF FAME.
13 PLAYERS INC KEPT NOTHING.

14 **Q.** AND ONE OF THE PLAYERS WHO GOT THAT MONEY WAS
15 MR. ADDERLEY; DID YOU KNOW?

16 **A.** PARDON?

17 **Q.** DO YOU KNOW IF MR. ADDERLEY WAS ONE OF THE PLAYERS WHO GOT
18 THAT MONEY?

19 **A.** I BELIEVE HE WAS, YES. I THINK HE'S IN THE HALL OF FAME.

20 **Q.** SO JUST TO END THIS -- WILL BE MY LAST QUESTION -- WHEN
21 MR. HUMMEL WAS ASKING YOU ABOUT YOUR DEPOSITION TESTIMONY ABOUT
22 A GAME THAT MIGHT EXIST THAT WOULD USE ALL THE IMAGES OF
23 RETIRED PLAYERS, AND YOU TESTIFIED THAT WOULD HAVE VALUE, HAS
24 SUCH A GAME EVER EXISTED TO YOUR KNOWLEDGE?

25 **A.** NO. THAT WAS THE WHOLE POINT OF THAT TESTIMONY, WAS TO

1 SAY THAT I HAD THOUGHT IT PLAUSIBLE THAT SOMEONE MIGHT BELIEVE
2 THAT A GAME WHERE YOU HAD ALL THE MEMBERS OF THESE HISTORICAL
3 TEAMS AND YOU'D PLAY, YOU KNOW, SOME GREAT DALLAS COWBOYS TEAM
4 WITH A GREAT SAN FRANCISCO 49ERS TEAM OF A COMPLETELY DIFFERENT
5 VINTAGE, I THOUGHT MAYBE THERE WOULD BE A DEMAND FOR THAT.

6 BUT THEN IT TURNS OUT THAT'S NOT WHAT THEY ACTUALLY
7 DID. THAT'S WHAT THAT TESTIMONY WAS ALL ABOUT. THERE REALLY
8 ISN'T ANYBODY OUT THERE WHO'S COLLECTED THE ENTIRE ROSTERS OF
9 HISTORICAL TEAMS AND PUT THEM ON A VIDEO GAME.

10 **Q.** AND HAVE YOU SEEN ANY EVIDENCE OF ANY MARKETPLACE DEMAND
11 FROM LICENSEES FOR SUCH A GAME?

12 **A.** I KNOW OF NO DEMAND. I'VE SEEN NOTHING THAT INDICATES
13 THERE IS SUCH A DEMAND.

14 **Q.** LAST THING ON TAKE TWO, OKAY? IF, IN FACT, IN THE
15 HYPOTHETICAL THE FACT THAT PLAYERS INC GAVE AN EXCLUSIVE ON
16 ACTIVE PLAYERS TO EA, IF THAT STIMULATED TAKE TWO TO DO A
17 RETIRED PLAYER GAME, DID THAT BENEFIT, HURT, HELP? WHAT IMPACT
18 DID IT HAVE ON RETIRED PLAYERS WHO WERE INCLUDED IN THAT GAME?

19 **A.** WELL, IT BENEFITED THE 240 PLAYERS WHO WERE IN THAT GAME,
20 YES.

21 **Q.** WERE THOSE RETIRED PLAYERS OR ACTIVE PLAYERS?

22 **A.** THOSE ARE ALL RETIRED PLAYERS.

23 **MR. KESSLER:** THANK YOU. NO FURTHER QUESTIONS.

24 **MR. HUMMEL:** ONE QUESTION, YOUR HONOR. ONE.

25 **THE COURT:** ALL RIGHT.

FURTHER RECROSS EXAMINATION

1
2 **BY MR. HUMMEL:**

3 **Q.** DR. NOLL, REFERRING TO THE HALL OF FAME, HAVE YOU SEEN ANY
4 EVIDENCE IN THIS CASE THAT WOULD SUGGEST TO YOU THAT PLAYERS
5 INC SOLD OUT HALL OF FAME RETIRED PLAYERS TO CURRY FAVOR WITH
6 EA?

7 **A.** THERE IS -- I -- I HAVE SEEN AN E-MAIL STRING THAT'S IN
8 RESPONSE TO AN ATTEMPT TO EA TO HAVE TO PAY LESS, YES. AND IT
9 HAS AN ARGUMENT BACK: WELL, NO. YOU'RE GETTING A GOOD DEAL,
10 SO YOU SHOULD BE HAPPY TO GET WHAT YOU'RE GETTING.

11 **MR. HUMMEL:** NO FURTHER QUESTIONS.

12 **MR. KESSLER:** I JUST HAVE ONE QUESTION ON THAT, YOUR
13 HONOR.

FURTHER REDIRECT EXAMINATION

14
15 **BY MR. KESSLER:**

16 **Q.** IS THERE ANY EVIDENCE THAT THE EA PAYMENTS WERE BELOW
17 MARKET VALUE IN ANY WAY IN THE HALL OF FAME GAME?

18 **A.** NO. IF THEY WERE BELOW MARKET VALUE, WHY WOULD EA THINK
19 IT PAID TOO MUCH? I MEAN, THEY WERE TRYING TO GET A HUNDRED
20 THOUSAND DOLLARS OFF.

21 **Q.** THEY THOUGHT IT WAS ABOVE OR BELOW MARKET VALUE?

22 **A.** THAT WOULD INDICATE THAT THEY THOUGHT IT WAS ABOVE MARKET
23 VALUE.

24 **MR. KESSLER:** THANK YOU, PROFESSOR NOLL.

25 **THE COURT:** MAY THE PROFESSOR BE EXCUSED NOT SUBJECT

1 TO RECALL?

2 **MR. HUMMEL:** YES, YOUR HONOR.

3 **THE WITNESS:** THANK YOU.

4 **MR. KESSLER:** YES, YOUR HONOR.

5 **THE COURT:** ALL RIGHT. THANK YOU.

6 ALL RIGHT. HOW MUCH LONGER IS -- YOU HAVE ONE MORE
7 WITNESS?

8 **MR. KESSLER:** WE DO. HE IS ABOUT -- HOW LONG IS IT?
9 ABOUT 25 MINUTES, YOUR HONOR.

10 **THE COURT:** ALL RIGHT. WE'RE GETTING CLOSE TO A
11 MILESTONE, AREN'T WE? 25 MORE MINUTES. BUT WE'RE GOING TO
12 TAKE A 15-MINUTE RECESS AT THIS TIME. PLEASE REMEMBER THE
13 ADMONITION.

14 **THE CLERK:** ALL RISE.

15 (THEREUPON, THE JURY LEFT THE COURTROOM.)

16 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
17 OUTSIDE THE PRESENCE OF THE JURY.)

18 **THE COURT:** ANYTHING YOU NEED ME FOR?

19 **MR. KESSLER:** IF YOUR HONOR WILL GET TO THEIR
20 REBUTTAL CASE. I DON'T KNOW IF YOU CAN DO IT IN THIS AMOUNT OF
21 TIME.

22 **THE COURT:** I'M GOING TO TRY TO LOOK AT IT RIGHT NOW.

23 **MR. KESSLER:** AND I WOULD JUST REMIND YOUR HONOR,
24 ONLY BECAUSE YOU CALLED THIS DISTINCTION BEFORE, THEY ARE NOW
25 PROPOUNDING MR. FRISS AS OPPOSED TO WE'RE DOING IT. AND THE

1 REASON I MENTION THAT IS WHEN YOUR HONOR LOOKED AT THIS TWICE
2 YOU SAID IT MADE A DIFFERENCE TO YOU ON THE QUESTION OF LEADING
3 AS TO WHO WAS PROPOUNDING THE WITNESS.

4 **THE COURT:** YES, I NEED TO LOOK AT THAT. THANK YOU.

5 **MR. KESSLER:** THANK YOU.

6 **MR. LECLAIR:** YOUR HONOR, I'M SORRY. I WAS INCORRECT
7 ON ONE THING.

8 ON SKALL WE HAVE ONE GLOBAL OBJECTION THAT ALL OF
9 THEIR DESIGNATIONS ARE BEYOND THE SCOPE. AND SO I DON'T THINK
10 WE DESIGNATED THAT WITH EACH. I THINK THEY PUT A NOTE ON THE
11 FRONT AND SAID: EVERYTHING THEY DESIGNATE IS BEYOND THE SCOPE
12 OF OUR SHORT DESIGNATION.

13 AND THEY'RE TRYING --

14 **THE COURT:** I WASN'T GIVEN SKALL. THERE WAS THAT ONE
15 QUESTION AND ANSWER YOU RAISED THIS MORNING. OR YOU RAISED
16 THIS MORNING. AND WHAT DID I RULE ON THAT?

17 **MR. KESSLER:** NO, I RAISED SKALL, IN GENERAL. YOU
18 SHOULD HAVE SKALL AND FRISS BEFORE YOU.

19 **MR. LECLAIR:** I THINK WE GAVE YOU BOTH OF THEM, YOUR
20 HONOR.

21 **THE COURT:** DIDN'T I RULE ON SKALL?

22 **MR. LECLAIR:** ON FRISS.

23 **MR. KESSLER:** THE ISSUE ON SKALL WAS THEY SAID IT WAS
24 REBUTTAL FOR PAT ALLEN, AND WE ARGUED WHETHER PAT ALLEN WAS IN
25 THEIR CASE OR NOT. AND YOU SAID ON THAT BASIS YOU WOULD ALLOW

1 IT.

2 BUT THERE ARE DESIGNATIONS THEY'VE OBJECTED TO AND
3 WE'VE OBJECTED TO, SO YOU NEED TO RULE ON THAT.

4 **THE COURT:** ALL RIGHT.

5 **MR. KESSLER:** WE DIDN'T ARGUE THAT YET.

6 **THE COURT:** OKAY. 15 MINUTES.

7 **MR. KESSLER:** THANK YOU.

8 (RECESS TAKEN FROM 9:04 TO 9:21 A.M.)

9 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
10 OUTSIDE THE PRESENCE OF THE JURY.)

11 **THE COURT:** ALL RIGHT. LET'S -- I GOT THE MESSAGE
12 THAT YOU WITHDREW FRISS.

13 WITH RESPECT TO SKALL, I'VE ALREADY STATED THAT
14 PLAINTIFF CAN READ THE PORTION THAT RELATES TO THE LIST.
15 HOWEVER, THE DEFENDANTS' COUNTER-DESIGNATIONS WILL BE EXCLUDED,
16 IN PART. THE PART THAT DEALS WITH REEBOK WILL BE EXCLUDED.
17 THAT ISSUE WAS IN THE CASE.

18 IT'S UNFAIR NOW TO BRING UP ALL THIS VERY LENGTHY
19 QUESTION AND ANSWERS ON REEBOK, AND YOU COULD HAVE PUT THAT IN
20 YOUR CASE.

21 IN FACT, WE HAVEN'T FINISHED YOUR CASE YET. I GUESS,
22 IF YOU WANTED TO --

23 **MR. KESSLER:** I GUESS, YOUR HONOR, WE WOULD THEN
24 DESIGNATE THAT PORTION TO BE IN OUR CASE AND WHY DON'T WE DO IT
25 TOGETHER BEFOREHAND, BECAUSE WE ARE GOING TO DO MR. SKALL. WE

1 WOULD LIKE THAT PORTION IN.

2 AND RATHER THAT SPLIT IT, WE COULD DO IT --

3 **THE COURT:** THEN, WE COME TO THE SECOND PART, WHICH
4 IS SOME OF THIS IS HEARSAY. WHENEVER THIS WITNESS SAYS:

5 "I CALLED UP PEOPLE AT REEBOK, AND THEY SAID
6 THEY NEVER SOLD ANYTHING," THAT'S JUST RANK HEARSAY.

7 AND WHEN I GOT TO THAT, I JUST THREW MY HANDS UP AND
8 SAID:

9 "WE'RE NOT GOING TO ALLOW THIS."

10 SO I HAVEN'T GONE THROUGH THIS TO -- IF YOU WILL GO
11 THROUGH AND TAKE ALL THE HEARSAY.

12 **MR. KESSLER:** WE WILL TAKE OUT WHATEVER WAS OBJECTED
13 TO, IF IT WAS HEARSAY, YOUR HONOR.

14 **MR. LECLAIR:** IT WOULDN'T HAVE TO BE OBJECTED TO.

15 **THE COURT:** DO WHAT?

16 **MR. LECLAIR:** IT WOULDN'T HAVE TO BE OBJECTED TO AS
17 HEARSAY.

18 **THE COURT:** NO, HEARSAY YOU DON'T HAVE TO OBJECT TO
19 AT THE DEPOSITION.

20 **MR. LECLAIR:** RIGHT.

21 **THE COURT:** IF THEY'VE OBJECTED TO IT NOW AS HEARSAY,
22 THEN IT OUGHT TO COME OUT.

23 **MR. KESSLER:** SO HOW WOULD YOUR HONOR LIKE US TO DO
24 THIS? SHOULD WE READ THAT PORTION IN OUR CASE, AND THEN HAVE
25 THEM READ A PORTION IN THEIR CASE? WHAT'S MOST EFFICIENT FOR

1 THE JURY?

2 WE COULD AGREE IT'S IN BOTH OF OUR CASES AND JUST
3 HAVE IT READ. IT DOESN'T MATTER TO US. OR WE COULD READ IT
4 TWICE.

5 **THE COURT:** JUST SEEMS LIKE JUST A LONG, EXTENDED,
6 OVER A SMALL, INCONSEQUENTIAL POINT.

7 **MR. KESSLER:** WE AGREE WITH THAT, YOUR HONOR, EXCEPT
8 THEY INJECTED THE REEBOK THING, YOU RECALL, WITH THE WAVING
9 JERSEY, WHEN MY EXAMINATION WAS INTERRUPTED BY MR. KATZ --

10 **THE COURT:** WHAT IS THIS GOING TO PROVE? IF YOU TAKE
11 OUT THE FACTS -- BECAUSE YOU CAN'T BRING IN THEY NEVER SOLD
12 ANYTHING THROUGH HEARSAY.

13 **MR. KESSLER:** NO. WE BELIEVE THE NONHEARSAY PORTIONS
14 ESTABLISH THAT IT WAS NEVER SOLD. IN OTHER WORDS, WE THINK
15 THERE ARE PORTIONS OF THAT THAT SHOW IT WAS NEVER SOLD. AT
16 LEAST, TO MR. SKALL'S KNOWLEDGE, PERSONAL KNOWLEDGE, HE KNEW
17 ABOUT THE PROGRAM.

18 AGAIN, IF YOUR HONOR -- YOU KNOW, GIVEN WHAT THEY
19 DID, I THINK WE CAN'T IGNORE IT.

20 **THE COURT:** ARE YOU GOING TO BE HAVING A READER OR IS
21 THIS GOING TO BE VIDEOTAPE?

22 **MR. KESSLER:** OKAY. WE'LL -- WE'LL DROP IT. WE'LL
23 DROP --

24 **THE COURT:** YOU'RE DROPPING SKALL?

25 **MR. KESSLER:** NO, WE'LL DROP --

1 (DEFENSE COUNSEL CONFER OFF THE RECORD.)

2 **MR. KESSLER:** OKAY. WE'LL DROP IT. WE'LL DROP IT.

3 **THE COURT:** DROP WHAT?

4 **MR. KESSLER:** THE REEBOK DISCUSSION THAT YOUR HONOR
5 DIDN'T THINK WAS APPROPRIATE.

6 **THE COURT:** THAT'S THE ONLY PART I WAS GOING TO
7 SUSTAIN ANY OBJECTIONS TO. SO WITH THAT, YOU CAN THEN READ
8 EVERYTHING AS A COUNTER-DESIGNATION, BECAUSE --

9 **MR. KESSLER:** YOUR HONOR, THEY ARE ATTEMPTING NOW --
10 THEY WANT TO RAISE THIS NOW -- TO INTRODUCE A DIFFERENT
11 WITNESS. WE HAD NO NOTICE ABOUT THIS. MR. ZUCKER. YOUR
12 HONOR'S RULES ARE VERY CLEAR. THEY HAD TO LET US KNOW. WE HAD
13 NO CHANCE TO DO ANY COUNTER-DESIGNATIONS.

14 BECAUSE YOUR HONOR RULED ONE WAY ON MR. FRISS, NOW
15 THEY WANT TO COME UP WITH MR. ZUCKER. THIS IS INAPPROPRIATE
16 UNDER YOUR HONOR'S RULES. THEY CAN'T KEEP PICKING AND DOING
17 THIS. WE HAVE NO TIME NOW TO REVIEW THEIR DESIGNATIONS ON
18 MR. ZUCKER, WHETHER THEY'RE PROPER, WHAT OUR
19 COUNTER-DESIGNATIONS ARE.

20 THEY HAD TO GIVE US NOTICE OF THIS YESTERDAY, UNDER
21 YOUR HONOR'S RULES. THEY GAVE US NOTICE OF THE OTHER TWO,
22 NOTHING ABOUT ZUCKER.

23 **MR. LECLAIR:** YOUR HONOR, TWO THINGS. THIS RELATES
24 TO MR. NOLL'S TESTIMONY THIS MORNING. WE'RE REBUTTING
25 DR. NOLL'S TESTIMONY THIS MORNING. I THINK WE ARE ENTITLED TO

1 DO THAT.

2 **THE COURT:** WHAT IS IT?

3 **MR. LECLAIR:** IT'S ABOUT 15 LINES OF A DEPOSITION.

4 DR. NOLL'S TESTIMONY WAS THERE'S NO DEMAND FOR THE GROUP. WHAT
5 THIS TESTIMONY SHOWS IS FROM A LICENSEE THAT THEY DON'T USE ALL
6 THE ACTIVE PLAYERS.

7 WHAT DR. NOLL SAID IS THERE'S DEMAND FOR INDIVIDUAL
8 RETIRED PLAYERS, NO DEMAND FOR THE GROUP.

9 THIS TESTIMONY SHOWS THAT ON ACTIVE PLAYERS THEY
10 DON'T NEED ALL THE ACTIVE PLAYERS, BUT THEY LICENSE THE ENTIRE
11 GROUP. IT SHOWS THAT INDIVIDUAL DEMAND CREATES DEMAND FOR THE
12 GROUP. AND THAT'S A FAIR POINT FOR US TO PUT IN. IT'S 15
13 LINES.

14 **THE COURT:** THAT ISSUE HAS BEEN IN THE CASE FOR A
15 LONG TIME. AND YOU SHOULD NOT BE -- YES, IT'S TRUE THAT THAT
16 ISSUE WAS VENTILATED WITH DR. NOLL, BUT IT'S ALSO COME UP
17 BEFORE, AND THIS IS NOT PROPER REBUTTAL. SO THAT'S NOT GOING
18 TO BE ALLOWED. IT'S TOO SHORT A NOTICE, AND IT'S COMMON SENSE,
19 ANYWAY.

20 THEY'RE NOT GOING -- THEY'VE GOT PEOPLE ON THE ACTIVE
21 ROSTER WHO PLAY VERY FEW GAMES AND SURELY THEY DON'T USE
22 EVERYBODY. YOU CAN MAKE THAT ARGUMENT JUST FROM COMMON SENSE.

23 **MR. LECLAIR:** IN FAIRNESS, YOUR HONOR --

24 **THE COURT:** WE'RE NOT GOING TO HAVE ANY MORE
25 DESIGNATIONS. AT LEAST THAT DESIGNATION WE'RE NOT GOING TO

1 HAVE.

2 **MR. LECLAIR:** YOUR HONOR, YOU JUST ALLOWED THEM TO
3 DECIDE, WHEN WE DROPPED FRISS, THEY'RE GOING TO READ PORTIONS
4 OF FRISS, I THOUGHT.

5 **THE COURT:** NO, THEY ARE NOT.

6 **MR. LECLAIR:** OH, THEY ARE DROPPING FRISS. OKAY.

7 **MR. KESSLER:** WE'RE DROPPING.

8 **MR. LECLAIR:** OKAY.

9 **MR. KESSLER:** THEY'RE NOT OFFERING FRISS. WE'RE NOT
10 OFFERING FRISS.

11 **MR. LECLAIR:** VERY GOOD, YOUR HONOR.

12 **THE COURT:** AND THEN, THEY ARE DROPPING REEBOK OUT OF
13 SKALL. SKALL CAN BE READ -- I'LL GIVE YOU A CHOICE. YOU CAN
14 READ IT NOW OR READ -- WHY DON'T YOU --

15 **MR. LECLAIR:** ACTUALLY, YOUR HONOR, THAT WAS MY
16 POINT.

17 **THE COURT:** WHAT?

18 **MR. LECLAIR:** I'M SORRY. MAYBE I'M DOING TOO MUCH
19 THIS MORNING. WITH NO NOTICE TO US, ALL THE SKALL DESIGNATIONS
20 ARE BEYOND THE SCOPE OF OUR SHORTEN ENTRY. BUT THEY'RE GOING
21 TO READ IT BECAUSE THEY SAY:

22 "WELL, WE'RE GOING TO PUT IT IN NOW," WITH NO
23 NOTICE.

24 **THE COURT:** NO. HERE'S THE THING.

25 YOU CALLED HER OUT OF TURN. THE ONLY REASON I'M

1 LETTING YOU EVEN READ SKALL IS BECAUSE OF THE PROCEDURAL SNAFU
2 THAT SHE GOT CALLED OUT OF TURN.

3 AND I'M PRETENDING, FOR PURPOSES OF THIS ANALYSIS, AS
4 IF MRS. PAT ALLEN HAD BEEN CALLED IN YOUR CASE-IN-CHIEF.

5 **MR. LECLAIR:** I UNDERSTAND, YOUR HONOR.

6 **THE COURT:** HAD THAT BEEN DONE THIS WOULD HAVE BEEN
7 ALLOWED.

8 **MR. LECLAIR:** I UNDERSTAND, YOUR HONOR. THAT'S FINE.

9 **THE COURT:** ALL RIGHT. SO WITH THAT EXPLANATION, I'M
10 HANDING ALL THIS BACK. IGNORE MY NOTES, BECAUSE IT'S ALL MOOT
11 NOW, IN LIGHT OF THE WITHDRAWAL OF THE LARGE PART OF THIS
12 DESIGNATION BY THE DEFENSE.

13 ARE WE READY TO GO?

14 **MR. KESSLER:** YES, WE ARE, YOUR HONOR.

15 **THE COURT:** ALL RIGHT. LET'S BRING OUR JURY BACK IN.

16 (THEREUPON, THE JURY RETURNED TO THE COURTROOM.)

17 **THE COURT:** OKAY. WELCOME BACK. HAVE A SEAT.

18 REMEMBER WHERE WE ARE. WE ARE STILL IN THE DEFENSE
19 CASE.

20 NEXT WITNESS.

21 **MR. KESSLER:** YOUR HONOR, OUR NEXT WITNESS WILL BE BY
22 DEPOSITION, THE LATE GENE UPSHAW.

23 AND MY ASSOCIATE, MOLLY DONOVAN, WILL PRESENT THE
24 WITNESS, AND MY ASSOCIATE, ROY TAUB, WILL READ FOR MR. UPSHAW.

25 **THE COURT:** ALL RIGHT. VERY WELL. YOU KNOW THE

1 DRILL BY NOW. LET'S GIVE THE JURY A HEADS-UP ON HOW LONG IT'S
2 GOING TO BE.

3 **MS. DONOVAN:** I THINK IT WILL LAST ABOUT 25 MINUTES.

4 **THE COURT:** ALL RIGHT.

5 **MS. DONOVAN:** YOUR HONOR, THE TIME ALLOTMENT ON THIS
6 IS TWO MINUTES FOR THE PLAINTIFFS, AND THE REMAINING TIME FOR
7 DEFENDANTS.

8 **THE COURT:** ALL RIGHT. I'LL KEEP THAT IN MIND.

9 ALL RIGHT. SO THE -- THIS IS THE DEPOSITION OF
10 MR. GENE UPSHAW, TAKEN ON WEDNESDAY, FEBRUARY 13TH OF THIS
11 YEAR, IN WASHINGTON, D.C.

12 AND IT LOOKS LIKE THE QUESTIONING WAS CONDUCTED BY
13 MR. -- MR. KATZ. DID ANYONE ELSE ASK QUESTIONS THAT YOU'RE
14 GOING TO BE READING?

15 **MS. DONOVAN:** MR. KESSLER.

16 **THE COURT:** ALL RIGHT. GO RIGHT AHEAD.

17 **GENE UPSHAW,**
18 CALLED AS A WITNESS FOR THE DEFENDANTS HEREIN, TESTIFIED VIA
19 DEPOSITION READ IN OPEN COURT IN THE PRESENCE AND HEARING OF
20 THE JURY AS-FOLLOWS:

21 (DEPOSITION TESTIMONY READ BY MS. DONOVAN AND MR.
22 TAUB AS FOLLOWS:)

23 **EXAMINATION**

24 **Q.** GOOD MORNING, MR. UPSHAW.

25 **A.** GOOD MORNING.

1 Q. YOU'RE THE EXECUTIVE DIRECTOR OF THE NFLPA; IS THAT
2 CORRECT, SIR?

3 A. YES.

4 Q. DO YOU HOLD ANY OTHER POSITIONS WITH THE NFLPA?

5 A. NO. I'M JUST THE EXECUTIVE DIRECTOR. AND I'M THE
6 CHAIRMAN OF PLAYERS INC. THAT'S SEPARATE FROM THE NFLPA.

7 Q. ARE YOU ON THE BOARD OF THE NFLPA?

8 A. THE BOARD?

9 Q. YES. ARE YOU A DIRECTOR?

10 A. I'M A NONVOTING MEMBER OF THE BOARD OF THE NFLPA.

11 Q. AND ARE YOU A MEMBER OF THE BOARD -- WELL, YOU'RE CHAIRMAN
12 OF THE BOARD OF PI?

13 A. PLAYERS INC.

14 Q. IS IT OKAY IF I CALL IT "PI"?

15 A. SURE.

16 Q. ALL RIGHT. GOOD.

17 DO YOU HOLD ANY OTHER OFFICES OR TITLES IN OTHER
18 FOOTBALL-RELATED ORGANIZATIONS, LIKE PROFESSIONAL ATHLETES
19 TRUST OR --

20 A. YES. I'M THE PRESIDENT OF PROFESSIONAL ATHLETES
21 INCORPORATED.

22 Q. DO YOU HOLD ANY OTHER OFFICES OR TITLES IN
23 FOOTBALL-RELATED ORGANIZATIONS?

24 A. YES. I'M THE EXECUTIVE DIRECTOR OF THE ARENA FOOTBALL
25 LEAGUE PLAYERS ASSOCIATION.

1 Q. OKAY.

2 A. I'M ALSO THE EXECUTIVE DIRECTOR OF THE NFL COACHES
3 ASSOCIATION. THOSE ARE ALL OF THE TITLES I HOLD RELATED TO
4 FOOTBALL.

5 Q. OKAY. AND THERE'S SOMETHING CALLED "THE PROFESSIONAL
6 ATHLETES FOUNDATION." DID YOU MENTION THAT?

7 A. YES.

8 Q. AND PROFESSIONAL ATHLETES TRUST. IS THERE ANOTHER ONE
9 CALLED "PROFESSIONAL ATHLETES TRUST"?

10 A. PROFESSIONAL ATHLETES FOUNDATION. I'M THE PRESIDENT.

11 Q. I'D LIKE TO DIRECT YOUR ATTENTION TO PAGE 4. AT THE TOP
12 OF IT IT SAYS:

13 "A CONTINUED VOICE IN YOUR UNION."

14 DO YOU BELIEVE THAT THE RETIRED PLAYERS HAVE A VOICE
15 IN THE UNION, SIR?

16 A. YES.

17 Q. AND IT REFERS IN THE FIRST SENTENCE TO:

18 "IN 1984, THE RETIRED PLAYERS ASSOCIATION WAS
19 FORMED TO PROVIDE AN ACTIVE VOICE IN THE ORGANIZATION OF ALL
20 FORMER PROFESSIONAL FOOTBALL PLAYERS."

21 IN 1984, WAS THAT BEFORE THEY BECAME MEMBERS OF THE
22 NFLPA?

23 A. YES.

24 Q. AND DO YOU HAVE AN UNDERSTANDING OF WHAT THE RETIRED
25 PLAYERS ASSOCIATION WAS AT THAT TIME?

1 **A.** IN 1984?

2 **Q.** YES.

3 **A.** IT WAS REALLY -- IT WAS PROBABLY IN THE SAME FORM THAT
4 IT'S IN NOW. WE HAD CHAPTERS. WE HAD PLAYERS THAT PAID DUES.
5 WE HAD ALL OF THE THINGS THAT WE HAVE TODAY, EXCEPT IT WAS NOT
6 RECOGNIZED IN THE CONSTITUTION AS MEMBERS, WAS THE ONLY
7 DIFFERENCE. I MEAN, EVERYTHING THAT APPLIED IN 1984 WHEN WE
8 FORMED THE ORGANIZATION STILL APPLIES.

9 **Q.** AND WERE YOU RETIRED YET IN 1984, SIR?

10 **A.** YES, I WAS.

11 **Q.** WERE YOU A MEMBER OF THE RETIRED PLAYERS ASSOCIATION?

12 **A.** I FOUNDED THIS WHOLE DEPARTMENT.

13 **Q.** SO YOU FOUNDED THE RETIRED PLAYERS ASSOCIATION?

14 **A.** THAT'S RIGHT.

15 **Q.** WHO WERE THE OTHER FOUNDERS, OR WERE THERE ANY OTHERS?

16 **A.** NO. WE MADE THIS AS A DEPARTMENT WITHIN THE NFL PLAYERS
17 ASSOCIATION. UNTIL 1984, THERE WAS NO SUCH DEPARTMENT IN THE
18 PLAYERS ASSOCIATION.

19 **Q.** NUMBER 113 APPEARS TO BE A FORM LETTER, SIR. BUT YOUR
20 SIGNATURE APPEARS TO APPEAR AT THE BOTTOM. IS THAT YOUR
21 SIGNATURE?

22 **A.** YES, IT IS.

23 **Q.** THEN, IF WE TAKE A LOOK AT THE NEXT PARAGRAPH, SECOND
24 SENTENCE, IT SAYS:

25 "IN THE PAST, WE HAVE DISTRIBUTED ALL OF THE

1 LICENSING FEES RECEIVED FOR USE OF RETIRED PLAYERS' NAMES AND
2 IMAGES TO THE RETIRED PLAYERS UTILIZED, AND WE WILL CONTINUE TO
3 DO SO."

4 SO DOES THAT MEAN THAT -- THERE WAS NO DISTRIBUTION,
5 OF COURSE, TO AN ESCROW ACCOUNT, BECAUSE NO ESCROW ACCOUNT
6 EXISTED; IS THAT RIGHT?

7 **A.** THAT'S CORRECT. THE MONEY THAT WAS GENERATED BY A RETIRED
8 PLAYER WENT TO THE RETIRED PLAYER.

9 **Q.** DO YOU KNOW WHY THE ESCROW ACCOUNT THAT WAS MENTIONED IN
10 THE GLA WAS NOT CREATED?

11 **A.** THE REASON IT WASN'T CREATED, BECAUSE WE PASSED THE MONEY
12 STRAIGHT TO THE PLAYERS. THERE WAS NO MONEY TO SET UP AN
13 ESCROW ACCOUNT. I WILL BE GLAD TO TAKE A LOAN. WE CAN SET ONE
14 UP TODAY. BUT WE DON'T HAVE ONE. WE NEVER DID.

15 **Q.** AND DID YOU EVER INFORM ANY RETIRED PLAYER THAT THE ESCROW
16 ACCOUNT WAS NOT BEING SET UP?

17 **A.** NO.

18 **Q.** NOW, WHEN YOU SAY, "WE HAVE DISTRIBUTED ALL OF THE
19 LICENSING FEES RECEIVED FOR USE OF RETIRED PLAYERS' NAMES AND
20 IMAGES TO THE RETIRED PLAYERS UTILIZED AND WE WILL CONTINUE TO
21 DO SO," WHEN YOU SAY "ALL OF THE LICENSING FEES," DOESN'T PI
22 TAKE A CUT OF THE LICENSING FEES, SIR?

23 **MR. TAUB:** AT HIS DEPOSITION, MR. UPSHAW TESTIFIED:

24 "NOT OF RETIRED PLAYERS."

25 SUBSEQUENT TO HIS DEPOSITION, MR. UPSHAW REVIEWED HIS

1 TRANSCRIPT AND CORRECTED IT AS FOLLOWS:

2 "I DON'T KNOW ABOUT RETIRED PLAYERS. I JUST
3 DON'T KNOW IF PLAYERS INC HAS CHARGED AN
4 ADMINISTRATIVE FEE. AND THAT APPLIES TO ALL
5 OF THE PROGRAMS WE DO. I AM NOT FAMILIAR
6 WITH THEM CHARGING, AND I JUST DON'T KNOW."

7 **THE COURT:** ALL RIGHT. NOW, LET ME JUST CLARIFY
8 THAT. COUNSEL READ IT EXACTLY THE RIGHT WAY, BUT YOU WILL
9 REMEMBER EARLIER IN THE TRIAL I TOLD YOU THAT DEONENTS,
10 MEANING PEOPLE WHO HAVE HAD THEIR DEPOSITIONS TAKEN, GET AN
11 OPPORTUNITY AFTER THE DEPOSITION TO READ AND CORRECT THEIR
12 TRANSCRIPT.

13 IF THEY WANT IT CHANGE THEIR TESTIMONY THEY CAN
14 CHANGE IT FROM "THE LIGHT WAS RED" TO "THE LIGHT WAS GREEN."

15 BUT AT TRIAL, BOTH VERSIONS CAN BE READ IN AND
16 CONSIDERED BY YOU AS EVIDENCE. SO WHEN THERE IS A CORRECTION,
17 THEN IT'S THE NORMAL PROCEDURE FOR YOU TO HEAR BOTH VERSIONS.

18 SO I'M GOING TO ASK -- SINCE YOU MIGHT NOT HAVE
19 UNDERSTOOD WHAT YOU WERE HEARING, I'M GOING TO ASK COUNSEL TO
20 READ THE INITIAL QUESTION AGAIN, AND THEN THE READER TO GO BACK
21 OVER IT AGAIN SO IT WILL MAKE SENSE TO YOU.

22 (DEPOSITION WAS CONTINUED TO BE READ AS FOLLOWS:)

23 **Q.** NOW, WHEN YOU SAY, "WE HAVE DISTRIBUTED ALL OF THE
24 LICENSING FEES RECEIVED FOR USE OF RETIRED PLAYERS' NAMES AND
25 IMAGES TO THE RETIRED PLAYERS UTILIZED AND WE WILL CONTINUE TO

1 DO SO," WHEN YOU SAY "ALL OF THE LICENSING FEES," DOESN'T PI
2 TAKE A CUT OF THE LICENSING FEES, SIR?

3 **MR. TAUB:** AT HIS DEPOSITION, MR. UPSHAW TESTIFIED:
4 "NOT OF RETIRED PLAYERS."

5 SUBSEQUENT TO HIS DEPOSITION, MR. UPSHAW REVIEWED HIS
6 TRANSCRIPT AND CORRECTED IT AS FOLLOWS:

7 "I DON'T KNOW ABOUT RETIRED PLAYERS. I JUST
8 DON'T KNOW IF PLAYERS INC HAS CHARGED AN
9 ADMINISTRATIVE FEE. AND THAT APPLIES TO ALL
10 OF THE PROGRAMS WE DO. I AM NOT FAMILIAR
11 WITH THEM CHARGING, AND I JUST DON'T KNOW."

12 **Q.** DOESN'T NFLPA TAKE A CUT?

13 **A.** NO, NOT OF RETIRED PLAYERS.

14 **Q.** SO NEITHER PI NOR NFLPA HAVE EVER TAKEN A CUT OF RETIRED
15 PLAYERS' FEES, TO YOUR KNOWLEDGE?

16 YOU MAY ANSWER, SIR.

17 **MR. TAUB:** AT HIS DEPOSITION, MR. UPSHAW TESTIFIED AS
18 FOLLOWS:

19 "ANY FEES THAT UTILIZE -- THAT RETIRED
20 PLAYERS WERE USED IN OR UTILIZED RETIRED
21 PLAYERS WENT DIRECTLY TO THE RETIRED PLAYERS,
22 NO ONE ELSE. WE WERE JUST A PASS-THROUGH."

23 MR. UPSHAW CORRECTED HIS TESTIMONY TO READ AS
24 FOLLOWS:

25 "TO MY UNDERSTANDING, ANY FEES THAT UTILIZE,

1 THAT RETIRED PLAYERS WERE USED IN OR UTILIZED
2 RETIRED PLAYERS WENT DIRECTLY TO THE RETIRED
3 PLAYERS, NO ONE ELSE. TO MY KNOWLEDGE, WE
4 WERE JUST A PASS-THROUGH. HOWEVER, I JUST
5 DON'T KNOW IF PLAYERS INC HAS CHARGED AN
6 ADMINISTRATIVE FEE."

7 **Q.** AND BY FEES, WOULD YOU INCLUDE ROYALTIES IN THAT?

8 **A.** WHATEVER WAS ENTITLED, WHATEVER THE RETIRED PLAYERS WERE
9 ENTITLED TO, THEY RECEIVED.

10 **Q.** SO EVERY PAYMENT THAT A RETIRED PLAYER RECEIVED, EVERY
11 PAYMENT THAT A RETIRED PLAYER HAS RECEIVED FROM LICENSEE, AS
12 FAR AS YOU KNOW, HAS NOT BEEN SUBJECTED TO ANY CUT TO PLAYERS
13 INC?

14 YOU MAY ANSWER, SIR.

15 **MR. TAUB:** AT HIS DEPOSITION, MR. UPSHAW TESTIFIED AS
16 FOLLOWS:

17 "THE FEE WENT TO DIRECTLY TO THE PLAYER. NO
18 ONE TOOK A CUT."

19 MR. UPSHAW SUBSEQUENTLY CORRECTED IT TO READ AS

20 FOLLOWS:

21 "TO MY KNOWLEDGE, THE FEE WENT DIRECTLY TO
22 THE PLAYER. NO ONE TOOK A CUT. BUT I JUST
23 DON'T KNOW IF PLAYERS INC HAS CHARGED
24 ADMINISTRATIVE FEE, AND THAT APPLIES TO ALL
25 OF THE PROGRAMS THAT WE DO."

1 Q. SAME QUESTION WITH RESPECT TO THE NFLPA.

2 A. YES.

3 Q. SAME ANSWER?

4 A. YES.

5 Q. OKAY. THEN, IT SAYS, IN THE SECOND PARAGRAPH IT SAYS:

6 "LIKE ANY OTHER LABOR UNION, WE REPRESENT ONLY ACTIVE PLAYERS."

7 AND WHEN YOU SAY "REPRESENT" THERE, YOU MEAN IN
8 COLLECTIVE BARGAINING?

9 A. YES.

10 Q. BECAUSE YOU DO REPRESENT THE RETIRED PLAYERS IN OTHER
11 WAYS, RIGHT?

12 A. YES.

13 Q. FOR EXAMPLE, YOU REPRESENT THEM IN THEIR LICENSING; ISN'T
14 THAT RIGHT?

15 A. WE PROVIDE ACCESS FOR THE RETIRED PLAYERS THROUGH OUR
16 PROGRAMS, YES.

17 Q. YOU REPRESENT THEM, THE NFLPA REPRESENTS THEM, AND PLAYERS
18 INC REPRESENTS THEM IN THEIR LICENSING ACTIVITIES; ISN'T THAT
19 CORRECT, SIR?

20 A. SOME, YES.

21 Q. THEN IT SAYS: "AS A RETIRED PLAYER, YOU'RE NOT A UNION
22 MEMBER."

23 THAT'S ACTUALLY NOT RIGHT, IS IT, SIR? THEY ARE
24 UNION MEMBERS, RIGHT?

25 A. THEY'RE NOT UNION MEMBERS IN THE SENSE OF COLLECTIVE

1 BARGAINING. THAT IS ACCURATE. THEY ARE NOT UNION MEMBERS.
2 THEY ARE NOT PART OF THE BARGAINING UNIT.

3 Q. I UNDERSTAND THAT. BUT THEY ARE MEMBERS OF THE NFLPA,
4 CORRECT?

5 A. THAT DOESN'T MAKE THEM MEMBERS OF THE BARGAINING UNIT.

6 Q. I DON'T WANT TO ARGUE WITH YOU, SIR.

7 A. THAT'S MY ANSWER.

8 Q. I AGREE WITH YOU. THEY ARE NOT MEMBERS OF THE BARGAINING
9 UNIT, OKAY? I'M NOT ASKING THAT QUESTION. THE QUESTION I'M
10 ASKING IS SIMPLY: IS IT CORRECT THAT RETIRED PLAYERS ARE
11 MEMBERS OF THE NFLPA?

12 A. YES.

13 Q. I MEAN, AS EXECUTIVE DIRECTOR OF THE UNION, YOU BELIEVE
14 THAT YOU HAVE OBLIGATIONS TO YOUR MEMBERS, TO YOUR RETIRED
15 MEMBERS, DON'T YOU?

16 YOU MAY ANSWER, SIR.

17 A. WELL, AS EXECUTIVE DIRECTOR I AM BY LAW REQUIRED TO
18 REPRESENT THE ACTIVE PLAYERS IN COLLECTIVE BARGAINING.

19 Q. RIGHT. I'M JUST GOING TO PUT THAT ASIDE FOR A MOMENT.

20 A. SURE.

21 Q. AND I'M ASKING YOU, AS EXECUTIVE DIRECTOR OF THE UNION, DO
22 YOU THINK THAT YOU HAVE -- DO ANY OF YOUR DUTIES RELATE TO
23 RETIRED PLAYERS?

24 A. OTHER THAN COLLECTIVE BARGAINING?

25 Q. PUTTING ASIDE COLLECTIVE BARGAINING, YES.

1 **A.** YES.

2 **Q.** AND WHAT ARE THOSE?

3 **A.** THE BENEFITS AND THE PROGRAMS WHICH WE DEVELOP TO HELP THE
4 RETIRED PLAYERS, IMPROVING THEIR PENSION BENEFITS, THEIR
5 DISABILITY BENEFITS, THEIR -- ALL OF THOSE THINGS THAT WE DO.

6 **Q.** OKAY.

7 **A.** WE TRY TO IMPROVE THOSE. BUT LEGALLY WE HAVE NO
8 OBLIGATION TO DO THAT.

9 **Q.** WELL, ONE OF THE THINGS YOU JUST MENTIONED WAS THEIR
10 DISABILITY BENEFITS. DO YOU HAVE ANY DIFFERENT -- STRIKE THAT.

11 WITH RESPECT TO THEIR PENSION BENEFITS, DO YOU YOUR
12 DUTIES TO THEM, ARE THEY ANY DIFFERENT FROM WHAT YOUR DUTIES
13 ARE TO THE ACTIVE PLAYERS?

14 **A.** YES.

15 **Q.** HOW IS THAT?

16 **A.** BECAUSE I REPRESENT THE ACTIVE PLAYERS IN COLLECTIVE
17 BARGAINING. I DO NOT REPRESENT THE RETIRED PLAYERS IN
18 COLLECTIVE BARGAINING. AND PENSION IS PART OF COLLECTIVE
19 BARGAINING.

20 **Q.** EXHIBIT 121, I WILL REPRESENT TO YOU, IS A COPY, CAPTURE
21 OF THE NFLPLAYERS.COM WEBSITE IN EARLY 2007. AND I TAKE IT
22 THAT'S FAMILIAR TO YOU; IS THAT CORRECT, SIR?

23 **A.** OKAY.

24 **Q.** AND NOW DIRECTING YOUR ATTENTION TO THE FIRST PARAGRAPH ON
25 THE SECOND PAGE UNDER THE HEADING: "WHAT IS PLAYERS INC." THE

1 LAST SENTENCE OF THAT PARAGRAPH SHOULD READ:

2 "PLAYERS INC, WHICH REPRESENTS MORE THAN 1800
3 ACTIVE PLAYERS AND OVER 3,000 RETIRED PLAYERS, HAS BEEN
4 AGGRESSIVE IN ITS EFFORTS TO EXPAND PLAYER MARKETING
5 OPPORTUNITIES."

6 WAS IT CORRECT AT THIS TIME THAT PLAYERS INC
7 REPRESENTED OVER 3,000 RETIRED PLAYERS?

8 **A.** YES.

9 **Q.** AND WERE THOSE THAT -- DID THAT MEAN THAT OVER 3,000 HAD
10 SIGNED GLA'S AT THIS POINT?

11 **A.** NO, IT DIDN'T MEAN OVER 3,000 HAD SIGNED GLA'S.

12 **Q.** OKAY.

13 **A.** BECAUSE GLA'S IS NOT THE ONLY FORM IN WHICH YOU REPRESENT
14 PLAYERS OR EVEN UTILIZE THEM IN MARKETING OPPORTUNITIES.

15 **Q.** OKAY. WHAT DOES IT MEAN THAT YOU REPRESENT THEM?

16 **A.** WHAT 300 -- I MEAN 3,000?

17 **Q.** OVER 3,000, YES.

18 **A.** IT'S PROBABLY THE NUMBER OF PLAYERS THAT ARE INCLUDED IN
19 THE DIRECTORY --

20 **Q.** OKAY.

21 **A.** -- THE RETIRED PLAYERS' DIRECTORY.

22 **Q.** WHETHER OR NOT THEY HAVE SIGNED A GLA?

23 **A.** THAT'S CORRECT.

24 **Q.** WHY IS IT THAT YOU CLAIM YOU REPRESENT THOSE WHO DID NOT
25 SIGN A GLA?

1 **A.** BECAUSE THERE ARE OPPORTUNITIES OUT THERE FOR PLAYERS THAT
2 DON'T SIGN GLA'S. WE DIDN'T ONLY JUST DO REPRESENTATION FOR
3 GLA PARTICIPANTS.

4 **Q.** OKAY. DID YOU INFORM THE PLAYERS WHO DID NOT SIGN GLA'S
5 THAT YOU REPRESENTED THEM?

6 **A.** IF THEY WERE INCLUDED IN A PROGRAM, IT WAS NOT A MATTER OF
7 INFORMING THEM. WHAT WE DID BY PRACTICE WAS INCLUDE THEM. AND
8 WE PAID IT.

9 **Q.** RIGHT. BUT MY QUESTION IS, DID YOU EVER INFORM THOSE WHO
10 DID NOT SIGN GLA'S:

11 "WE ARE REPRESENTING YOU. WE, PLAYERS INC, OR
12 WE, THE NFLPA, ARE REPRESENTING YOU"?

13 DID YOU EVER TELL THEM THAT?

14 **A.** THE ONLY WAY I WOULD ANSWER THAT QUESTION IS TO ANSWER IT
15 BY THE PRACTICE IN WHICH WE OPERATED. THAT WAS IF THERE WAS A
16 TRADING CARD PROGRAM OR AN APPEARANCE OR A MARKETING
17 OPPORTUNITY, AND A COMPANY SAID THAT THEY WERE INTERESTED IN
18 GENE UPSHAW, WE WOULD THEN PROVIDE THAT. AND IF I DIDN'T HAVE
19 A GLA, WE WOULD STILL PROVIDE THAT PLAYER'S NAME TO THAT
20 COMPANY.

21 **Q.** WE WERE TALKING ABOUT EXHIBIT 91, MR. UPSHAW. CAN YOU
22 TELL US WHAT THAT IS, PLEASE?

23 **MS. DONOVAN:** I BELIEVE EXHIBIT 91 IS IN EVIDENCE.

24 **A.** I HAVE TO FIND IT.

25 **Q.** IT'S THE LAST ONE THAT I SHOWED YOU RIGHT HERE, 91, OKAY.

1 TELL US WHAT THAT IS, SIR?

2 (DOCUMENT DISPLAYED.)

3 **A.** IT'S AN AMENDMENT OF A LICENSING TRANSACTION BETWEEN THE
4 NFLPA AND PLAYERS INC.

5 **Q.** AND IS IT CORRECT TO SAY THAT THE RESULTS OF THIS IS THAT
6 THE \$8 MILLION WAS REALLOCATED FROM THE ACTIVE PLAYERS EQUAL
7 SHARE POOL TO THE NFLPA AND PI?

8 **A.** YES.

9 **Q.** SO WHEN IT SAYS HERE IN THE LAST PARAGRAPH, LAST "WHEREAS"
10 PARAGRAPH OF THE FIRST PAGE IT SAYS:

11 "WHEREAS, THE NFLPA AND PLAYERS INC AGREE THAT
12 FURTHER ADJUSTMENT MAY BE NECESSARY AFTER COMPLETION OF AN
13 INDEPENDENT, THIRD-PARTY EVALUATION OF THE VALUE CONFERRED BY
14 THE PLAYERS, THE NFLPA, AND PLAYERS INC," WHAT WAS THAT
15 THIRD-PARTY EVALUATION? WAS THAT THE TAX COUNSEL THAT YOU
16 MENTIONED?

17 **A.** NO. IT SAYS THAT:

18 "NFLPA AND PLAYERS INC AGREE THAT FURTHER
19 ADJUSTMENTS MAY BE NECESSARY."

20 **Q.** YEAH. I AGREE IT SAYS THAT. IT SAYS:

21 "AFTER COMPLETION OF AN INDEPENDENT THIRD-PARTY
22 EVALUATION."

23 I'M ASKING YOU: WAS THAT THIRD-PARTY EVALUATION EVER
24 COMPLETED?

25 **A.** NO, NOT THAT I'M AWARE OF. I MEAN, I'M NOT AWARE THAT

1 THERE WAS A -- NO, I'M NOT.

2 **Q.** LOOKING AT THE LAST PARAGRAPH ON THE SECOND PAGE,
3 PARAGRAPH E, IT SAYS:

4 "NOTWITHSTANDING THE OTHER PROVISIONS OF THIS
5 SECTION 4, \$8 MILLION OF THE AMOUNT DESCRIBED IN THE SECTION 4A
6 SHALL BE PAID OUT OF THE LICENSING REVENUE DEPOSITORY ACCOUNT."

7 IS THAT THE ACTIVE PLAYERS EQUAL SHARE ROYALTY POOL?

8 **A.** EVERYTHING IN THIS TRANSACTION DEALS WITH ACTIVE PLAYERS.

9 **Q.** I UNDERSTAND. I'M JUST ASKING.

10 **A.** BUT THAT'S, YES, THAT'S WHERE IT CAME FROM. IT'S THE
11 ACTIVE PLAYERS.

12 **Q.** OKAY. AND DID YOU MAKE EFFORTS TO GET THE LICENSEES TO
13 DESIGNATE RETIRED PLAYERS?

14 **A.** IT'S UP TO THE LICENSEE. IT'S THEIR BUSINESS. THEY
15 DETERMINE WHAT'S BEST FOR THEIR BUSINESS. WE HAVE NO INPUT
16 WHATSOEVER IN TELLING THEM WHO THEY SHOULD USE AND WHO THEY
17 SHOULD NOT USE. THEY HAVE THEIR OWN COMPANY. WE JUST
18 FACILITATE AS MUCH AS WE POSSIBLY CAN HELP.

19 **Q.** BUT YOU DON'T MAKE ANY AFFIRMATIVE EFFORTS TO SELL THEM
20 THE IMAGES OF RETIRED PLAYERS AS A GROUP OR INDIVIDUALLY?

21 **A.** I DON'T RUN ANY LICENSEES' COMPANY. THAT'S UP TO THEM.

22 **Q.** SO YOU DON'T MAKE THOSE AFFIRMATIVE SALES EFFORTS TO SELL
23 RETIRED PLAYERS TO LICENSEES, IMAGES TO LICENSEES?

24 **A.** I'VE ANSWERED IT. I CAN'T ANSWER ANY DIFFERENT.

25 **Q.** AND DO YOU MAKE ANY EFFORTS WITH RESPECT TO SELLING THE

1 IMAGES OF RETIRED PLAYERS TO COMPANIES THAT REQUEST -- MAKE
2 REQUESTS FOR NFL PLAYER SERVICES?

3 **A.** IF THEY'RE MAKING A REQUEST, IT'S PRETTY MUCH SOLD.

4 **Q.** RIGHT. BUT DO YOU MAKE ANY EFFORTS TO SELL THAT PRIOR TO
5 THEIR MAKING A REQUEST?

6 **MR. TAUB:** AT HIS DEPOSITION, MR. UPSHAW TESTIFIED AS
7 FOLLOWS:

8 "NOT REALLY."

9 MR. UPSHAW SUBSEQUENTLY CORRECTED THE TESTIMONY TO
10 READ AS FOLLOWS:

11 "IF THEY MAKE A REQUEST, THERE IS NO NEED TO
12 MAKE AN EFFORT. SO, NO, NOT REALLY."

13 **Q.** I MEAN, THAT'S NOT YOUR JOB. YOU DON'T GO OUT AND SELL
14 LICENSES?

15 **A.** WELL, IT'S NOT MY JOB ON A DAY-TO-DAY BASIS. BUT WHENEVER
16 I HAVE CONTACT WITH LICENSEES OR RESPONORS, OR WHATEVER, I
17 ALWAYS REMIND THEM THAT WE ALSO HAVE THIS GROUP OF PLAYERS
18 BESIDES OUR ACTIVE PLAYERS. AND THAT APPLIES TO ANY OF OUR
19 PLAYERS, BOTH ACTIVE AND RETIRED.

20 **Q.** DID YOU PERSONALLY EVER PROMOTE MR. ADDERLEY'S IMAGE TO A
21 LICENSEE?

22 **A.** WELL, I THINK HIS IMAGE WAS PROMOTED. AND I DON'T KNOW IF
23 I PERSONALLY DID IT, NO. I NEVER -- I HAVE NEVER PERSONALLY.

24 **Q.** DO YOU HAVE FIRSTHAND KNOWLEDGE THAT ANYONE ELSE IN PI OR
25 NFLPA HAS DONE THAT?

1 **A.** AS PART OF THE PROGRAM, YES, I DO.

2 **Q.** AND WHICH PROGRAM WAS THAT?

3 **A.** THAT WAS A JERSEY PROGRAM WHICH I ACTUALLY PARTICIPATED
4 IN.

5 **Q.** WAS THAT THE REEBOK PROGRAM?

6 **A.** YES. AND I PROBABLY -- JUST TO FOLLOW UP ON THAT, MY
7 JERSEY HAD THE SAME DEATH AS HERB'S. NO ONE WANTED IT. WE
8 COULDN'T SELL IT. THEY EVEN QUIT MAKING IT. THEY MADE THE
9 REPLICA, AND THAT WAS THE END OF IT.

10 **Q.** LET ME SHOW YOU, SIR, WHAT HAS ALREADY BEEN MARKED AS
11 EXHIBIT 99 IN YESTERDAY'S DEPOSITION.

12 **MS. DONOVAN:** AND THIS IS ALSO IN EVIDENCE.

13 **A.** ALL RIGHT.

14 **Q.** AND IS THAT YOUR SIGNATURE ON THE FIRST PAGE?

15 **A.** YES, IT IS.

16 **Q.** AND CAN YOU TELL US WHAT THIS IS, PLEASE?

17 **A.** THIS IS AN AGREEMENT BETWEEN NFL PROPERTIES AND PLAYERS
18 INC. IT'S A SPONSORSHIP AGREEMENT.

19 **Q.** OKAY. AND WHO NEGOTIATED THIS AGREEMENT?

20 **A.** THIS AGREEMENT?

21 **Q.** YES.

22 **A.** I DID.

23 **Q.** OKAY. AND WITH WHOM DID YOU NEGOTIATE?

24 **A.** WITH -- AT THE TIME IT WAS ROGER GOODELL, WHO WAS THE
25 PRESIDENT OF NFL PROPERTIES.

1 Q. MR. UPSHAW, YOU JUST GOT ASKED A QUESTION ABOUT THE
2 SPONSORSHIP AGREEMENT WHICH TALKS ABOUT GROUP PLAYER LICENSING
3 RIGHTS AS DEFINED IN THE CBA. DO YOU SEE THAT?

4 A. YES.

5 Q. DOES THE COLLECTIVE BARGAINING AGREEMENT COVER ANYBODY BUT
6 ACTIVE PLAYERS?

7 A. NO, ONLY --

8 Q. YOU CAN ANSWER.

9 A. THE CBA ONLY COVERS ACTIVE PLAYERS.

10 Q. NOW, YOU GOT ASKED SOME QUESTIONS ABOUT WHETHER OR NOT
11 PLAYERS INC EVER ENGAGED IN ANY MARKETING EFFORTS FOR RETIRED
12 NFL PLAYERS. DO YOU RECALL A QUESTION ABOUT THAT?

13 A. YES.

14 Q. HAVE YOU PERSONALLY EVER MADE ANY EFFORTS TO TRY TO MARKET
15 RETIRED PLAYERS TO POTENTIAL LICENSEES?

16 A. YES, I'VE HAD DISCUSSIONS WITH SEVERAL LICENSEES ABOUT THE
17 RETIRED PLAYERS AND HOW THEY WOULD BE HELPFUL AND BENEFICIAL IN
18 CERTAIN PROGRAMS. YES, I'VE DONE THAT.

19 Q. CAN YOU GIVE SOME EXAMPLES?

20 A. WELL, THE MOST RECENT EXAMPLE WOULD BE THE EA CONTRACT
21 THAT WE JUST EXECUTED NOT LONG AGO. AND I OFFERED RETIRED
22 PLAYERS IN THAT AREA, BUT THERE WAS -- THERE WAS REALLY NO
23 INTEREST.

24 Q. THERE WAS NO INTEREST IN EA?

25 A. NO.

1 Q. ARE OTHER PEOPLE ON PLAYERS INC INVOLVED IN ANY EFFORTS TO
2 MARKET RETIRED PLAYERS THAT YOU KNOW ABOUT?

3 YOU CAN ANSWER.

4 A. YES. I'M FAMILIAR WITH PEOPLE IN PLAYERS INC MARKETING
5 RETIRED PLAYER RIGHTS.

6 Q. NOW --

7 A. AND THAT WOULD BE -- WE HAVE A WHOLE DEPARTMENT OF PLAYER
8 MARKETING. THAT'S WHAT THEY DO.

9 Q. BUT WOULD THAT INCLUDE RETIRED PLAYERS?

10 A. OF COURSE. IT WOULD INCLUDE -- AT THE TIME WE WERE
11 TALKING ABOUT, THAT WOULD INCLUDE HOWARD SKALL, WHO WAS HEAD OF
12 THAT DEPARTMENT. THAT WAS ONE OF HIS DUTIES, WAS PLAYER
13 MARKETING, BOTH ACTIVE AND RETIRED.

14 Q. NOW, WHEN PLAYERS INC HAS WHAT'S CALLED "DESIGNATED
15 PROGRAMS," ARE YOU FAMILIAR WITH THAT IDEA FOR RETIRED PLAYERS?

16 A. YES, I AM.

17 Q. ARE DESIGNATED PROGRAMS TYPICALLY ENTERED INTO WITH
18 RETIRED PLAYERS, WITH THE RETIRED PLAYER GLA OR WITH SOME OTHER
19 TYPE OF ARRANGEMENT?

20 YOU CAN ANSWER.

21 A. THE DESIGNATED PROGRAMS ARE -- IT'S JUST ONE FORM IN WHICH
22 RETIRED PLAYERS ARE UTILIZED BY OUR LICENSEES. THE MAIN AREA
23 IN WHICH THEY ARE UTILIZED IS REALLY AD HOC PROGRAMS IN WHICH
24 WE CONTACT THE PLAYER, WE TELL THEM ABOUT THE OPPORTUNITY, AND
25 HE DECIDES IF HE WANTS TO BE IN OR OUT. AND IF HE DECIDES TO

1 BE IN, THERE'S A SEPARATE AGREEMENT THAT DEALS WITH AD HOC
2 OPPORTUNITIES THAT'S DIFFERENT FROM GLA'S.

3 GLA'S, IN FACT, YIELD VERY LITTLE REVENUE -- YIELD
4 VERY LITTLE WHEN IT COMES TO REVENUES GENERATED BY THE RETIRED
5 PLAYERS.

6 **Q.** I WAS GOING TO ASK THAT QUESTION. FOR BOTH DESIGNATED
7 PROGRAMS AND ANY OTHER KIND OF PROGRAMS, IS MORE OF THE RETIRED
8 PLAYER MONEY GENERATED THROUGH AD HOC AGREEMENTS OR THROUGH THE
9 GLA'S?

10 **A.** MORE IS GENERATED THROUGH AD HOC AGREEMENTS, NOT THROUGH
11 GLA'S. GLA'S YIELD VERY LITTLE.

12 **Q.** NOW, YOU GOT ASKED SOME QUESTIONS ABOUT THE \$8 MILLION
13 THAT WAS ALLOCATED BETWEEN THE NFLPA AND PLAYERS INC, CORRECT?

14 **A.** YES, I WAS ASKED ABOUT THAT.

15 **Q.** WAS ANY OF THAT \$8 MILLION IN ANY WAY RELATED TO,
16 ATTRIBUTABLE TO, OR CONSTITUTING RETIRED PLAYER LICENSING
17 MONEY?

18 **A.** ABSOLUTELY NONE OF THAT MONEY, NONE OF THE \$8 MILLION, HAD
19 ANYTHING TO DO WITH RETIRED PLAYERS' MONEY AT ALL.

20 **Q.** YOU ALSO GOT ASKED QUESTIONS ABOUT THE 1994 AGREEMENT, AND
21 THEN THE 2000 AGREEMENT BETWEEN PLAYERS INC AND THE NFLPA
22 REGARDING HOW TO VALUE DIFFERENT RIGHTS AND ALLOCATE MONIES.

23 DO YOU RECALL THAT?

24 **A.** YES.

25 **Q.** DID ANY OF THOSE MONIES THAT WERE THE SUBJECT OF THOSE

1 AGREEMENTS HAVE ANYTHING TO DO WITH RETIRED PLAYER MONIES OR
2 LICENSING RIGHTS?

3 **A.** NO. NONE OF THOSE AGREEMENTS HAD ANYTHING TO DO WITH
4 RETIRED PLAYER RIGHTS.

5 **Q.** WHOSE RIGHTS AND MONIES DID THOSE AGREEMENTS RELATE TO?

6 **A.** IT WAS ACTIVE PLAYERS AND ACTIVE PLAYERS ONLY.

7 **Q.** WHEN MR. KESSLER WAS QUESTIONING YOU, MR. UPSHAW, HE ASKED
8 YOU ABOUT WHETHER YOU HAD MADE EFFORTS TO PROMOTE THE LICENSING
9 OF RETIRED PLAYERS' IMAGES. AND YOU SAID THAT YOU DID THAT.
10 AND I THINK YOU SAID YOU SPOKE WITH SOMEONE AT ELECTRONIC ARTS;
11 IS THAT CORRECT?

12 **A.** THAT'S CORRECT.

13 **Q.** WITH WHOM DID YOU SPEAK AT ELECTRONIC ARTS?

14 **A.** I SPOKE TO -- ACTUALLY, AT THE TIME IT WAS LARRY PROBST,
15 WHO WAS CEO, BUT ALSO WITH JOEL LINZNER, WHO WAS VERY MUCH
16 INVOLVED WITH THE NEGOTIATION OF OUR AGREEMENT.

17 **Q.** AND DO YOU RECALL WHAT YOU SAID TO MR. -- IS IT
18 P-R-O-B-S-T -- MR. PROBST?

19 **A.** SAME THING I SAID TO JOEL. THEY WERE BOTH IN THE SAME
20 ROOM AT THE SAME TIME WHEN WE WERE TALKING ABOUT THE RIGHTS WE
21 HAVE, AND I TOLD HIM I THOUGHT THAT IT WOULD BE HELPFUL IF THEY
22 USED SOME OF THE RETIRED PLAYERS IN SOME OF THEIR DESIGNATED
23 PROGRAMS.

24 **Q.** AND WHAT DID THEY SAY TO YOU?

25 **A.** THEY DIDN'T HAVE VERY MUCH INTEREST IN THAT.

1 (READING CONCLUDED.)

2 **MS. DONOVAN:** THAT'S ALL. THANK YOU.

3 **THE COURT:** IS THAT IT?

4 **MS. DONOVAN:** YES.

5 **THE COURT:** ALL RIGHT. THANK YOU.

6 NEXT WITNESS.

7 **MR. KESSLER:** YOUR HONOR, AT THIS TIME I'D LIKE TO
8 MOVE INTO EVIDENCE SOME DOCUMENTS.

9 FIRST, I'D LIKE TO MOVE INTO EVIDENCE EXHIBIT 113,
10 WHICH WAS DISCUSSED IN MR. UPSHAW'S DEPOSITION THAT WAS JUST
11 REVIEWED, TRIAL EXHIBIT 113.

12 **THE COURT:** ANY OBJECTION?

13 **MR. KATZ:** I NEED TO SEE IT, YOUR HONOR.

14 **THE COURT:** LET'S GET IT OUT AND SHOW COUNSEL.

15 **MR. KESSLER:** AND THEN, I WOULD ALSO MOVE IN, WHILE
16 HE'S LOOKING AT THAT, TRIAL EXHIBIT 1268-108, WHICH IS PART OF
17 THE MADDEN GAME THAT IS ALREADY IN EVIDENCE. IT'S A SCREEN
18 SHOT FROM THAT GAME.

19 AND, ALSO, EXHIBIT 2272 --

20 **THE COURT:** 1268, I HAVE THE ENTIRE THING BEING IN.

21 **MR. KESSLER:** I DIDN'T KNOW THAT. THIS IS A SEPARATE
22 SCREEN SHOT, 108, THAT BREAKS IT OUT, YOUR HONOR.

23 **THE COURT:** 1268-108?

24 **MR. KESSLER:** DASH 108.

25 **MR. KATZ:** MAY I SEE THAT? I HAVE NO OBJECTION TO

1 113.

2 **THE COURT:** 113 IS RECEIVED.

3 (TRIAL EXHIBIT 113 RECEIVED IN EVIDENCE.)

4 **MR. KESSLER:** AND THEN --

5 **MR. KATZ:** MAY I SEE THE ONE YOU JUST MENTIONED?

6 **MR. KESSLER:** YES.

7 **THE COURT:** DASH 108.

8 **MR. KATZ:** IS IT THIS ONE PAGE?

9 **MR. KESSLER:** IT'S THE SCREEN SHOT. THAT'S ALL.

10 **MR. KATZ:** WE HAVE NO OBJECTION.

11 **THE COURT:** IT'S IN.

12 (TRIAL EXHIBIT 1268-108 RECEIVED IN EVIDENCE.)

13 **MR. KESSLER:** THEN TRIAL EXHIBIT 2272, WITH IS
14 ANOTHER SCREEN SHOT FROM THE MADDEN GAME ALREADY IN EVIDENCE.

15 **MR. KATZ:** IT'S IN EVIDENCE.

16 **THE COURT:** 2272, ANY OBJECTION?

17 **MR. KATZ:** WELL, HE SAID IT'S IN EVIDENCE ALREADY.

18 **MR. KESSLER:** WELL, THE SCREEN SHOT.

19 **THE COURT:** 2272 IS NOT IN EVIDENCE.

20 **MR. KATZ:** I HAVE NO OBJECTION.

21 **THE COURT:** ALL RIGHT. RECEIVED.

22 (TRIAL EXHIBIT 2272 RECEIVED IN EVIDENCE.)

23 **MR. KESSLER:** YOUR HONOR, AT THIS TIME I WOULD LIKE
24 TO DISPLAY TO THE JURY TRIAL EXHIBIT 113, WHICH WAS JUST
25 ADMITTED, IF I MAY.

1 **THE COURT:** WELL, WHAT DO YOU MEAN, JUST PUBLISH IT?

2 **MR. KESSLER:** I WOULD LIKE TO PUBLISH IT BY VISUAL
3 MEANS, YOUR HONOR.

4 **THE COURT:** WAS THIS IN THE UPSHAW TESTIMONY?

5 **MR. KESSLER:** IT WAS, YOUR HONOR. AND HE TESTIFIED
6 WHAT IT WAS.

7 **THE COURT:** GO AHEAD. WE'LL LEAVE IT ON THE SCREEN
8 FOR 30 SECONDS SO THE JURY CAN SEE IT.

9 **MR. KESSLER:** CAN WE BLOW UP, IF WE CAN, LAUREN, THE
10 FIRST SEVERAL PARAGRAPHS?

11 AND I WOULD, IN PARTICULAR, CALL THE --

12 **THE COURT:** THIS IS JUST ARGUMENT.

13 **MR. KESSLER:** I WAS JUST GOING TO READ. CAN I READ,
14 YOUR HONOR?

15 **THE COURT:** YOU CAN READ THE WHOLE THING.

16 **MR. KESSLER:** OKAY. I'LL START FROM THE BEGINNING,
17 IF WE CAN. GREAT NEWS --

18 "GOOD NEWS. ONCE AGAIN, PLAYERS INC LICENSED
19 VIDEO GAME COMPANIES" -- AND THIS IS DATED JUNE 20, 2003 --
20 "HAVE UTILIZED RETIRED PLAYER NAMES AND IMAGES IN THEIR GAMES.
21 YOUR NAME AND IMAGE RIGHTS WERE UTILIZED BY ONE OR MORE VIDEO
22 GAME COMPANIES UNDER LICENSE BY PLAYERS INC FOR A GAME THAT
23 FEATURED ACTIVE PLAYER ROSTERS FOR THE 2002 NFL SEASON, EA
24 SPORTS MADDEN 2003."

25 NEXT LINE, IF WE CAN.

1 "BASED ON THE RIGHTS FEES PAID TO PLAYERS INC BY
2 VIDEO GAME LICENSEES, FOR EACH RETIRED PLAYER UTILIZED UNDER
3 SUCH LICENSE FOR THE PERIOD ENDED FEBRUARY 28, 2003, THE SHARE
4 IS 750. IN THE PAST, WE HAVE DISTRIBUTED ALL OF THE LICENSING
5 FEES RECEIVED FOR USE OF RETIRED PLAYERS' NAMES AND IMAGES TO
6 THE RETIRED PLAYERS UTILIZED, AND WE WILL CONTINUE TO DO SO.

7 "ENCLOSED WITH THIS LETTER, THEREFORE, IS YOUR
8 PAYMENT OF 750 FOR INCLUSION IN THE VIDEO GAME CATEGORY LAST
9 YEAR. WE APPRECIATE YOUR SUPPORT FOR AND PARTICIPATION IN THE
10 PLAYERS INC RETIRED GROUP LICENSING PROGRAM."

11 NEXT LINE, I GUESS.

12 "PLAYERS INC IS THE LICENSING AND MARKETING
13 SUBSIDY OF THE NFLPA. PAYMENTS BY PLAYERS INC TO THE NFLPA
14 PERMIT YOUR UNION TO SPREAD FAR MORE THAN -- TO SPEND FAR MORE
15 THAN RETIRED PLAYER DUES TO SERVICE THE NEEDS OF RETIRED
16 PLAYERS. THAT MEANS, BECAUSE ACTIVE PLAYERS ENTHUSIASTICALLY
17 SUPPORT THE RETIRED PLAYERS WHO BUILT THE GAME, YOUR NFLPA DUES
18 ARE LOW, SERVICES ARE MANY, AND YOUR BENEFITS HAVE IMPROVED
19 DRAMATICALLY OVER THE PAST 10 YEARS. ACTIVE PLAYERS' DUES AND
20 ACTIVE PLAYER LICENSING ROYALTIES PAID TO THE NFLPA MAKE THAT
21 POSSIBLE.

22 "FOR EXAMPLE, THE ANNUAL COST OF THE NFLPA
23 RETIRED PLAYERS DEPARTMENT AND BENEFITS DEPARTMENT IS
24 1.5 MILLION, WHILE RETIRED PLAYERS' DUES LAST YEAR TOTALED ONLY
25 175,000."

1 NEXT PARAGRAPH:

2 "WE LOOK FORWARD TO CONTINUING PLAYERS INC'S
3 SUCCESSFUL EFFORTS ON BEHALF OF RETIRED NFL PLAYERS. BECAUSE
4 YOU AND THE MANY OTHER NFL STARS OF THE PAST HAVE PROVIDED YOUR
5 NAME AND IMAGE RIGHTS TO THE NFLPA AND PLAYERS INC, GROUP
6 LICENSING ROYALTIES, AUTOGRAPH SESSIONS, APPEARANCES AND
7 ENDORSEMENT OPPORTUNITIES ARE INCREASING EACH YEAR.

8 "IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT US.
9 PLEASE CHECK OUT THE RETIRED PLAYER SECTION ON
10 WWW.NFLPLAYERS.COM, OUR VERY POPULAR WEB SITE. MORE
11 INFORMATION ABOUT PLAYERS INC AND CONTACT INFORMATION ABOUT OUR
12 STAFF ARE AVAILABLE THERE, AS WELL.

13 "THANK YOU, AGAIN, FOR YOUR SUPPORT."

14 AND, FINALLY:

15 "SINCERELY, GENE UPSHAW, CHAIRMAN."

16 YOUR HONOR, AT THIS POINT, DEFENDANTS ARE PLEASED TO
17 SAY THAT WE REST OUR CASE.

18 **THE COURT:** ALL RIGHT.

19 **MR. KATZ:** YOUR HONOR, I HAVE A POINT.

20 THE OTHER DAY YOUR HONOR ADMONISHED MR. KESSLER TO
21 LINK SOMETHING UP. AND HE SAID HE WOULD, AND HE DIDN'T.

22 I HAVE THE -- YOUR HONOR'S ADMONITION HERE. SO,
23 THEREFORE, WE WOULD SEEK AN INSTRUCTION TO THE JURY ON THAT.

24 **MR. KESSLER:** YOUR HONOR, I WOULD LIKE TO BE ABLE TO
25 ARGUE THIS ISSUE, BUT I THINK IT SHOULD BE DONE OUT OF THE

1 PRESENCE OF THE JURY.

2 **MR. KATZ:** IT'S PAGE 1970. LINE 17 THROUGH 24 WAS
3 YOUR ADMONITION, YOUR HONOR.

4 **THE COURT:** I'M SORRY, WHAT PAGE?

5 **MR. KATZ:** PAGE 1970, LINE 17 THROUGH 24.

6 **THE COURT:** WELL, I'D HAVE TO HEAR FROM -- DO YOU
7 WANT TO DO THIS IN THE PRESENCE OF THE JURY OR NOT?

8 **MR. KATZ:** WHATEVER YOUR HONOR WANTS.

9 **MR. KESSLER:** I THINK IT SHOULD BE DONE OUTSIDE THE
10 PRESENCE OF THE JURY.

11 **THE COURT:** ALL RIGHT. YOU'VE RESTED YOUR CASE.

12 **MR. KESSLER:** I HAVE RESTED MY CASE, YOUR HONOR.

13 **THE COURT:** IS THERE GOING TO BE A REBUTTAL CASE?

14 **MR. LECLAIR:** WE DO HAVE THAT SHORT DEPOSITION
15 EXCERPT, YOUR HONOR, TO READ, AND ONE EXHIBIT TO PUT IN.

16 **THE COURT:** ALL RIGHT. WE'RE GOING TO TAKE A
17 15-MINUTE RECESS. I THINK WE'RE GOING TO BE ABLE TO LET YOU GO
18 EARLY TODAY, BECAUSE I THINK THE LAWYERS ARE GOING TO RUN OUT
19 OF EVIDENCE. OR AT LEAST RUN OUT OF TIME TO PRESENT EVIDENCE.
20 AND, THEREFORE, WE WILL BE LETTING YOU GO A LITTLE EARLY TODAY.

21 BUT I WANT TO HEAR WHAT THE LAWYERS HAVE TO SAY OUT
22 OF YOUR PRESENCE. SO PLEASE REMEMBER THE ADMONITION. 15
23 MINUTES.

24 **THE CLERK:** ALL RISE.

25 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,

1 OUTSIDE THE PRESENCE OF THE JURY.)

2 **THE COURT:** ALL RIGHT. EVERYONE BE SEATED. I'M
3 NOT -- YOU'VE GOT TO HELP ME FOCUS ON YOUR POINT, MR. KATZ.

4 **MR. KATZ:** SURE.

5 **THE COURT:** I SEE THE PASSAGE ABOUT SCRIMMAGE
6 PLAYERS. IS THAT IT?

7 **MR. KATZ:** RIGHT. WHAT MR. --

8 **THE COURT:** GIVE ME THE CONTEXT. I DON'T REMEMBER
9 VERY WELL.

10 **MR. KATZ:** MR. KESSLER ASKED A NUMBER OF QUESTIONS OF
11 MR. ROWLEY TO THE EFFECT:

12 "WHAT IF SOMEBODY WAS ON THE PRACTICE SQUAD, AND
13 THEN THEY ONLY PLAYED TWO GAMES IN THE MIDDLE OF THE SEASON,"
14 ET CETERA. THERE WERE A NUMBER OF THOSE.

15 "WHAT IF NOBODY EVER PLAYED A GAME," ET CETERA.

16 IN FACT, YOUR HONOR, MOST, IF NOT ALL, OF THE PEOPLE
17 WHO SIGNED GLA'S HAD CAREERS LASTING YEARS AND YEARS. SO THERE
18 SIMPLY WAS NO FOUNDATION FOR THAT.

19 SO I BELIEVE -- I'M SPECULATING A LITTLE BIT AS TO
20 WHY YOUR HONOR ADMONISHED MR. KESSLER, BUT I BELIEVE WHAT YOU
21 WERE SAYING IS THERE'S A LOT OF QUESTIONS OUT HERE, BUT THERE'S
22 NO EVIDENCE. AND SUCH THAT THE JURY COULD THINK THAT THERE'S A
23 LOT OF PEOPLE ON THIS LIST THAT WERE REALLY JUST NOTHINGS. I
24 MEAN, IN THE SENSE THEY NEVER EVEN PLAYED A GAME.

25 SO YOU GAVE THAT ADMONITION. I'M SPECULATING A

1 LITTLE BIT AS TO WHAT YOUR HONOR WAS THINKING. OBVIOUSLY, I
2 DON'T KNOW THAT. BUT YOU DID GIVE THE ADMONITION.

3 HE SAID HE WOULD LINK IT UP. HE NEVER DID LINK IT
4 UP. THERE IS NO EVIDENCE AT ALL ON THOSE SUBJECTS, AND THERE
5 NEVER COULD BE EVIDENCE. THERE IS NO FOUNDATION.

6 **THE COURT:** WHAT DO YOU SAY TO THAT?

7 **MR. KESSLER:** YOUR HONOR, TO BEGIN WITH, ALL OF THESE
8 WERE HYPOTHETICAL QUESTIONS. LET ME GO TO THE TRANSCRIPT.
9 THIS STARTS BACK IN 1923. IN FACT, ON 17 -- WELL, 13:

10 "NOW, UNDER YOUR ANALYSIS, SIR" -- I WAS
11 ASKING THE EXPERT -- "IF SOMEONE WAS A
12 PRACTICE SQUAD PLAYER IN 2006, OKAY, THAT --
13 AND THAT'S ALL HE DID, HE WOULD GET 1,000
14 FROM THE GLR POOL, CORRECT?

15 **"ANSWER:** YES.

16 **"QUESTION:** IF THAT PRACTICE SQUAD PLAYER
17 RETURNED IN 2006 IN THE MIDDLE OF THE SEASON,
18 SIGNED A RETIRED PLAYER GLA, BUT PLAYED NO
19 MORE GAMES, JUST SIGNED THE RETIRED PLAYER
20 GLA, YOUR ANALYSIS WOULD AWARD THAT PRACTICE
21 SQUAD PLAYER TENS OF THOUSANDS OF DOLLARS,
22 RIGHT?

23 **"ANSWER:** MY --

24 "YES OR NO?

25 **"ANSWER:** NO."

1 **"MR. HUMMEL:** I OBJECT, YOUR HONOR. THERE'S
2 NO EVIDENCE IN THE RECORD, AND HE'S OFFERED
3 NO OPINION ABOUT HOW THE TOTAL DAMAGES TO THE
4 CLASS WOULD BE ALLOCATED AMONG INDIVIDUAL
5 CLASS MEMBERS, SO HIS HYPOTHETICAL --

6 **"THE COURT:** IT'S OVERRULED."

7 THIS IS THE COURT SPEAKING.

8 **"IT'S COMPLETELY PROPER TO ASK AN EXPERT**
9 **HYPOTHETICAL QUESTIONS. THE ENTIRE EXERCISE**
10 **BY THE EXPERT IS A HYPOTHETICAL EXERCISE.**

11 **IT'S BASED ON THE HYPOTHESIS THAT A JURY**
12 **REACHES A CERTAIN DETERMINATION AND SO IS**
13 **PROPER TO HEAR THE HYPOTHETICAL AND TEST ITS**
14 **LIMITS. THAT'S WHAT COUNSEL'S DOING.**

15 **"OVERRULED.**

16 **"PLEASE RESTATE THE QUESTION."**

17 AND THEN, THIS IS WHEN I CONTINUE:

18 **"SO THE QUESTION IS: YOU KNOW IF THE PLAYER**
19 **WAS ON THE PRACTICE SQUAD THE WHOLE YEAR,**
20 **LET'S SAY 2000 SO WE'RE FAIRLY WITHIN THE**
21 **PERIOD, THAT THE PLAYER WOULD ONLY GET 1,000**
22 **UNDER THE GLR POOL ELIGIBILITY CRITERIA AS A**
23 **PRACTICE SQUAD PLAYER, CORRECT?**

24 **"CORRECT."**

25 AND I KEEP GOING ON ASKING THIS WHOLE THING. IT'S

1 CLEAR ALL OF THIS IS HYPOTHETICAL. IT'S TRUE YOUR HONOR LATER
2 SAID TO ME CAN I PROVE THAT UP? AND AT THE TIME I SAID TO YOUR
3 HONOR I THOUGHT I WOULD BE ABLE TO PROVE IT UP.

4 NOW, WE DO HAVE THE EVIDENCE THAT TOOK PLACE. IT'S
5 IN THE FORM OF PRINTOUTS FROM THE PLAYERS ASSOCIATION, WHICH WE
6 NEVER DESIGNATED AS EXHIBITS. OKAY?

7 I CONSIDERED WHETHER I SHOULD TRY TO BRING IN AN
8 UNDISCLOSED EXPERT -- SORRY -- AN UNDISCLOSED WITNESS WHO WAS
9 ON MY -- WHO I NEVER PUT ON THE LIST, BECAUSE I DIDN'T REALIZE
10 THIS WAS GOING TO BE A POINT. AND WE CONCLUDED IT WAS GOING TO
11 BE A POOR WASTE OF THE JURY'S TIME, AND THEY WOULD OBJECT TO
12 OUR CALLING A WITNESS WHO HAD NEVER BEEN DISCLOSED AND A
13 DOCUMENT THAT WAS NEVER THERE.

14 BUT I CAN OFFER IT TO YOUR HONOR. WE HAVE THE
15 PRINTOUT THAT SHOWS THERE ARE SUCH PRACTICE SQUAD PLAYERS IN
16 THE GROUP.

17 SO I HAD A GOOD FAITH BASIS FOR THE HYPOTHETICAL.
18 BUT I DIDN'T THINK IT WAS APPROPRIATE TO TRY TO BRING IN A
19 WITNESS I NEVER DISCLOSED AND DOCUMENTS I NEVER DISCLOSED NOW
20 TO PUT IT IN.

21 SO THAT'S THE ISSUE. I DON'T THINK THERE SHOULD BE
22 AN INSTRUCTION. I DIDN'T PUT IT IN.

23 THEY COULD ARGUE IT IN CLOSING, IF THEY WANT TO,
24 ABOUT THIS PRACTICE SQUAD PLAYER.

25 BUT I THINK AS A HYPOTHETICAL IT WAS A PROPER

1 QUESTION. AND WHILE I DID SAY I THOUGHT I WOULD PROVE IT UP, I
2 CONCLUDED I CAN ONLY DO IT THROUGH EVIDENCE I NEVER DISCLOSED
3 TO THEM.

4 THAT'S WHAT IT COMES DOWN TO.

5 I'D BE HAPPY TO OFFER THAT EVIDENCE, BY THE WAY, YOUR
6 HONOR, BUT I ASSUME THEY'D OBJECT.

7 **THE COURT:** LET ME ASK A QUESTION TO JUMP AHEAD A
8 MINUTE. WHAT IS GOING TO BE THE REBUTTAL CASE?

9 **MR. LECLAIR:** YOUR HONOR, THE ONLY REBUTTAL CASE IS
10 READING THE SKALL DEPOSITION EXCERPT, AND THEN ONE COMPILATION
11 EXHIBIT THAT WE'VE TENDERED IT IN, WE INTEND TO OFFER IN
12 EVIDENCE.

13 **THE COURT:** THAT NUMBER IS WHAT?

14 **MR. LECLAIR:** THE COMPILATION EXHIBIT IS EXHIBIT
15 1327, YOUR HONOR.

16 **MR. KESSLER:** IS THAT ALL THE RETIRED PLAYER GLA'S?

17 **MR. LECLAIR:** NO, NO. THIS IS ONE WE SENT OVER.

18 **THE COURT:** WELL, LET ME ASK -- I WANT TO ASK A
19 DIFFERENT QUESTION.

20 AT ONE POINT IN -- THIS IS A DIFFERENT -- IT RELATES
21 TO THE PENDING MOTION. MR. HUMMEL SAID TO THE JURY THAT THE
22 WEB SITE HAD BEEN CHANGED AFTER -- I THINK HE SAID AFTER THIS
23 LAWSUIT WAS FILED, BUT MIGHT HAVE BEEN AFTER SOMETHING ELSE.

24 WAS THERE ACTUALLY -- IS THERE ANY EVIDENCE THAT
25 OCCURRED?

1 **MR. HUMMEL:** YES, YOUR HONOR. I READ REQUEST FOR
2 ADMISSION RESPONSE BY THE DEFENDANTS.

3 **THE COURT:** AND READ THAT TO ME AGAIN.

4 **MR. HUMMEL:** IF I HAD IT, I COULD. WE'LL GET IT IN A
5 MINUTE.

6 **THE COURT:** WHAT DID IT SAY?

7 **MR. HUMMEL:** THE REQUEST FOR ADMISSION WAS: AFTER
8 THIS LAWSUIT WAS FILED ADMIT YOU CHANGED THE WEB SITE.

9 AND THE ANSWER WAS: WE ADMIT, AND WE CHANGED THE WEB
10 SITE TO READ Y, WHEN IT HAD BEEN X.

11 **THE COURT:** ALL RIGHT.

12 **MR. HUMMEL:** THERE'S NO DISPUTE ABOUT THAT.

13 **THE COURT:** ALL RIGHT. WELL, I WAS THINKING, ANYWAY,
14 ABOUT GIVING THE JURY AN INSTRUCTION ABOUT THE -- I'M POSITIVE
15 BOTH SIDES HAVE DONE THIS, HAVE MADE STATEMENTS THAT HAVE GONE
16 OUTSIDE THE ACTUAL TRIAL RECORD, AND HOW THE JURY SHOULD
17 EVALUATE THE EVIDENCE.

18 SINCE I AM POSITIVE THAT BOTH SIDES HAVE DONE THIS,
19 IT WOULD BE UNFAIR TO SINGLE OUT THIS ONE INSTANCE, EXCEPT AS
20 PERHAPS AN EXAMPLE, WHICH I THINK MAYBE I SHOULD DO.

21 BUT TO JUST ADMONISH THE JURY ON THIS ONE POINT,
22 WITHOUT MAKING IT AN EVEN-HANDED THING, WOULD BE UNFAIR. SO I
23 WILL SAY SOMETHING APPROPRIATE TO THE JURY ON THIS POINT.

24 ALL RIGHT. ARE WE READY TO BRING --

25 **MR. KESSLER:** YES, YOUR HONOR, ON THIS COMPILATION

1 THEY WANT TO OFFER, THIS IS, IN EFFECT -- IS A WAY OF THEM
2 OFFERING FOR MR. RASCHER IN EXHIBIT FORM. IT'S HIS DATA
3 REDISPLAYED IN A NEW FORM THAT WAS NEVER OFFERED IN HIS
4 EXPERT -- OR MR. ROWLEY. I'M NOT SURE IF IT'S ROWLEY OR
5 RASCHER.

6 **THE COURT:** IS THERE AN OBJECTION TO IT?

7 **MR. KESSLER:** THERE'S AN OBJECTION TO IT.

8 **THE COURT:** IT IS HEARSAY. IT'S NOT GOING TO COME
9 IN. I DON'T KNOW WHY YOU LAWYERS EVEN THOUGHT YOU'VE ALLOWED
10 IT.

11 EXPERT REPORTS NEVER COME INTO EVIDENCE.

12 **MR. LECLAIR:** YOUR HONOR, THIS HAS NOTHING TO DO WITH
13 MR. ROWLEY OR AN EXPERT.

14 **THE COURT:** WHO PREPARED IT?

15 **MR. LECLAIR:** YOUR HONOR, MY OFFICE PREPARED --

16 **THE COURT:** LET ME SEE IT.

17 **MR. LECLAIR:** THIS IS A PURE COMPILATION, YOUR HONOR.
18 THIS COMES FROM PAT ALLEN'S TESTIMONY, YOUR HONOR. SHE --
19 REMEMBER SHE HAD --

20 **THE COURT:** WHY DIDN'T YOU DRAG IT OUT OF HER WHEN
21 SHE WAS HERE?

22 **MR. LECLAIR:** YOUR HONOR, BECAUSE IT'S A PURE
23 COMPILATION. SHE DIDN'T DO IT. IT'S JUST A COMPILATION OF THE
24 NUMBERS.

25 **THE COURT:** SORRY. THIS IS HEARSAY. I'M NOT

1 TAKING -- THERE'S NO FOUNDATION THAT THIS IS A PURE
2 COMPILATION. AND THE IDEA THAT PURE COMPILATIONS -- NO. THIS
3 IS NOT COMING IN.

4 **MR. KESSLER:** THANK YOU.

5 **THE COURT:** WHAT IS THE EXHIBIT NUMBER? 1327 IS
6 EXCLUDED.

7 ALL RIGHT. WHAT ELSE?

8 **MR. KESSLER:** THAT'S ALL FROM US, YOUR HONOR.

9 **THE COURT:** NOW, THERE IS A POINT I WANT TO SAY ON
10 MR. KESSLER'S PART, PARTLY IN HIS DEFENSE.

11 WHEN YOU ARE EXAMINING AN EXPERT YOU CAN VARY THE
12 HYPOTHETICAL AND SEE HOW IT WOULD CHANGE THE ANSWER BECAUSE THE
13 ENTIRE EXERCISE WITH AN EXPERT IS HYPOTHETICAL.

14 SO THAT'S OKAY. THE PROBLEM IS THAT THE WAY IN WHICH
15 THAT EXAMINATION CAME DOWN LEFT THE IMPRESSION THAT THE FACTS
16 WERE ABOUT THE SCRIMMAGE PLAYERS, AS THEY WERE INDICATING. NOW
17 IT TURNS OUT THERE'S NOTHING IN THE RECORD TO EVALUATE THAT.
18 SO THAT'S THE PROBLEM.

19 **MR. KATZ:** WELL, IT'S A BIG PROBLEM, YOUR HONOR,
20 BECAUSE OUR PLAYERS PLAYED FOR YEARS. YOU COULD GO THROUGH
21 THAT LIST AND ALL OF THEM PLAYED FOR YEARS.

22 AND YET, ALL THEY HEARD -- AND HE ASKED IT SEVERAL
23 TIMES -- WAS, YOU KNOW, SOMEBODY WHO NEVER PUT ON A UNIFORM,
24 SOMEBODY WHO PLAYED ONE GAME.

25 IT'S JUST A COMPLETELY AND TOTALLY INCORRECT

1 IMPRESSION.

2 YOUR HONOR NOTED IT AT THE TIME. YOU ADMONISHED HIM.
3 HE DIDN'T SAY:

4 "I'M GOING TO THINK ABOUT IT."

5 HE SAID:

6 "I WILL," AND HE DIDN'T.

7 **THE COURT:** ALL RIGHT. OKAY. LET'S TAKE TEN MINUTES
8 OURSELVES, AND THEN WE'LL BRING THE JURY BACK AND HEAR THE
9 REBUTTAL CASE.

10 (RECESS TAKEN FROM 10:12 TO 10:23 A.M.)

11 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
12 OUTSIDE THE PRESENCE OF THE JURY.)

13 **MR. KESSLER:** YOUR HONOR, I DON'T KNOW IF YOU INTEND
14 TO USE MY COMMENTS AS AN EXAMPLE IN YOUR INSTRUCTION. YOUR
15 HONOR, IF YOU DO, I WOULD LIKE TO MAKE ONE POINT. I THINK THE
16 ONLY FAIR THING, THEN, WOULD BE TO USE AN EXAMPLE FROM
17 PLAINTIFFS AT THE SAME TIME.

18 **THE COURT:** DO YOU HAVE ONE?

19 **MR. KESSLER:** YES. FOR EXAMPLE, JUST TODAY
20 MR. HUMMEL ASKED ROGER NOLL ABOUT TAKE TWO'S MOTIVE IN WAITING
21 YEARS BEFORE INTRODUCING THEIR GAME, AND HOW THEY -- AND THAT
22 THEY WERE DRIVEN OUT BY THE USE OF -- THAT THERE WAS A DELAY OF
23 THREE YEARS BECAUSE ... THAT WAS ALL PURE SPECULATION.

24 THIS WITNESS HAD NO PERSONAL KNOWLEDGE OF IT.
25 THERE'S NO EVIDENCE IN IT ABOUT TAKE TWO. AND IT WAS RIGHT

1 DONE BEFORE THE JURY.

2 SO I THINK IF YOUR HONOR IS GOING TO USE ANY EXAMPLE
3 YOU WOULD HAVE TO USE ONE FOR BOTH SIDES.

4 SECOND, BECAUSE MR. KATZ MADE A STATEMENT TO THIS
5 COURT THAT EVERY OTHER COUNSEL AT HIS TABLE SAID TO EACH OTHER
6 IS FALSE, AND THEY KNEW IT. I HAVE TO CORRECT IT, YOUR HONOR.

7 **MR. HUMMEL:** WHAT?

8 **MR. KESSLER:** IT IS NOT TRUE THAT EVERY ONE OF THE
9 MEMBERS IN THIS RETIRED PLAYER CLASS PLAYED FOR YEARS. IN
10 FACT, THE OTHER SIDE KNOWS -- THERE'S NO EVIDENCE ON THIS FROM
11 THEM, EITHER.

12 THE OTHER SIDE KNOWS THAT MANY OF THESE CLASS MEMBERS
13 PLAYED A FEW GAMES AT BEST, TOTALLY APART FROM THIS PRACTICE
14 SQUAD THING.

15 AND IF THEY THINK THAT'S WRONG, THEY SHOULD COME UP
16 AND SAY THAT. BUT THEY KNOW MR. KATZ MISSPOKE. I'M NOT SAYING
17 HE WAS DELIBERATING MISSPEAKING, BUT IT WAS WRONG.

18 I HAVE HERE, YOUR HONOR, FOR EXAMPLE, TWO CLASS
19 MEMBERS WHO WERE REFEREES, WHO NEVER PLAYED IN THE NFL. THEY
20 SIGNED THE GLA, SO THEY ARE IN THE CLASS.

21 ONE IS NAMED MR. JOHN WESTINHAVER (PHONETIC) AND THE
22 OTHER IS NAMED -- WHAT WAS THE OTHER ONE? IT'S JOHN
23 WESTINHAVER. AND THE OTHER ONE IS MR. DON WEDGE. THEY ARE NOW
24 CLASS MEMBERS BECAUSE THEY SIGNED --

25 **THE COURT:** WAIT.

1 **MR. KESSLER:** SORRY.

2 **THE COURT:** WAIT UNTIL THE DOOR IS COMPLETELY CLOSED.

3 ALL RIGHT. GO AHEAD.

4 **MR. KESSLER:** THEY'RE CLASS MEMBERS BECAUSE THEY
5 SIGNED THIS FORM IN THE GLA. AGAIN, I DON'T WANT YOUR HONOR IN
6 THE INSTRUCTION TO GIVE ANY SENSE TO THE JURY THAT, IN FACT,
7 THERE'S EVIDENCE THAT ALL THESE CLASS MEMBERS PLAYED FOR YEARS,
8 BECAUSE THERE'S NO SUCH EVIDENCE ON THAT POINT.

9 THOSE ARE MY TWO REQUESTS, YOUR HONOR.

10 **THE COURT:** MR. HUMMEL?

11 **MR. HUMMEL:** SURE. I'LL RESPOND BRIEFLY.

12 THE QUESTIONS I ASKED ABOUT TAKE TWO OF DR. NOLL
13 RELATE -- WERE ATTACHED TO A DECLARATION OF ANDREW FEFFER THAT
14 HE RELIED ON IN CONNECTION WITH FORMULATING HIS OPINIONS. HE
15 SAID HE WAS FAMILIAR WITH THE ARTICLE.

16 I ASKED HIM A QUESTION BASED ON A PREMISE THAT HE WAS
17 ABSOLUTELY FAMILIAR WITH. HE WAS WELL AWARE OF THE FACTS.

18 **THE COURT:** I'M NOT DENYING YOU HAD A GOOD FAITH
19 BASIS FOR THE QUESTION, PERHAPS, BUT THAT'S NOT IN EVIDENCE.

20 **MR. HUMMEL:** IT IS IN EVIDENCE, YOUR HONOR -- HIS
21 OPINION BASED ON FACTS THAT HE CONSIDERED --

22 **THE COURT:** INTERROGATORIES WERE NEVER READ INTO
23 EVIDENCE.

24 **MR. HUMMEL:** THEY ARE NOT INTERROGATORIES.

25 **THE COURT:** YOU SAID THERE WAS SOME INTERROGATORY YOU

1 RELIED ON.

2 **MR. HUMMEL:** NO, I SAID IT'S A DECLARATION BY --

3 **THE COURT:** IT'S NOT IN EVIDENCE.

4 **MR. HUMMEL:** CORRECT. I DIDN'T READ IT TO HIM.

5 **THE COURT:** SO IT'S NOT BEFORE THE JURY. IT WON'T BE
6 IN THE JURY ROOM, AND THEY NEVER HEARD THAT.

7 **MR. HUMMEL:** NO. BUT, YOUR HONOR, THIS IS APPLES AND
8 ORANGES COMPLETELY.

9 WHAT I ASKED HIM WAS:

10 "DID YOU CONSIDER, IN CONNECTION WITH THIS
11 REPORT, THIS DECLARATION AND THE EVIDENCE CONTAINED THEREIN?

12 "YES."

13 AND THEN, I'M ENTITLED TO CROSS HIM ON IT.

14 **THE COURT:** I DON'T REMEMBER YOU ASKING HIM --

15 **MR. HUMMEL:** IT'S IN THE RECORD. I ABSOLUTELY DID,
16 AND HE KNOWS IT.

17 **THE COURT:** HERE'S WHAT WE ARE GOING TO DO. I'M NOT
18 GOING TO DEAL WITH THIS NOW, BECAUSE I AM CONVINCED TO A MORAL
19 CERTAINTY THAT BOTH SIDES HAVE DONE THIS.

20 SO HERE'S WHAT WE'RE GOING TO DO. TODAY YOU GET --
21 MR. KESSLER, YOU PICK OUT ONE OR TWO EXAMPLES THAT YOU THINK
22 ARE JUST BLATANT -- MR. KATZ OR SOMEONE ELSE -- BLATANT
23 STATEMENTS TO THE JURY FOR WHICH THERE IS NO EVIDENCE IN THE
24 RECORD.

25 THEN, THEY CAN RESPOND. AND IF THEY WANT TO PUT OUT

1 TWO THAT THEY -- THAT YOU'VE SAID LIKE THIS ONE, WHERE THERE'S
2 NO EVIDENCE IN THE RECORD, YOU CAN RESPOND. AND -- WAIT JUST A
3 MINUTE.

4 SO THIS IS DUE AT 4 O'CLOCK TODAY. BY MIDNIGHT THE
5 OTHER SIDE CAN RESPOND. WHENEVER I GET THE FINAL JURY
6 INSTRUCTIONS I'M GOING TO TELL THE JURY SOMETHING. AND I MIGHT
7 USE AN EXAMPLE FROM BOTH SIDES.

8 THIS IS -- THIS IS ONE I CAN USE, MR. -- MR. KESSLER,
9 BUT IT WOULD BE UNFAIR TO DO IT UNTIL HE GETS HIS OPPORTUNITY
10 TO SHOW THAT YOU HAVE DONE THE SAME THING.

11 **MR. KATZ:** MAY I RESPOND, YOUR HONOR?

12 **THE COURT:** YES.

13 **MR. KATZ:** FIRST OF ALL, YOU ARE NOT GOING TO FIND
14 ANY FROM ME. HE WON'T FIND ONE. I'M SAYING THAT RIGHT NOW.

15 **THE COURT:** I WILL JUST SAY THIS: I HAVE HEARD A LOT
16 OF THINGS IN THIS TRIAL THAT WHEN I HEARD IT AT THE TIME, MY
17 EYEBROW WENT UP, AND I SAID:

18 "I HAVE NOT HEARD A THING ALONG THOSE LINES, AND
19 I'M WONDERING IF I EVER WILL."

20 AND I HEARD IT FROM YOUR SIDE, TOO, MR. KATZ. I
21 DIDN'T WRITE IT DOWN AT THE TIME.

22 **MR. KATZ:** ALL I'M SAYING IS TWO THINGS. NUMBER ONE,
23 YOU'RE NOT GOING TO FIND ONE FROM ME.

24 AND NUMBER TWO, ALL I DID WAS GET UP AND READ YOUR
25 HONOR'S ADMONITION AND MAKE A MOTION.

1 AND ALL OF THIS BLOWBACK NOW --

2 **THE COURT:** I THINK THERE'S SOME GOOD MERIT TO THIS
3 MOTION.

4 **MR. KATZ:** YEAH, ABSOLUTELY, BECAUSE THERE'S NO
5 EVIDENCE BACKING IT UP. IT'S AN IMPROPER HYPOTHETICAL. YOU
6 CAN'T ASK A HYPOTHETICAL AND JUST MAKE IT UP OUT OF WHOLE
7 CLOTH.

8 WE HAVE HAD FOUR PEOPLE COME HERE --

9 **THE COURT:** I BELIEVE YOUR SIDE DID THE SAME THING,
10 BUT I CAN'T GIVE YOU CHAPTER AND VERSE. AND I'M GOING TO GIVE
11 THE OTHER SIDE A CHANCE TO GIVE ME THE EXAMPLE SO I CAN GIVE A
12 BALANCED INSTRUCTION THAT CASTS A PLAGUE ON BOTH HOUSES.

13 **MR. KESSLER:** YOUR HONOR, YOU ASKED FOR TWO.

14 **THE COURT:** YOU CAN GIVE THREE. I DON'T CARE. I
15 JUST NEED ONE THAT WILL HOLD UP.

16 **MR. KESSLER:** OKAY. VERY GOOD.

17 **THE COURT:** INSTEAD OF --

18 **MR. KESSLER:** WE'LL GIVE YOU A VARIETY --

19 **THE COURT:** IF IT TURNS ON EXTENDED ARGUMENT, THEN IT
20 DOESN'T HOLD UP.

21 **MR. KESSLER:** WE'LL GIVE YOU A VARIETY OF CHOICES
22 WHICH WE THINK EACH WILL HOLD UP, BUT YOUR HONOR CAN PICK.

23 **MR. KATZ:** I JUST WANT TO SAY FOR THE RECORD
24 MR. ADDERLEY PLAYED 11 YEARS?

25 **MR. ADDERLEY:** 12.

1 **MR. KATZ:** MR. MCNEIL, I THINK, PLAYED FIVE YEARS?

2 **MR. MCNEIL:** 11.

3 MR. BEACH, I THINK PLAYED, WHAT? FIVE YEARS?

4 **MR. ADDERLEY:** SIX.

5 **MR. KATZ:** SIX YEARS.

6 AND MR. LAIRD PLAYED 11 YEARS.

7 **THE COURT:** WELL, BUT THE PURPORT OF HIS QUESTIONS
8 WERE: IS THERE SOMEBODY IN THIS CLASS WHO DIDN'T DO ALL THAT?

9 **MR. KATZ:** NO. THE PURPORT OF THE QUESTION WAS
10 EVERYBODY WAS LIKE THIS. EVERYBODY IS JUST A FREE RIDER.
11 EVERYBODY IS WORTHLESS. EVERYBODY WANTS SOMETHING FOR NOTHING.

12 **THE COURT:** NO, HE NEVER WENT THAT FAR. HE NEVER
13 WENT THAT FAR.

14 **MR. KESSLER:** NOR WOULD I, YOUR HONOR.

15 **THE COURT:** BUT HE DID -- HE DID GIVE THE EXAMPLE OF
16 THE SCRIMMAGE PLAYER.

17 **MR. KATZ:** IT'S NOT AN EXAMPLE, BECAUSE IT DOESN'T
18 EXIST.

19 **MR. KESSLER:** IT DOES. I CAN GIVE MR. KATZ THE
20 EXAMPLE OF THE PLAYER. IT EXISTS. I AGREE, YOUR HONOR, WE
21 DIDN'T PUT IN THE EVIDENCE --

22 **THE COURT:** HERE'S WHAT WE'LL DO. HOW ABOUT LETTING
23 THEM REOPEN THEIR CASE? WE WILL LET THEM PUT ON THE WITNESS SO
24 THIS WILL JUST EVAPORATE.

25 **MR. KATZ:** MY TIMING WAS ACTUALLY COORDINATED WITH

1 THEIR CLOSING OF THE CASE. THERE WAS A REASON FOR IT.

2 **THE COURT:** I CAN ALLOW THEM TO REOPEN.

3 **MR. KATZ:** YES, YOU CAN.

4 **THE COURT:** HOW HARD IS IT GOING TO BE TO PUT ON A
5 WITNESS TO DO THIS?

6 **MR. KESSLER:** IF HE CAN TESTIFY FROM THE RECORDS OF
7 THE UNION, I COULD PUT UP MR. NAHRA TO TESTIFY FROM THE RECORDS
8 OF THE UNION, AND I HAVE HERE AS TO WHEN THE PLAYER PLAYED --

9 **MR. KATZ:** SO WAIT.

10 **MR. KESSLER:** -- AND WHAT STATUS HE WAS.

11 **MR. KATZ:** I'M NOT GOING TO BE PUNISHED FOR MAKING
12 THIS MOTION? I DON'T GET IT. I JUST DON'T GET IT.

13 **THE COURT:** I THINK THIS IS A SAND-BOX-TYPE THING ON
14 BOTH SIDES. I'M GOING TO INSTRUCT THE JURY, BECAUSE THIS IS A
15 BROADER PROBLEM THAN THIS ONE THING.

16 I'M GOING TO INSTRUCT THE JURY IN THE FINAL
17 INSTRUCTIONS ON THIS GENERAL PROBLEM OF THE LAWYERS SAYING
18 THINGS THAT ARE NOT SUPPORTED BY THE EVIDENCE. AND I'M GOING
19 TO TRY TO FIND AN EXAMPLE THAT IS A PLAGUE ON BOTH HOUSES.

20 **MR. KATZ:** WELL, YOUR HONOR --

21 **THE COURT:** ONE FROM YOUR SIDE, ONE FROM THAT SIDE.

22 **MR. KATZ:** YOUR HONOR --

23 **THE COURT:** NO, I'M NOT GOING TO LET YOU REOPEN,
24 BECAUSE I THINK YOU SHOULD HAVE DONE THIS, AND YOU SHOULD NOT
25 HAVE USED THIS EXAMPLE -- THERE WAS -- I ACCEPT THAT THERE WAS

1 A GOOD FAITH BASIS FOR THE QUESTION.

2 **MR. KESSLER:** YES.

3 **THE COURT:** BUT THEN, YOU DIDN'T FOLLOW THROUGH TO
4 LAY THAT BEFORE THE JURY.

5 **MR. KESSLER:** I UNDERSTAND THAT, YOUR HONOR. I AM
6 CERTAINLY NOT DISAGREEING WITH YOUR HONOR. I GUESS AS LONG AS
7 YOU GIVE ONE EXAMPLE FROM EACH SIDE OR DON'T GIVE EXAMPLES
8 THAT'S FINE.

9 **THE COURT:** I AM GOING TO INSTRUCT THE JURY. BUT
10 YOU -- I'M GIVING YOU UNTIL 4 O'CLOCK TODAY TO COME UP WITH
11 YOUR EXAMPLES THAT SHOW THE OTHER SIDE HAS DONE THINGS JUST AS
12 BAD.

13 THEN, IT WILL BE BALANCED.

14 **MR. KESSLER:** OKAY.

15 **THE COURT:** BECAUSE I DO BELIEVE THAT BOTH SIDES HAVE
16 DONE THIS.

17 **MR. KESSLER:** AND WHAT WE WILL DO IS FACTS THEY PUT
18 IN THAT ARE NOT IN EVIDENCE, WHICH WE WILL SHOW YOU.

19 **MR. KATZ:** WELL, YOUR HONOR, I AM CONCERNED ABOUT
20 YOUR HONOR'S SAND BOX REMARK, BECAUSE I DON'T CONSIDER THIS TO
21 BE A SAND BOX, AND I HEREBY WITHDRAW MY MOTION.

22 **THE COURT:** ALL RIGHT. THEN, THE MOTION IS
23 WITHDRAWN. I'M STILL GOING TO SAY SOMETHING, THOUGH, WITHOUT
24 USING EXAMPLES, BECAUSE I'M CONVINCED TO A MORAL CERTAINTY THAT
25 BOTH SIDES ARE GOING TO GET UP IN THEIR CLOSING ARGUMENTS AND

1 SAY THINGS THAT ARE NOT SUPPORTED BY THE EVIDENCE.

2 **MR. KESSLER:** WE HAVE NO OBJECTION WITH THAT EXAMPLE,
3 SO LONG AS HE'S WITHDRAWN HIS MOTION.

4 **THE COURT:** ALL RIGHT. MOTION WITHDRAWN.

5 WHAT DO YOU HAVE, MR. HUMMEL?

6 **MR. HUMMEL:** YOUR HONOR, SOMETHING YOUR COURTROOM
7 DEPUTY GAVE ME, WHICH IS AN INQUIRY FROM THE PRESS ABOUT HOW
8 THEY GET ACCESS TO EXHIBITS. WE DON'T HAVE TO DEAL WITH IT
9 NOW. BUT WE -- BOTH SIDES --

10 **THE COURT:** THERE WERE TWO, TWO DOCUMENTS THEY
11 WANTED.

12 **MR. HUMMEL:** RIGHT.

13 **THE COURT:** WHY CAN'T YOU JUST TAKE CARE OF IT FOR ME
14 AND GIVE THEM THE COPIES?

15 **MR. HUMMEL:** WE WILL. I JUST WANTED TO MAKE SURE
16 THAT'S NOT A VIOLATION OF THE COURT'S ORDER ABOUT CONTACTING
17 PRESS.

18 **THE COURT:** WERE THEY CONFIDENTIAL DOCUMENTS OR
19 SOMETHING?

20 **MR. HUMMEL:** NO, NO.

21 **THE COURT:** WOULD YOU TWO TAKE CARE OF THIS SO I
22 DON'T HAVE TO HAVE DAWN --

23 **MR. HUMMEL:** WE WILL.

24 **THE COURT:** -- DO --

25 **MR. KESSLER:** WHY DON'T WE DO THAT?

1 **MR. HUMMEL:** WE WILL DO IT, YOUR HONOR, YES.

2 **MR. KESSLER:** WE'LL MAKE SURE NONE OF US SPEAK TO THE
3 PRESS.

4 **THE COURT:** ALL RIGHT. THAT WOULD BE OKAY.

5 **MR. HUMMEL:** THANK YOU, YOUR HONOR.

6 **THE COURT:** ALL RIGHT. LET'S BRING THE JURY BACK,
7 AND WE WILL FINISH THE CASE ON EVIDENCE.

8 (THEREUPON, THE JURY RETURNS TO THE COURTROOM.)

9 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
10 IN THE PRESENCE OF THE JURY.)

11 **THE COURT:** OKAY. WELCOME BACK. HAVE A SEAT. WE
12 TOOK SOME TIME TO SORT OUT A MATTER WHICH REALLY GETS
13 SIMPLIFIED, AND I WILL TELL YOU WHAT YOU NEED TO KNOW ON THIS
14 TOMORROW.

15 SO WE'RE GOING TO NOW JUST PROCEED TO -- WE'VE
16 REACHED A MILESTONE. PLAINTIFF HAS RESTED. DEFENSE HAS
17 RESTED. BUT BOTH SIDES NOW GET A CHANCE TO PUT ON A REBUTTAL
18 CASE. AND THEN, THE DEFENSE GETS TO PUT ON A, QUOTE,
19 "SURREBUTTAL CASE."

20 TYPICALLY, THESE ARE VERY SHORT, AND I KNOW FROM WHAT
21 THE LAWYERS HAVE TOLD ME THIS IS GOING TO BE VERY SHORT RIGHT
22 NOW.

23 SO, MR. LECLAIR, DO YOU HAVE A REBUTTAL CASE TO
24 PRESENT AT THIS TIME?

25 **MR. LECLAIR:** YES, YOUR HONOR. WE'RE JUST GOING TO

1 READ A VERY SHORT DEPOSITION EXCERPT. AND MR. HILBERT AND
2 MR. GARZA ARE GOING TO READ THE TRANSCRIPT FOR US.

3 **THE COURT:** ALL RIGHT. COME FORWARD, PLEASE.

4 WHAT IS THE NAME OF THE WITNESS?

5 **MR. HILBERT:** AND THE WITNESS IS HOWARD J. SKALL,
6 YOUR HONOR.

7 **THE COURT:** S-K-A-L-L?

8 **MR. HILBERT:** THAT'S CORRECT.

9 **THE COURT:** ALL RIGHT. AND HOW LONG -- YOU WILL TELL
10 ME HOW THE TIME IS ALLOCATED, BUT GIVE THE JURY A HEADS-UP ON
11 HOW LONG IT'S GOING TO BE.

12 **MR. HILBERT:** WE HAVEN'T ACTUALLY MEASURED IT, BUT
13 IT'S GOING TO BE MAYBE TEN MINUTES TOPS.

14 **THE COURT:** AND MR. SKALL WAS AN EMPLOYEE OF WHO?

15 **MR. HILBERT:** HE WAS AN EMPLOYEE OF PLAYERS INC.
16 FORMER EMPLOYEE. HE WAS THEIR VICE PRESIDENT OF PLAYER
17 MARKETING.

18 **THE COURT:** ALL RIGHT. WHAT IS THE DATE OF THE
19 DEPOSITION?

20 **MR. HILBERT:** THE DATE OF THE DEPOSITION IS FEBRUARY
21 14, 2008.

22 **THE COURT:** ALL RIGHT. PLEASE GO RIGHT AHEAD.

23 **MR. HILBERT:** LET ME GIVE ONE CAVEAT, WHICH IS THIS
24 IS A DEPOSITION THAT I ACTUALLY TOOK, SO I'M GOING TO READ MY
25 OWN PART.

1 MR. GARZA IS GOING TO BE PLAYING THE ROLE OF HOWARD
2 SKALL.

3 AND, INCIDENTALLY, MY NAME IS RYAN HILBERT. I'M AN
4 ATTORNEY WITH THE PLAINTIFFS.

5 **HOWARD SKALL,**
6 CALLED AS A WITNESS FOR THE PLAINTIFFS HEREIN, TESTIFIED VIA
7 DEPOSITION READ IN OPEN COURT IN THE PRESENCE AND HEARING OF
8 THE JURY AS-FOLLOWS:

9 (DEPOSITION TESTIMONY READ BY MR. HILBERT AND MR.
10 GARZA AS FOLLOWS:)

11 **EXAMINATION**

12 **Q.** AS YOU HEARD, MY NAME IS RYAN HILBERT, AND I'M WITH
13 MANATT, PHELPS & PHILLIPS OUT IN PALO ALTO.

14 **THE COURT:** READ SLOWER.

15 **MR. HILBERT:** SORRY.

16 **Q.** AND WE'RE COUNSEL FOR THE PLAINTIFFS IN THIS MATTER.

17 CAN YOU PLEASE STATE YOUR NAME AND ADDRESS FOR THE
18 RECORD.

19 **A.** HOWARD SKALL. ADDRESS IS 18524 RUSHBROOKE DRIVE IN OLNEY,
20 MARYLAND.

21 **Q.** WHEN DID YOU START WORKING FOR PLAYERS INC?

22 **A.** FOR PLAYERS INC OR THE NFLPA?

23 **Q.** FOR PLAYERS INC, INITIALLY.

24 **A.** IT WOULD HAVE BEEN MARCH OR APRIL 1995.

25 **Q.** AND WHAT WAS YOUR TITLE UPON JOINING PLAYERS INC?

1 **A.** I BELIEVE MY FIRST TITLE WAS PLAYER MARKETING COORDINATOR.

2 **Q.** AND FOR HOW LONG DID YOU HOLD THAT POSITION?

3 **A.** PROBABLY ABOUT THREE OR FOUR YEARS.

4 **Q.** SO UNTIL AROUND 1995 TO 1999?

5 **A.** CORRECT.

6 **Q.** AND WHAT WERE YOUR JOB DUTIES AS PLAYER MARKETING

7 COORDINATOR?

8 **A.** I WAS RESPONSIBLE FOR RUNNING THE PLAYER MARKETING
9 DEPARTMENT. AND WHAT WE DID IN THE PLAYER MARKETING DEPARTMENT
10 WAS A FEW DIFFERENT THINGS. WE PROCURED PLAYERS FOR OUR
11 INTERNAL NEEDS, WHETHER IT WAS AN INTERNAL EVENT THAT WE WERE
12 PUTTING ON, ANYTHING ELSE WE WERE DOING FROM A PLAYERS INC
13 STANDPOINT, WHICH WE WERE LOOKING TO INCORPORATE PLAYERS,
14 PLAYERS INC RADIO OR RADIO PROPERTY. WE HAD THINGS OF THAT
15 NATURE. AND THEN, THE OTHER MAIN RESPONSIBILITY WAS PROCURING
16 PLAYERS FOR PLAYERS INC LICENSEES AND SPONSORS WHEN THEY WANTED
17 TO INCORPORATE PLAYERS TO PROMOTE THEIR PRODUCTS OR SERVICES.

18 **Q.** AND WHEN YOU SAY "PLAYERS," DO YOU MEAN TO INCLUDE ACTIVE
19 AND RETIRED NFL PLAYERS?

20 **A.** YES.

21 **Q.** YOU SAID YOU WERE IN CHARGE OF THE DEPARTMENT. HOW MANY
22 PEOPLE WERE IN THE DEPARTMENT?

23 **A.** IN 1995, WHEN I STARTED, IT WAS ME. AND IN 2006, WHEN I
24 LEFT, I WAS RUNNING A DEPARTMENT OF TEN PEOPLE.

25 **Q.** IN 1998 OR 1999 WHAT DID YOUR TITLE CHANGE TO?

1 **A.** ASSISTANT VICE PRESIDENT, PLAYER MARKETING.

2 **Q.** AND WAS THAT THE TITLE THAT YOU HAVE HAD UP UNTIL YOUR
3 DEPARTURE FROM PLAYERS INC?

4 **A.** NO.

5 **Q.** FOR HOW LONG DID YOU HOLD THE TITLE OF ASSISTANT VICE
6 PRESIDENT OF PLAYER MARKETING?

7 **A.** PROBABLY ANOTHER THREE TO FOUR YEARS.

8 **Q.** ALL RIGHT. AND THEN IN 2002 YOUR JOB TITLE CHANGED AGAIN,
9 CORRECT?

10 **A.** CORRECT.

11 **Q.** AND WHAT DID IT CHANGE TO AT THAT POINT?

12 **A.** VICE PRESIDENT, PLAYER MARKETING.

13 **Q.** FIRST YOU WERE ASSISTANT VICE PRESIDENT OF PLAYER
14 MARKETING, AND IN 2002 IT CHANGED TO VICE PRESIDENT OF PLAYER
15 MARKETING?

16 **A.** CORRECT.

17 **Q.** AND IS THAT THE TITLE THAT YOU HELD UP UNTIL THE TIME OF
18 YOUR DEPARTURE FROM PLAYERS INC?

19 **A.** YES.

20 **Q.** WAS YOUR DEPARTMENT INVOLVED IN THE LICENSING OF RETIRED
21 PLAYER RIGHTS?

22 **A.** NO.

23 **Q.** IS THERE A LIST OF APPROXIMATELY 3,000 RETIRED PLAYERS
24 THAT'S MADE AVAILABLE TO LICENSEES?

25 **A.** NOT THAT I WAS AWARE OF.

1 **Q.** IS THERE A FLAT FEE AVAILABLE FOR THE LICENSING OF GROUP
2 OF RETIRED PLAYERS?

3 **A.** NOT THAT I WAS AWARE OF.

4 **Q.** DO YOU HAVE ANY IDEA HOW MANY OF THE 765 RETIRED PLAYER
5 OPPORTUNITIES, HOW MANY RETIRED PLAYERS WERE INVOLVED IN THOSE
6 765?

7 **A.** LOOKING AT CHART 2, THERE WERE 95 HALL OF FAME PLAYERS AND
8 255 NON-HALL OF FAME PLAYERS FOR A TOTAL OF 350 DIFFERENT
9 RETIRED PLAYERS WHICH HAD GONE UP FROM 210 THE PREVIOUS YEAR.
10 AND THEN THROUGHOUT THE TIME I WAS THERE WE WERE VERY PROUD OF
11 THE PROGRESS THAT WE MADE GETTING OPPORTUNITIES FOR BOTH ACTIVE
12 AND RETIRED PLAYERS. YOU CAN SEE HOW MUCH MORE WE WERE GOING
13 UP FROM ONE YEAR TO THE NEXT YEAR BY THIS CHART.

14 **Q.** WAS ANYONE OTHER THAN HALL OF FAME PLAYERS INCLUDED IN
15 THOSE 765 RETIRED PLAYER OPPORTUNITIES?

16 **A.** YES. AND THE BREAKDOWN IS RIGHT THERE IN CHART 2. THERE
17 WAS 490 OPPORTUNITIES FOR NON-HALL PLAYERS IN THAT FISCAL YEAR,
18 WHICH WAS AN INCREASE OF DOUBLE THE YEAR BEFORE.

19 (READING CONCLUDED.)

20 **MR. HILBERT:** THAT'S ALL WE HAD, YOUR HONOR.

21 **THE COURT:** WHAT WAS THE BREAKDOWN TIME-WISE ON THAT?

22 **MR. HILBERT:** PARDON?

23 **THE COURT:** WHY DON'T I JUST SAY FIVE AND FIVE?

24 **MR. GARZA:** SOUNDS FAIR, YOUR HONOR.

25 **MR. HILBERT:** THANK YOU.

1 **THE COURT:** OKAY, MR. LECLAIR, YOUR NEXT ITEM?

2 **MR. LECLAIR:** YOUR HONOR, I JUST WANT TO NOTE FOR THE
3 RECORD WE OFFERED 1164-4 YESTERDAY, SUBJECT TO VERIFICATION.
4 AND DEFENDANTS HAVE SAID THEY HAVE NO OBJECTION.

5 SO 1164-4, I THINK, IS NOW ADMITTED WITHOUT
6 OBJECTION.

7 **THE COURT:** LET ME PUT IT ON MY LIST. 1164 DASH
8 WHAT?

9 **MR. LECLAIR:** 4.

10 **THE COURT:** IS IN EVIDENCE. ALL RIGHT.

11 THANK YOU.

12 (TRIAL EXHIBIT 1164-4 RECEIVED IN EVIDENCE.)

13 **MR. LECLAIR:** AND WITH THAT, YOUR HONOR, I THINK
14 WE'RE DONE.

15 **THE COURT:** ALL RIGHT. SEE, I TOLD YOU THAT WOULD BE
16 SHORT.

17 IS THERE A SURREBUTTAL CASE?

18 **MR. KESSLER:** YOUR HONOR, I'M HAPPY TO INFORM THE
19 JURY THAT ALL THE EVIDENCE HAS BEEN PRESENTED, AND THE
20 DEFENDANTS ARE VERY HAPPY TO REST.

21 **THE COURT:** ALL RIGHT. SO NOW WE'VE REACHED DOUBLE
22 MILESTONES IN QUICK ORDER.

23 AND YOU HAVE NOW HEARD ALL OF THE EVIDENCE THAT
24 YOU'RE GOING TO HEAR FROM THE WITNESSES.

25 NOW, THERE ARE A FEW DOCUMENTS YOU PROBABLY HAVEN'T

1 COMPLETELY READ THAT WILL BE IN THAT ARE IN EVIDENCE. BUT ALL
2 THE EVIDENCE IS IN. THERE'S NO MORE WITNESSES. NO MORE
3 DOCUMENTS TO MOVE IN.

4 SO WHAT'S LEFT? REALLY, THREE THINGS. YOU'VE GOT TO
5 HEAR THE CLOSING ARGUMENTS. YOU'VE GOT TO HEAR ME TELL YOU
6 WHAT THE LAW IS. THEN, YOU GET TO GO DELIBERATE AND LAY THE
7 LAW ALONGSIDE THE FACTS AS YOU DETERMINE THEM TO BE, TO DECIDE
8 THE CASE.

9 SO THAT'S THE -- AND IT HAS TO BE A UNANIMOUS VERDICT
10 ON EACH -- EACH QUESTION. SO ALL TEN OF YOU WILL HAVE TO
11 AGREE.

12 NOW, LET'S TALK ABOUT THE SCHEDULE FOR A MOMENT.
13 IT'S ONLY 10:45 IN THE MORNING, BUT I NEED TO TAKE AT LEAST
14 SEVERAL HOURS TO SORT OUT ISSUES OF LAW WITH THE LAWYERS.
15 WE'VE MADE A LOT OF PROGRESS ON THIS ALREADY. NOT TO BORE YOU
16 WITH IT, BUT WE'VE ALREADY GOTTEN THROUGH ONE-AND-A-HALF DRAFTS
17 OF THE INSTRUCTIONS OF LAW I WILL GIVE TO YOU.

18 BUT I NEED TO HAVE A CAREFUL SESSION WITH THE LAWYERS
19 ON THIS SUBJECT SO THAT WHENEVER I DO GIVE YOU THE LAW AT THE
20 END, IT IS AS FAIR A STATEMENT OF THE LAW AS I CAN MAKE IT FIT
21 THESE FACTS.

22 SO YOU -- WE NEED TO TAKE TOMORROW OFF, IS WHAT I'M
23 LEADING UP TO, FOR YOU. NOT US. THE LAWYERS AND I WILL BE
24 WORKING HARD ON THIS CASE.

25 BUT I WANT TO GIVE YOU TOMORROW OFF. AND TODAY IS

1 WEDNESDAY, WEDNESDAY THE 5TH. SO THURSDAY, TOMORROW, YOU DON'T
2 HAVE TO COME TO COURT.

3 BUT PLEASE COME BACK ON FRIDAY MORNING AT THE REGULAR
4 TIME. AND BY THEN, WE'LL BE READY TO GIVE YOU THE CLOSING
5 ARGUMENTS AND THE INSTRUCTIONS, AND THEN YOU CAN DELIBERATE.

6 NOW, HEADS UP ON THAT, ON FRIDAY. WE'VE BEEN HERE
7 HOW LONG? ABOUT TWO WEEKS OF EVIDENCE. I THINK THAT'S ABOUT
8 RIGHT.

9 SO I -- IT WILL TAKE ROUGHLY AN HOUR TO READ YOU THE
10 INSTRUCTIONS. IT WILL TAKE -- I'M INCLINED TO GIVE EACH
11 SIDE -- WELL, I'M INCLINED TO GIVE EACH SIDE ENOUGH TIME THAT
12 EVEN IF WE START AT THE REGULAR TIME THIS CASE WON'T GO TO YOU
13 UNTIL CLOSE TO SOMETIME BETWEEN 11:15 AND NOON ON FRIDAY,
14 ROUGHLY.

15 SO I WANT TO GIVE THE LAWYERS ENOUGH TIME TO ARGUE
16 THE CASE SO THAT THEY CAN GO BACK, AND IF THEY WANT TO, PUT
17 THINGS UP ON THE SCREEN AND SAY:

18 "HERE'S THE TESTIMONY" THAT SOMEBODY GAVE IN THE
19 CASE, OR THEY WANT TO PUT A DOCUMENT UP THERE. THAT'S WHAT
20 CLOSING ARGUMENT IS ALL ABOUT.

21 SO WHAT I'M LEADING UP TO IS, I'M GOING TO SUGGEST TO
22 YOU THAT YOU ARRANGE YOUR SCHEDULE SO THAT YOU CAN STAY FRIDAY
23 AFTERNOON.

24 NOW, IF SOMEBODY HAS GOT A MEDICAL APPOINTMENT AND
25 JUST CAN'T DO THAT, THEN WE'LL -- WE -- WE WON'T DO THAT. BUT

1 NORMALLY WHEN THE JURIES START TO DELIBERATE THEY STAY PAST
2 1 O'CLOCK. BUT IT'S UP TO YOU. YOU SHOULD BE THINKING ABOUT
3 THAT.

4 AND, IN FACT, WHAT I WILL DO IS, WITH THE LAWYER'S
5 PERMISSION, WHEN YOU -- BEFORE YOU LEAVE TODAY YOU MIGHT SPEND
6 FIVE MINUTES AND JUST TALK ABOUT THE SCHEDULE FOR FRIDAY. AND
7 FOR THAT MATTER, FOR NEXT WEEK, IF -- BECAUSE YOU MIGHT BE
8 COMING BACK NEXT WEEK TO CONTINUE YOUR DELIBERATIONS.

9 IS THAT OKAY, AS LONG AS THEY DON'T TALK ABOUT THE
10 CASE?

11 **MR. KESSLER:** THAT'S FINE, YOUR HONOR.

12 **MR. PARCHER:** YES.

13 **THE COURT:** NOW, THE ADMONITION STILL APPLIES. EVEN
14 THOUGH YOU HAVE HEARD ALL THE EVIDENCE YOU STILL CANNOT TALK
15 ABOUT THE CASE, THE MERITS IN THE CASE, THE EVIDENCE IN THE
16 CASE, ARGUMENTS AND SO FORTH. IT WILL BE YOUR DUTY TO DO THAT
17 VERY SOON, BUT YOU CAN'T DO IT YET. SO JUST WAIT UNTIL IT'S
18 YOUR DUTY TO DO IT, AND THEN YOU WANT TO TALK. BUT NOT YET.

19 YOU WANT TO HEAR THE ARGUMENTS AND YOU WANT TO HEAR
20 THE INSTRUCTIONS BEFORE YOU START DOING THAT. BUT IN TERMS OF
21 THE SCHEDULE, SO YOU CAN PLAN YOUR LIVES, IF ANY OF YOU HAVE A
22 GOOD REASON FOR NOT DELIBERATING ON FRIDAY AFTERNOON, THEN
23 DON'T. IT'S OKAY.

24 I'M JUST GIVING YOU A SUGGESTION BASED ON WHAT OTHER
25 JURIES HAVE DONE IN THE PAST. THEY GET INTO THEIR

1 DELIBERATIONS AND JUST PLOW RIGHT THROUGH.

2 ALL RIGHT. I THINK I'M GOING TO LEAVE IT THERE
3 UNLESS SOMEBODY HAS -- I JUST -- SINCE WE'RE GOING TO HAVE A
4 DAY OFF, I WANT TO EMPHASIZE THIS. PLEASE DON'T GO DO SOME
5 HOMEWORK ON THIS CASE.

6 DON'T GO ON THE INTERNET. DON'T READ PRESS ACCOUNTS
7 ABOUT THIS CASE. DON'T -- DON'T DO ANYTHING THAT WOULD VIOLATE
8 ANY OF THE ADMONITIONS. DON'T TALK TO YOUR FRIENDS, FAMILY,
9 LOVED ONES, WHATEVER, ABOUT THIS CASE, OR AMONG YOURSELVES.

10 IT WILL BE YOUR DUTY TO DO THAT SOON ENOUGH. OKAY.
11 DO ANY OF YOU HAVE QUESTIONS ABOUT THE SCHEDULE?

12 NEXT WEEK WE HAVE TUESDAY OFF. BUT ALL THE OTHER
13 DAYS WOULD BE FREE FOR YOU TO DELIBERATE.

14 AND HOW LONG YOU NEED TO DELIBERATE IS ENTIRELY UP TO
15 YOU. THAT'S YOUR CALL. BUT THAT'S -- I'VE GOT THE JURY ROOM
16 RESERVED FOR YOU, IF YOU NEED THAT TIME. BUT TUESDAY IS A
17 HOLIDAY. WE CAN'T ASK YOU TO COME IN ON TUESDAY, BECAUSE IT'S
18 ARMISTICE'S DAY.

19 ALL RIGHT. ANYTHING THE LAWYERS WANT ME TO SAY
20 BEFORE WE LET THE JURY GO?

21 **MR. KESSLER:** NOT FROM US, YOUR HONOR.

22 **MR. PARCHER:** NO, SIR.

23 **THE COURT:** ALL RIGHT. YOU ALL HAVE A GREAT REST OF
24 THE DAY AND GOOD DAY OFF, AND WE'LL SEE YOU BACK HERE AT THE
25 REGULAR TIME ON FRIDAY MORNING. THANK YOU.

1 **THE CLERK:** ALL RISE.

2 (JURY EXCUSED.)

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT,
4 OUTSIDE THE PRESENCE OF THE JURY.)

5 **THE COURT:** ALL RIGHT. ON -- HAVE A SEAT EVERYBODY.

6 I WOULD LIKE FOR YOU TO -- LET'S GO OVER THE SCHEDULE
7 FOR THE LAWYERS. THE JURY IS NOT PRESENT NOW.

8 ABOUT 4:00 P.M. TODAY I THINK I'D ASKED YOU TO GIVE
9 ME YOUR 10-PAGE CRITIQUE OF THE INSTRUCTIONS.

10 THIS TIME, THOUGH, YOU GOT TO PUT IN ANYTHING THAT
11 YOU THINK IS AN ERROR. OTHERWISE, IT WILL BE DEEMED TO BE
12 WAIVED.

13 AND THE FACT THAT YOU MONTHS AGO OR WEEKS AGO GAVE ME
14 SOME STRAY INSTRUCTION -- I TRIED TO INCLUDE EVERYTHING THAT I
15 THINK IS RELEVANT -- IF YOU DON'T RERAISE IT, IT WILL BE DEEMED
16 TO BE WAIVED.

17 **MR. KESSLER:** IN THE 10 PAGES, YOUR HONOR?

18 **THE COURT:** DO YOU NEED MORE THAN THAT?

19 **MR. KESSLER:** I DON'T KNOW. IN OTHER WORDS, WE
20 THOUGHT WHAT YOUR HONOR SAID WAS THAT THE TEN PAGES SHOULD
21 CLEARLY BE MORE COMPREHENSIVE THAN THE FIVE, BUT THAT THE FINAL
22 OPPORTUNITY --

23 **THE COURT:** YOU TAKE AS MANY PAGES AS YOU WANT, THEN.
24 AND IF I STOP READING AFTER TEN PAGES, I'M GOING TO MAKE A
25 JUDGMENT CALL. I'LL READ AS MUCH AS I CAN POSSIBLY READ.

1 **MR. KESSLER:** OKAY.

2 **THE COURT:** BUT YOU -- IF YOU DON'T BRING IT TO MY
3 ATTENTION AGAIN, IT IS WAIVED.

4 **MR. KESSLER:** UNDERSTOOD.

5 **THE COURT:** SO IF YOU -- IF THERE'S SOMETHING YOU
6 WANT TO ADD OR SUBTRACT FROM THESE INSTRUCTIONS YOU'VE GOT TO
7 SAY IT AGAIN, AND DON'T RELY ON SOMETHING LURKING IN THE RECORD
8 EARLIER TO ASSIGN ERROR ON APPEAL. THAT'S POINT ONE.

9 NOW, THE REPLIES ARE NOT MANDATORY, BUT MIGHT BE
10 HELPFUL. AND THOSE WOULD BE DUE AT MIDNIGHT. BUT PLEASE DON'T
11 RAISE NEW OBJECTIONS IN YOUR MIDNIGHT FILING. ONLY RESPONSIVE
12 TO THE OTHER SIDE.

13 IN OTHER WORDS, DON'T SAY:

14 "AH, WE'LL PUT IT IN," OR, "WE FORGOT TO PUT
15 THAT ONE IN, SO NOW WE'LL RAISE IT IN THE MIDNIGHT ONE,"
16 BECAUSE I WANT TO BE ABLE TO LOOK AT WHAT YOU FILED AT
17 4 O'CLOCK TODAY SAYING THIS IS THE UNIVERSE OF THE PROBLEMS
18 THAT ARE BEING CLAIMED IN THE INSTRUCTIONS THAT I CAME UP WITH.

19 THEN, WE'LL COME BACK HERE TOMORROW AT THE REGULAR
20 TIME TO START ON THE -- THIS WILL BE THE FINAL CHARGING
21 CONFERENCE.

22 **MR. KESSLER:** YES.

23 **THE COURT:** IN TERMS OF THE JURY ARGUMENTS, I THOUGHT
24 NOW THAT I'VE HEARD ALL THE EVIDENCE, ONE HOUR AND 20 MINUTES
25 PER SIDE IS PLENTY.

1 YOU CAN RESERVE 30 MINUTES FOR YOUR -- THE LAST PART.
2 IN OTHER WORDS, PLAINTIFF GOES FIRST AND LAST. YOU CAN DIVIDE
3 THE HOUR AND 20 MINUTES AND RESERVE UP TO 30 MINUTES FOR
4 REBUTTAL, BUT NOT ANYMORE THAN THAT.

5 AND IF YOU WIND UP, SAY, USING AN HOUR AND FIVE
6 MINUTES IN YOUR OPENING, THEN YOU WOULD HAVE 15 MINUTES LEFT.
7 SO THAT'S THE WAY THAT WOULD WORK.

8 NOW, THERE'S A RULE ABOUT NO SANDBAGGING. YOU KNOW
9 WHAT THAT MEANS. THAT MEANS IN THE LAST 15 MINUTES OR LAST 30
10 MINUTES, WHATEVER YOU RESERVE, YOU CAN GO INTO ANYTHING THAT
11 MR. KESSLER BRINGS UP. ANYTHING THAT MR. KESSLER TOUCHES,
12 YOU'RE FREE TO GO INTO. AND ANYTHING THAT YOU TOUCHED ON IN
13 YOUR OPENING YOU ARE FREE -- BY "OPENING" I MEAN THE FIRST PART
14 OF YOUR CLOSING.

15 BUT WHAT IS UNFAIR TO DO IS TO BRING UP A NEW SUBJECT
16 THAT YOU DIDN'T TOUCH ON, AND THEN MR. KESSLER LEFT ALONE.
17 CLASSIC EXAMPLE IS PUNITIVE DAMAGES. PLAINTIFF CANNOT DO THE
18 FOLLOWING, AS I'M USING THIS ONLY AS AN EXAMPLE: IGNORE
19 PUNITIVE DAMAGES IN THE FIRST PART OF THE CLOSING, WAIT AND SEE
20 IF THE OTHER SIDE ADDRESSES IT. IF THEY LEAVE WELL ENOUGH
21 ALONE AND IGNORE IT, YOU CANNOT THEN HAMMER THEM AND SAY:

22 "AH-HA, NOW I GOT THEM IN PUNITIVE DAMAGE CITY."

23 YOU CANNOT DO THAT. THAT'S CALLED "SANDBAGGING."

24 YOU AT LEAST HAVE TO ASK FOR PUNITIVE DAMAGES IN
25 YOUR -- OF COURSE, YOU CAN -- YOU DON'T HAVE TO USE THE SAME

1 WORDS ALL OVER AGAIN, BUT THE SUBJECT HAS TO BE TOUCHED UPON TO
2 GIVE FAIR NOTICE TO THE OTHER SIDE THAT THEY BETTER ADDRESS IT.

3 I'M USING THE PUNITIVES ONLY AS AN EXAMPLE.

4 ALL RIGHT. THE OTHER THING WHICH I WANT TO REMIND
5 YOU IS THAT YOU SHOULD NOT BE SAYING THINGS LIKE "WE" OR "I
6 BELIEVE" OR "WE BELIEVE."

7 WHAT YOU CAN SAY -- REALLY, IT'S IMPROPER FOR A
8 LAWYER TO SAY:

9 "I THINK MR. SO-AND-SO TOLD THE TRUTH."

10 OR:

11 "I THINK WE HAVE PROVEN." THAT'S IMPROPER.

12 YOU CAN SAY:

13 "WE HAVE PROVEN." THAT'S OKAY.

14 "WE HAVE PROVEN X."

15 BUT WHENEVER YOU PUT YOUR PERSONAL IMPRIMATUR ON IT,
16 THEN THAT IS VOUCHING. IN A CRIMINAL CASE IF THE GOVERNMENT
17 DOES IT, IT'S GROUNDS FOR REVERSAL ON APPEAL. AT LEAST IN THE
18 NINTH CIRCUIT.

19 BUT IT'S ALSO IMPROPER TO DO IT IN A CIVIL CASE.

20 NOW, I WILL NOT INTERRUPT YOU THE FIRST OR SECOND
21 TIME THAT YOU GET CARRIED AWAY AND DO THAT. BUT AT SOME POINT
22 I MAY FEEL AN OBLIGATION TO REGULATE THE CONDUCT OF THE
23 OFFICERS OF THE COURT TO MAKE SURE THEY DON'T ENGAGE IN THAT.

24 SO I'LL BE A LITTLE LAX ON IT, BUT AT SOME POINT I
25 MAY HAVE TO SAY:

1 "PLEASE, YOU'VE GOT TO STOP THAT."

2 NOW, I AM THINKING ABOUT SAYING TO THE JURY -- I WILL
3 SAY TO THE JURY FOR SURE:

4 "BE CAREFUL ABOUT WHAT THE LAWYERS SAY VERSUS
5 WHAT THE EVIDENCE IS."

6 I ENCOURAGE YOU, IF YOU THINK THE EVIDENCE THAT YOU
7 HAVE IS GREAT STUFF, TO PUT IT UP ON THE SCREEN. YOU CAN PUT
8 THE TRANSCRIPT. YOU CAN SAY "QUESTION" THIS, "ANSWER" THIS.
9 THAT WOULD BE OKAY.

10 UNLESS IT'S THE QUESTION WHERE IT'S THE COURT ASKING
11 THE QUESTION, THEN YOU -- YOU CAN READ IT, BUT YOU DON'T SAY
12 "THE COURT," BECAUSE I DO NOT WANT ONE SIDE OR THE OTHER TRYING
13 TO MAKE IT APPEAR AS IF THE JUDGE IS AN ADVOCATE FOR ONE SIDE
14 OR THE OTHER.

15 **MR. KESSLER:** AND I TAKE IT, THEN, THE WORD "COURT"
16 SHOULD NOT APPEAR UP ON THE SCREEN, EITHER.

17 **THE COURT:** NOT WITH ME ASKING QUESTIONS.

18 **MR. KESSLER:** THAT'S WHAT I MEANT, YOUR HONOR. YES.

19 **THE COURT:** YOU CAN READ THAT AND WORK AROUND THE
20 PROBLEM WITH THE COURT ASKING QUESTIONS.

21 SO WE'VE GOT A FEW MINUTES HERE. IF YOU HAVE OTHER
22 QUESTIONS, I WILL BE HAPPY TO TRY TO ANSWER THEM. OTHERWISE,
23 WE'LL LET YOU GO HOME EARLY, TOO.

24 **MR. KESSLER:** MY ONLY QUESTION IS, YOUR HONOR, HOW
25 SHOULD WE HANDLE THE RULE 50 MOTION ISSUE?

1 **THE COURT:** OH. I GUESS -- HAVE YOU FILED ANYTHING
2 YET?

3 **MR. KESSLER:** WELL, WE FILED JUST THE 2-PAGER, YOUR
4 HONOR. WHAT WOULD YOUR HONOR LIKE US TO DO?

5 **THE COURT:** WE'RE MOVING ON A FAST TRACK TOWARDS A
6 VERDICT. YOU BETTER HURRY UP.

7 **MR. KESSLER:** I'M PREPARED TO JUST ARGUE IT, YOUR
8 HONOR, AT SOME POINT, WITHOUT GOING THROUGH BRIEFING, IF YOUR
9 HONOR WOULD LIKE TO DO THAT.

10 **THE COURT:** HERE'S WHAT I THINK WE OUGHT TO DO, THEN,
11 BECAUSE I THINK WE SHOULD TAKE A 15-MINUTE BREAK, AND THEN
12 WE'LL COME BACK HERE, AND YOU CAN ARGUE YOUR RULE 50 MOTION.

13 **MR. KESSLER:** THANK YOU, YOUR HONOR.

14 **THE COURT:** ALL RIGHT. IS THAT ALL RIGHT WITH
15 EVERYONE? THAT WAY WE'LL GET IT DONE TODAY.

16 **MR. LECLAIR:** YOUR HONOR, I THOUGHT IT WOULD BE MORE
17 EFFICIENT TO DO IT IN WRITING. WE'LL DO WHATEVER YOUR HONOR
18 WANTS TO DO.

19 **THE COURT:** IF IT TURNS OUT I FEEL LIKE IT HAS TO BE
20 IN WRITING, THEN -- BUT MOST OF THESE MOTIONS ARE DONE ORALLY,
21 AND I -- I THINK IT -- WHY DON'T YOU DO THIS SO THAT THE 15
22 MINUTES CAN BE PUT TO GOOD USE? WHAT ARE YOUR MAIN POINTS
23 GOING TO BE, SO THE OTHER SIDE CAN BE THINKING ABOUT IT?

24 **MR. KESSLER:** MY FIRST POINT WILL FOCUS ON THE
25 FIDUCIARY DUTY CLAIM. WE BELIEVE THAT UNDER D.C. LAW THE

1 CONTROLLING TEST IS, IN FACT, CONTROL.

2 IN FACT, ALL THE EVIDENCE HAS BEEN THAT PLAINTIFFS
3 DON'T HAVE THE CONTROL THAT'S NECESSARY TO CONSTITUTE A
4 FIDUCIARY DUTY UNDER DISTRICT OF COLUMBIA LAW. ALL FOUR
5 PLAINTIFFS HAVE ADMITTED THEY DON'T HAVE CONTROL.

6 AND WE'LL DISCUSS THE ONE PROVISION THEY'VE CITED
7 THAT THEY THINK GIVES THEM SOME CONTROL: THE OPT-OUT FOR
8 EXCLUSIVE ENDORSEMENTS. WE DO NOT THINK THAT SATISFIES IT. WE
9 THINK ON THAT BASIS THERE COULD BE NO FIDUCIARY DUTY CLAIM HERE
10 AND SHOULD BE DISMISSED.

11 SECOND, YOUR HONOR, WE WILL ARGUE THAT WITH RESPECT
12 TO THE PUNITIVE DAMAGES CLAIM THAT THERE'S NOT ANY POSSIBLE
13 EVIDENCE IN THIS CASE THAT CAN MEET THE DISTRICT COLUMBIA
14 STANDARD TO SUPPORT A PUNITIVE DAMAGE CLAIM IN TERMS OF THE
15 MALICE THAT'S REQUIRED OR THE DESPICABLE CONDUCT THAT'S
16 REQUIRED.

17 THAT WHATEVER ISSUES THERE ARE WITH RESPECT TO BREACH
18 OF CONTRACT OR FIDUCIARY DUTY, OTHERWISE, THIS IS CLEARLY NOT A
19 PUNITIVE DAMAGE CLAIM, AND, THEREFORE, THAT SHOULD BE DISMISSED
20 ON RULE 50 AND SHOULD NOT GO TO THE JURY.

21 THIRD, YOUR HONOR, WE INTEND TO ARGUE MORE BROADLY
22 THAT WITH RESPECT TO THE INJURY ELEMENT OF FIDUCIARY DUTY, THAT
23 BECAUSE THE ONLY EVIDENCE THEY'VE OFFERED IS MR. ROWLEY'S
24 TESTIMONY OF -- THAT THEY WOULD GET AN EQUAL SHARE OF THE GLR
25 GROSS LICENSING POOL, THAT THEY'VE OFFERED NOTHING TO CAUSALLY

1 LINK ANY CLAIM TO THAT POOL TO ANY BREACH OF FIDUCIARY DUTY.

2 SO, FOR EXAMPLE, IF THERE'S A MARKETING CLAIM THAT WE
3 DIDN'T ADEQUATELY MARKET, THEY'VE OFFERED NOTHING TO SHOW THAT
4 IF THERE HAD BEEN PROPER MARKETING IT WOULD LEAD TO AN EQUAL
5 SHARE OF THE GLR POOL WITH THE ACTIVE PLAYER MONEY.

6 THEY JUST CAN'T PROVE IT UP.

7 AND BECAUSE INJURY IS A SEPARATE LIABILITY ELEMENT OF
8 FIDUCIARY DUTY, THEY CAN'T -- AND THAT'S IN D.C. LAW VERY
9 CLEAR -- THEY CAN'T SHOW THE INJURY ELEMENT.

10 WE ALSO BELIEVE, YOUR HONOR -- AND WE WILL ARGUE THIS
11 FOR BOTH BREACH OF CONTRACT AND FIDUCIARY DUTY -- THAT INJURY
12 HATS TO BE PROVEN INDIVIDUALLY TO CLASS MEMBERS. WE'VE CITED
13 AUTHORITY FOR THAT.

14 AND THAT WHILE YOU CAN HAVE A CLASS-WIDE
15 DEMONSTRATION, THEY HAVEN'T SHOWN ANY CLASS-WIDE DEMONSTRATION
16 INDIVIDUALLY, AS THEY HAVE TO.

17 ALL THEY DID IS HAVE MR. ROWLEY TESTIFY THERE'S THIS
18 GLR POOL. AND THAT IF THEY PROVED THAT THEY WERE ENTITLED TO A
19 SHARE OF THAT POOL, THIS IS WHAT IT WOULD BE, WE DON'T THINK
20 THAT SHOWS INJURY.

21 AND FINALLY, ON THE BREACH OF CONTRACT, THERE'S
22 NOTHING IN THE CONTRACT THAT LINKS TO THE GLR POOL, AN EQUAL
23 SHARE OF THE GLR POOL OR ANYTHING THAT WOULD CONNECT TO THE GLR
24 POOL.

25 SO WHATEVER ELSE THEY THINK ABOUT THEIR BREACH OF

1 CONTRACT CLAIM, THERE'S NO EVIDENCE OF THAT. THOSE WOULD BE
2 THE MAIN POINTS, YOUR HONOR. I DON'T THINK I MISSED ANYTHING,
3 BUT I THINK THOSE WOULD BE THE POINTS.

4 **THE COURT:** HERE'S WHAT WE'LL DO. WE'LL ARGUE IT
5 WHEN WE COME BACK, AND WE WILL ARGUE ONE POINT AT A TIME. AND
6 EACH SIDE WILL GET ABOUT FIVE MINUTES ON EACH POINT.

7 SO, IN OTHER WORDS, ON YOUR NO NEXUS CLAIM YOU WILL
8 HAVE FIVE MINUTES. THEY'LL HAVE FIVE MINUTES. THEN WE'LL GO
9 TO THE NEXT POINT.

10 IT WILL TAKE CLOSE TO AN HOUR TO WORK OUR WAY THROUGH
11 IT.

12 **MR. KESSLER:** VERY GOOD, YOUR HONOR. THANK YOU.

13 **THE COURT:** ALL RIGHT. WE'LL TAKE 15 MINUTES NOW.

14 FOR THE RECORD, BOTH SIDES WOUND UP RESTING WITH --
15 I'M JUST EYEBALLING THIS -- BUT OVER 30 MINUTES AND PROBABLY 45
16 MINUTES OF UNUSED TIME. SO THAT'S FOR THE RECORD. NO ONE
17 SHOULD CLAIM ON APPEAL THAT THEY DID NOT HAVE ENOUGH TIME. ALL
18 RIGHT.

19 (RECESS TAKEN FROM 11:00 TO 11:21 A.M.)

20 **THE COURT:** ALL RIGHT. ARE WE READY TO BEGIN?

21 **MR. KESSLER:** WE ARE, YOUR HONOR.

22 **THE COURT:** OKAY. WHAT WE'LL DO IS ON EACH -- TAKE
23 IT IN LIKE THREE SEGMENTS. SO ON THE CONTRACT CLAIM, MAKE ALL
24 OF YOUR POINTS ON THE CONTRACT CLAIM. THEN, WE'LL HEAR FROM
25 THE OTHER SIDE. THEN, WE'LL GO TO THE FIDUCIARY. THEN, WE'LL

1 GO TO THE PUNITIVE.

2 SO WE CAN BREAK IT INTO THREE PIECES. ALL RIGHT?

3 **MR. KESSLER:** VERY GOOD, YOUR HONOR.

4 WITH RESPECT TO THE CONTRACT CLAIM, YOUR HONOR, THE
5 ONLY EVIDENCE THAT PLAINTIFFS HAVE OFFERED OF ANY INJURY OR
6 DAMAGES FROM THE BREACH OF CONTRACT CLAIM HAS BEEN A CLAIMED
7 ENTITLEMENT TO THE GLR, THE GROSS LICENSING REVENUE POOL.

8 IN OTHER WORDS, WHAT THEY HAVE NOT DONE IS THEY HAVE
9 NOT HAD ANY EXPERT OR ANYONE ELSE COME IN AND SAY:

10 "HOW MUCH WERE THESE RIGHTS WORTH THAT YOU GAVE
11 UP IN THE GLA?" THEY HAVEN'T DONE THAT.

12 OKAY. AND SAY:

13 "YOU WEREN'T PAID FOR THEM, SO WHAT WERE THEY
14 WORTH?"

15 INSTEAD, THEIR CLAIM IS DEPENDENT ON THE JURY FINDING
16 THAT THERE IS A CONTRACTUAL RIGHT TO AN EQUAL SHARE OF THE GLR
17 POOL. IF THEY CANNOT FIND THAT, THEN THERE'S NO INJURY IN
18 DAMAGES.

19 AND THIS DID NOT COME FROM ME. THIS CAME FROM THEIR
20 OWN EXPERT, FOR EXAMPLE. SO I ASKED THEIR EXPERT, TRANSCRIPT
21 1938/11-15:

22 **"QUESTION:** YOU'VE GIVEN THE JURY NO BASIS TO
23 CALCULATE ANY DAMAGES IF THEY FIND THAT
24 RETIRED PLAYERS ARE NOT ENTITLED TO ACTIVE
25 PLAYER LICENSING MONEY AND ALL THE MONEY IN

1 THE GLR POOL IS ACTIVE PLAYER LICENSING
2 MONEY, CORRECT?

3 **"ANSWER:** IF THOSE TWO ASSUMPTIONS ARE TRUE
4 THEN, YES."

5 AND THEN, MORE PROFOUNDLY, ON TRANSCRIPT 1685, LINE
6 2:

7 **"QUESTION:** SO YOU WOULD AGREE, SIR, THAT IF
8 THIS JURY FINDS THAT THERE'S NO CONTRACTUAL
9 ENTITLEMENT OF THE PLAINTIFF CLASS TO THE
10 REVENUES IN THE GLR POOL, OR NO OTHER LEGAL
11 ENTITLEMENT TO AN EQUAL SHARE OF THE REVENUES
12 IN THE GLR POOL, YOUR MEASURE, OKAY, WOULD
13 NOT BE APPLICABLE, CORRECT?

14 **"ANSWER:** I WAS ASKED TO ASSUME LIABILITY SO,
15 YES, THAT WOULD BE CORRECT."

16 WHAT THE WITNESS WAS INDICATING IS THAT THE ONLY WAY
17 THEY'VE OFFERED ANY DAMAGES -- AND THEY'VE OFFERED NO OTHER
18 DAMAGES EVIDENCE, YOUR HONOR. THEY DIDN'T HAVE -- NONE OF
19 THEIR PLAINTIFFS TESTIFIED IN LAY TESTIMONY:

20 "HERE'S WHAT MY RIGHTS WERE WORTH." SO THERE'S
21 NO NON-EXPERT TESTIMONY OF THE VALUE.

22 THE ONLY THING THEY'VE OFFERED IS ENTITLEMENT. NOW,
23 WE LOOK AT THE TERMS OF GLA, THIS CORE DOCUMENT.

24 THERE IS NO REFERENCE IN THE GLA TO THE GROSS
25 LICENSING REVENUE POOL.

1 THEY, YOUR HONOR, YOU KNOW, HAVE TRIED TO CONFUSE
2 GROUP LICENSING, WHICH IS DEFINED, WITH GLR, BUT IT'S GROSS
3 LICENSING REVENUE.

4 AND AS YOUR HONOR KNOWS, IN TRIAL EXHIBIT 95, WHICH
5 IS IN EVIDENCE, WHICH DEFINES -- DEFINES THE GROSS LICENSING
6 REVENUE POOL, IT SAYS IN PARAGRAPH 4A5 THAT IT SPECIFICALLY
7 EXCLUDES ANY OF THE AMOUNTS REGARDING RETIRED PLAYERS.

8 SO THERE'S NO CONTRACTUAL LINK TO THAT GROSS
9 LICENSING REVENUE POOL. THERE'S ALSO NO INDICATION IT WOULD BE
10 AN EQUAL SHARE.

11 WHAT THE CONTRACT SAYS IS THAT IF THERE'S MONEY
12 GENERATED FROM RETIRED PLAYER GROUP RIGHTS, IT WILL BE DIVIDED
13 ETWEEN, A, THE PLAYER -- THAT WOULD BE THE PLAYER WHO SIGNED --
14 AND THEN, AN ESCROW ACCOUNT FOR ALL ELIGIBLE NFLPA MEMBERS WHO
15 HAVE SIGNED A GROUP LICENSING FORM.

16 THE ONLY EVIDENCE IN ON WHAT THAT WOULD BE WAS
17 MR. ALLEN TESTIFIED THAT IF MONEY HAD BEEN GENERATED AND PUT
18 INTO AN ESCROW ACCOUNT, IT WOULD HAVE BEEN ALL RETIRED PLAYERS,
19 NOT MIXED IN THE GLR POOL. AND THEY WOULD HAVE THEN DETERMINED
20 WHO WAS ELIGIBLE AS A MEMBER OF THE RETIRED PLAYERS TO SHARE IN
21 THAT.

22 SO WHERE IS THERE NO EVIDENCE?

23 THERE'S NO EVIDENCE, ONE, OF ANY CONNECTION BETWEEN
24 THIS CONTRACT AND THE GLR POOL.

25 THERE'S NO EVIDENCE ON HOW IT WOULD BE DIVIDED UP.

1 IT'S JUST PURE SPECULATION. OKAY.

2 THERE'S NO EVIDENCE OF WHAT THE DIVISION WOULD BE
3 BETWEEN THE PLAYER WHO SIGNED THE GLR AND HOW MUCH WOULD GO
4 INTO THE ESCROW ACCOUNT.

5 AND THERE'S NO EVIDENCE OF WHAT THE ELIGIBILITY
6 REQUIREMENTS WOULD BE.

7 SO YOUR HONOR COULD SAY:

8 "WELL, IT'S ALL VAGUE, SO HOW DO THEY KNOW THIS?"

9 WHAT THEY SHOULD HAVE DONE IS HAVE AN EXPERT WHO CAME
10 IN AND SAID:

11 "I VALUE HOW MUCH THESE LICENSING RIGHTS ARE
12 WORTH. HERE'S HOW MUCH THEY WOULD HAVE BEEN WORTH HAD THEY
13 BEEN MARKETED."

14 OR:

15 "HERE'S HOW MUCH SHOULD HAVE BEEN PAID FOR
16 THEM."

17 THEY DIDN'T DO THAT. THEY TRIED TO TAKE THE ACTIVE
18 PLAYER GLR POOL AND LINK THIS TO THIS CONTRACT.

19 YOUR HONOR, THIS CANNOT SUSTAIN A CLAIM, WE BELIEVE,
20 UNDER RULE 50.

21 MY SECOND CONTRACTUAL ARGUMENT, YOUR HONOR -- AND
22 WE'VE CITED THE CASE LAW ON THIS -- IS WE BELIEVE FOR BOTH
23 CONTRACT AND LATER FIDUCIARY DUTY, THAT THERE MUST BE
24 INDIVIDUAL INJURY SHOWN FOR EACH CLASS MEMBER. AND, IN
25 PARTICULAR, YOUR HONOR, I'M GOING TO CITE YOU CONTROLLING NINTH

1 CIRCUIT LAW WHICH I BELIEVE APPLIES FOR THIS.

2 AND THE CONTROLLING NINTH CIRCUIT CASES ARE, FIRST,
3 KLINE V. COLDWELL BANKER & COMPANY. THIS IS CITED IN OUR
4 PROPOSED JURY INSTRUCTIONS, 508 F.2D 226, 236 NOTE 8, WHICH
5 SAYS:

6 "RULE 23 DOES" -- I'M QUOTING NOW -- "DOES NOT
7 ELIMINATE THE ULTIMATE NEED FOR INDIVIDUAL PROOF OF DAMAGES BY
8 EACH MEMBER OF THE CLASS.

9 MY SECOND NINTH CIRCUIT CASE IS ABUAN, A-B-U-A-N, VS.
10 GENERAL ELECTRIC COMPANY, 3 F.3D, 329-334. AND THIS SAYS THAT,
11 AGAIN, AT SOME POINT IN A RULE 23 CASE THAT CLASS MEMBERS MUST
12 PROVE THAT THEY WERE INDIVIDUALLY DAMAGED.

13 NOW, YOUR HONOR, THERE CAN BE CLASS-WIDE PROOF, BUT
14 ONLY IF THEY CAN SHOW THE INDIVIDUAL INJURIES, THAT THEY ALL
15 HAD THE SAME WORTH, THE SAME VALUE, WHAT IT WOULD BE.

16 THEY CAN'T SIMPLY SAY BECAUSE EVERYBODY SIGNED THIS
17 GLA, THAT SOMEHOW THAT GIVES THEM A RIGHT TO A GLR POOL IN
18 WHICH IT'S NOT TIED OR LINKED TO THE CONTRACT.

19 YOUR HONOR, WE DO BELIEVE THERE ARE OTHER REASONS FOR
20 OUR RULE 50 MOTION ON THIS BREACH OF CONTRACT CLAIM, BUT I
21 THINK SINCE YOU ARE GIVING ME FIVE MOMENTS, THOSE ARE THE TWO
22 POINTS I'VE CONFINED MY ARGUMENTS TO.

23 BUT, IN GENERAL, WE DO NOT BELIEVE A REASONABLE JURY
24 COULD FIND A BREACH OF CONTRACT BASED ON THE EVIDENCE
25 PRESENTED.

1 THANK YOU.

2 **THE COURT:** ALL RIGHT. MR. LECLAIR.

3 **MR. LECLAIR:** YOUR HONOR, OUR CLAIM IN THE CASE FOR
4 BREACH OF CONTRACT -- LET'S START WITH THAT -- IS OUR CLIENTS
5 SIGNED A CONTRACT THAT ENTITLED THEM TO SHARE. IT SAYS
6 "DIVIDED BETWEEN." AND THE TESTIMONY IS THAT THE PLAYER IS THE
7 PEOPLE WHO SIGNED THE CONTRACT.

8 AND THE REVENUE THAT WE SEEK BY WAY OF DAMAGES IS THE
9 GROUP LICENSING REVENUE, WHICH IS, IN FACT, THE VERY REVENUE
10 THAT GOES INTO THE GROSS LICENSING REVENUE POOL.

11 AND SO OUR -- WE'RE SEEKING EXACTLY THE DAMAGES THAT
12 MR. ROWLEY TALKED ABOUT. BUT IT'S NOT BECAUSE WE'RE
13 CONTRACTUALLY ENTITLED TO THE GROSS LICENSING REVENUE POOL BY
14 VIRTUE OF THE CONTRACT.

15 OUR CLAIM IS BECAUSE OF THE LANGUAGE OF "SIX OR MORE"
16 AND THE LANGUAGE OF THE GLA, WE'RE ENTITLED TO RECOVER THE
17 GROUP REVENUE THAT WAS NOT PAID TO US.

18 AND THE MEASURE OF THE GROUP REVENUE IS ALL OF THE
19 LICENSES. AND THAT'S EITHER BECAUSE THE LICENSES ACTUALLY
20 INCLUDE US, BECAUSE OF THE LANGUAGE OF 1(A) AND 2(A) -- THAT'S
21 A THEORY WE'RE ARGUING TO THE JURY -- OR BECAUSE THE LANGUAGE
22 OF "SIX OR MORE" UNDER THE GLA INCLUDES US IN EVEN THE ACTIVE
23 LICENSES. SO, THEREFORE, WE ARE ENTITLED TO RECOVER OUR SHARE
24 OF THE GROUP LICENSING REVENUE.

25 NOW, IS THERE LANGUAGE ABOUT "EQUAL"? NO. THERE'S

1 NO LANGUAGE IN THE ACTIVE, EITHER.

2 WHAT WE ARE SAYING IS WE SHOULD HAVE BEEN DISTRIBUTED
3 THE GROSS GROUP LICENSING REVENUE IN THE SAME WAY. AND THE
4 EVIDENCE WILL SHOW THAT WAS ON EQUAL BASIS.

5 AS A MATTER OF FACT, EVEN THEIR WITNESS, MR. GOICH,
6 TESTIFIED THAT HE THOUGHT IT WOULD BE DISTRIBUTED EQUALLY.

7 WE KNOW THAT'S WHAT THE NFLPA ITSELF DID, WAS
8 DISTRIBUTE IT EQUALLY.

9 SO FOR THAT REASON, UNDER THE CONTRACT, WE HAVE AN
10 EXACT MATCH TO THE INJURY TO THE CLASS, WHICH IS THE REVENUE
11 FROM THE -- NOT THE AD HOC REVENUE, WHICH IS SEPARATE, BUT THE
12 GROUP REVENUE IS WHAT WE ARE SEEKING. WE ARE ENTITLED
13 CONTRACTUALLY TO SHARE IN EVERY PENNY OF IT.

14 AND THAT'S EXACTLY THE CALCULATIONS THAT WERE GONE
15 THROUGH BY MR. EYRICH, WHO TESTIFIED, AND BY MR. ROWLEY, WHO
16 TESTIFIED ABOUT THE METHODOLOGY AND HOW YOU GET TO THE BOTTOM
17 LINE AS TO WHAT THE RETIRED PLAYERS WOULD HAVE SHARED. SO WE
18 ARE FULLY ENTITLED TO TAKE THAT CLAIM TO THE JURY.

19 WHAT MR. KESSLER IS DOING IS HE'S ASSUMING WE LOSE,
20 AND THEN SAY:

21 "WELL, OF COURSE YOU DON'T HAVE DAMAGES, BECAUSE
22 YOU LOSE."

23 WELL, THAT'S JUST NOT THE WAY IT WORKS. IF WE WIN,
24 WE ARE ENTITLED TO THE GROUP REVENUE UNDER THE LICENSE
25 AGREEMENTS THAT WERE ISSUED. AND WE'RE ENTITLED TO OUR SHARE

1 OF IT. AND THAT'S EXACTLY WHAT WE CALCULATED, YOUR HONOR.

2 **THE COURT:** ALL RIGHT.

3 REBUTTAL?

4 **MR. KESSLER:** NEXT POINT, YOUR HONOR?

5 **THE COURT:** NO, NO. DO YOU HAVE A REBUTTAL? I'LL
6 GIVE YOU A FEW MOMENTS FOR REBUTTAL --

7 **MR. KESSLER:** YES, YOUR HONOR.

8 **THE COURT:** -- JUST ON THIS ONE POINT.

9 **MR. KESSLER:** VERY QUICKLY.

10 THE CONCESSION BY COUNSEL THAT THERE IS NO
11 CONTRACTUAL ENTITLEMENT TO THE GLR POOL IS FATAL TO THEIR
12 POSITION, BECAUSE THERE ARE TWO -- AND THAT'S WHAT HE STATED TO
13 YOUR HONOR IN ARGUMENT. HE SAID:

14 "WE'RE NOT CONTENDING A CONTRACTUAL ENTITLEMENT
15 TO THE GLR POOL."

16 **THE COURT:** HE DID SAY THAT, BUT HE WENT ON TO SAY --
17 I THINK WHAT HE MEANT BY THAT IS UNDER THE THIRD-PARTY LICENSE
18 AGREEMENT. BUT HE DID GO ON TO SAY THAT UNDER THE GLA, THE
19 GROUP -- THE RETIRED PLAYER GROUP LICENSING FORM, HE
20 UNDERSTANDS THAT THAT SHOULD BE READ TO SAY THAT THE RETIRED
21 PLAYERS SHARE IN THE ACTIVE PLAYER MONEY.

22 **MR. KESSLER:** THE ONLY THING HE POINTS TO, YOUR
23 HONOR, IS NO LANGUAGE AT ALL IN THE PARAGRAPH THAT SAYS WHEN
24 YOU WILL GET PAID.

25 AS YOU KNOW, THAT'S THE FOURTH PARAGRAPH. THAT SAYS

1 IT WILL BE DIVIDED BETWEEN THE PLAYER AND THE ESCROW ACCOUNT.

2 HE DOES NOT POINT TO ANYTHING IN THAT PARAGRAPH, THE
3 PAY PARAGRAPH, TO LINK TO THE GLR POOL.

4 WHAT HE CLAIMS IS THE DEFINITION OF "GROUP LICENSING"
5 SOMEHOW ENTITLES HIM TO OTHER REVENUES. BUT THE GLR POOL IS
6 NOT EVEN ALL GROUP LICENSING REVENUES. AD HOC AGREEMENTS, FOR
7 EXAMPLE, AS YOUR HONOR KNOWS, MEET THE DEFINITION OF "SIX OR
8 MORE FORMER OR PRESENT PLAYERS." OKAY?

9 SO HE CAN'T USE THAT PARAGRAPH 2 AS THE BASIS TO GET
10 INTO THE GLR POOL.

11 THE GLR POOL WAS A SPECIFIC POOL THAT EXCLUDED
12 RETIRED PLAYER MONEY. AND IF HE WAS ENTITLED TO A PORTION OF
13 THE GLR POOL, HE'D HAVE TO SHOW: WELL, WHAT PORTION? WHICH
14 AGREEMENTS ARE THEY? IS IT THE EA AGREEMENT? IS IT THE
15 AGREEMENTS THAT DON'T MENTION RETIRED PLAYERS AT ALL? IS IT
16 THE NFL SPONSORSHIP AGREEMENT THAT ONLY SAYS "ACTIVE PLAYERS"?

17 IN OTHER WORDS, THEY'VE TAKEN A POOL THAT'S UNRELATED
18 TO THEIR CLAIM. IF HE WANTED TO PROVE HIS CASE -- AND THIS WAS
19 NOT OUR DECISION -- HE COULD HAVE PUT UP A DAMAGES EXPERT WHO
20 SAID:

21 "THEY'RE ENTITLED TO GROUP LICENSING REVENUE OF
22 SIX OR MORE. HERE IS THE REVENUE I THINK THEY WOULD HAVE
23 EARNED, OR THEY DID EARN. YOU CAN LOOK IN THE RECORD THEY
24 EARNED."

25 NOBODY DID THAT. MR. ROWLEY DIDN'T OFFER THAT

1 OPINION. HE DIDN'T COME IN AND SAY:

2 "THIS IS THE REVENUE -- THAT THIS IS THE REVENUE
3 THAT WAS THERE."

4 I ALSO WOULD NOTE, YOUR HONOR, THAT THE GLR POOL
5 EXCLUDES 35-AND-UNDER DEALS BY ACTIVE PLAYERS.

6 IN OTHER WORDS, THERE'S NO LINKAGE OF THAT PARTICULAR
7 POOL TO THE INJURY THEY'RE CLAIMING IN THIS CONTRACT.

8 FINALLY, I NOTE, YOU HAVE HEARD NO CONTRARY CITATION
9 TO MY CONTROLLING NINTH CIRCUIT AUTHORITY ON INDIVIDUAL INJURY,
10 YOUR HONOR. I BELIEVE THAT'S DISPOSITIVE.

11 **THE COURT:** WAIT. WAIT. TAKE A MOMENT.

12 ONE OF THE FUNDAMENTAL ISSUES IN THIS CASE: WHAT WAS
13 THE POINT OF THE DEFENDANTS ASKING 2,000 PLUS PEOPLE TO SIGN
14 THESE AGREEMENTS --

15 **MR. KESSLER:** YOUR HONOR, THE --

16 **THE COURT:** -- IF IT HAS NEVER GENERATED A PENNY FOR
17 THESE PEOPLE AND THERE NEVER WAS AN ESCROW?

18 SO WHAT -- FROM THE POINT OF VIEW OF YOUR CLIENTS --

19 **MR. KESSLER:** YES.

20 **THE COURT:** -- WHEN DID THEY EVER EXPECT THAT THIS
21 WOULD GET TRIGGERED?

22 **MR. KESSLER:** YOUR HONOR, I THINK I CAN ONLY GO
23 THROUGH WHAT THE EVIDENCE IS.

24 **THE COURT:** WHAT DOES THE EVIDENCE SAY ON IT?

25 **MR. KESSLER:** THE ONLY EVIDENCE ON THIS POINT IS,

1 OKAY, FIRST MR. ALLEN TESTIFIED. REMEMBER THE QUESTIONS THAT
2 HE WAS AN OPTIMIST? HE HOPED THAT HE WOULD EVENTUALLY ATTRACT
3 ENOUGH OF THE TOP RETIRED PLAYERS AND THE QUANTITY OF PLAYERS
4 SO THAT THERE WOULD BE AN INTEREST IN LICENSEES IN LICENSING
5 THE WHOLE GROUP, JUST LIKE THEY'RE ABLE TO DO FOR THE ACTIVES.

6 WHEN THEY DO A LICENSE, AS YOUR HONOR KNOWS, WITH EA,
7 EA IS INTERESTED:

8 "I WANT ALL THE ACTIVE PLAYERS."

9 MR. ALLEN HOPED THAT HE WOULD BUILD A PROGRAM WHERE
10 YOU WOULD GET THE JOE MONTANAS, YOU WOULD GET THE JOE NAMATHS,
11 YOU WOULD GET THE JIM BROWNS. THEY WOULD ALL SIGN THESE FORMS.

12 NON-EXCLUSIVE, BY THE WAY. IT DIDN'T HARM A SOUL
13 BECAUSE THE EVIDENCE IS THEY DIDN'T PAY ANYTHING. IT WAS
14 NON-EXCLUSIVE. THEY COULD DO WHATEVER THEY WANTED TO. SO WHAT
15 WAS THE HARM IN TRYING?

16 THEY TRIED TO PUT TOGETHER THE GROUP. AND, AGAIN, AS
17 PROFESSOR NOLL TESTIFIED -- AND NO ONE DISPUTES THIS -- THE
18 BEST PLAYERS DIDN'T SIGN.

19 SO WHAT HAPPENED IS, WHAT CAME BACK IS:

20 "YEAH, WE WANT SOME OF YOUR GUYS."

21 NONE OF THEM -- NOT NONE OF THEM. MANY OF THEM WERE
22 NOT THE GLA PLAYERS.

23 SO WHAT THEY HAD TO DO WAS USE THE AD HOC MECHANISM
24 BECAUSE THEY -- BECAUSE THEY DIDN'T HAVE THE CRITICAL MASS.
25 YOU HEARD ABOUT THE CRITICAL MASS.

1 SO, NOW, YOU COULD SAY THAT WAS FOOLISH. THEY SHOULD
2 HAVE GIVEN IT UP EARLIER. EVENTUALLY, THEY DID GIVE UP. THEY
3 TOOK OUT THE ESCROW LANGUAGE. THEY SAID: WE'RE NOT
4 GENERATING ANYTHING FOR IT IN '05 AND DURING THIS PERIOD OF
5 TIME.

6 BUT THE POINT IS, THAT DOESN'T MAKE IT A BREACH OF
7 CONTRACT. THE ONLY EVIDENCE IS MAYBE THEY WERE STUPID. THEY
8 SHOULDN'T HAVE DONE IT. I SAY THAT IN FRONT OF MY CLIENT. IT
9 WAS NAIVE TO THINK YOU COULD INTEREST A WHOLE GROUP.

10 BUT THAT DOESN'T GIVE THEM A CONTRACTUAL CLAIM.
11 THINK OF WHAT THEIR CLAIM IS. THEIR CLAIM -- AND WE'LL GET TO
12 THIS ON MOTIVE. THEIR CLAIM IS WE DID THIS DELIBERATELY. HOW
13 WOULD WE DO THIS DELIBERATELY?

14 THINK ABOUT WHAT THEY'RE ARGUING. WE DELIBERATELY
15 PUT IN LANGUAGE THAT MEANT YOU GET ACTIVE PLAYER LICENSING
16 MONEY. BUT WE DON'T TELL ANY OF THE RETIRED PLAYERS THAT. SO
17 ONLY 2,000 SIGNED INSTEAD OF 13,000, BECAUSE, AS YOUR HONOR
18 POINTED OUT, THEY WOULD ALL SIGN; JUST FOR SIGNING THEY WOULD
19 GET THE ACTIVE PLAYER MONEY. SO WE DON'T TELL THEM THAT. SO
20 NO ONE SIGNS, AND IT DEFEATS THE PROGRAM. AND WE DO THIS
21 WITHOUT TELLING THE ACTIVE PLAYERS.

22 HOW COULD WE TAKE AWAY THEIR MONEY TO GIVE IT TO
23 ANYONE WITHOUT VOTING --

24 **THE COURT:** YOU'RE OFF NOW --

25 **MR. KESSLER:** I'M SORRY.

1 **THE COURT:** -- ON THEIR THEORY. I WANT TO STICK WITH
2 WHAT'S WRONG WITH YOUR THEORY.

3 **MR. KESSLER:** SURE.

4 **THE COURT:** I DIDN'T HEAR A SINGLE PERSON, INCLUDING
5 MR. ALLEN, SAY HE WENT TO JOE MONTANA AND TRIED TO GET HIM TO
6 SIGN THIS, SIGN THIS UP.

7 YOU CAN SEE IT'S NOT GOING TO WORK UNLESS THE
8 CELEBRITIES SIGNED UP. AND NO ONE TESTIFIED THAT JOE MONTANA
9 WAS APPROACHED OR THAT THE FAMOUS PEOPLE WERE APPROACHED. AND
10 SO --

11 **MR. KESSLER:** I COULD BE WRONG, YOUR HONOR. I
12 BELIEVE MR. ALLEN DID TESTIFY THAT THEY TRIED TO GET THE
13 SUPERSTARS TO SIGN, AND COULDN'T DO SO. I'M PRETTY CONFIDENT
14 OF THAT.

15 WE'LL LOOK FOR THAT TESTIMONY.

16 **THE COURT:** LOOK FOR IT. MAYBE IT'S THERE.

17 **MR. KESSLER:** I BELIEVE THAT'S THERE, YOUR HONOR.

18 FINALLY, YOUR HONOR, THIS LAST POINT ON THIS. YOUR
19 QUESTION DID GO A LITTLE FURTHER AFIELD. REMEMBER, THEIR OWN
20 WITNESSES TESTIFIED BEFORE THEY BROUGHT IN, AND THEN MR. GOICH
21 CONFIRMED, THAT MR. ADDERLEY SAID HE DIDN'T EXPECT TO GET PAID
22 UNTIL HIS LICENSE RIGHTS WERE USED.

23 MR. BEACH TESTIFIED TO THAT. MR. GOICH TESTIFIED TO
24 THAT. MR. ALLEN TESTIFIED TO THAT. AND ALL OF THEM, EVEN
25 MR. MCNEIL, WHO SAID:

1 "WELL, I THOUGHT I'D GET ACTIVE PLAYER MONEY."
2 NO ONE EVER COMPLAINED UNTIL THIS LITIGATION WAS
3 FILED.

4 IN FACT, WHAT I'M GETTING AT IS MR. ALLEN TESTIFIED
5 THAT FAMOUS -- THAT IT WAS PRECISELY BECAUSE THE FAMOUS PEOPLE
6 WOULDN'T -- THE FAMOUS PLAYERS WOULDN'T SIGN THE EXCLUSIVE
7 GLA'S, THAT THAT'S WHY THEY CHANGED IT TO MAKE IT
8 NON-EXCLUSIVE, THIS GLA, BECAUSE THEY WERE HOPING TO TRY TO GET
9 THOSE FAMOUS PEOPLE TO SIGN. AND THAT'S RIGHT IN THE RECORD.

10 **THE COURT:** BUT THAT'S NOT ANSWERING THE QUESTION OF:
11 DID THEY GO TO JOE MONTANA, MEANING YOUR CLIENT, AND SAY:

12 "JOE, PLEASE SIGN THIS. IT WILL HELP THE RETIRED
13 PLAYERS."

14 **MR. KESSLER:** WE'LL LOOK FOR THAT, UNLESS MR. FEHER
15 IS HANDING --

16 **THE COURT:** I DON'T REMEMBER THAT. MAYBE IT'S IN
17 THERE SOMEWHERE.

18 **MR. KESSLER:** OKAY.

19 **THE COURT:** GO AHEAD, IF YOU HAVE SOME NUGGET THERE
20 YOU WANT TO READ.

21 **MR. KESSLER:** I'M TRYING TO SEE WHAT HE'S GIVEN ME
22 NOW. OKAY. HOLD ON.

23 **THE COURT:** ALL RIGHT.

24 **MR. KESSLER:** YOUR HONOR, I CAN'T FIND IT, YOUR
25 HONOR, RIGHT AWAY HERE. I'LL HAVE TO LOOK THROUGH THE

1 TRANSCRIPT AND SEE IF IT'S THERE.

2 IN ANY EVENT, YOUR HONOR, REGARDLESS OF WHETHER YOUR
3 HONOR QUESTIONS, I UNDERSTAND, WHY DID WE DO THIS, I DO NOT
4 BELIEVE -- EVEN IF YOUR HONOR THOUGHT THERE WAS EVIDENCE OF A
5 BREACH, WITHOUT ANY EVIDENCE IT WAS PLAINTIFFS' COUNSEL'S
6 CHOICE TO INDICATE WHAT THE REAL DAMAGES WERE FOR SOME BREACH,
7 THEY JUST CAN'T WITHOUT ANY --

8 **THE COURT:** AS I UNDERSTAND IT, THEIR SOLE THEORY FOR
9 DAMAGES IS AN EQUAL SHARE OF THE GROSS LICENSING REVENUE.

10 **MR. KESSLER:** AND THERE'S NO POSSIBLE CONNECTION TO
11 THAT, AND THERE'S NOT INDIVIDUALIZED PROOF.

12 **THE COURT:** POSSIBLY YOU'RE RIGHT ON THAT, BUT THAT'S
13 THE ARGUMENT IS -- THE ARGUMENT GOES LIKE THIS:

14 "MONIES GENERATED BY SUCH LICENSING UNDER
15 RETIRED PLAYER GROUP RIGHTS WILL BE DIVIDED BETWEEN THE PLAYER
16 AND AN ESCROW ACCOUNT FOR ALL ELIGIBLE NFLPA MEMBERS."

17 AND THEN, THEY SAY:

18 "WELL, ELIGIBLE NFLPA MEMBERS INCLUDES ACTIVES
19 WHO HAVE SIGNED THE GROUP LICENSING AUTHORIZATION FORM."

20 AND THEN, THE SECOND PARAGRAPH DOES REFER TO ACTIVES.

21 **MR. KESSLER:** AND THERE'S NO -- OTHER THAN COUNSEL
22 SAYING IT, THERE'S NO EVIDENCE AT ALL THAT ELIGIBLE NFLPA
23 PLAYERS FOR THE ESCROW ACCOUNT WOULD HAVE ANY ACTIVE PLAYERS IN
24 IT.

25 THIS IS A PERFECT EXAMPLE, YOUR HONOR, OF COUNSEL'S

1 QUESTIONS VERSUS WITNESSES. NO WITNESS HAS TESTIFIED TO THAT.
2 THE ONLY WITNESSES WHO HAVE BEEN ASKED ABOUT THAT WHO HAD
3 KNOWLEDGE, MR. ALLEN SAID IT WOULD ONLY BE RETIRED PLAYERS.
4 AND THE STANDARDS WOULD BE SET WHEN THAT WAS DONE.

5 I WOULD ALSO NOTE, YOUR HONOR -- NOW THEY JUST HANDED
6 ME SOMETHING HERE.

7 CAN YOU SHOW ME WHERE, PLEASE?

8 **MR. GREENSPAN:** START HERE BECAUSE -- THEN HERE.

9 **MR. KESSLER:** OKAY. I'M READING FROM MR. ALLEN'S
10 TESTIMONY.

11 "WE WERE" -- THIS IS 622, LINE 7:

12 "BECAUSE WE DIDN'T GIVE UP, WE WERE -- WE
13 WERE HOPING TO TAKE ADVANTAGE OF ACHIEVING
14 THAT CRITICAL MASS AND HOPING THAT THE
15 MARKETPLACE WOULD RESPOND TO THAT CRITICAL
16 MASS."

17 AND THEN, SAYS:

18 "BUT THAT HADN'T HAPPENED AND DIDN'T HAPPEN
19 IN THE TIME I WAS THERE.

20 **"QUESTION:** SO, IN OTHER WORDS, IF YOU GOT
21 MORE RETIRED PLAYERS THAT NOBODY WANTED FOR
22 YOUR CRITICAL MASS, YOU WOULD DO BETTER FOR
23 THEM?

24 "WELL, WE WERE -- FOR ANOTHER 1002 RETIRED
25 THAT NOBODY WANTED SIGN UP WITH YOU? IF WE

1 HAD" -- IT'S A LITTLE RAMBLED UNTIL WE GET TO
2 IT.

3 "EXCUSE ME. LET ME FINISH THIS QUESTION."

4 AND THIS WAS BY COUNSEL FOR PLAINTIFFS:

5 "YOUR CONTENTION FOR THIS COURT AND THIS JURY
6 IS YOU WOULD YOU DO BETTER FOR THEM. YOU
7 WOULD HAVE A BETTER SHOT AT IT IF YOU HAD
8 ANOTHER 2,000 GUYS NO ONE CARED ABOUT?

9 **"ANSWER:** WELL, IT'S NOT JUST ASKING THE
10 RETIRED GUYS WHO NOBODY CARED ABOUT. IT'S
11 ASKING EVERYBODY WHO'S A RETIRED TO SIGN,
12 SAYING THAT EVERY SINGLE MEMBER, AND THAT
13 INCLUDES PLAYERS THAT COMPANIES DO CARE
14 ABOUT.

15 **"QUESTION:** AND, YES, AND THOSE PLAYERS ARE
16 THE JOE MONTANAS, THE JOE NAMATHS OF THE
17 WORLD, RIGHT?

18 **"ANSWER:** THAT'S TWO OF THEM."

19 WHAT MR. ALLEN WAS TESTIFYING ABOUT, HE WAS TRYING TO
20 SIGN UP THOSE GUYS BECAUSE THE QUESTION WAS:

21 YOU'RE SAYING YOU WERE TRYING TO SIGN MORE
22 NOBODIES?

23 HE SAID:

24 NO, I'M TRYING TO SIGN THE JOE MONTANAS.

25 **THE COURT:** I DON'T HEAR HIM IN THERE EVER SAYING

1 THAT HE EVER APPROACHED JOE MONTANA OR JOE NAMATH. IT'S ONE
2 THING TO SAY:

3 "YEAH, IT WOULD HAVE BEEN GOOD TO GET THEM."

4 BUT WHAT ACTUAL EVIDENCE IS THERE THAT JOE MONTANA
5 WAS EVER APPROACHED?

6 **MR. KESSLER:** THIS CAME, YOUR HONOR, SAYING HE WAS
7 ASKING EVERYBODY WHO'S A RETIRED PLAYER TO SIGN.

8 HE THEN GOT QUESTIONED:

9 YOU'RE TALKING ABOUT THE JOE MONTANAS AND THE
10 JOE NAMATHS?

11 HE SAID:

12 THAT WOULD BE TWO OF THEM.

13 THE QUESTION WAS HE WAS ASKING EVERYBODY.

14 **THE COURT:** YOU MEAN, JOE MONTANA JUST GOT THE
15 ORDINARY THING IN THE MAIL. AND NO ONE WENT TO HIM AS A
16 DELEGATION AND SAID:

17 "YOU CAN REALLY HELP OUT THE RETIRED PLAYERS."
18 THAT'S NOT IN EVIDENCE.

19 **MR. KESSLER:** THAT SPECIFIC IS NOT IN EVIDENCE, YOUR
20 HONOR. BUT, AGAIN, I WOULD SAY THAT WHETHER THAT SHOULD BE IN
21 EVIDENCE OR NOT, IT HAS NOTHING TO DO WITH THIS EVIDENCE OF
22 PROVING THEIR DAMAGES IN THIS BREACH.

23 AND, CERTAINLY, ON AN INDIVIDUAL BASIS WHERE I THINK
24 NINTH CIRCUIT AUTHORITY IS CONTROLLING, THEY'VE NEVER CITED A
25 CONTRARY CASE IN THE NINTH CIRCUIT.

1 **THE COURT:** ALL RIGHT. LOOK, ON THIS PIECE THE
2 MOTION IS DENIED. IT'S DENIED WITHOUT PREJUDICE FOR RENEWAL
3 AFTER THE VERDICT.

4 I THINK THERE ARE SOME POSSIBLE POINTS THAT DEFENDANT
5 RAISES THAT ARE TROUBLING. BUT IF THE VERDICT GOES AGAINST THE
6 DEFENDANTS THEY CAN RENEW THE MOTION.

7 **MR. KESSLER:** THANK YOU, YOUR HONOR.

8 **THE COURT:** ALL RIGHT. LET'S GO TO THE NEXT --

9 **MR. KESSLER:** BREACH OF FIDUCIARY DUTY.

10 **THE COURT:** BREACH OF FIDUCIARY DUTY.

11 **MR. KESSLER:** OUR FIRST POINT ON -- WELL, OUR FIRST
12 POINT ON BREACH OF FIDUCIARY DUTY, YOUR HONOR, IS THE CONTROL
13 POINT.

14 WHAT WE BELIEVE D.C. CIRCUIT LAW STATES, AND WE THINK
15 THIS IS CONTROLLING, IS THAT HAVING CONTROL IN AN AGENCY
16 RELATIONSHIP, WHICH IS THE ONLY THEORY YOUR HONOR PERMITTED TO
17 GO FORWARD. YOU HAVEN'T PERMITTED ANY OTHER THEORY OF
18 FIDUCIARY DUTY TO GO FORWARD ON A CLASS BASIS. THAT CONTROL
19 WOULD BE A PREREQUISITE.

20 IN OTHER WORDS, THERE ARE OTHER FACTORS YOU THAT YOU
21 CONSIDER. CONTROL ALONE IS NOT ENOUGH TO CREATE THE AGENCY.

22 BUT IF YOU DON'T HAVE CONTROL, THEN IT'S -- YOU CAN'T
23 HAVE THE DUTY UNDER D.C. LAW.

24 AND OUR CITATIONS FOR THAT, YOUR HONOR, IS:

25 C & E SERVS. V. ASHLAND, INC., 498 F. SUPP 2D,

1 242-264. THAT'S THE DISTRICT COURT OF D.C. 2007.

2 AND LOTT V. BURNING TREE CLUB, 516 F. SUPP 913-917.
3 (D.D.C. 1980.)

4 AND, ALSO, JACKSON V. LOEWS WASHINGTON CINEMAS, INC.,
5 944 A.2D 1088-1097 (D.C. 2008).

6 JUDAH V. REINER, 744, A.2D 1037-1040 (D.C. 2000).

7 AND AMES V. YELLOW CAB COMPANY, 2006 WESTLAW
8 2711546,5, DISTRICT COURT OF D.C., SEPTEMBER 21ST, 2006.

9 SO WE BELIEVE THAT HAS TO BE HERE. ON THE EVIDENCE,
10 YOUR HONOR, THE ONLY EVIDENCE IN THIS CASE, ALL FOUR OF THE
11 PLAINTIFFS ADMITTED THAT THEY DID NOT HAVE SUCH CONTROL.

12 I MAY HAVE JUST PUT THOSE DOWN. LET ME JUST GO LOOK
13 FOR THEM.

14 MR. LAIRD. "QUESTION." TRANSCRIPT 980/20 TO 22:

15 "WELL, WHEN YOU SENT THIS LETTER BACK IN" --

16 THAT WAS THE GLA -- "DID YOU RETAIN ANY

17 CONTROL OVER WHAT THE UNION COULD OR COULDN'T

18 DO?

19 **"ANSWER:** OH, NO."

20 MR. BEACH. THIS IS TRANSCRIPT 1181/6-10:

21 "MR. BEACH, DO YOU BELIEVE YOU HAVE ANY

22 CONTROL OVER DEFENDANTS' LICENSING

23 OPERATIONS?

24 **"ANSWER:** OH, NO."

25 SIMILAR ANSWER.

1 "I DON'T HAVE ANY CONTROL ABOUT THAT."

2 MR. MCNEIL. TRANSCRIPT 433/2-7:

3 **"QUESTION:** OKAY. AND I THINK YOU HAVE NO
4 CONTROL OVER THE DEFENDANTS' LICENSING
5 OPERATIONS, RIGHT?

6 **"ANSWER:** NO, I DON'T HAVE ANY CONTROL TO MY
7 KNOWLEDGE. I DON'T HAVE ANY CONTROL."

8 FINALLY, MR. ADDERLEY, THE CLASS REPRESENTATIVE,
9 TRANSCRIPT, 1568/1-14:

10 **"QUESTION:** AND WHAT YOUR TESTIMONY IS, IF
11 YOU HAD AN INDIVIDUAL AGREEMENT THAT
12 CONFLICTED WITH SOMETHING THEY DID, YOU COULD
13 ASK NOT TO BE INCLUDED IN WHAT THEY WERE
14 DOING, RIGHT?

15 **"ANSWER:** YES.

16 **"QUESTION:** BUT YOU NEVER HAD ANY SUCH
17 AGREEMENT, INDIVIDUAL AGREEMENT, CORRECT?

18 **"ANSWER:** CORRECT.

19 **"QUESTION:** SO APART FROM THAT, DID YOU HAVE
20 ANY ABILITY TO CONTROL PLAYERS INC'S USE OF
21 YOUR GLA RIGHTS?

22 **"ANSWER:** NO.

23 **"QUESTION:** AND YOU STAND BY THAT TESTIMONY,
24 SIR, DO YOU NOT?

25 **"ANSWER:** CORRECT."

1 EVERYBODY ADMITTED ON THEIR SIDE -- AND THERE WAS
2 SIMILAR TESTIMONY FROM MR. ALLEN ON THE OTHER SIDE -- THAT THE
3 GLA WAS SIMPLY AN AUTHORIZATION TO GO OUT AND LICENSE
4 NON-EXCLUSIVE, WHICH IS SIGNIFICANT.

5 SO IT DIDN'T LIMIT THEM IN ANY WAY OR WHAT THEY CAN
6 DO. NON-EXCLUSIVE RIGHTS. AND IT DID NOT IMPOSE ANY DUTY
7 BECAUSE UNDER AN AGENT THEORY, AN AGENT THEORY, UNDER D.C. LAW,
8 A PREREQUISITE IS THAT THE PRINCIPAL HAS TO RETAIN CONTROL OVER
9 THE AGENT.

10 **THE COURT:** BUT LET'S STOP WITH THAT. YOUR THEORY,
11 THEN, HAS TO BE THAT THIS WAS A BARE LICENSE AND NOTHING MORE.

12 **MR. KESSLER:** YES, YOUR HONOR. THIS IS A BARE
13 LICENSE.

14 OR I WOULDN'T SAY "NOTHING MORE." NOTHING MORE THAT
15 WOULD GIVE RISE TO A FIDUCIARY DUTY.

16 **THE COURT:** BUT WAS THERE IS ANY DUTY ON BEHALF OF
17 PLAYERS -- NFLPA OR THE PLAYERS INC TO MARKET THE IMAGES OF
18 THESE PLAYERS?

19 **MR. KESSLER:** UNDER THE TERMS OF THE GLA THERE WERE
20 NOT, YOUR HONOR. AND WHAT YOUR HONOR HAS NOTED, THIS IS NOT --

21 **THE COURT:** SO THEY COULD HAVE PUT IT IN A DRAWER.

22 **MR. KESSLER:** THEY COULD HAVE.

23 **THE COURT:** THEY COULD HAVE JUST -- ACCORDING TO YOU,
24 AFTER COLLECTING ALL THESE THINGS THEY COULD PUT THEM ON A
25 SHELF AND LET THEM COLLECT DUST AND DO NOTHING.

1 **MR. KESSLER:** RIGHT. AS YOU COULD IN A BARE LICENSE.
2 IN OTHER WORDS, YOUR HONOR MAKES THAT SOUND HORRIBLE,
3 BUT IN A BARE LICENSE, IF YOU GIVE SOMEONE -- SAY "HERE'S MY
4 RIGHTS," BECAUSE THEY'RE NON-EXCLUSIVE, BECAUSE THEY'RE
5 NON-EXCLUSIVE, BECAUSE IF YOU -- WHAT MR. GOICH SAID:

6 "IF IT GENERATED SOME MONEY FOR ME, GREAT."

7 SAYS:

8 "IF IT DIDN'T, OKAY."

9 **THE COURT:** WHY, THEN, DID THEY PUT UP ON THE
10 WEB SITE THAT THEY REPRESENTED ALL THESE RETIRED PLAYERS AND
11 THAT THEY AGGRESSIVELY MARKETED THEM?

12 **MR. KESSLER:** BECAUSE DESPITE THE ABSENCE OF A
13 FIDUCIARY DUTY, DESPITE THE ABSENCE OF A FIDUCIARY DUTY, THEY
14 ACTUALLY TRIED TO HELP THESE PLAYERS.

15 OKAY? YOUR HONOR CAN'T SAY, WELL, BECAUSE THEY
16 ACTUALLY TRIED THAT, THAT SOMEHOW READS THE DUTY IN.

17 AS A MATTER OF LAW, YOU CAN'T DO THAT. IT HAS TO
18 BE -- THE DUTY HAS TO COME OUT OF THE GLA TERMS.

19 YOUR HONOR ONLY CERTIFIED THE CLASS ARISING OUT OF
20 THE GLA. THERE'S GOT TO BE SOMETHING THERE.

21 AND, IN FACT --

22 **THE COURT:** ONE EXPLANATION IS THAT IT WAS JUST A
23 GOOD DEED. THEY DIDN'T HAVE TO DO IT, AND IT WAS A GOOD DEED.
24 THAT'S TRUE. THAT'S ONE EXPLANATION.

25 BUT ANOTHER EXPLANATION IS THAT THE REASON THEY WENT

1 TO ALL THIS GROUP LICENSING AND SO FORTH IS THAT THEY WERE
2 GOING TO BE LIKE THE HOLLYWOOD AGENT FOR ALL OF THE -- ALL OF
3 THE RETIRED PLAYERS.

4 **MR. KESSLER:** AND, YOUR HONOR, IF THAT WERE TRUE --
5 THINK ABOUT IT. IF THAT WERE TRUE, WHY WOULD THEY GIVE BACK --
6 AND THE ONLY EVIDENCE IN THE CASE IS WHAT A REASONABLE JURY CAN
7 FIND. THAT'S OUR STANDARD HERE ON RULE 50.

8 THE ONLY EVIDENCE IN THE CASE IS FOR THE RETIRED
9 PLAYER LICENSING THEY GAVE BACK 99-AND-A-HALF PERCENT TO THE
10 RETIRED PLAYERS. THEY DIDN'T TAKE EVEN A 1 PERCENT COMMISSION
11 OUT OF THIS.

12 **THE COURT:** DOESN'T THAT ARGUMENT HURT YOU? THINK
13 ABOUT THAT FOR A MINUTE. IN A BARE LICENSE, THE WAY IT USUALLY
14 WOULD WORK, IS YOUR SIDE WOULD PAY: HERE'S A HUNDRED DOLLARS.
15 CASH SUM CERTAIN. AND GIVE THAT TO THE PLAYER.

16 AND THEN, YOU WOULD SAY IF IT WAS -- YOU WOULD SAY TO
17 THE PLAYER:

18 "WE OWN THESE RIGHTS. WE CAN PUT THEM IN THE
19 SHELF, IF WE WANT, OR WE CAN GO LICENSE THEM. WE'RE GOING TO
20 KEEP THE MONEY, OR WE'LL GIVE YOU A PERCENTAGE OF IT."

21 BUT, IF YOU THINK ABOUT IT, THE ONLY WAY THE
22 ADDERLEYS OF THE WORLD WERE GOING TO GET PAID UNDER THIS IS
23 THEY GOT NOTHING OUT OF THIS UNLESS YOU ARE OUT THERE -- NOT
24 YOU, YOUR CLIENT -- WAS OUT THERE TRYING TO MARKET IT. AND FOR
25 WHOSE ACCOUNT -- IF YOU WERE -- IF YOUR CLIENT WAS OUT THERE

1 DOING IT, BY WHOSE ACCOUNT WERE THEY WORKING?

2 BECAUSE BY YOUR OWN TESTIMONY YOU KEPT NONE OF IT; IT
3 WAS ALL FOR THE ACCOUNT OF THE ADDERLEYS OF THE WORLD.

4 **MR. KESSLER:** WE KEPT A HALF PERCENT OUT OF THE
5 WHOLE.

6 **THE COURT:** SO 99-AND-A-HALF PERCENT. SO THAT
7 SUGGESTS, DOESN'T IT, THAT THIS WAS -- THAT THE PLAYERS
8 ASSOCIATION WAS REPRESENTING --

9 **MR. KESSLER:** YOUR HONOR, WITH ALL DUE RESPECT, THE
10 POINT YOUR HONOR IS MAKING HAS NOTHING TO DO WITH THE LAW OF
11 THE DISTRICT OF COLUMBIA. IT MAY HAVE SOMETHING TO DO WITH, I
12 DON'T KNOW, CALIFORNIA LAW -- I HAVEN'T STUDIED IT -- OR SOME
13 OTHER --

14 **THE COURT:** GENERAL PRINCIPLES.

15 **MR. KESSLER:** THE GENERAL PRINCIPLES I DON'T --

16 **THE COURT:** THE GENERAL PRINCIPLES.

17 **MR. KESSLER:** I DO NOT -- I BELIEVE THE CONTROLLING
18 LAW -- WHICH THEY STIPULATED TO, OKAY? THEY DIDN'T HAVE TO
19 STIPULATE TO D.C. LAW.

20 **THE COURT:** YOU FIND ME SOME LAW THAT SAYS WHAT I
21 SAID IS NOT CORRECT.

22 I DON'T HAVE TO JUST CUT AND PASTE FROM SOME JUDGE IN
23 THE D.C. SUPERIOR COURT.

24 **MR. KESSLER:** YOUR HONOR, WHAT I WOULD SUGGEST IS THE
25 FOLLOWING. AT LEAST, IT'S OUR POSITION. OKAY? WE'VE CITED

1 SIX CASES THAT SAY WITHOUT CONTROL THERE COULD BE NO DUTY IN AN
2 AGENCY THING THERE.

3 THEY'VE CITED NO CASES TO SAY WHAT YOUR HONOR JUST
4 STATED IS CORRECT. I THINK YOUR HONOR HAS TO GO -- UNLESS YOUR
5 HONOR HAS YOUR CLERK DO SOME RESEARCH FOR YOU AND FIND A CASE,
6 I THINK YOU HAVE TO GO WITH D.C. LAW.

7 **THE COURT:** I SAW SOME OF THOSE SAYING THAT CONTROL
8 WAS IMPORTANT. I NEVER SAW ONE THAT SAID IT'S A SINE QUA NON.

9 **MR. KESSLER:** WELL, YOUR HONOR, WE'RE BRIEFING THAT
10 AGAIN TODAY, IN OUR 10-PAGE INSTRUCTION TO THE JURY, BECAUSE IT
11 OBVIOUSLY COMES UP THERE, AS WELL. AND MAYBE YOUR HONOR WILL
12 LOOK AT IT AGAIN.

13 WE DO BELIEVE THAT'S THE LAW OF THE D.C. CIRCUIT.

14 **THE COURT:** I AM GOING TO LOOK AT IT. I AM GOING TO
15 LOOK AT IT AGAIN.

16 ALL RIGHT. LET'S HEAR FROM THE OTHER SIDE.

17 **MR. KESSLER:** ONE OTHER POINT ON FIDUCIARY DUTY, IF
18 YOU WANT.

19 **THE COURT:** GO AHEAD.

20 **MR. KESSLER:** MY SECOND POINT ON FIDUCIARY DUTY IS
21 THAT EVEN -- I KNOW YOUR HONOR DECLINED THIS WITH RESPECT TO
22 THE BREACH OF CONTRACT CLAIM. BUT WITH RESPECT TO THE
23 FIDUCIARY DUTY CLAIM, IT'S AN EVEN MORE, WE BELIEVE, COMPELLING
24 ARGUMENT THAT YOU CAN'T USE THE GLR POOL, WHICH THEIR ONLY
25 DAMAGE MEASUREMENT, AS -- THERE'S NO CAUSAL PROOF, FOR EXAMPLE,

1 ON A MARKETING CLAIM, WHICH I KNOW YOUR HONOR BELIEVES THERE
2 POSSIBLY IS A CLAIM YOU SHOULD HAVE MARKETED.

3 IF WE SHOULD HAVE MARKETED, THEN THEY NEEDED TO HAVE
4 A DAMAGE EXPERT STATE:

5 "IF YOU MARKETED THESE PLAYERS, HERE'S WHAT I
6 BELIEVE THEY WOULD HAVE BEEN WORTH, THOSE RIGHTS."

7 THAT'S NOT WHAT WAS DONE. AND I ASKED MR. ROWLEY
8 THIS SPECIFICALLY, SPECIFICALLY ON THIS.

9 THIS IS ON 1915. THIS COULDN'T BE CLEARER.

10 "QUESTION," LINE 19:

11 "LET ME ASK YOU THIS. LET'S SAY THE JURY
12 WERE TO FIND THERE WAS NO BREACH OF CONTRACT,
13 OKAY? AND THERE WAS A BREACH OF FIDUCIARY
14 DUTY FOR NOT MARKETING, NOT SUFFICIENTLY
15 MARKETING THE RETIRED PLAYERS WHO SIGNED THE
16 GLA'S, OKAY? HAVE YOU DONE ANY ANALYSIS OF
17 SPECIFICALLY OF HOW MUCH THE RETIRED PLAYERS
18 WOULD HAVE EARNED FOR THEIR RIGHTS IF THEY
19 HAD BEEN MORE AGGRESSIVELY MARKETED, JUST ON
20 THAT CLAIM SEPARATELY?

21 **"ANSWER: NO."**

22 IN OTHER WORDS, HE DID NO ANALYSIS OF ANY BREACH FROM
23 MARKETING. HE DID NO SEPARATE ANALYSIS OF ANY BREACH INVOLVING
24 SCRAMBLING. HE DID NO SEPARATE ANALYSIS OF ANY BREACH FROM,
25 QUOTE, "CONFLICT OF INTEREST."

1 AND FIDUCIARY DUTY LAW -- THIS IS VERY IMPORTANT,
2 YOUR HONOR -- FIDUCIARY DUTY LAW IS NOT DISPUTED. IT'S EVEN IN
3 YOUR HONOR'S CHARGES. THERE HAS TO BE AN INDIVIDUAL ELEMENT OF
4 THE INJURY UNDER FIDUCIARY DUTY LAW, EVEN MORE STRONGLY THAN
5 CONTRACT, BECAUSE OF ITS TORT NATURE.

6 SO, AGAIN, WHATEVER YOUR HONOR MIGHT BELIEVE
7 GENERALLY, WE DON'T BELIEVE THEY OFFERED ANY DAMAGE CAUSAL
8 LINKUP TO ANY KIND OF FIDUCIARY DUTY CLAIM SO THEY COULD HAVE
9 AN ABSTRACT CLAIM FOR LACK OF MARKETING. HOW WOULD THIS JURY
10 DECIDE ANY REASONABLE BASIS WHAT PORTION OF THE GLR POOL HAD TO
11 DO WITH LACK OF MARKETING?

12 IT MAKES NO SENSE AT ALL, YOUR HONOR. AND THE
13 WITNESS HAS SO TESTIFIED.

14 **THE COURT:** MR. LECLAIR.

15 **MR. LECLAIR:** YOUR HONOR, LET ME DEAL FIRST WITH THE
16 EXISTENCE OF THE FIDUCIARY DUTY.

17 **THE COURT:** I'M JUST SMILING BECAUSE I GUESS I'M
18 LOOKING FORWARD TO THE CLOSING ARGUMENTS TO SEE HOW YOU LAWYERS
19 DEAL WITH -- BECAUSE BOTH SIDES HAVE GOT MOUNTAINS -- MAYBE NOT
20 MOUNTAINS, BUT AT LEAST SOME -- YOU'VE GOT SOME PROBLEMS WITH
21 YOUR CASE, PLAINTIFFS AND THE DEFENSE.

22 ALL RIGHT. GO AHEAD. WHAT DO YOU HAVE TO SAY?

23 **MR. LECLAIR:** YOUR HONOR, I THINK THIS IS A CLASSIC
24 FACT QUESTION ON FIDUCIARY DUTY. FIRST OF ALL --

25 **THE COURT:** HOW ABOUT THE LAW PART? IS IT TRUE THAT

1 CONTROL IS A SINE QUA NON?

2 **MR. LECLAIR:** ABSOLUTELY NOT. IT'S A FACTOR, YOUR
3 HONOR, UNDER D.C. LAW. IT'S A FACTOR. THEY SAY IT'S AN
4 IMPORTANT FACTOR.

5 BUT THE QUESTION, YOUR HONOR, IS AGENCY. CONTROL IS
6 SIMPLY A FACTOR TO DETERMINE WHETHER AGENCY EXISTS. AND THE
7 RECORD IS REplete WITH EVIDENCE ON THEIR AGENCY.

8 FOR EXAMPLE, EXHIBIT 36, WHICH IS ONE OF THE LICENSE
9 AGREEMENTS, THE TOPPS LICENSE AGREEMENT, SAYS:

10 "NFLPA REPRESENTS THAT THE NFLPA HAS BEEN DULY
11 APPOINTED AND IS ACTING ON BEHALF OF THE ACTIVE AND RETIRED
12 FOOTBALL PLAYERS OF THE NATIONAL FOOTBALL LEAGUE WHO HAVE
13 ENTERED INTO A GROUP LICENSING ASSIGNMENT" DAH, DAH, DAH, DAH,
14 DAH.

15 MY POINT IS, THEY THEMSELVES, AS YOU POINT OUT, ON
16 THEIR WEB SITE SAID THEY REPRESENT RETIRED PLAYERS. THEY
17 ACTIVELY MARKET THEM. THEY THEMSELVES HAVE ABSOLUTELY SET
18 FORTH THE AGENCY EXPRESSLY.

19 JOEL LINZNER TESTIFIED THAT THAT'S WHAT HE THOUGHT
20 BECAUSE OF HIS DEALINGS WITH THEM, THAT THEY WERE REPRESENTING
21 THE RETIRED PLAYERS.

22 AND SO AGENCY IS VERY CLEARLY ESTABLISHED. IT MAY BE
23 ESTABLISHED, NOT JUST A FACT ISSUE, BASED ON THE EVIDENCE IN
24 THE RECORD.

25 IN ADDITION, BRUCE LAIRD TESTIFIED:

1 "THEY WERE MY AGENT."

2 AND I'VE ALREADY TALKED ABOUT THE WEB SITE. SO IN
3 TERMS OF THE EXISTENCE OF THE AGENCY, THE ADMISSIONS OF THE
4 DEFENDANTS THEMSELVES ARE SUFFICIENT TO ESTABLISH AGENCY.

5 **THE COURT:** WELL, OKAY. GO TO THE SECOND POINT.

6 **MR. LECLAIR:** ALL RIGHT. WITH RESPECT TO CONTROL,
7 YOUR HONOR, AGAIN, THIS IS JUST A FACT QUESTION. AND CONTROL
8 IS ONE OF THE FACTORS TO BE CONSIDERED BY THE JURY.

9 **THE COURT:** BUT THOSE WITNESSES ALL SAID THEY DIDN'T
10 HAVE ANY --

11 **MR. LECLAIR:** THAT'S NOT CORRECT, YOUR HONOR. THEY
12 QUOTED BITS AND PIECES. FOR EXAMPLE, MR. BEACH SAID -- FOR
13 EXAMPLE, WHAT MR. BEACH IS SAYING:

14 I DON'T CONTROL THE OPERATIONS.

15 AND HE EXPLAINED. WHEN HE SAT IN THE WITNESS CHAIR,
16 TO THE JURY HE SAID:

17 I THOUGHT THEY WERE TALKING ABOUT THE FAX
18 MACHINE WHEN THEY ASKED ME THAT QUESTION, WHETHER I HAD CONTROL
19 OF THE FAX MACHINE.

20 HE SAID: SURE, I HAD CONTROL.

21 I'M PARAPHRASING, BECAUSE I DON'T HAVE THE
22 TRANSCRIPT. I HAVEN'T HAD TIME TO PULL IT. BUT I REMEMBER
23 WHEN HE SAT THERE AND TESTIFIED, HE SAID HE HAD CONTROL.

24 HERE ARE THE THINGS THAT, YOUR HONOR, GIVE US CONTROL
25 SPECIFICALLY, AS A MATTER OF LAW.

1 WHEN YOU HAVE A SCOPE OF REPRESENTATION CLAUSE IN A
2 CONTRACT, HERE THERE'S THE HOLE THAT EXCLUDES FIVE OR LESS.
3 THAT KIND OF SCOPE CLAUSE IS EVIDENCE OF LEGAL CONTROL. THAT'S
4 ONE.

5 SECOND, RIGHT OF TERMINATION. WHEN THEY AMENDED THE
6 GLA IN 2005, AFTER THIS GLA THAT WE ARE TALKING ABOUT, THEY
7 AMENDED IT TO PUT IN AN EXPRESS CLAUSE THAT SAYS:

8 "YOU CAN'T REVOKE THIS CLAUSE. YOU CAN'T REVOKE
9 THIS GLA."

10 THAT IS EVIDENCE THAT WHEN THEY WROTE THE ONE IN 2001
11 THAT IS THE ONE AT ISSUE IN THIS CASE THEY DID NOT PUT THAT
12 LANGUAGE IN.

13 THEREFORE, IT IS -- GIVES US THE ABILITY TO ARGUE TO
14 THIS JURY THAT WE HAD A RIGHT TO REVOKE, WHICH IS ULTIMATE
15 EVIDENCE OF CONTROL.

16 THEN, THERE IS THE CONFLICTS PROVISION WHICH PROVIDES
17 FOR US TO BE ABLE TO GET OUT OF THEIR ABILITY TO REPRESENT US.

18 SO ALL THE FACTS AND CIRCUMSTANCES.

19 AND THEN, FINALLY, YOUR HONOR, VERY, VERY IMPORTANT,
20 THE NONINTERFERENCE CLAUSE. THEY DON'T WANT TO TALK ABOUT
21 THIS. IT'S NOT JUST A CONTRACT ITSELF. THEY THEMSELVES PUT IN
22 EVERY SINGLE LICENSE AGREEMENT.

23 AS JOSEPH NAHRA TESTIFIED FROM THE WITNESS STAND,
24 EVERY SINGLE LICENSE AGREEMENT CONTAINS THIS NONINTERFERENCE
25 CLAUSE. WHICH MEANS THEY PUT THEMSELVES BETWEEN EVERY SINGLE

1 LICENSEE OUT THERE, ALL 200 OF THEM, AND THE PLAYERS, THE
2 RETIRED PLAYERS.

3 THEY CANNOT DEAL WITH THEM ON THE LICENSE PRODUCTS,
4 WHICH, ARE BROADLY DEFINED. SO THEY HAVE TO BE OUR AGENT, YOUR
5 HONOR. THAT'S THE PROBLEM. THEY HAVE PUT THEMSELVES BETWEEN
6 US AND THE LICENSEES.

7 SO FOR ALL OF THOSE REASONS, IT IS AT THE VERY LEAST
8 A FACT QUESTION FOR THE JURY, IF NOT ESTABLISHED CONCLUSIVELY,
9 THAT THEY ACTED AS OUR AGENT UNDER THIS CONTRACT.

10 NOW, WITH RESPECT TO DAMAGES, WHAT WE HAVE SAID --
11 AND, OBVIOUSLY, WE'VE NOT DONE A GOOD JOB OF THIS WITH YOUR
12 HONOR. AND I'M SORRY FOR THAT. I WISH WE HAD DONE BETTER, BUT
13 WE DIDN'T.

14 OUR THEORY OF THIS CASE IS FROM THE VERY BEGINNING
15 THEY SET UP THIS PROGRAM AS BASICALLY A SCAM OF RETIRED
16 PLAYERS. IT WAS NOT A GOOD DEED. IT WAS DESIGNED -- WHAT THEY
17 WANTED TO DO WAS TO CONTROL THE MARKET.

18 THEY DID NOT WANT ANYBODY ELSE TO GET INTO THIS
19 PICTURE OF GROUP LICENSING, BECAUSE THEY WANTED TO BE THE
20 ONE-STOP SHOP ON GROUP LICENSING.

21 AND WHAT THEY DID IS THEY SET THIS UP WITH A CONTRACT
22 THAT SUGGESTS TO THE RETIRED PLAYERS THAT THEY'RE GOING TO
23 SHARE WITH THE ACTIVES. AND THERE'S PLENTY OF TESTIMONY.

24 CLIFTON MCNEIL, THE VERY FIRST WITNESS IN THE CASE,
25 SAID ON THE WITNESS STAND:

1 I READ THIS CONTRACT. I THOUGHT IT MEANT WHEN IT
2 SAYS "ELIGIBLE NFLPA MEMBERS," AND WHEN IT TALKED ABOUT SIX OR
3 MORE PRESENT OR FORMER I UNDERSTOOD WE WERE SHARING WITH THE
4 ACTIVE PLAYERS. THAT'S THE REASON I WANTED TO DO THIS.

5 AND THAT'S THE VERY IMPRESSION THEY WROTE THIS
6 CONTRACT. IT IS, AS YOUR HONOR HAS SAID, A MASTERPIECE OF
7 OBFUSCATION. AND THEY WROTE IT SPECIFICALLY TO MISLEAD AND
8 CONFUSE THE RETIRED PLAYERS.

9 AND WHAT THEY WERE TRYING TO DO WAS THEY WERE TRYING
10 TO SET IT UP IN A WAY THAT WAS AS FOLLOWS: BY SUGGESTING
11 EVERYBODY'S GOING TO SHARE TOGETHER. AND IF YOU ASSUME NOW --
12 ASSUME THAT WE'RE WRONG UNDER CONTRACT, AND THAT WE WEREN'T
13 INCLUDED IN EVERY SINGLE LICENSE AGREEMENT. THE POINT WAS,
14 THEY THEMSELVES DID THAT. AND THEY DID IT INTENTIONALLY
15 BECAUSE THEY DID NOT WANT TO HAVE THE RETIRED PLAYERS AS A PART
16 OF THE GROUP LICENSES.

17 THE TESTIMONY OF PAT ALLEN WAS, OF COURSE, THEY
18 MARKETED RETIRED AND ACTIVE PLAYERS TOGETHER.

19 YOU REMEMBER THE DOCUMENT I PUT IN EVIDENCE
20 YESTERDAY, YOUR HONOR, WHERE SHE TRIED TO SAY:

21 OH, THIS SAYS THEY'RE PART OF A BIGGER ACTIVE
22 PLAYER PROGRAM.

23 AND SHE WAS LIKE:

24 OH, WELL, MAYBE ON ONE THEY WERE, AFTER ALL.

25 AND THEN, SHE SAID:

1 BY THE WAY, THEY WANTED -- THEY WANTED TO DO
2 RETIRED GUYS, BUT I TOLD THEM THEY HAD TO HAVE SIX ACTIVES.

3 YOUR HONOR, WHAT THEY DID WAS THEY WERE SAYING:

4 "WAIT. WE CAN'T DO RETIRED AS A GROUP. WE GOT
5 TO MAKE SURE WE HAVE SIX ACTIVE PLAYERS IN HERE SO WE CAN DO AN
6 ACTIVE PLAYER GROUP LICENSE TO MAKE SURE THAT WE DO ALL THE
7 GROUP MONEY AS ACTIVE GROUP MONEY."

8 AND THE POINT WAS IT WAS A SCAM, YOUR HONOR. IT
9 REALLY WAS.

10 WHAT THEY WANTED TO DO WAS SET UP A PROGRAM WHERE
11 THEY COULD DO A BUNCH OF AD HOCS FOR THE ACTIVE PLAYERS THAT
12 WERE STARS, DO THE LOW-HANGING FRUIT AD HOCS FOR THE RETIRED
13 PLAYERS WHO WERE STARS.

14 THEY NEVER INTENDED TO DO ANYTHING FOR THE GROUP THAT
15 THEY ACTUALLY WERE OUT SOLICITING EVERY WEEK, EVERY MONTH, TO
16 SIGN THESE DOCUMENTS.

17 AND WHAT THEY WERE DOING WAS, IN FACT, TRYING TO SET
18 IT UP SO THEY SEPARATED OFF THE RETIRED PLAYERS FROM THE ACTIVE
19 PLAYERS, EVEN THOUGH WHAT THEY TOLD THEM IN THEIR CONTRACT WAS:

20 "YOU'RE GOING TO BE TOGETHER."

21 THAT WAS WHY IT WAS A BREACH OF FIDUCIARY DUTY.

22 AND THE DAMAGES FROM THAT WERE IF THEY HAD DONE --
23 LET'S TAKE THE WORLD. LET'S ASSUME THAT WE HAD AN AGENT WHO
24 WAS ACTUALLY A TRUE AGENT WITH OUR BEST INTEREST AT HEART. AND
25 THEY GOT TOGETHER AND SAID:

1 "LOOK, HERE IS TOPPS. THEY WANT TO SIGN A GROUP
2 LICENSE. THEY WANT TO USE 500 ACTIVE PLAYERS AND 500 RETIRED
3 PLAYERS. AND THEY WANT TO MAKE CARDS FOR MR. ADDERLEY TO SIGN,
4 AND THEY WANT MAKE CARDS FOR 27 ACTIVE PLAYERS AND 37 OTHER
5 RETIRED PLAYERS. WHAT SHOULD WE DO?"

6 IF WE SIGN A GROUP LICENSE THAT SAYS:

7 "YOU CAN HAVE ALL THE ACTIVE PLAYERS YOU WANT
8 AND ALL THE RETIRED PLAYERS YOU WANT FROM THIS LIST," WHAT
9 WOULD HAVE BEEN THE EFFECT? THE EFFECT WOULD HAVE BEEN WE
10 WOULD HAVE SHARED IN THE GROUP LICENSING REVENUE. BUT THEY
11 NEVER WANTED THAT TO HAPPEN.

12 AND THE REASON THEY DIDN'T IS BECAUSE THEY HAD SET
13 ALL THIS UP TO FUND THEMSELVES WITH A 1994 STUDY.

14 AND DID YOUR HONOR WONDER WHY THEY NEVER DID ANOTHER
15 STUDY AFTER 1994? BECAUSE THEY KNEW THEY HAD A PROBLEM WITH
16 THE RETIRED PLAYERS, AND THEY DIDN'T KNOW WHAT TO DO ABOUT IT.

17 SO THEY NEVER DID -- EVEN THOUGH THEY SAID IN A
18 FOOTNOTE OF THEIR FINANCIAL STATEMENT:

19 "WE'RE GOING TO DO ANOTHER STUDY IN 2007," THEY
20 HAD TO ADMIT THEY DIDN'T TO IT, BECAUSE THEY COULDN'T FIGURE
21 OUT HOW TO DO THE SHARING WITH THE RETIRED PLAYERS SO THEY
22 JUST --

23 **THE COURT:** NOW, THAT'S YOUR SURMISE. I NEVER SAW
24 ANY EVIDENCE THAT THAT WAS THE REASON.

25 **MR. LECLAIR:** THAT WHAT WAS THE REASON?

1 **THE COURT:** THE REASON THEY DIDN'T DO THAT STUDY HAD
2 SOMETHING TO DO WITH THE RETIRED.

3 **MR. LECLAIR:** NO, YOUR HONOR. THAT'S THE ARGUMENT.
4 THAT'S ARGUMENT BASED ON THE EVIDENCE THAT WE'RE ENTITLED TO
5 ARGUE TO THE JURY.

6 OUR THEORY OF THE CASE IS --

7 **THE COURT:** A SMOKING GUN WOULD BE:

8 "HEY, WE BETTER NOT DO THIS STUDY, BECAUSE THEN
9 WE'LL HAVE TO DEAL WITH THE RETIRED. SIGNED DOUG ALLEN."

10 THAT WOULD BE A SMOKING GUN. BUT YOU DON'T HAVE
11 THAT, SO IT'S A SURMISE.

12 **MR. LECLAIR:** WE DON'T HAVE A SMOKING GUN, BUT WE
13 HAVE REASONABLE INFERENCES FROM THE EVIDENCE, YOUR HONOR, THAT
14 THEY NEVER INTENDED -- RICHARD BERTHELSEN TESTIFIED THAT FROM
15 THE VERY BEGINNING THEY NEVER INTENDED TO PUT THESE PEOPLE
16 TOGETHER. AND THE QUESTION IS:

17 "WHY NOT? WHY NOT PUT THEM TOGETHER?"

18 AND THE ANSWER IS:

19 "BECAUSE WE DON'T WANT TO SHARE. WE DON'T WANT
20 TO SHARE THE GROUP REVENUE. WE'RE GOING TO GIVE ALL THIS AD
21 HOC MONEY TO THE ACTIVE PLAYERS, ALL THIS AD HOC MONEY TO THE
22 STAR RETIRED PLAYERS, AND WE'RE GOING TO SHARE THE GROUP
23 LICENSING REVENUE WITH ALL THESE JOURNEYMEN ACTIVE PLAYERS, THE
24 THIRD STRINGS, THE SPECIAL TEAMS, BUT WE DON'T WANT TO SHARE IT
25 WITH THE RETIRED JOURNEYMEN," EVEN THOUGH THAT'S WHAT WE SAY

1 THEY REPRESENTED.

2 **THE COURT:** WHAT, THEN, WAS THE MOTIVE FOR -- WHY GO
3 OUT AND GET THESE GLA'S IN ANY EVENT, THEN?

4 **MR. LECLAIR:** I'LL TELL YOU EXACTLY WHY, YOUR HONOR.
5 THE REASON WAS BECAUSE THEY DID NOT WANT TO LET ANY OTHER GROUP
6 EVER DEVELOP FOR PROFESSIONAL FOOTBALL PLAYERS --

7 **THE COURT:** ALL RIGHT.

8 **MR. LECLAIR:** -- WHO WOULD COMPETE WITH THEM.

9 **THE COURT:** THAT'S WHAT I THOUGHT YOU WOULD SAY. SO
10 LET'S PURSUE THAT FOR A MINUTE.

11 LET'S SAY THAT A DIFFERENT HOLLYWOOD AGENCY HAD COME
12 FORWARD AND SIGNED UP THE SAME GROUP OF CLASS MEMBERS. SO IT
13 HAD NOTHING TO DO WITH THE NFLPA. IT WAS A DIFFERENT AGENT.

14 AND LET'S SAY THEY JUST SAID FLAT OUT:

15 "WE'RE GOING TO BE YOUR AGENT AND YOUR
16 REPRESENTATIVE."

17 SO THEN THE ACTIVE PLAYER MONEY WOULD HAVE CONTINUED
18 TO GO TO THE ACTIVE PLAYERS. AND MR. HOLLYWOOD WOULD BE OUT
19 THERE TRYING TO SELL THE 2,000 RPGLA CLASS MEMBERS.

20 NOW, POSSIBLY A DEAL COULD HAVE BEEN DONE FOR SOME
21 MONEY. BUT THE RECORD SHOWS NOTHING ABOUT HOW MUCH THAT MONEY
22 WOULD BE AND WITH WHOM IT MIGHT BE. THERE'S NO -- THERE'S NO
23 TESTIMONY, IS THERE, OR ANALYSIS THAT THIS GROUP OF 2,000
24 RETIRED PLAYERS WOULD COMMAND A CERTAIN RANGE OF PRICE IF THEY
25 HAD BEEN SOLD AS A GROUP BY A REASONABLE AGENT?

1 **MR. LECLAIR:** THAT'S NOT OUR THEORY OF DAMAGE, YOUR
2 HONOR. LET ME EXPLAIN OUR --

3 **THE COURT:** I KNOW IT'S NOT. BUT SINCE THAT'S NOT
4 THERE, WHAT -- YOUR ONLY THEORY IS YOU SHOULD HAVE GOTTEN AN
5 EQUAL SHARE OF THE ACTIVES.

6 **MR. LECLAIR:** NO. AS I STARTED TO SAY THIS MORNING,
7 YOUR HONOR, THEY HAD A CHOICE. IF THEY WERE GOING TO COMPLY
8 WITH THEIR FIDUCIARY DUTY, THEY COULD EITHER HAVE DONE WHAT I
9 SUGGESTED, WHICH IS TO LICENSE ACTIVES AND RETIRED TOGETHER,
10 IN WHICH CASE WE WOULD HAVE BEEN ENTITLED TO A SHARE OF THE
11 GROUP REVENUE, WHICH IS EXACTLY WHAT IS CALCULATED IN THE GROSS
12 LICENSING REVENUE POOL, AND WHAT MR. ROWLEY TOLD THE JURY.

13 SO WE WOULD HAVE BEEN ENTITLED TO RECOVER EXACTLY
14 WHAT WE HAVE TOLD THE JURY IF THEY HAD COMPLIED WITH THEIR
15 FIDUCIARY DUTY AND PUT US IN THE LICENSES AS THEY WERE REQUIRED
16 TO DO.

17 IF THEY DID NOT WANT TO DO THAT -- AND I UNDERSTAND.
18 YOUR HONOR SAYS: WELL, MAYBE BAD THINGS; THEY COULD HAVE DONE
19 THIS OR THAT.

20 IF THEY DIDN'T WANT TO DO THAT, THEY HAD A DUTY TO
21 SAY:

22 "WE'VE GOT A CONFLICT OF INTEREST HERE. OUR
23 INTEREST IS BETTER SERVED IF WE DON'T DO THIS. YOUR INTEREST
24 WOULD BE BETTER SERVED IF WE DO."

25 AND SO --

1 **THE COURT:** BUT THINK ABOUT IT FOR A SECOND. IF YOU
2 WIN ON THE MEANING OF THE CONTRACT, LET'S SAY, AND IF THAT'S
3 NOT SET ASIDE UNDER RULE 50 OR THE NINTH CIRCUIT, LET'S JUST
4 SAY IF YOU WIN ON THE CONTRACT THEORY ALONE, SINCE YOUR CLASS
5 GETS TO SHARE EQUALLY IN THE GROSS LICENSING REVENUE, ALL
6 RIGHT? THAT'S ONE SCENARIO.

7 THEN, THE FIDUCIARY DUTY CLAIM ADDS NO ADDITIONAL
8 DAMAGES.

9 ON THE OTHER HAND, IF YOU LOSE ON THAT, LET'S SAY THE
10 JURY DISAGREES WITH YOUR MEANING OF THE CONTRACT. AND LET'S
11 SAY THE JURY SAYS THERE'S NO WAY THIS EVER MEANT THEY WERE
12 GOING TO SHARE IN THE GROSS LICENSING REVENUE.

13 BUT THEN, LET'S SAY THE JURY AGREES THAT THE NFLPA
14 HELD THEMSELVES OUT AS A REPRESENTATIVE AND AN AGENT AND
15 UNDERTOOK A FIDUCIARY DUTY TO MARKET THESE PEOPLE, THESE CLASS
16 MEMBERS.

17 NOW, WE GET TO THAT JUNCTURE IN THE DECISION TREE BY
18 ONLY -- ON THE ASSUMPTION THAT THE CONTRACT DOES NOT REQUIRE
19 PARTICIPATION IN THE GROSS LICENSING REVENUE.

20 SO IS THERE THEN A DAMAGE THEORY THAT CAN GET YOU TO
21 THAT OUTCOME?

22 MR. KESSLER SAID, NO, THERE'S NOT.

23 **MR. LECLAIR:** YOUR HONOR --

24 **THE COURT:** SO WHAT IS THE MEASURE OF DAMAGES?

25 **MR. LECLAIR:** THE MEASURE OF DAMAGES IS THE SAME

1 REVENUE FROM THE SAME LICENSES, BECAUSE OUR THEORY IS THEY
2 SHOULD HAVE INCLUDED US. WE SHOULD HAVE BEEN PUT TOGETHER WITH
3 THE -- BECAUSE THEY WERE ACTING AS OUR AGENT.

4 **THE COURT:** EVEN THOUGH THE CONTRACT DID NOT
5 REQUIRE -- EVEN THOUGH THE JURY SAYS: LOOK, THE CONTRACT DOES
6 NOT REQUIRE -- THE THING THAT EVERYBODY SIGNED DOES NOT REQUIRE
7 THAT, AND THEN, NONETHELESS, YOU'RE SAYING THAT THE AGENCY
8 WOULD HAVE --

9 **MR. LECLAIR:** ACTUALLY, I AM SAYING THAT.

10 **THE COURT:** TAKE THE HOLLYWOOD EXAMPLE. TAKE THE
11 HOLLYWOOD EXAMPLE. LET'S SAY AN AGENT HAS A CONTRACT WITH A
12 FAMOUS HOLLYWOOD STAR, AND IT SAYS FLAT OUT:

13 "YOU DO NOT HAVE TO TRY TO GET ME INTO MOVIE X,
14 Y, Z. YOU'VE GOT TO TRY TO GET ME IN SOME OTHER MOVIE, BUT NOT
15 MOVIE X, Y, Z."

16 TURNS OUT X, Y, Z IS THE BIGGEST MOVIE OF ALL TIME.
17 CAN THAT STAR COME ALONG AND SAY:

18 "YEAH, BUT THEY OWED ME A FIDUCIARY DUTY, DESPITE
19 THE WORDING OF THE CONTRACT, TO TRY TO GET ME INTO X, Y, Z."

20 IT JUST SEEMS TO ME THAT'S TOPSY-TURVY.

21 AND WHY EVER HAVE A CONTRACT IF YOU CAN DISREGARD THE
22 WORDING OF IT?

23 **MR. LECLAIR:** YOUR HONOR, I THINK RESPECTFULLY THAT'S
24 NOT -- THAT ANALOGY ISN'T THE SAME AS OUR SITUATION.

25 BECAUSE THIS IS NOT A CONTRACT THAT SAYS WE'RE GOING

1 TO FAVOR THE ACTIVE -- THIS WOULD BE DIFFERENT. IF THE
2 CONTRACT SAID:

3 "BY THE WAY, WE'RE GOING TO FAVOR THE ACTIVE
4 PLAYERS; WE'RE GOING TO DO EVERYTHING WE CAN TO AVOID PUTTING
5 YOU IN A GROUP LICENSE; WE'RE GOING TO DO WHAT WE CAN TO KEEP
6 FROM PAYING YOU; WE'RE GOING TO DO OUR BEST TO MAKE SURE IF
7 YOU'RE A STAR PLAYER YOU GET YOUR MONEY; AND IF YOU'RE A
8 JOURNEYMAN, WE THINK YOU'RE WORTHLESS, AND YOU'RE NEVER GOING
9 TO GET ANYTHING," IF THEY HAD SAID ALL THAT IN THE CONTRACT WE
10 WOULDN'T BE HERE.

11 BUT THAT'S NOT WHAT THEY SAID. THEY SAID IN THE
12 CONTRACT -- THE CONTRACT CLAIM IS THAT THE LANGUAGE REQUIRES
13 THAT THEY PAY US BY VIRTUE OF THAT FOR EVERY LICENSE.

14 THE FIDUCIARY CLAIM IS:

15 "YOU SHOULD HAVE PUT US IN BY VIRTUE OF BEING
16 OUR AGENT."

17 AND IF YOU HAVE A CONTRACT --

18 **THE COURT:** EVEN THOUGH THE CONTRACT DID NOT REQUIRE
19 IT?

20 **MR. LECLAIR:** "EVEN THOUGH THE CONTRACT DID NOT
21 REQUIRE YOU TO DO IT, YOU SHOULD HAVE AS OUR FIDUCIARY. AND IF
22 YOU WEREN'T GOING TO DO THAT, YOU SHOULD HAVE DISCLOSED YOUR
23 CONFLICT OF INTEREST AND TOLD US WE DIDN'T HAVE TO."

24 **THE COURT:** BUT THE CONTRACT INTERPRETATION IS
25 SUPPOSED TO BE -- AS THE DRAFT INSTRUCTIONS SAY, IT IS SUPPOSED

1 TO CARRY OUT THE REASONABLE EXPECTATIONS -- REASONABLE
2 EXPECTATIONS OF THE PARTIES BASED ON THE LANGUAGE AND THE
3 SURROUNDING CIRCUMSTANCES.

4 SO IF THE REASONABLE EXPECTATIONS OF THE PARTIES WAS
5 IN NO WAY THAT THE RETIRED PLAYERS WERE GOING TO SHARE WITH THE
6 ACTIVE MONEY, HOW CAN YOU THEN SAY THAT THE CONTRACT AND THE
7 CIRCUMSTANCES IMPOSED A FIDUCIARY DUTY TO DO THE OPPOSITE,
8 I.E., TO GET THEM INTO THE SHARE AND SHARE ALIKE WITH THE
9 ACTIVE MONEY?

10 **MR. LECLAIR:** I DO UNDERSTAND YOUR HONOR'S QUESTION.
11 NOW I COMPLETELY UNDERSTAND WHAT YOU ARE SAYING. THERE IS A
12 GOOD ANSWER. LET ME GIVE IT TO YOU.

13 **THE COURT:** ALL RIGHT. WHAT IS IT?

14 **MR. LECLAIR:** WHAT WE'RE SAYING UNDER THE CONTRACT --
15 THEY HAVE THIS ARGUMENT UNDER THE CONTRACT, AND THEY HAVE BEAT
16 US AND BEAT US AND BEAT US WITH IT SAYING, EVERY WITNESS ON THE
17 STAND:

18 "IS THIS ALL ACTIVE PLAYER MONEY? IS THIS ALL
19 ACTIVE? IS THIS ALL ACTIVE PLAYER MONEY? IS IT ALL ACTIVE
20 PLAYER MONEY?"

21 OKAY? ASSUME THEY CONVINCED THE JURY THAT'S TRUE,
22 BECAUSE THEY DECIDED -- THEY THEMSELVES DID THE LICENSES --
23 EXPRESSLY TO SAY:

24 "CONTRARY TO WHAT WE SAY, ASSUME THE LICENSES DON'T
25 INCLUDE THE ACTIVE -- DON'T INCLUDE THE RETIRED PLAYERS."

1 WHAT WE'RE SAYING IS:

2 "OKAY. WE ACCEPT THAT YOU DIDN'T DO THAT. YOU
3 DIDN'T INCLUDE US IN THE LICENSES, SO WE DON'T HAVE A
4 CONTRACTUAL CLAIM."

5 BUT THE FIDUCIARY CLAIM IS TOTALLY DIFFERENT. WHAT
6 WE'RE SAYING IS:

7 "NOT THAT YOU DID INCLUDE US, BUT THAT YOU
8 SHOULD HAVE. AND IF YOU WEREN'T GOING TO INCLUDE US, YOU
9 SHOULD HAVE TOLD US YOU HAD A CONFLICT OF INTEREST."

10 SO IT'S NOT INCONSISTENT AT ALL.

11 **THE COURT:** WELL, IF THE CONTRACT DIDN'T REQUIRE IT
12 IN THE FIRST PLACE, THEN WHY SHOULD -- IN OTHER WORDS, LET'S
13 SAY THAT THE CONTRACT HAD BEEN MORE CLEAR, FOR THE SAKE OF
14 ARGUMENT, AND IT SAID FLAT OUT:

15 "THIS MEANS YOU WILL NOT PARTICIPATE IN THE" ...

16 SO YOU'RE SAYING THAT THEY SHOULD HAVE MADE MORE
17 CLEAR THAT THEY WEREN'T GOING TO PARTICIPATE. BUT I COME BACK
18 TO THE RULE OF CONTRACT INTERPRETATION IS: WHAT WERE THE
19 REASONABLE EXPECTATIONS OF THE PARTIES?

20 AND IF IT WAS THE REASONABLE EXPECTATION OF THE
21 PARTIES TO BEGIN WITH THAT THERE WOULD BE NO PARTICIPATION IN
22 THE GROSS LICENSING REVENUE, THEN THEY HAVE BEEN TOLD. THEY
23 HAVE BEEN TOLD, BECAUSE THAT'S THE REASONABLE EXPECT -- THAT'S
24 THE MEANING OF THE CONTRACT.

25 **MR. LECLAIR:** YOUR HONOR, IF THEY'VE BEEN TOLD

1 THEY'RE NOT IN THE CONTRACT, BUT WHAT THEY DON'T KNOW IS THE
2 REASON THEY'RE NOT IN THE CONTRACT, WHICH IS WHY THEIR AGENT
3 HAS STABBED THEM IN THE BACK. THAT'S THE FIDUCIARY CLAIM IS
4 THEIR AGENT, INSTEAD OF SAYING TO THEM -- WHAT DID THEY SAY?
5 WHAT THEY SAID WAS:

6 "OH, THERE'S NOT MUCH INTEREST. YOU'RE KIND OF
7 WORTHLESS. NOBODY WANTS YOU."

8 AND WHAT WE ARE SAYING TO THE JURY IS THE EVIDENCE IS
9 TO THE CONTRARY. IT'S NOT THAT THEY DIDN'T WANT US. IT'S
10 THAT THE FACT OF THE MATTER IS THEY DIDN'T WANT TO INCLUDE US
11 IN THE LICENSES.

12 PEOPLE WANTED -- THERE'S ABUNDANT EVIDENCE THAT THESE
13 LICENSEES WANTED TO USE RETIRED PLAYERS. TONS OF EVIDENCE OF
14 THAT, INCLUDING SOME THEY HAVE PUT IN.

15 THE POINT IS: HOW DID THEY STRUCTURE THE LICENSE?
16 AND IF THEY CONTRACTUALLY SAY:

17 "OKAY. WE'RE GOOD LAWYERS. WE WROTE THE PAPERS.
18 AND WE WROTE 'ACTIVE' OVER HERE AND 'RETIRED' OVER HERE, SO YOU
19 DON'T GET ANY OF THIS MONEY," AND THEY CONVINCED THE JURY THAT
20 THEY'RE RIGHT ABOUT THAT, WE LOSE ON CONTRACT.

21 BUT THAT HAS NOTHING TO DO WITH THEIR FIDUCIARY DUTY
22 TO EITHER KEEP US TOGETHER OR TO TELL US WE HAVE A CONFLICT OF
23 INTEREST.

24 AND WHEN THEY DON'T DO THAT, THEY HAVE BREACHED THEIR
25 FIDUCIARY DUTY, AND THEY HAVE BLOCKED US FROM DEALING WITH THE

1 VERY PEOPLE --

2 **THE COURT:** LET'S PURSUE THAT, THOUGH.

3 IF THAT'S -- IF THE BREACH IS THAT THEY FAILED TO
4 DISCLOSE A CONFLICT OF INTEREST, THEN THE DAMAGES THAT WOULD
5 FLOW FROM THAT WOULD BE IF MR. ADDERLEY HAD KNOWN AND OTHER
6 CLASS MEMBERS HAD KNOWN THAT THERE WAS A CONFLICT OF INTEREST,
7 THEN CONCEIVABLY THEY COULD HAVE GONE OUT AND HIRED
8 MR. HOLLYWOOD TO BE THEIR GROUP LICENSING AGENT, AND MAY TRY TO
9 MAKE THEIR OWN DEALS.

10 AND ONCE AGAIN WE COME BACK TO THE QUESTION OF: HAD
11 MR. HOLLYWOOD GONE OUT TO DO THAT, WHAT WOULD BE THE PLAUSIBLE
12 RANGE OF POTENTIAL ROYALTIES THAT SUCH A GROUP LICENSE WOULD
13 HAVE COMMANDED IN THE MARKET?

14 THERE'S NO EVIDENCE ON THIS POINT.

15 **MR. LECLAIR:** YOUR HONOR, IF THE EVIDENCE IS THAT
16 THEY COULD HAVE DONE A GROUP LICENSE, WHICH THERE IS EVIDENCE,
17 THEY COULD HAVE DONE A GROUP LICENSE, IT DOESN'T EVEN MATTER
18 WHETHER IT'S THE SAME MONEY OR ONE DOLLAR MORE, OR IT DOESN'T
19 MAKE ANY DIFFERENCE. BECAUSE THE POINT IS: EVERYBODY GOT
20 THEIR AD HOC MONEY.

21 AND IF -- ALL THEY HAD TO DO -- LET'S TAKE THE EA
22 LICENSE AS AN EXAMPLE. LET'S BE VERY SPECIFIC. LET'S TAKE THE
23 EA LICENSE AS AN EXAMPLE.

24 WHAT IF INSTEAD OF THE WAY THEY STRUCTURED THE
25 LICENSE AGREEMENT THEY HAD SIMPLY SAID -- YOU KNOW, THIS IS

1 WHAT WE ARGUE. BUT LET'S ASSUME IT'S REJECTED THAT WE'RE
2 ACTUALLY IN THE LANGUAGE. LET'S ASSUME THAT THE LANGUAGE ABOUT
3 MENTIONING RETIRED PLAYERS ISN'T EVEN THERE.

4 IF THEY HAD, IN FACT, HAD A CONTRACT THAT HAD BOTH --
5 IF WE SAY:

6 "WHAT YOU SHOULD HAVE DONE IS JUST -- YOU ENDED
7 UP -- USING THESE RETIRED PLAYERS."

8 THERE'S NO QUESTION THEY USED THEM. EA USED THEM.
9 LOTS OF OTHER LICENSEES USED THEM.

10 IF THEY HAD WRITTEN A LICENSE AGREEMENT THAT SAYS:

11 "YOU HAVE ALL THE ACTIVE PLAYERS TO CHOOSE FROM,
12 AND YOU HAVE THIS GROUP OF RETIRED PLAYERS TO CHOOSE FROM," IF
13 THEY HAD DONE THAT, WHICH WE SAY WAS WHAT THEIR FIDUCIARY DUTY
14 REQUIRED THEM TO DO, WE WOULD HAVE SHARED IN THE MONEY. WE'D
15 HAVE SHARED IN THE GROUP MONEY. AND THAT'S WHY WE'RE ENTITLED
16 TO THE DAMAGES FROM THAT.

17 AND THE BREACH IS THAT THEY DIDN'T DO THAT, AND THEY
18 DIDN'T DO THE CONFLICT OF INTEREST.

19 **THE COURT:** YOU HAVE GONE OFF AND NOT ACCEPTED MY
20 HYPOTHETICAL. YOU SAID --

21 **MR. LECLAIR:** I TRIED TO, YOUR HONOR. I APOLOGIZE.

22 **THE COURT:** YOU SAID THAT THE PROBLEM WAS CONFLICT OF
23 INTEREST. THAT THEN SAYS: OKAY. WHAT WOULD THEY HAVE DONE IN
24 THE ALTERNATIVE?

25 THE ALTERNATIVE WOULD HAVE BEEN MR. HOLLYWOOD.

1 MR. HOLLYWOOD COULD HAVE THEN GONE TO EA IN
2 CONNECTION WITH THE MADDEN GAME AND SAID:

3 "I'VE GOT THIS ENTIRE GROUP OF 2,053 RETIRED
4 PLAYERS, INCLUDING MR. ADDERLEY, HALL OF FAME. WOULD YOU
5 LICENSEES" -- AND THEN, AT LEAST THOSE YOU COULD USE THEIR REAL
6 NAMES IN THE MADDEN GAME.

7 AND, FRANKLY, I THINK JUST USING PLAUSIBILITY,
8 THERE'S SOME PLAUSIBILITY TO THE IDEA THAT EA WOULD HAVE SAID:

9 "OKAY, WE'LL GIVE YOU \$10,000 FOR THAT, OR MAYBE
10 EVEN -- MAYBE EVEN A HUNDRED THOUSAND DOLLARS FOR THAT."

11 I DON'T KNOW WHAT THE NUMBER WOULD BE. BUT IT
12 WOULD -- CONTRARY TO MR. NOLL, I THINK EA, IF CONFRONTED WITH
13 THAT, MIGHT HAVE PAID SOME MONEY FOR THOSE PARTICULAR GROUP
14 RIGHTS.

15 **MR. LECLAIR:** OKAY.

16 **THE COURT:** BUT NO WAY THAT -- THE JURY COULD
17 DECIDE -- BUT IT IS HARD TO BELIEVE THAT EA WOULD HAVE PAID THE
18 SAME FOR THE -- FOR THE ACTIVE PLAYERS AS THEY WOULD FOR THE
19 RETIRED PLAYERS.

20 SO THE IDEA THAT YOU -- SO WE'RE FOLLOWING THE
21 MR. HOLLYWOOD SCENARIO NOW, BECAUSE MR. HOLLYWOOD DOESN'T HAVE
22 ANY ACTIVE PLAYERS TO MARKET.

23 ANYWAY, YOU -- YOU COME BACK AT EACH JUNCTURE TO SAY,
24 BASICALLY THIS, THAT THE BREACH OF FIDUCIARY DUTY HAS TO BE
25 THAT THE DEFENDANTS SHOULD HAVE THROWN IN THE RETIRED FOR

1 FREE, AND THEN SHARED THE \$25 MILLION ON A PLAYER-BY-PLAYER
2 BASIS, WHICH I THINK -- AND WE ONLY GET TO THIS SCENARIO IF
3 YOU'RE ASSUMING FOR THE SAKE OF ARGUMENT THAT THE CONTRACT DOES
4 NOT -- DID NOT REQUIRE SHARING IN THE GROSS LICENSING REVENUE
5 TO BEGIN WITH.

6 SO I THINK THERE'S A POSSIBLE CIRCULARITY HERE
7 THAT -- JUST A MINUTE.

8 ALL RIGHT. I'M GOING TO DENY THE MOTION. I'M GOING
9 TO LET THE JURY DECIDE THIS, WITHOUT PREJUDICE TO RENEWING THE
10 MOTION AT THE END.

11 JUST A WORD OF CAUTION, THOUGH. I'VE SEEN THIS
12 HAPPEN. WHEN PLAINTIFFS GO TO THE JURY WITH MULTIPLE THEORIES,
13 AND THEY WIN ON ONE THAT IS FATALLY DEFECTIVE, THEY WIND UP
14 WITH NOTHING.

15 WHEREAS, IF THEY HAD -- IF DISCRETION HAD BEEN THE
16 BETTER PART OF VALOR, AND THEY HAD RECOGNIZED FATAL PROBLEMS
17 WITH THEIR THEORY AND GONE WITH ONE THAT HAD A SHOT, THEY MIGHT
18 HAVE WON SOMETHING.

19 I'M DENYING THIS MOTION, AND I'M GOING TO LET THE
20 JURY HAVE THE FIRST SHOT AT IT. BUT I WANT YOU TO KNOW IF THE
21 SCENARIO TURNS OUT AS I SAY, AND YOU WIND UP WITH A BIG ZERO
22 HERE --

23 **MR. PARCHER:** COULD YOU BE MORE SPECIFIC? SCENARIOS
24 YOU SAY IS --

25 **THE COURT:** I'M TELLING YOU ALL OF YOUR THEORIES ARE

1 TENUOUS. ALL OF THEM. BUT I'M NOT SAYING I'M GOING TO TAKE
2 THEM AWAY. I'M SAYING THESE ARE VERY SUBSTANTIAL RULE 50
3 MOTIONS THAT HAVE BEEN MADE.

4 AND I'M GOING -- BECAUSE THERE IS A REASONABLE
5 POSSIBILITY THE JURY WILL REJECT ALL OF THE ARGUMENTS, THEN
6 THAT WILL END THE CASE.

7 BUT I AM NOT -- I WANT YOU TO BE AWARE THAT IF YOU
8 PREVAIL -- I AM NOT SAYING YOU WILL GET IT TAKEN AWAY. I'M
9 JUST TRYING TO SAYING I'VE TRIED TO EXPRESS WHAT MY CONCERNS
10 ARE ABOUT YOUR THEORY, AND YOU NOW KNOW MOST OF THEM.

11 BUT IF YOU CHOOSE TO GO TO THE JURY ON A THEORY THAT
12 ULTIMATELY GETS TAKEN AWAY, AND THAT'S THE ONLY ONE YOU WON ON
13 BEFORE THE JURY, YOU SHOULD BE AWARE -- I'M TELLING YOU RIGHT
14 NOW -- YOU'RE AT RISK ON ALL YOUR THEORIES.

15 **MR. PARCHER:** I APPRECIATE WHAT YOUR HONOR SAID VERY
16 MUCH, BECAUSE IT'S INSTRUCTIVE AS TO HOW TO SUM UP.

17 BUT I NEED TO RAISE YOUR HONOR'S CONSCIOUSNESS TO ONE
18 THING THAT I DON'T THINK YOUR HONOR HAS FOCUSED ON, WHICH MAY
19 NOT HAVE BEEN APPEARING ON ANYTHING --

20 **THE COURT:** I'M DENYING THE MOTION. GO AHEAD.

21 **MR. PARCHER:** I UNDERSTAND. I UNDERSTAND. BUT IT'S
22 A RACE FOR YOUR MIND, AS WELLS AS FOR THE JURORS' MIND HERE.

23 THERE IS A REALITY HERE. ASSUME FOR THE PURPOSES OF
24 DISCUSSION, ASSUME THAT THE DEFENDANTS SOLD THE PLAINTIFFS DOWN
25 THE RIVER. JUST ASSUME IT, BECAUSE I THINK THERE'S A

1 LIKELIHOOD THAT THE JURY IS GOING TO BELIEVE THAT.

2 ASSUME FURTHER --

3 **THE COURT:** WELL, THE EXPERT, MR. NOLL, CAME CLOSE TO
4 SAYING THAT AT THE END.

5 **MR. PARCHER:** YES, HE DID.

6 **THE COURT:** HE SAID THAT THERE WAS EVIDENCE THAT
7 DEFENDANTS HAD "SOLD OUT," WAS THE PHRASE HE USED. "SOLD OUT."

8 **MR. PARCHER:** I HEARD IT. I ACTUALLY WROTE IT DOWN
9 ON MY --

10 **THE COURT:** YEAH.

11 **MR. PARCHER:** OKAY. ASSUME FURTHER THAT THE
12 DEFENDANTS FOUND THEMSELVES IN A DILEMMA WHEN THEY STARTED.
13 WHEN THEY STARTED, THEY DESPERATELY WANTED AS MANY PLAYERS AS
14 POSSIBLE, PAST, PRESENT, EVEN TRYING TO LAY THE GROUNDWORK FOR
15 THE FUTURE, SO THEY COULD BE THE ONLY GAME IN TOWN, SO THAT THE
16 BOSSES OF THE TRACE ARMSTRONGS OF THIS WORLD WOULDN'T BE IN
17 THERE COMPETING, OR SUCCESSFULLY COMPETING, BECAUSE THEY
18 PRACTICALLY GOT A MONOPOLY AS A RESULT OF WHAT OUR GUYS GAVE
19 THEM ALONG WITH THE ACTIVES.

20 AND THEN, THEY FOUND THEMSELVES IN THE A QUAGMIRE.
21 AND THE QUAGMIRE WAS THEY NEEDED TO PLEASE -- "THEY" IS ALLEN
22 AND MR. UPSHAW, THE LATE MR. UPSHAW -- THEY NEEDED TO PLEASE
23 THEIR CONSTITUENCY, WHICH, AFTER ALL, AT THE END OF THE DAY ARE
24 ACTIVE PLAYERS. OUR PLAYERS ARE DOG FOOD. THEY NEEDED TO
25 PLEASE THEIR CONSTITUENCY BECAUSE THEY VOTE.

1 AND ONE OF THE VOTES THEY COULD CAST IS TO CAST
2 MR. UPSHAW AND MR. ALLEN OUT OF OFFICE, AND PERHAPS GET
3 SOMEBODY ELSE IN THERE.

4 AND SO, THEREFORE, THEY WANTED AS MUCH MONEY AS
5 POSSIBLE TO GO INTO THE ACTIVE TILL.

6 BY THE SAME TOKEN, THEY DID NOT WANT THE RETIRED TO
7 BOLT AND SIGN UP MR. ARMSTRONG'S BOSSES, BECAUSE IF THEY SIGNED
8 UP MR. ARMSTRONG -- IF THE RETIRED WERE SIGNED UP BY
9 MR. ARMSTRONG'S BOSSES THERE'S A VERY STRONG LIKELIHOOD THAT
10 THE JOE MONTANAS AND THE JOE NAMATHS OF THE WORLD, WHO ACTUALLY
11 BECAME JOE NAMATHS AND JOE MONTANAS BECAUSE SOME OF THESE
12 FELLOWS BLOCKED FOR THEM, AND SOME OF THESE FELLOWS TACKLED FOR
13 THEM, AND SOME OF THESE FELLOWS CAUGHT PASSES FOR THEM, THAT
14 WHEN THEY'RE PLAYING POKER OR DRINKING BEER, OR GOING TO
15 CHURCH, OR WHATEVER THEY DO WHEN THEY GET TOGETHER, THEY MIGHT
16 HAVE SAID:

17 "DO YOU LIKE YOUR AGENT? YOU LIKE YOUR" -- YOU
18 CALLED HIM "MR. HOLLYWOOD."

19 IT'S ACTUALLY SOME GUYS IN PINSTRIPE SUITS AND
20 ATTRACTIVE TIES WITH DIMPLES IN THEM, YOU KNOW, THAT SOME OF
21 THESE MEN AND WOMEN ACTUALLY LIKE. THEY ARE NOT ALL
22 STEREOTYPICALLY WHAT MAKES SAMMY RUN.

23 IN FACT, MR. ARMSTRONG WAS ONE OF THEM, AS YOUR HONOR
24 SAW. QUITE AN ATTRACTIVE YOUNG MAN.

25 AND SUPPOSE THE RETIRED SAID:

1 "SURE. WE WERE BEING SOLD DOWN THE RIVER BY --
2 BY THE SO-CALLED 'UNION AGENT.'"

3 **THE COURT:** ALL RIGHT. SO LET'S -- I SEE WHERE
4 YOU'RE GOING. THAT'S WHERE MR. LECLAIR WAS GOING.

5 SO LET'S SAY THAT MR. ARMSTRONG'S COMPANY SIGNED UP
6 THE ENTIRE CLASS.

7 **MR. PARCHER:** RIGHT.

8 **THE COURT:** HOW MUCH OF A ROYALTY COULD THAT CLASS
9 COMMAND IN THE MARKETPLACE?

10 **MR. PARCHER:** I THINK THAT'S THE WRONG QUESTION.

11 **THE COURT:** WHAT IS THE --

12 **MR. PARCHER:** THE QUESTION IS -- FIRST OF ALL, THE
13 FIDUCIARY CLAIM CARRIES WITH IT NOT ONLY COMPENSATORY DAMAGES,
14 WHICH IS OSTENSIBLY EQUAL TO THE CONTRACTUAL DAMAGES, ASSUMING
15 OUR VIEW OF THE CONTRACT PREVAILS, BUT ALSO CARRIES WITH IT
16 PUNITIVE DAMAGES.

17 AND WHAT -- AND WHAT IS IT WORTH, WHAT IS IT WORTH IF
18 YOU FIND OUT THAT YOUR AGENT, THE PERSON THAT YOU -- THE
19 COMPANY THAT YOU TRUSTED, THE ONES THAT YOU THOUGHT WERE GOING
20 TO HELP YOU, THE ONES THAT YOU HELPED TO BUILD INTO THE
21 POWERHOUSE THEY ARE, WERE NOT ONLY SELLING YOU DOWN THE RIVER
22 BUT WERE WRITING YOU THINGS LIKE "GROUP LICENSING IS
23 ESSENTIAL," LONG AFTER, SIX, SEVEN, EIGHT, NINE, TEN YEARS
24 AFTER THEY REALIZED THAT THERE WAS NOBODY -- YOU KNOW, THAT
25 NOBODY WAS SIGNING UP. WHAT IS IT WORTH? WHAT IS IT WORTH

1 HERE WHEN YOU FINALLY FIND -- WHEN YOU FINALLY FIND OUT THAT
2 YOU WERE STABBED IN THE BACK?

3 AND THE REASON YOU WERE STABBED IN THE BACK AND THEY
4 KEPT LURING YOU BACK IN WAS THEY DIDN'T WANT YOU TO GO
5 ELSEWHERE, BECAUSE IF YOU WENT THAT MIGHT START THE RUN ON THE
6 BANK AND UNRAVEL THE WHOLE CABOODLE.

7 NOW, I'M SAYING THAT TO YOUR HONOR WITHOUT ANY --
8 WITHOUT ANY NECESSARILY INSERTION INTO ANY CHARGE, OR PERHAPS
9 THERE IS AN INSERTION, BUT TO RAISE YOUR HONOR'S CONSCIOUSNESS
10 HERE AS TO WHAT PROBABLY WAS GOING ON.

11 BECAUSE, OTHERWISE --

12 **THE COURT:** WHY IS THAT ANY DIFFERENT FROM WHAT
13 MR. LECLAIR SAID?

14 WHAT I'M SUGGESTING TO YOU IS IF YOU -- IF YOU PURSUE
15 THAT THEORY, AND THEN MR. HOLLYWOOD HAS GOT TO BE BROUGHT INTO
16 THE PICTURE BECAUSE YOU HAVE TO ASK THE QUESTION:

17 "ALL RIGHT. IF THIS GROUP HAD BEEN REPRESENTED
18 BY AN INDEPENDENT AGENT WITH NO BREACH OF CONTRACT -- I MEAN,
19 NO BREACH OF FIDUCIARY DUTY, WHAT WOULD THEY HAVE NEGOTIATED ON
20 BEHALF OF THIS GROUP?"

21 **MR. PARCHER:** AND IF THE GROUP HAD BEEN REPRESENTED
22 BY AN INDEPENDENT AGENT WHO, AS A RESULT OF THE REPRESENTATION
23 OF THAT GROUP WAS ABLE TO PERSUADE AD HOC PLAYERS TO COME OVER,
24 STAR RETIRED AD HOC PLAYERS TO COME OVER, EVENTUALLY TO GET THE
25 UNION -- TRACE ARMSTRONG AND THE LOVEABLE MR. GOICH TO REALIZE

1 WHAT THE CON GAME WAS AND SAY:

2 "WE'RE ALL GOING OVER THERE, AND WE'RE GOING TO
3 THEN BE A LICENSOR FOR BOTH ACTIVES AND GROUPS," WHAT WOULD
4 THAT HAVE BEEN WORTH?

5 I MEAN, YOUR HONOR IS CUTTING IT OFF AT ITS ANKLE.

6 **THE COURT:** I'M NOT CUTTING OFF. I'M ASKING YOU,
7 WHAT EVIDENCE -- YOU ARE THE PLAINTIFF.

8 **MR. PARCHER:** YES, SIR.

9 **THE COURT:** IT'S YOUR BURDEN OF PROOF. WHAT EVIDENCE
10 DID YOU PUT IN ON WHAT THAT INDEPENDENT AGENT WHO HAD NOTHING
11 TO DO WITH THE LEAGUE, NOTHING TO DO WITH THE DEFENDANTS, WHAT
12 THEY WOULD HAVE BEEN ABLE TO NEGOTIATE IN THE MARKETPLACE?

13 I DIDN'T HEAR ANY EVIDENCE ON THAT.

14 **MR. PARCHER:** DEPENDS ON WHO THEY REPRESENTED AND WHO
15 THEY COULD PUT IN.

16 **THE COURT:** THE EXACT GROUP THAT WE HAVE HERE, THE
17 ENTIRE CLASS. THAT'S THE TEST.

18 **MR. PARCHER:** WHAT IF IT WAS THE ENTIRE CLASS PLUS
19 THE AD HOCS? WHAT IF IT WAS THE ENTIRE CLASS PLUS THE AD HOCS
20 AND THE ACTIVES?

21 **THE COURT:** WE DIDN'T EVEN GET EVIDENCE ON THAT
22 SCENARIO. LOOK, I'M DENYING THE MOTION FOR NOW. I THINK MY
23 CONSCIOUSNESS HAS BEEN RAISED ALREADY. BUT YOU'VE RAISED IT
24 AGAIN.

25 **MR. PARCHER:** RIGHT. AND YOU'VE RAISED MINE.

1 **THE COURT:** AND I'VE RAISED WITH YOU A POINT THAT
2 COUNSEL OUGHT TO CONSIDER.

3 ALL RIGHT. I WILL NOW GO INTO THE LAST ARGUMENT, ON
4 PUNITIVE DAMAGES.

5 **MR. KESSLER:** BEFORE GOING TO THAT, I WOULD JUST
6 STATE I KNOW YOUR HONOR IS DENYING THE MOTION, BUT I WOULD ASK
7 WHEN YOU LOOK AT THE JURY INSTRUCTIONS THAT THEY SHOULD NOT
8 THEN BE PERMITTED -- FOR EXAMPLE, YOUR HONOR CHARGED NOW ON
9 MARKETING. THEY APPARENTLY DON'T HAVE A MARKETING THEORY
10 ANYMORE FOR DAMAGES.

11 SO THEY SHOULDN'T -- IN OTHER WORDS, THEY SHOULDN'T
12 BE ABLE TO GO TO THE JURY MIXED TOGETHER ALL THESE DIFFERENT
13 FIDUCIARY DUTY CLAIMS. BUT WHAT ABOUT THE PROFESSOR NOLL WAS
14 ASKED ABOUT? THAT WAS ABOUT THE HALL OF FAME AGREEMENT.
15 THAT'S NOT EVEN IN THEIR DAMAGES CLAIM.

16 SO, AGAIN, WE HAVE THIS GREAT DANGER, YOUR HONOR,
17 THAT UNLESS YOU CHARGE -- IF YOU'RE GOING TO ALLOW ANYTHING, TO
18 JUST THIS THEORY THAT WE SHOULD HAVE INCLUDED THEM IN THE
19 LICENSE FOR FREE, OR SOMETHING LIKE THAT, THAT SHOULD BE THE
20 ONLY CLAIM THAT GOES TO THE JURY OR WE'RE NOT GOING TO KNOW
21 WHICH ONE THEY'RE AWARDING FOR.

22 **THE COURT:** LOOK, LET'S GO TO PUNITIVES.

23 **MR. KESSLER:** OKAY. FINALLY, ON PUNITIVES, YOUR
24 HONOR, WHATEVER ELSE YOUR HONOR DOES, IN THE D.C. CIRCUIT THERE
25 HAS TO BE TWO THINGS, TWO THINGS.

1 FIRST, THERE HAS TO BE EVIDENCE, EVIDENCE THAT A
2 REASONABLE JURY COULD FIND THAT THEY ACTED WITH EVIL MOTIVE,
3 ACTUAL MALICE -- WHICH YOUR HONOR KNOWS IS A VERY TOUGH
4 STANDARD -- DELIBERATE VIOLENCE OR OPPRESSION, OR WITH INTENT
5 TO INJURE, OR IN WILLFUL DISREGARD FOR THE RIGHTS OF PLAINTIFFS
6 AND -- THERE'S THEN AN "AND," SO YOU NEED ONE OF THOSE THINGS.

7 AND THEN, YOU NEED THAT DEFENDANTS' CONDUCT ITSELF
8 WAS OUTRAGEOUS, GROSSLY FRAUDULENT OR RECKLESS TOWARD THE
9 SAFETY OF PLAINTIFFS.

10 WHATEVER ELSE THIS CASE IS -- AND THE BURDEN IS BY
11 CLEAR AND CONVINCING, AS YOUR HONOR KNOWS.

12 **THE COURT:** DID YOU SEE THE INSTRUCTIONS I GAVE ON
13 THIS POINT?

14 **MR. KESSLER:** YES. AND I BELIEVE --

15 **THE COURT:** ARE THEY ARE INADEQUATE?

16 **MR. KESSLER:** THEY ARE INADEQUATE, YOUR HONOR. FIRST
17 OF ALL -- TWO THINGS.

18 ONE IS THERE'S NO WAY A REASONABLE JURY FROM THE
19 EVIDENCE IN THIS CASE COULD FIND ANY OF THAT TYPE OF BEHAVIOR.

20 **THE COURT:** BUT I JUST HEARD MR. PARCHER MAKE THE
21 ARGUMENT.

22 **MR. KESSLER:** AND WITHOUT EVIDENCE, YOUR HONOR.

23 **THE COURT:** WHEN YOU STAB SOMEBODY IN THE BACK,
24 THAT'S NOT DESPICABLE --

25 **MR. KESSLER:** YOUR HONOR, IS THAT EVIDENCE? IS THAT

1 EVIDENCE?

2 **THE COURT:** THAT'S ARGUMENT.

3 **MR. KESSLER:** YOUR HONOR, I'M BEGGING YOUR HONOR ON
4 THIS POINT TO LOOK AT THE D.C. LAW OF THIS. BECAUSE WHAT IT
5 DOES --

6 **THE COURT:** WHERE CAN I FIND THAT? WE LOOKED FOR IT
7 AND COULDN'T FIND IT.

8 YOU LAWYERS GAVE ME ONLY 42,012 PAGES.

9 **MR. KESSLER:** THIS IS VERY EASY. STANDARD
10 INSTRUCTIONS OF D.C. 1601 MODIFIED.

11 **THE COURT:** DO YOU HAVE A COPY RIGHT HERE?

12 **MR. KESSLER:** IF WE HAVE IT, WE WILL GIVE IT TO YOU.

13 **THE COURT:** I'M GOING TO FOLLOW THE D.C. LAW.

14 **MR. KESSLER:** BUT MY POINT ON THE RULE 50 MOTION IS,
15 APPLYING THE D.C. LAW YOU HAVE TO MAKE A DETERMINATION IS THERE
16 EVIDENCE -- NOT FROM ARGUMENT, BUT EVIDENCE -- BECAUSE YOU HAD
17 A LOT OF ARGUMENTS ABOUT HOW HORRIBLE --

18 **THE COURT:** IT'S ALWAYS GOING TO BE CIRCUMSTANTIAL.

19 **MR. KESSLER:** RIGHT. RIGHT. BUT EVEN FROM
20 CIRCUMSTANTIAL, IT HAS TO BE BY CLEAR AND CONVINCING THAT A
21 JURY COULD FIND REASONABLY BY CLEAR AND CONVINCING EVIDENCE --
22 CIRCUMSTANTIAL IS OKAY, BUT NOT JUST BY LAWYERS' ARGUMENT --
23 THAT THAT TYPE OF OUTRAGEOUS BEHAVIOR OCCURRED TO WARRANT
24 THIS -- WHAT IS THAT YOU'RE HANDING ME?

25 **MS. DONOVAN:** THAT'S MODIFIED FROM THE D.C.

1 INSTRUCTIONS.

2 **THE COURT:** IF THERE WAS A BREACH OF FIDUCIARY DUTY,
3 DOES IT HAVE TO BE INTENTIONAL OR CAN IT BE NEGLIGENT?

4 **MR. KESSLER:** IT HAS TO BE INTENTIONAL.

5 **THE COURT:** WELL, THEY ARGUED THERE IS AN
6 INTENTIONAL. ISN'T THAT BAD ENOUGH?

7 **MR. KESSLER:** NO, NO, NO. IT HAS TO BE -- THIS IS
8 IMPORTANT -- A SPECIFIC TYPE OF INTENT. IT HAS TO BE EVIL
9 MOTIVE, WHICH IS DEFINED IN D.C. AS REALLY EVIL; ACTUAL MALICE,
10 WHICH IS ALSO DEFINED IN THESE HORRIBLE THINGS; DELIBERATE
11 VIOLENCE OR OPPRESSION; OR IN WILLFUL DISREGARD FOR THE RIGHTS
12 OF PLAINTIFFS.

13 AND THE INTENT ALONE IS NOT ENOUGH. THE CONDUCT HAS
14 TO BE OUTRAGEOUS, GROSSLY FRAUDULENT -- NOT JUST FRAUDULENT,
15 MERE FRAUD IS NOT ENOUGH -- OR RECKLESS TOWARDS SAFETY.
16 CLEARLY, THIS ISN'T A SAFETY ISSUE.

17 THE PROBLEM, YOUR HONOR, IS BY PUTTING ANY
18 INSTRUCTION ON THIS IS THE COURT'S SUGGESTING A JURY COULD
19 POSSIBLY FIND SUCH OUTRAGEOUS BEHAVIOR.

20 WHEN THERE'S NO EVIDENCE OF IT, IT'S PREJUDICIAL EVEN
21 TO GIVE THE INSTRUCTION. BECAUSE THEN THE JURY IS SAYING:

22 "AH-HA, THE COURT'S TELLING ME I MIGHT FIND THIS
23 IS AN OUTRAGEOUSLY RECKLESS, DANGEROUS, MALICE."

24 YOUR HONOR, THERE IS JUST NO EVIDENCE OF IT.
25 WHATEVER ELSE YOUR HONOR DOES ON RULE 50, WE BELIEVE

1 RESPECTFULLY THERE SHOULD BE NO PUNITIVE DAMAGES CLAIM IN THIS
2 CASE.

3 **MR. LECLAIR:** YOUR HONOR, WE TENDERED OUR
4 INSTRUCTION, WHICH IS BASED ON THE D.C. STANDARDIZED JURY
5 INSTRUCTIONS. AND WHAT IT SAYS IS, THE PLAINTIFF HAS TO PROVE
6 IN CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS' CONDUCT
7 WAS WILLFUL AND OUTRAGEOUS OR EXHIBITS RECKLESS DISREGARD FOR
8 THE RIGHTS OF OTHERS.

9 SO THE POINT IS, IF THEY BREACHED THEIR -- IF THEY
10 DID WHAT WE SAY THEY DID, IF THE JURY FINDS THEY DID WHAT WE
11 SAY THEY DID, IF THEY INTENDED NOT TO SHARE THIS MONEY WITH
12 RETIRED PLAYERS, AND THEY INTENTIONALLY MISLED THE RETIRED
13 PLAYERS BY WHAT THEY DID AND WHAT THEY SAID, AND THE
14 CIRCUMSTANTIAL --

15 **THE COURT:** IT WOULD HAVE TO BE AN INTENTIONAL
16 BREACH OF DUTY. YOU CAN'T INTRODUCE FRAUD IN THE CASE. IT
17 WOULD HAVE TO BE FIRST THEY FIND A FIDUCIARY DUTY.

18 **MR. LECLAIR:** AND THAT THEY INTENDED TO DO IT.

19 **THE COURT:** THAT IT WAS BREACHED, AND THEY INTENDED
20 TO BREACH, AND THEN THEY DID IT THROUGH THIS DESPICABLE CONDUCT
21 TEST.

22 **MR. LECLAIR:** ABSOLUTELY, YOUR HONOR. AND WE THINK
23 THE EVIDENCE WILL SHOW THAT'S EXACTLY WHAT THEY DID. BUT IF
24 THEY DID, THEY DID. IF THEY DIDN'T, THEY DIDN'T.

25 **MR. KESSLER:** AND, AGAIN, YOUR HONOR, I WOULD JUST

1 SAY WHILE THEY ARGUE IT'S DESPICABLE, THEY HAVE TO ACTUALLY
2 HAVE CONDUCT THAT'S DESPICABLE. THEY HAVE NO EVIDENCE OF
3 CONDUCT THAT'S DESPICABLE.

4 IN FACT, THEY DON'T HAVE ANY KIND OF EVIDENCE SAYING:

5 "OH, YES. WE DELIBERATELY GAVE THESE FORMS,
6 SAYS NOT INTENDING TO LICENSE THEM, WITHOUT TELLING THE ACTIVE
7 PLAYERS THAT WE WERE GIVING AWAY THEIR MONEY, EVEN THOUGH WE
8 KNEW WE COULDN'T GIVE AWAY THEIR MONEY, AND WE DECEIVED THE
9 RETIRED PLAYERS TO GIVE IT OUT."

10 FOR WHAT? THAT'S ALL ARGUMENT, YOUR HONOR.

11 THIS WHOLE STUFF ABOUT THE AGENT, THE PLOT TO
12 DOMINATE THE WORLD IS ARGUMENT. WHATEVER ELSE YOUR HONOR MAY
13 THINK, IT'S NOT A BASIS FOR PUNITIVE DAMAGES. NOT UNDER D.C.
14 LAW.

15 **MR. LECLAIR:** YOUR HONOR, FIRST OF ALL,
16 MR. BERTHELSEN SAID THEY NEVER INTENDED TO PUT THIS TOGETHER.
17 THEY ALWAYS INTENDED TO KEEP IT SEPARATE, EVEN THOUGH
18 EVERYTHING THEY TOLD US WAS IT WAS GOING TO BE TOGETHER.
19 THAT'S THE REASON WHY IT WAS INTENTIONAL.

20 **THE COURT:** HE ALSO TESTIFIED THAT HE -- THEY NEVER
21 INTENDED TO PUT IT TOGETHER BECAUSE HE ALWAYS UNDERSTOOD THE
22 CONTRACT TO KEEP THE RETIREDS SEPARATE FROM THE ACTIVE.

23 **MR. KESSLER:** RIGHT. HIS TESTIMONY WAS THAT
24 EVERYBODY UNDERSTOOD RETIRED PLAYER MONEY WOULD GO TO RETIRED
25 AND ACTIVE WOULD GO TO ACTIVE. THAT'S DESPICABLE CONDUCT?

1 THAT'S PUNITIVE DAMAGES THAT SOMEONE COULD ARGUE?

2 YOUR HONOR, HOW COULD THAT BE A REASONABLE BASIS? IT
3 WILL BE EMOTION. IT WILL BE INFLAMING THE JURY. YOU'VE SEEN
4 WHAT MR. PARCHER'S STYLE IS. AND THAT IF YOU LET HIM LOOSE ON
5 THIS JURY, OKAY.

6 (LAUGHTER.)

7 IF YOU DO THAT ON PUNITIVE DAMAGES, WHAT YOU'RE GOING
8 TO GET IS YOU'RE GOING TO GET INFLAMMATORY STUFF, WILD STUFF
9 NOT IN THE RECORD. AND THERE'S NO BASIS FOR IT.

10 **MR. PARCHER:** SOUNDS LIKE HE'S A WORRIED MAN.

11 **THE COURT:** CAN I JUST SAID AS AN ASIDE ON THIS --
12 THIS IS NOT A RULING ON YOUR MOTION -- BUT THERE WOULD BE A
13 NUMBER OF LAWYERS IN YOUR POSITION, MR. KESSLER, PRAYING THAT I
14 LEAVE THIS IN. BECAUSE IF THE JURY THINKS THAT THIS IS NOT
15 EVEN CLOSE TO A PUNITIVE DAMAGES CASE, THE WHOLE PLAINTIFFS'
16 CASE CAN GO DOWN THE TOILET, EVEN IF THERE IS SOME OTHER --
17 BECAUSE OF CREDIBILITY.

18 I'M NOT SAYING THE CASE IS THAT WEAK ON PUNITIVE
19 DAMAGES. BUT IF IT'S AS WEAK AS YOU THINK IT IS, THEN IT'S --
20 AT LEAST MY EXPERIENCE IN THIS DISTRICT IS THAT WE HAVE VERY
21 SMART JURORS WHO CAN SEE THROUGH THE LAWYERING.

22 SO IF IT'S AS WEAK AS YOU SAY IT IS, YOU MAY -- YOU
23 MIGHT BE BETTER OFF LEAVING THE CLAIM IN.

24 BUT HERE, LET ME JUST ADDRESS THE MERITS OF THE
25 MOTION FOR A SECOND.

1 IF YOU TAKE THE -- HERE ARE SOME OF THE POINTS THAT
2 WORK IN THE PLAINTIFFS' FAVOR. YOU'VE GOT A CONTRACT THAT
3 CALLS FOR AN ESCROW AND NO ESCROW WAS EVER SET UP.

4 YOU'VE GOT A CONTRACT THEY TRIED FOR 14 YEARS TO GET
5 PEOPLE TO SIGN UP, AND NOT ONE PENNY WAS EVER DISTRIBUTED UNDER
6 THIS CONTRACT. SO WHAT WAS THE -- WHY WAS THAT? AND WHY WAS
7 IT SO HARD?

8 IT'S TRUE THAT YOU HAVE SOME VERBAL TESTIMONY SAYING:

9 "YES, WE TRIED TO INTEREST THE LICENSEES IN THE
10 GROUP LICENSING CLASS MEMBERS." BUT IT'S NOT STRONG EVIDENCE.
11 IT'S VERBAL.

12 AND THERE IS IN WRITING A LETTER SAYING:

13 "DON'T USE THEIR NAMES AND IMAGES. YOU MUST
14 SCRAMBLE."

15 IT WOULD HAVE BEEN NICE IF THAT SAME LETTER HAD SAID:

16 "AND, BY THE WAY, WE STAND READY TO GIVE YOU A
17 GROUP LICENSE ON THESE PEOPLE, OR AT LEAST ON A LARGE NUMBER OF
18 THEM."

19 BUT THE DEFENSE PERSON -- I HAVE FORGOTTEN HER
20 NAME -- WHO WROTE THAT LETTER, DIDN'T DO THAT. INSTEAD, SHE
21 SAID:

22 "DON'T USE THEM."

23 NOW, I UNDERSTAND THE EXPLANATION. BUT IF THE -- IF
24 THE DEFENDANTS WERE SO KEEN ON TRYING TO MARKET THESE RIGHTS,
25 THAT WOULD HAVE BEEN A VERY NATURAL OPPORTUNITY TO SAY:

1 "AND, BY THE WAY, WE HAVE 20,000 -- I MEAN 2,053
2 SIGNED UP. WE WILL LICENSE THESE TO YOU FOR \$10,000."

3 OKAY? FOR SOME REASONABLE SUM OVER AND ABOVE.

4 SOMETHING TO INDICATE IN WRITING THAT THERE WAS A
5 GENUINE, SINCERE EFFORT TO MARKET.

6 NO, THAT DID NOT OCCUR.

7 THAT -- LASHANDA, WAS THAT HER NAME?

8 **MR. HUMMEL:** LASHUN LAWSON.

9 **THE COURT:** MS. LAWSON DID NOT DO THAT. INSTEAD, SHE
10 JUST SAYS:

11 "NO. SCRAMBLE."

12 THEN, YOU HAVE THE PROBLEM WITH OWING THE FAVOR AND
13 TRYING TO HELP EA OUT AND SAVING THEM MONEY.

14 ONE COULD INFER THAT THE DEFENDANTS WANTED TO
15 MONOPOLIZE -- THAT'S TOO STRONG A WORD -- WANTED TO KEEP
16 SOMEONE ELSE OUT, LIKE TWO DECK OR DOUBLE DECK OR --

17 **MR. KATZ:** TWO K.

18 **THE COURT:** WHO?

19 **MR. KATZ:** TWO K.

20 **MR. PARCHER:** TAKE TWO.

21 **THE COURT:** KEEP TAKE TWO OUT OF THE MARKET SO THAT
22 THEY WOULD NOT EMERGE AN ALTERNATIVE SOURCE FOR FOOTBALL
23 PLAYERS.

24 AND THAT THIS WAS A PREEMPTIVE MOVE, A DEFENSIVE MOVE
25 TO BOTTLE UP THE PLAYERS AND -- IT'S NOT EXCLUSIVE, BUT,

1 NONETHELESS, MAKE THE PLAYERS THINK THAT THEY WERE DOING
2 SOMETHING SO THAT THEY WOULD NOT GET ANY INTEREST IN TAKE TWO.

3 WHAT I'M DOING IS RECITING FOR THE RECORD A THEORY
4 THAT THE PLAINTIFFS HAVE IN WORDS, MORE OR LESS, ARTICULATED,
5 WHICH WOULD SUPPLY EVIL MOTIVE, SUPPLY GREED, TRYING TO TRICK
6 THE RETIRED PLAYERS.

7 I RECOGNIZE THAT THERE IS AN ALTERNATIVE VERSION THAT
8 MAKES MR. ALLEN AND HIS GROUP LOOK LIKE ANGELS, GOOD
9 SAMARITANS, HONESTLY. AND IT GOES SOMETHING LIKE THIS:

10 THEY SET UP A GROUP -- A RETIRED THING. THE ACTIVE
11 PLAYERS PAID FOR IT. IT COST MILLIONS OF DOLLARS. THE ACTIVE
12 PLAYERS PAID FOR IT. THE ACTIVE PLAYERS TRIED TO FIGURE OUT A
13 WAY TO GET THE RETIRED SOME MONEY, SO THEY DID ALL THESE
14 AD HOCS, MILLIONS AND MILLIONS OF DOLLARS OF AD HOCS.

15 AND THEN, THEY TRIED THIS GROUP LICENSING THING. AND
16 IN ORDER TO GET THAT TO WORK YOU NEEDED 11,000, THEY ONLY GOT
17 TWO. SO NO WONDER IT FAILED.

18 THEY TRIED FOR 14 YEARS TO GET EVERYBODY TO SIGN UP,
19 BUT IT NEVER GOT TO THE CRITICAL MASS. THAT'S WHY NO MONEY WAS
20 EVER PAID UNDER THIS.

21 THAT'S AN ALTERNATIVE THEORY.

22 AND NOW NO GOOD DEED EVER GOING UNPUNISHED,
23 MR. PARCHER IS ON THEIR CASE. THAT'S THE ALTERNATIVE.

24 BUT TO GO BACK TO THE EVIL VERSION FOR A MOMENT, THE
25 EVIL VERSION CONCEIVABLY COULD BE ACCEPTED BY THE JURY. IF SO,

1 THAT COULD LEAD TO PUNITIVE DAMAGES.

2 I THINK THE MORE FUNDAMENTAL PROBLEM THAT THE COURT
3 HAS IS THE -- IF THERE IS A BREACH OF FIDUCIARY DUTY, AND
4 THERE'S NO CONTRACT VIOLATION, THERE MAY NOT BE A VIABLE AVENUE
5 TO COLLECT DAMAGES.

6 SO THAT'S THE ONE THAT I'M GOING TO RESERVE ON. I'M
7 RESERVING ON ALL OF THESE. YOU CAN MAKE ALL YOUR MOTIONS AT
8 THE END, ANYWAY.

9 SO I'M AFRAID THAT I'M GOING TO HAVE TO LET
10 MR. PARCHER LOOSE ON THE JURY TO SEE WHAT HE CAN DO.

11 **MR. KESSLER:** I'LL TAKE IT AS A GIFT, YOUR HONOR.

12 **THE COURT:** ALL RIGHT. TAKE IT AS A GIFT.

13 SO THOSE MOTIONS ARE ALL DENIED WITHOUT PREJUDICE FOR
14 RENEWAL AT THE END OF THE VERDICT.

15 I HAVE TO BRING THIS TO A CLOSE. IS THERE ANYTHING
16 MORE RIGHT NOW?

17 **MR. KESSLER:** NO, YOUR HONOR. AGAIN, I WOULD NOTE
18 THAT ON THIS AREA, IN PARTICULAR, IN THE INSTRUCTIONS AND IN
19 THE VERDICT FORM, I WOULD ASK YOUR HONOR -- WE WILL BE
20 SUBMITTING IN OUR BRIEF -- TO PLEASE MAKE SURE THAT YOU REVIEW
21 D.C. LAW ON THIS PUNITIVE DAMAGES --

22 **THE COURT:** I'M GOING TO LOOK AT THAT AS SOON AS --

23 **MR. KESSLER:** AND THE VERDICT FORM, IN PARTICULAR, WE
24 THINK, DOESN'T HAVE IT IN A WAY WE THINK IS CONSISTENT.

25 **THE COURT:** WE'LL HAVE OUR CONFERENCE TOMORROW

1 STARTING AT 7:30.

2 THANK YOU.

3 **MR. KESSLER:** THANK YOU, YOUR HONOR.

4 **MR. PARCHER:** THANK YOU, YOUR HONOR.

5 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL THURSDAY,
6 NOVEMBER 6, 2008, AT 7:30 O'CLOCK A.M.)

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CERTIFICATE OF REPORTER

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17

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

18

19

DATE: WEDNESDAY, NOVEMBER 5, 2008

20

21

S/B KATHERINE POWELL SULLIVAN

22

KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

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RE CROSS EXAMINATION BY MR. HUMMEL 2326 11

FURTHER REDIRECT EXAMINATION BY MR. KESSLER 2342 11

FURTHER RE CROSS EXAMINATION BY MR. HUMMEL 2350 11

FURTHER REDIRECT EXAMINATION BY MR. KESSLER 2350 11

UPSHAW, GENE

DEPOSITION TESTIMONY READ BY MS. DONOVAN 2360 11

AND MR. TAUB

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DEPOSITION TESTIMONY READ BY MR. HILBERT 2407 11

AND MR. GARZA

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