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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HERBERT ANTHONY ADDERLEY, on behalf of
himself and all others similarly situated,

No. C 07-00943 WHA

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE PLAYERS
ASSOCIATION, a Virginia corporation, and
NATIONAL FOOTBALL LEAGUE PLAYERS
INCORPORATED d/b/a PLAYERS INC., a Virginia
corporation,

Defendants.

FINAL CHARGE TO THE JURY

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1.

Members of the jury, it is my duty to instruct you on the law that applies to this case. Copies of these instructions will be available in the jury room for you to consult as necessary.

It is your duty to find the facts from all the evidence presented in the case. To those facts you must apply the law as I give it to you. You must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the Court may have said or done as suggesting what verdict you should return — that is a matter entirely up to you.

2.

The evidence from which you are to decide what the facts are consists of:

1. The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. The exhibits which have been received into evidence;
3. The sworn testimony of witnesses in depositions read into evidence; and
4. Any facts to which all the lawyers have stipulated here in the courtroom before you. You must treat any stipulated facts as having been conclusively proven.

3.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the

1 evidence, but it is not evidence. If the facts as you remember them differ from the
2 way the lawyers have stated them, your memory of them controls.

3 2. A suggestion in a question by counsel or the Court is not evidence
4 unless it is adopted by the answer. A question by itself is not evidence. Consider
5 it only to the extent it is adopted by the answer.

6 3. Objections by lawyers are not evidence.

7 4. Testimony or exhibits that have been excluded or stricken, or that
8 you have been instructed to disregard, are not evidence and must not be
9 considered.

10 5. Anything you may have seen or heard when the Court was not in
11 session is not evidence. You are to decide the case solely on the evidence
12 received at the trial.

13 4.

14 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such
15 as testimony by a witness about what that witness personally saw or heard or did. Circumstantial
16 evidence is proof of one or more facts from which you could find another fact. By way of
17 example, if you wake up in the morning and see that the sidewalk is wet, you may find from that
18 fact that it rained during the night. However, other evidence, such as a turned-on garden hose,
19 may explain the presence of water on the sidewalk. Therefore, before you decide that a fact has
20 been proven by circumstantial evidence, you must consider all the evidence in light of reason,
21 experience and common sense. You should consider both kinds of evidence. It is for you to
22 decide how much weight to give to any evidence.

23 5.

24 In deciding the facts in this case, you may have to decide which testimony to believe and
25 which testimony not to believe. You may believe everything a witness says or part of it or none
26 of it. In considering the testimony of any witness, you may take into account:

27 1. The opportunity and ability of the witness to see or hear or know
28 the things testified to;

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9.

You have heard testimony from witnesses referred to as “expert witnesses.” These are persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness’ education and experience, the reasons given for the opinion and all the other evidence in the case. If an expert witness was not present at the events in question, his or her opinion is necessarily based on an assumed set of circumstances. In evaluating the opinion during the trial, you should take into account the extent to which you do agree or do not agree with the circumstances assumed by the expert witness.

10.

In these instructions, I will often refer to the burden of proof. The principal burden of proof in this case is known as a burden of proof by a preponderance of the evidence. When a party has the burden of proof on any issue by a preponderance of the evidence, it means you must be persuaded by the evidence that the issue is more probably true than not true. To put it differently, if you were to put the evidence favoring plaintiff and the evidence favoring defendant on opposite sides of a scale, the party with the burden of proof on the issue would have to make the scale tip somewhat toward its side. If the party fails to meet this burden, then the party with the burden of proof loses on that issue. Preponderance of the evidence basically means “more likely than not.”

11.

Plaintiff has the burden of proof on all issues in this case. If you find that plaintiff carried its burden of proof as to an issue your verdict should be for plaintiff on that issue. If you find that plaintiff did not carry its burden of proof, you must find against plaintiff on that issue.

12.

I now will turn to the law that applies to this case. This is a class action lawsuit. A class action lawsuit is one where the plaintiff is allowed to bring a claim on behalf of a large group

1 who share a common interest in the same issue. As to the claims made in this case, your verdict
2 will govern for the entire class.

3 13.

4 This class action arises out of a form agreement between various individual retired
5 players and the National Football League Players Association which I will refer to as the
6 “NFLPA.” The form is entitled “Retired Player Group Licensing Authorization Form.” I will
7 refer to it as the RPGLA. Mr. Herb Adderley is the representative of a class of 2,062 retired
8 NFL players who, like Mr. Adderley, signed RPGLAs with the NFLPA that were in effect
9 between February 14, 2004, to February 14, 2007. The starting date was determined by the
10 statute of limitations, not on any change in format of the RPGLA. Mr. Adderley and the class he
11 represents are referred to in these instructions as “plaintiff” or the “RPGLA Class members.”
12 Your job is to decide the class claims asserted on behalf of the entire class. There is no claim for
13 any subset of retired players on any particular deal or any isolated evidence. Rather, since this is
14 a class action, the only claims for you to decide are claims common to the entire class.

15 14.

16 Under the RPGLA, the retired player authorized the NFLPA and Players Inc., to use and
17 to license to third parties his name, image, voice, signature, and biographical information in the
18 “NFLPA Retired Player Group Licensing Program.”

19 15.

20 On behalf of the RPGLA class, plaintiff asserts two claims against defendants: (1)
21 breach of the RPGLA contract and (2) breach of fiduciary duty as it relates to the RPGLA. On
22 the other hand, defendants claim that there was no breach of contract or breach of any fiduciary
23 duty relating to the RPGLA. You must apply the following instructions in deciding whether
24 plaintiff has proven these claims.

25 16.

26 On the breach-of-contract claim, plaintiff has the burden of establishing by a
27 preponderance of the evidence the following:
28

1 possible meanings. This is called ambiguity. To resolve such ambiguities, the law has
2 developed further guidelines for contract interpretation that I will now discuss.

3 20.

4 In determining the reasonable and mutual expectations of the parties to the contract, you
5 should also consider the relevant facts and circumstances known to the parties at the time of
6 making the agreement and evaluate how these surrounding circumstances informed the mutual
7 and reasonable expectations of the parties concerning the agreement. You may consider the
8 circumstances that existed at the time the contract was made, including the apparent purpose of
9 the parties in entering into the contract, the history of negotiations leading up to the contract, and
10 any statements of the parties about their understanding of the contract at the time the contract
11 was entered into. Facts and circumstances known to both sides of a contract are entitled to more
12 weight than facts and circumstances known only to one side of the contract. That is because our
13 goal is to determine the mutual reasonable intent and expectations of both sides.

14 21.

15 In determining the reasonable and mutual expectations of the parties to a contract, you
16 may also consider the conduct of the parties in carrying out the contract before any controversy
17 arose, that is, how the parties to a contract implemented their contract before any contemplation
18 of litigation. If *both* sides to a contract consistently acted as if certain words and phrases meant
19 one thing and not another, then their conduct may be viewed by you as their own practical
20 construction of those words and phrases and any such consistent and mutual conduct would be
21 entitled to considerable weight. Similarly, even if only one side acted consistently as if the
22 words and phrases meant one thing and not another and that action was made known to the other
23 party and acquiesced in without objection, all prior to any contemplation of litigation, then you
24 may also consider that course of known and unprotested conduct as the parties own practical
25 construction of the words and phrases and you may adopt any such interpretation as the proper
26 interpretation.

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24.

In evaluating evidence of an understanding testified to by a party to a contract, you may take into account whether the interpretation was against the interest of that testifying party rather than in the self-interest of that testifying party. An admission against one’s own interest is usually of more probative value than a self-serving statement. This is because admissions against interest are usually made only if they are true. A self-serving interpretation, however, may also be accurate. It is entirely up to you to decide how much weight to give any witness testimony.

25.

Again, you have heard much testimony about various “understandings” by witnesses at the time in question. Such testimony should only be evaluated in light of the actual words used in the contract itself. In other words, you should take into account whether the actual words used in the contract were reasonably susceptible to any such understanding, taking into account the circumstances known to the contracting parties. If a contract word or phrase seems ambiguous, meaning that it is susceptible to two or more different meanings, you may use verbal testimony to help select among the alternative meanings. You may not use testimony, however, to adopt a meaning the words and phrases themselves will not reasonably bear or that would lead to absurd results.

26.

The contract should be considered as a whole; no part of it should be ignored. The contract should be interpreted to give effect to all of its parts. No word or phrase in a contract should be treated as meaningless if any meaning which is reasonable and consistent with other parts of the contract can be given to it. If a term of a contract is ambiguous, you are not required to choose between only the interpretations offered by the two sides but you are free to adopt any meaning consistent with the actual words of the contract, using the rules of contract interpretation given above.

27.

If, after applying all of the foregoing rules of construction, you are unable to resolve an

1 ambiguity in the meaning of a word or a phrase in the contract, such doubt or ambiguity may be
2 resolved against the party who drafted the contract so long as you adopt a reasonable
3 interpretation of the contract. This is because the drafter of the contract was in the best position
4 to have avoided an ambiguity in the first place.

5 28.

6 As I instructed you earlier, in evaluating the claims in this case you may have to decide
7 the meaning of the third-party license agreements like the Electronic Arts license agreements. In
8 evaluating that question, if you decide you need to reach it, you should use the same rules of
9 interpretation but, of course, you should apply them from the point of view of the reasonable
10 expectations of the specific parties to the those third-party license agreements.

11 In this connection, there is a recital in various third-party licenses that deserves attention.
12 I will use TX 28 as an example. TX 28 is an Electronic Arts agreement. The first paragraph
13 started with a recital that stated as follows and I will quote:

14 PLAYERS INC represents that it is a licensing affiliate of the
15 National Football League Players Association (“NFLPA”); that the
16 NFLPA has been duly appointed and is acting on behalf of the
17 football players of the National Football League who have entered
18 into a Group Licensing Authorization, either in the form attached
19 hereto as Attachment “A” or through the assignment contained in
20 Paragraph 4(b) of the NFL Player Contract, which have been
21 assigned to PLAYERS INC; and that in such capacity PLAYERS
22 INC has the right to negotiate this contract and the right to grant
23 rights and licenses described herein.

24 Plaintiff and defendants agree in this case that this passage referred only to *active* NFL players.

25 One reason is that the Attachment A referenced in the passage was used exclusively with active
26 players. As well, the Electronic Arts witness testified that it referred only to *active* players.

27 Therefore, you should treat as established that that sentence referred solely to active players.

28 The two sides in this litigation, however, disagree on the meaning of the next sentence in the
recital, which stated as follows:

Licensee acknowledges that PLAYERS INC also on occasion
secures authorization for inclusion in PLAYERS INC licensing
programs from players, including but not limited to retired players,
who have not entered into such Group Licensing Authorization,
but who, nevertheless, authorize PLAYERS INC to represent such
players for designated PLAYERS INC licensed programs.

1 the class was only entitled to moneys generated by licensing of retired player group rights. In
2 evaluating these arguments, you, of course, will not need to construe any third-party license
3 agreements.

4 31.

5 With respect to the contract claim, you must decide whether or not plaintiff has proven
6 that moneys were received by defendants' licensing of rights to which the RPGLA class was
7 entitled and, if so, the extent to which those moneys were payable to the class under the RPGLA.

8
9 32.

10 A separate claim you must decide is a claim for breach of fiduciary duty as it related to
11 the RPGLA. You have heard some testimony relating to whether or not class members were
12 union members. In this regard, please remember that some class members are not union
13 members. Plaintiff's breach of fiduciary claim is not based on union membership. The fiduciary
14 claim is alleged to arise only from the RPGLA. Although you have heard information about
15 pensions, benefits, and collective bargaining, there is no claim in this case for unfair
16 representation by the union of its members. This case involves the RPGLA.

17 33.

18 On plaintiff's breach of fiduciary duty claim, plaintiff has the burden of establishing by a
19 preponderance of the evidence the facts necessary to prove the following elements:

- 20 1. That, in connection with the RPGLA, defendants owed a fiduciary duty to the
21 RPGLA class members to market and promote their names, images, and identities as an entire
22 group;
- 23 2. That defendants breached any such fiduciary duty;
- 24 3. That the RPGLA Class members suffered damages as a result.

25 34.

26 To establish a fiduciary relationship, plaintiff must prove an agency relationship that
27 required defendants to promote the names and images of the RPGLA class. The mere existence
28 of a license agreement, by itself, does not give rise to a fiduciary or agency relationship.

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35.

An agency relationship results when one person, called the principal, agrees that another person, called the agent, shall act on the principal's behalf and subject to the principal's control, and the agent agrees to do so. In this case plaintiff alleges they were the principals and the defendants were their agents. Defendants admit that a license was acquired by them but deny that there was any agency or fiduciary relationship requiring defendants to actively promote retired players.

36.

An agency relationship is sometimes created by an express contract. You have heard evidence, for example, that some sports figures have agents to negotiate on their behalf and to promote their interests. A mere license is not the same as an agency contract. A license by itself gives the licensee the option to use or sell rights owned by the licensor and does not necessarily require the licensee to promote those rights or create a fiduciary relationship, it being up to the licensee to decide how to use the rights for its own purposes. On the other hand, a licensee may, depending on the circumstances, also undertake to act as a marketing agent and to affirmatively promote the rights on behalf of the licensor. In that case, the licensee is not only a licensee but also an agent with fiduciary duties.

37.

In evaluating whether defendants undertook to be an agent with fiduciary duties, you must consider not only the actual words used in the written agreement but also all of the circumstances surrounding the licensed rights at issue and the parties' relationship.

38.

An important factor to consider is control. In an agency relationship, the principal usually has the ability to control the agent's conduct. For example, the principal may direct the agent to try to make certain deals and not other deals. This is called control. The presence of such control is a factor indicative of an agency relationship. On the other hand, the absence of control is an indication that the relationship was a mere license arrangement whereby the licensee was free to try and market or not market such license rights as it wished. Be aware,

1 however, that the control does not have to be actually exercised; instead it is simply the right to
2 control, rather than its actual exercise, that can be indicative of an agency relationship.

3 39.

4 Another factor you may consider is the financial arrangement between the licensor and
5 the licensee. Remember that pertaining to the RPGLA, the licensors were the RPGLA class
6 members and the licensees were the defendants. To the extent that a licensee paid a sum certain
7 for the rights and was entitled to keep all or most of any third-party revenue, such a circumstance
8 would be indicative of a bare license with no agency relationship. In such a case, the licensee
9 would be making any marketing efforts for its own account and not for the account of the
10 licensor. On the other hand, if the licensor gave consideration to the licensee to go out and
11 market the rights and to pass a large part of the revenues through to the licensor, then that would
12 be indicative of an agency relationship.

13 40.

14 Another factor is a right to discharge. In an agency relationship, the principal usually has
15 the right to discharge the agent and to terminate the relationship. One reason is so that the
16 principal can engage someone else to promote him or to make other promotional arrangements.
17 On the other hand, the absence of a right to discharge is more indicative of a bare-license
18 relationship wherein the licensee is free, during the life of the license, to use or not use the rights
19 as it wishes. So another factor you should examine is whether there was or was not a power to
20 discharge.

21 41.

22 Another factor you should consider is the reasonable expectations of the parties
23 supported by the relationship, that is, what reasonable persons in the same circumstances would
24 have expected from the other side in the relationship. In evaluating this, you may not impose on
25 defendants a fiduciary duty, if at all, that would exceed the reasonable expectations of the parties
26 in the circumstances of this case.

27 42.

28 The basic issue you must decide is, as stated, whether or not in addition to acquiring

1 license rights, defendants also undertook a fiduciary duty to promote and to market those retired
2 players who signed RPGLAs. If you find that there was no such fiduciary undertakings,
3 applying the factors stated above, then you must find for defendants on the fiduciary-duty claim.
4 It is up to you to decide how much weight to give the various factors I have listed in making
5 your decision. If you find such a duty existed, then you must consider whether that duty was
6 breached, so I will now tell you the duties owed by a fiduciary.

7 43.

8 A fiduciary owes several duties to his principal. A fiduciary must exercise good faith to
9 his principal. A fiduciary has a duty to act reasonably and with the care, competence and
10 diligence normally exercised by fiduciaries in similar circumstances. Special skills or
11 knowledge possessed by a fiduciary are circumstances to be taken into account in determining
12 whether the fiduciary acted with due care and diligence. If a fiduciary claims to possess special
13 skills or knowledge, the fiduciary has a duty to the principal to act with the care, competence and
14 diligence normally exercised by fiduciaries with such skill or knowledge.

15 A fiduciary also has a duty of loyalty toward his principal. This means that the fiduciary
16 must put the principal's interests ahead of his own, as to all matters connected with the
17 relationship. The fiduciary is also required to refrain from conduct that is adverse to or likely to
18 damage the principal's interests.

19 44.

20 A fiduciary has a duty to use reasonable effort to provide the principal with facts that the
21 agent knows, has reason to know, or should know when the agent knows or has reason to know
22 that the principal would wish to have the facts or the facts are material to the agent's duties to the
23 principal. A fiduciary has a duty not to acquire a material benefit from a third party in
24 connection with transactions conducted or other actions taken on behalf of the principal or
25 otherwise through the fiduciary's use of his position. Finally, a fiduciary has a duty to act in
26 accordance with the express and implied terms of any contract between the fiduciary and the
27 principal.

28 45.

1 Plaintiff has the burden to prove that defendants breached any fiduciary duty. You have
2 heard that Electronic Arts scrambled the names and identities of retired players. I remind you
3 again that there is no claim in this case that this scrambling by Electronic Arts violated any
4 player's rights. Instead, plaintiff's claim is that defendants breached a fiduciary duty by insisting
5 on scrambling rather than licensing the entire group of RPGLA rights to Electronic Arts.
6 Defendants respond that Electronic Arts was not willing to pay any money to license the entire
7 group of RPGLA rights and therefore defendants were acting to protect retired players in
8 insisting on scrambling.

9 46.

10 During the cross-examination of Professor Noll, questions were asked supposing that
11 defendants had certain monopoly and market power with respect to active player licensing and
12 asked whether there had been anything to prevent defendants from using that power to induce
13 third-party licensees to also take retired players as a group. In this regard, I instruct you that an
14 agent has no duty to market its principals in a way that would be illegal or that would raise a
15 substantial question of illegality. On the assumptions of market power and monopoly used in the
16 examination, a substantial question of illegality under the antitrust laws would have been raised
17 had defendants refused to license active players to a third-party licensee like Electronic Arts
18 except on condition that it also took a license for all RPGLA class members. On the other hand,
19 no question of illegality would have been presented by a stand-alone offer by defendants to
20 license all RPGLA class members as an entire group. Neither would it have been illegal for
21 defendants to have offered the option of present and former players together as a package
22 license, so long as one was not conditioned on the other.

23 47.

24 I will now instruct you on damages. It is the duty of the Court to instruct you about the
25 measure of damages. By instructing you on damages, the Court does not mean to suggest for
26 which party your verdict should be rendered.

27 If you find for plaintiff, the RPGLA Class members, on a particular claim, you must
28 determine the amount of damages, if any, they suffered. Damages means the amount of money

1 which will compensate the RPGLA Class members for any injury you find was caused by
2 defendants for a particular claim. You may award plaintiff damages that are based on a just and
3 reasonable estimate derived from relevant evidence.

4 48.

5 Under the relevant law, the claims at issue must be brought within three years of the time
6 when the breach occurred. In this case, the limitations period reaches back to February 14, 2004.
7 No damages may be awarded for any contract violation or fiduciary duty violation occurring
8 prior to February 14, 2004.

9 49.

10 If you decide that plaintiffs have proved their breach-of-contract claim against
11 defendants, then the RPGLA class members are entitled to recover as damages the sum of money
12 that would put the RPGLA Class members in the same economic position as they would have
13 been if the contract had not been breached by the defendants but only to the extent that such
14 damages were reasonably foreseeable by the parties in the event of breach.

15 The plaintiff has the burden to prove by a preponderance of the evidence the amount of
16 damages suffered by the RPGLA Class members. You may not award damages based on
17 sympathy, conjecture, speculation, guess work or punishment. On the other hand, the law does
18 not require that plaintiff prove the amount of damages with mathematical precision, but only
19 with reasonable certainty.

20 50.

21 The purpose of the law of damages is to compensate a plaintiff for the loss, if any, which
22 results from a defendant's conduct. If you find that plaintiff has proven that the defendants
23 breached any fiduciary duty to plaintiff, then plaintiff also has the burden of proving damages by
24 a preponderance of evidence.

25 The measure of damages for breach of fiduciary duty is the amount of money necessary
26 to place RPGLA Class members in the same economic position they would have been in if
27 defendants' fiduciary duty had not been breached. In other words, the purpose of awarding
28 damages to the RPGLA Class for breach of fiduciary duty is to make them whole for any injuries

1 they suffered.

2 Plaintiff must first prove that they suffered economic injury as a result of defendants'
3 breach of fiduciary duty. If plaintiff fails to meet their burden, then you may not award any
4 damages for that claim. If, however, you find that plaintiff suffered economic injury as a result
5 of defendants' breach of fiduciary duty, then you may next consider whether plaintiff has proven
6 the amount of such damages.

7 51.

8 As the party seeking damages, plaintiff has the burden of proving the amount of damages
9 by a preponderance of the evidence. While plaintiff is not required to prove damages with
10 mathematical precision, it must prove their damages with reasonable certainty. If plaintiff has
11 met their burden, your damages award should put plaintiff in approximately the financial
12 position they would have been in had the breach not occurred.

13 You may only award plaintiff damages that are adequate to compensate for the breach.
14 You may not award any more or less damages. Plaintiff is not entitled to recover damages which
15 are speculative, remote, imaginary, contingent, or merely possible. Your award must be based
16 upon evidence and not upon speculation, guesswork or conjecture.

17 Nor may you include any amount for the purpose of punishing defendants or setting an
18 example.

19 52.

20 Recovery of damages may be limited to a nominal sum if the plaintiff has failed to prove
21 the extent and amount of damages, even though they have proven that they have been wronged.
22 A nominal sum is a small, symbolic amount of money, such as one dollar, awarded as
23 recognition that an injury was sustained. If you find that defendants breached the RPGLA, or
24 that they breached their fiduciary duties to the RPGLA class members, but that plaintiff has not
25 proved any actual damages, or that plaintiff's proof is vague or speculative, then you may award
26 nominal damages.

27 53.

28 Plaintiff has made claims against defendants for breach of contract and breach of

1 fiduciary duty. If you decide that plaintiff has proved more than one of these causes of action,
2 the same damages that resulted from multiple claims can be awarded only once.

3 54.

4 In addition to compensatory damages, plaintiff also seeks an award of punitive damages
5 in this case against defendants. Punitive damages are damages above and beyond the amount of
6 compensatory (or nominal) damages you may award. Punitive damages are awarded to punish
7 the defendant for his or her conduct and to serve as an example to prevent others from acting in a
8 similar way.

9 You may award punitive damages only if plaintiff has proved with clear and convincing
10 evidence:

11 (1) that the defendants acted with evil motive, actual malice, deliberate violence or
12 oppression, or with intent to injure, or in willful disregard for the rights of the
13 RPGLA Class members; AND

14 (2) that the defendants' conduct itself was outrageous, grossly fraudulent, or reckless
15 toward the safety of the RPGLA Class members.

16 You may conclude that the defendants acted with a state of mind justifying punitive damages
17 based on direct evidence or based on circumstantial evidence from the facts of the case.

18 "Clear and convincing" evidence means evidence of such convincing force that it
19 demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for
20 which it is offered as proof. Such evidence requires a higher standard of proof than proof by a
21 preponderance of the evidence.

22 If you decide that punitive damages should be awarded, you will have a short
23 supplemental proceeding immediately following your verdict in order to receive more evidence
24 and argument as to the amount that should be awarded.

25 55.

26 When you begin your deliberations, you should elect one member of the jury as your
27 foreperson. That person will preside over the deliberations and speak for you here in court. I
28

1 recommend that you select a foreperson who will be good at leading a fair and balanced
2 discussion of the evidence and the issues.

3 56.

4 In your deliberations it is usually a mistake to take a straw vote early on. This is due to
5 the risk of jury members expressing a premature opinion and then, out of pride, digging their
6 heels. Rather, it is usually better to discuss the evidence, pro and con, on the various issues
7 before proceeding to take even a straw vote. In this way, all the viewpoints will be on the table
8 before anyone expresses a vote. These are merely recommendations, however, and it is up to
9 you to decide on how you wish to deliberate.

10 57.

11 Your verdict as to each claim and as to damages, if any, must be unanimous. Each of you
12 must decide the case for yourself, but you should do so only after you have considered all of the
13 evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

14 58.

15 Do not be afraid to change your opinion if the discussion persuades you that you should.
16 Do not come to a decision simply because other jurors think it is right. It is important that you
17 attempt to reach a unanimous verdict but, of course, only if each of you can do so after having
18 made your own conscientious decision. Do not change an honest belief about the weight and
19 effect of the evidence simply to reach a verdict.

20 59.

21 Some of you have taken notes during the trial. Whether or not you took notes, you
22 should rely on your own memory of what was said. Notes are only to assist your memory. You
23 should not be overly influenced by the notes.

24 60.

25 When you retire to the jury room to deliberate, the Clerk will bring you the following:

- 26 1. All of the exhibits received into evidence;
- 27 2. An index of the exhibits;
- 28 3. A work copy of these jury instructions for each of you;

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- 4. A work copy of the verdict form for each of you; and
- 5. An official verdict form.

You do not have to discuss the questions in the strict sequence indicated in the special verdict form, but you must, by the end, answer them unanimously as indicated in the form.

When you recess at the end of a day, please place your work materials in the brown envelope provided and cover up any easels containing your work notes so that if my staff needs to go into the jury room, they will not even inadvertently see any of your work in progress.

61.

A United States Marshal will be outside the jury-room door during your deliberations. If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone — including me — how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the Court.

62.

You have been required to be here each day from 7:45 a.m. to 1:00 p.m. Now that you are going to begin your deliberations, however, you are free to modify this schedule within reason. For example, if you wish to continue deliberating in the afternoons after a reasonable lunch break, that is fine. The Court does, however, recommend that you continue to start your deliberations by 8:00 a.m.

It is very important that you let the Clerk know in advance what hours you will be deliberating so that the lawyers may be present in the courthouse at all times the jury is deliberating.

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You may only deliberate when all of you are together. This means, for instance, that in the mornings before everyone has arrived, or when someone steps out of the jury room to go to the restroom, you may not discuss the case. As well, the admonition that you are not to speak to anyone outside the jury room about this case still applies during your deliberation.

64.

After you have reached a unanimous agreement on a verdict, your foreperson will fill in, date and sign the verdict form and advise the Court through the marshal that you have reached a verdict. The foreperson should hold on to the filled-in verdict form and bring it into the courtroom when the jury returns the verdict. Thank you for your careful attention. The case is now in your hands. You may now retire to the jury room and begin your deliberations.

Dated: November 7, 2008.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE