

VOLUME 13

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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
FRIDAY
NOVEMBER 7, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(APPEARANCES CONTINUED ON NEXT PAGE)

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P R O C E E D I N G S

NOVEMBER 7, 2008

7:30 A.M.

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

THE COURT: ALL RIGHT. PLEASE BE SEATED.

ANY ITEMS THAT ANYONE WANTS TO BRING UP?

MR. KESSLER: GOOD MORNING, YOUR HONOR.

WE HAVE OBJECTED TO A FEW OF THE SLIDES OR BOARDS
THAT PLAINTIFFS WANT TO PUT UP, BECAUSE WHAT THEY DO IS THEY
QUOTE A WITNESS'S PARTIAL ANSWER. AND WE'RE NOT SAYING THEY
CAN'T JUST GIVE ONE ANSWER AND QUESTION, BUT WE DON'T THINK
THAT THEY CAN GIVE PART OF AN ANSWER WHEN THE WITNESS
CONTINUES.

WE WILL HAND UP, YOUR HONOR, THE ONES WE THINK ARE A
PROBLEM WITH RESPECT TO THAT, IF WE MAY.

AND I'LL SHOW YOUR HONOR HOW MISLEADING THIS COULD BE
BECAUSE, YOUR HONOR, I BELIEVE EVEN MISREMEMBERED ONE OF THESE
PREVIOUSLY.

THE FIRST ONE IS WITH PROFESSOR NOLL. AND YOU'LL
REMEMBER THE QUESTION WAS -- AND THE LAWYER'S QUESTION IS NOT
EVIDENCE:

"HAVE YOU SEEN ANY EVIDENCE IN THIS CASE THAT
WOULD SUGGEST TO YOU THAT PLAYERS INC SOLD OUT HALL OF FAME
RETIRED PLAYERS TO CURRY FAVOR WITH EA?"

1 AND THEY STOP THE ANSWER:

2 "THERE IS -- I -- I HAVE SEEN AN E-MAIL STRING
3 THAT IS IN RESPONSE TO AN ATTEMPT TO EA TO HAVE TO PAY LESS,
4 YES."

5 YOUR HONOR, LOOK AT THE REST OF THE ANSWER.

6 **THE COURT:** WHERE IS IT?

7 **MR. KESSLER:** IT'S ATTACHED RIGHT BEHIND IT, YOUR
8 HONOR.

9 IT THEN SAYS:

10 "AND IT HAS AN ARGUMENT BACK. WELL, NO, YOU'RE
11 GETTING A GOOD DEAL."

12 **THE COURT:** WAIT. WAIT. WAIT.

13 OF COURSE, YOU HAVE TO QUOTE THE ENTIRE ANSWER. THAT
14 CHART WILL NOT BE USED UNLESS YOU FIX IT TO DO THE ENTIRE
15 ANSWER.

16 **MR. PARCHER:** EXCUSE ME, YOUR HONOR. IF THAT'S WHAT
17 YOUR HONOR'S RULING IS --

18 **THE COURT:** THAT IS MY RULING. YOU'RE NOT GOING TO
19 DECEIVE THIS JURY.

20 **MR. PARCHER:** EXCUSE ME. I HAVE NO INTENTION OF
21 DECEIVING THE JURY.

22 **THE COURT:** PUT UP THE ENTIRE --

23 **MR. PARCHER:** HE CAN PUT UP THE ENTIRE ANSWER.
24 THAT'S WHAT --

25 **THE COURT:** IT'S NOT GOING TO BE USED, MR. PARCHER.

1 THAT'S THE RULING.

2 **MR. PARCHER:** OKAY. SURE. BUT THE IDEA THAT I'M
3 TRYING TO DECEIVE THE JURY, I'M AN OFFICER OF THIS COURT, AND
4 IT'S VERY UPSETTING TO ME WHEN YOU SAY THAT.

5 HE'S A VERY COMPETENT LAWYER.

6 **THE COURT:** NO. THAT'S NOT THE WAY IT WORKS.

7 **MR. PARCHER:** OKAY. THAT'S NOT THE WAY IT WORKS IN
8 YOUR HONOR'S COURTROOM. I UNDERSTAND THAT.

9 **THE COURT:** YOU CAN DO THIS. PUT UP THE ENTIRE
10 ANSWER, AND THEN YOU CAN EMPHASIZE LIKE CRAZY THE PART YOU'RE
11 INTERESTED IN. BUT YOU CANNOT, YOU CANNOT GIVE A PARTIAL
12 ANSWER TO --

13 **MR. PARCHER:** YOUR HONOR, I DON'T THINK IT'S A
14 PARTIAL ANSWER.

15 **THE COURT:** I TAKE BACK THE "DECEIVE" THING. LET ME
16 REPHRASE WHAT I MEANT TO SAY.

17 **MR. PARCHER:** YES.

18 **THE COURT:** NOT THAT YOU INTENDED TO.

19 **MR. PARCHER:** I CERTAINLY DIDN'T.

20 **THE COURT:** BUT IT WOULD HAVE THE EFFECT OF DECEIVING
21 THE JURY.

22 **MR. PARCHER:** OKAY. JUST GIVE ME TEN SECONDS,
23 PLEASE. I WOULD VERY MUCH APPRECIATE IT. IT WOULD BE ONE
24 THING IF I STOPPED A TRANSCRIPT IN MID-SENTENCE.

25 **THE COURT:** ONE THING IF YOU STOPPED IT IN

1 MID-ANSWER.

2 **MR. PARCHER:** NO, IT'S NOT MID-ANSWER.

3 **THE COURT:** IT IS.

4 **MR. PARCHER:** HE NEEDS ANOTHER QUESTION TO GET THE
5 ANSWER.

6 **THE COURT:** I'M LOOKING AT IT RIGHT HERE.

7 **MR. PARCHER:** I DON'T HAVE IT. WHAT NUMBER? WHAT
8 NUMBER IS IT?

9 **THE COURT:** THE ANSWER IS ON PAGE 2350.

10 **MR. PARCHER:** LET ME FIND THE EXHIBIT, MAY I?

11 **MR. KESSLER:** AND EVERY ONE WE HANDED UP, YOUR HONOR,
12 IS LIKE THIS. SO THERE ARE FIVE --

13 **THE COURT:** I WANT COUNSEL TO SEE IT.

14 **MR. PARCHER:** YEAH. YEAH. I -- THIS IS NOLL?

15 **THE COURT:** NOLL, PAGE 2350.

16 **MR. KESSLER:** HERE'S THE TRANSCRIPT. YOU STOPPED AT
17 "YES."

18 **MR. PARCHER:** I DON'T WANT TO WALK AWAY FROM A
19 GRAPHIC. I WAS JUST TAKING THE GRAPHICS AND HADN'T READ
20 TRANSCRIPTS. BUT I HAVE TO SAY, I STILL THINK HE CAN GET UP
21 AND DO WHAT HE WANTS. THE PROBLEM WITH IT NOW IS IF I ARGUED
22 IT NOW I WOULD BE FOOLISH. THAT'S THE REAL PROBLEM ON MY MIND.
23 BECAUSE -- YOU KNOW WHAT I'M SAYING?

24 **THE COURT:** YOU CAN TAKE --

25 **MR. PARCHER:** BECAUSE HE WOULD COME BACK AND READ IT

1 BACK, AND THEY'D SAY: "WHAT'S THIS GUY TELLING US?"

2 THAT I UNDERSTAND.

3 **THE COURT:** YOU CAN TAKE THE EXACT SAME QUESTION,
4 WHICH I THINK HAS -- A SUBSTANTIAL PART OF THE ANSWER FAVORS
5 YOU.

6 **MR. PARCHER:** YEAH.

7 **THE COURT:** BUT YOU'VE GOT TO READ THE ENTIRE ANSWER.
8 YOU CAN PUT IT ON THE ELMO, AND PUT IT UP ON THE SCREEN. JUST
9 DON'T USE THE GRAPHIC THAT IS INCOMPLETE.

10 **MR. PARCHER:** RIGHT. I --

11 **MR. KESSLER:** YOUR HONOR, WE OBJECTED LAST NIGHT, SO
12 THEY HAD TIME TO REDO THE GRAPHICS IF THEY WANTED TO.

13 THE SECOND ONE, YOUR HONOR, IS MR. ALLEN'S TESTIMONY.
14 AND IF YOUR HONOR WILL LOOK AT THE ACTUAL TRANSCRIPT, THEY
15 ELLIPSED OUT THE PART -- THE FRONT PART OF THE ANSWER IN THIS
16 ONE.

17 **THE COURT:** WAIT A MINUTE. THERE'S SO MANY OF THESE.

18 **MR. KESSLER:** I GAVE THEM TO YOUR HONOR, I THINK, IN
19 ORDER. TESTIMONY REGARDING EQUAL SHARES.

20 **THE COURT:** THIS IS --

21 **MR. KESSLER:** YES.

22 **THE COURT:** -- TESTIMONY REGARDING EQUAL SHARES. ALL
23 RIGHT.

24 **MR. KESSLER:** AND THE QUESTION AND THE ANSWER IS:

25 "THAT'S RIGHT."

1 AS YOUR HONOR WILL SEE, THEY ELLIPSED OUT THE FRONT
2 PART OF THE ANSWER, WHICH CHANGES ITS MEANING.

3 **MR. PARCHER:** I HAVE TO SAY THAT I'M NOT FOLLOWING
4 HIM, JUDGE. I NEED A NUMBER OR A PAGE OR SOMETHING.

5 **THE COURT:** PLEASE HAND MR. PARCHER A SET OF WHAT YOU
6 GAVE ME.

7 **MR. KESSLER:** IT'S HIS SET. I'LL GET ANOTHER ONE FOR
8 HIM.

9 **THE COURT:** I CAN'T TELL WHERE THIS IS.

10 **MR. KESSLER:** I WILL SHOW HIM, YOUR HONOR.

11 **MR. PARCHER:** YOU NEED TO SHOW HE ME WHAT YOU'RE
12 TALKING ABOUT.

13 **MR. KESSLER:** THIS IS WHAT I'M TALKING.
14 UNFORTUNATELY, I THOUGHT YOU HAD YOUR OWN SET.

15 **MR. PARCHER:** I DO HAVE MY OWN SET. I STILL DON'T
16 KNOW WHAT YOU'RE TALKING ABOUT.

17 **MR. KESSLER:** THIS ONE, TESTIMONY REGARDING EQUAL
18 SHARE.

19 **MR. PARCHER:** RIGHT.

20 **MR. KESSLER:** "AND THE RETIRED, MY CLIENTS GOT ZERO,
21 CORRECT?"

22 **MR. PARCHER:** YEAH, THAT'S RIGHT.

23 **MR. KESSLER:** OKAY. AND THE ANSWER WAS:

24 "ZERO OUT OF GLR POOL, THAT'S RIGHT."

25 HE TOOK OUT "ZERO OUT OF GLR POOL," WHICH TOTALLY

1 CHANGES ITS MEANING. HE JUST ELLIPSED IT OUT.

2 **MR. PARCHER:** THE ONLY THING I'LL SAY ABOUT THIS,
3 JUDGE, IS COUNSEL IS DOING ME A BIG FAVOR. WHAT HE'S SAYING
4 IS:

5 "IF YOU DO SOMETHING LIKE THAT, WATCH WHAT'S
6 GOING TO HAPPEN WHEN I READ IT."

7 THE IDEA THAT I WOULD WANT TO PUT SOMETHING IN THAT
8 WOULD DISTORT SOMETHING WOULD BE VERY FOOLISH ON MY PART, AND
9 IT'S SILLY.

10 SO IF THAT'S THE EFFECT OF SOMETHING I'M GOING TO
11 WATCH MYSELF. THAT'S FOR SURE. YOU DON'T NEED TO TROUBLE
12 YOURSELF ABOUT THAT.

13 **THE COURT:** ALL RIGHT.

14 **MR. PARCHER:** JUST POINT IT OUT TO ME.

15 **THE COURT:** THIS ONE ALSO LEAVES OUT SOME IMPORTANT
16 PARTS OF THE QUESTION AND THE ANSWER. I THINK YOU'VE GOT TO
17 FIX THAT ONE, TOO.

18 **MR. KESSLER:** THE NEXT ONE, YOUR HONOR, I WOULD LIKE
19 TO CALL YOUR ATTENTION TO, IT SAYS:

20 "DEFENDANTS' DOUBLE-TALK. NO EVALUATION OF
21 8 MILLION REALLOCATION."

22 IF YOU LOOK AT THE TRANSCRIPT, YOU'LL SEE THEY CUT
23 OUT AFTER THE WORD "ANSWER, AS YOU REFER TO IT THERE." IT THEN
24 GOES ON TO SAY:

25 "I DON'T KNOW ABOUT YOUR PROMISE, BUT" --

1 IN OTHER WORDS, HE WAS REJECTING THE PART OF THE
2 QUESTION ABOUT "PROMISE," AND THEY JUST CUT IT OUT.

3 **THE COURT:** THIS IS CALLED "DOUBLE-TALK." THERE'S
4 NOTHING WRONG WITH THE HEADINGS. THAT'S ALL ARGUMENT. THAT'S
5 FINE. BUT THE --

6 **MR. PARCHER:** I SEE HIS POINT. I SEE HIS POINT. I
7 DON'T KNOW IF --

8 **THE COURT:** YOU'RE NOT GOING TO USE THIS ONE?

9 **MR. PARCHER:** I'M JUST SAYING, FRANKLY, IT'S A
10 TACTICAL POINT, IN MY MIND. I WOULD BE VERY FOOLISH TO SAY
11 THAT:

12 "THE ANSWER WAS THE MOON IS BLUE," AND THEN, I LEFT
13 OUT A COMMA, AND SAYS:

14 "YOU KNOW, THE MORE I THINK ABOUT IT, IT REALLY
15 WAS RED AND PURPLE, AND IT WASN'T BLUE," BECAUSE HE'LL MAUL ME
16 ON HIS SUMMATION.

17 **THE COURT:** WELL, POSSIBLY HE WOULD.

18 **MR. PARCHER:** YEAH. I CREATED A PROBLEM HERE --

19 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY, WHICH
20 WAS NOT REPORTABLE.)

21 **MR. PARCHER:** -- INADVERTENTLY WITHOUT MATCHING
22 THINGS. I JUST GOT A SET OF GRAPHICS, AND I FILLED THEM INTO
23 MY SUMMATION.

24 **THE COURT:** YOU'VE EITHER GOT TO FIX OR NOT USE THE
25 ONE CALLED --

1 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY, WHICH
2 WAS NOT REPORTABLE.)

3 **MR. KESSLER:** THE NEXT ONE, YOUR HONOR, IS
4 "DEFENDANTS' DOUBLE-TALK OFFERING AS A GROUP," MR. LINZNER'S
5 TESTIMONY. AGAIN, CUT OFF THE END OF THE ANSWER AFTER THE LIST
6 OF 2100 PLAYERS. JUST CUT IT OFF.

7 THAT'S ON THE SECOND PAGE, YOUR HONOR, ON LINES 3 TO
8 7. THEY CUT OUT 6 AND 7.

9 **THE COURT:** WAIT A MINUTE. I'M NOT FOLLOWING.

10 **MR. KESSLER:** I'M SORRY, YOUR HONOR. THIS IS THE ONE
11 THAT SAYS: "DEFENDANTS' DOUBLE-TALK OFFERING AS A GROUP."

12 **THE COURT:** WHERE IT SAYS: "WE TYPICALLY WOULD TELL
13 THEM WHO WE WANTED"? IS THAT THE PART OF THE ANSWER YOU'RE
14 SAYING IS CUT OFF?

15 **MR. GREENSPAN:** YES.

16 **MR. KESSLER:** YES, IT'S CUT OFF.

17 **THE COURT:** PART OF THE VERY SAME ANSWER, AND IT
18 SHOULD BE IN THERE. SO THAT ONE CAN'T BE USED UNLESS YOU FIX
19 IT.

20 **MR. KESSLER:** FINALLY, YOUR HONOR, THIS ONE IS EVEN
21 STRANGER. THEY HAVE THIS HUGE THING OF MR. BERTHELSEN:

22 "DEFENDANTS HAVE TO TAKE RESPONSIBILITY FOR THE
23 DOCUMENT." THEY HAVE NO QUESTION. SO IT'S JUST AN ABSTRACT
24 STATEMENT.

25 **MR. PARCHER:** HE SAID THAT BEYOND ALL DOUBT.

1 **THE COURT:** WHERE IS IT?

2 **MR. KESSLER:** IT'S THIS ONE, YOUR HONOR.

3 **MR. PARCHER:** HE SAID THAT BEYOND ALL DOUBT.

4 **THE COURT:** BUT IS IT IN THE TRANSCRIPT?

5 **MR. PARCHER:** OF COURSE IT IS.

6 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY, WHICH
7 WAS NOT REPORTABLE.)

8 **THE COURT:** JUST A SECOND. LET ME SEE IT. IT MAY OR
9 MAY NOT BE MISLEADING. DEPENDS ON THE CONTEXT.

10 WHERE DOES HE SAY THAT?

11 **MR. KESSLER:** PAGE 18 HE SAYS:

12 **"QUESTION:** DO YOU ACTUALLY KNOW, YES OR NO,
13 WHETHER DEFENDANTS ARE RESPONSIBLE FOR THIS
14 DOCUMENT OR NOT?"

15 **"ANSWER:"** -- AND HE TOOK OUT THE FIRST PART:

16 "RESPONSIBILITY IS A DIFFERENT QUESTION.

17 YES, DEFENDANTS HAVE TO TAKE RESPONSIBILITY
18 FOR THE DOCUMENT."

19 WHAT DOCUMENT ARE WE TALKING ABOUT?

20 **MR. PARCHER:** I'M SORRY. THAT'S LIKE VOODOO
21 ECONOMICS. COME ON.

22 **MR. KESSLER:** NO. IT'S THE RECORD OF THIS CASE.

23 **MR. PARCHER:** COME ON. THAT'S LIKE SAYING:

24 "I GOT YOU ON 1 AND 2 AND 3, SO LET ME JUST PRESS
25 MY POINT HERE." THAT'S COMPLETELY WRONG.

1 **THE COURT:** WAIT A MINUTE. I'M GOING TO OVERRULE THE
2 OBJECTION ON ONE CONDITION. ON THIS ONE, IT'S NOT SO
3 MISLEADING, AS LONG AS WHEN YOU USE IT YOU SAY: HE WAS ASKED
4 WHETHER DEFENDANTS ARE RESPONSIBLE FOR THIS DOCUMENT, AND THE
5 ANSWER HE GAVE WAS THIS.

6 **MR. PARCHER:** OKAY. WHAT I NEED TO DO --

7 **THE COURT:** THAT ONE IS NOT MISLEADING.

8 **MR. PARCHER:** WHAT I NEED TO DO, JUDGE -- I'M SORRY
9 TO DO THIS TO YOU BECAUSE I'M UPSETTING YOUR SCHEDULE HERE, BUT
10 I NEED TO TAKE FIVE MINUTES TO MAKE SURE I'VE GOT THE RIGHT
11 TRANSCRIPT.

12 **THE COURT:** I'LL GIVE YOU FIVE MINUTES.

13 **MR. PARCHER:** I'M VERY SORRY ABOUT THAT, JUDGE. BUT
14 THE IDEA THAT I WAS TRYING TO DECEIVE SOMEBODY, PLEASE TAKE
15 THAT OUT OF YOUR MIND.

16 **THE COURT:** YOU WERE NOT TRYING TO DECEIVE ME, BUT IT
17 WOULD HAVE THE EFFECT.

18 NEXT, I HAVE A LETTER FROM MR. PARCHER ABOUT
19 PARAGRAPH 46.

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

21 **THE COURT:** I'VE READ YOUR LETTER.

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

23 **THE COURT:** ANYTHING YOU WANT TO SAY TO YOUR LETTER?

24 **MR. PARCHER:** WELL, I WROTE IT AS CAREFULLY -- I
25 WROTE IT AS CAREFULLY AS I COULD. I THINK THAT HONESTLY --

1 **THE COURT:** IS THIS -- I'M GOING TO GIVE PARAGRAPH
2 46, BUT I'M CONSIDERING GIVING AN ADDITIONAL SENTENCE SOMEWHAT
3 ALONG THE LINES THAT YOU SUGGESTED. IT WOULD SAY:

4 "NEITHER WOULD IT HAVE BEEN ILLEGAL FOR
5 DEFENDANTS TO HAVE OFFERED THE OPTION OF PRESENT AND FORMER
6 PLAYERS TOGETHER AS A PACKAGE LICENSE, SO LONG AS ONE WAS NOT
7 CONDITIONED ON THE OTHER."

8 **MR. PARCHER:** THANK YOU, JUDGE.

9 **THE COURT:** I WANT TO MAKE SURE YOU HAVE NO
10 OBJECTION.

11 **MR. KESSLER:** I HAVE NO OBJECTION TO THAT.

12 **MR. PARCHER:** EXCUSE ME. I WANT TO SAY ONE MORE
13 THING, JUDGE. AND THAT IS I DON'T WANT YOU TO HAVE THE
14 IMPRESSION THAT WHAT MR. HUMMEL WAS DOING -- AND HE CAN SPEAK
15 FOR HIMSELF -- WAS GOING FOR AN ILLEGAL TYING. HE WAS GOING
16 FOR A LEVERAGING.

17 **THE COURT:** I HEARD ALL KINDS OF --

18 **MR. PARCHER:** AND YOUR HONOR THOUGHT THAT PERHAPS HE
19 WAS GOING -- AND I PROBABLY WASN'T ANYTHING ABOUT ILLEGAL
20 TYING. YOUR HONOR THOUGHT HE WAS GOING INTO IT FURTHER. THE
21 WITNESS THEN BROUGHT UP THE ILLEGALITY, AND WE WERE OFF TO THE
22 RACES HERE.

23 BUT NOBODY HERE WAS TRYING TO BRING ILLEGAL TYING
24 INTO THE CASE. I DON'T WANT YOU TO THINK THAT OF MR. HUMMEL.

25 **THE COURT:** PERHAPS IT WASN'T, BUT IT WAS VERY

1 STRANGE EXAMINATION GETTING INTO MONOPOLY POWER AND WHAT --
2 "MONOPOLY" AND "MONOPOLY POWER." THOSE TERMS WERE USED BY
3 MR. HUMMEL.

4 **MR. PARCHER:** OKAY. I DON'T THINK THAT THAT WAS
5 INAPPROPRIATE, BUT IN ANY EVENT, IT WAS YOUR HONOR THAT ASKED
6 THE QUESTION THAT PROMPTED WHAT YOUR HONOR IS NOW BOTHERED
7 ABOUT. AND I'M NOT FAULTING THE COURT FOR DOING THAT. IF YOU
8 THOUGHT THAT'S WHAT HUMMEL WAS DOING, YOU WANTED TO CLEAR IT
9 UP.

10 **THE COURT:** THAT'S WHAT I THOUGHT HE WAS DOING, AND I
11 THINK THAT THAT WAS FAIRLY RAISED BY THE LINE OF QUESTIONS HE
12 WAS ASKING. SO YOU CAN BLAME ME IN THE NINTH CIRCUIT.

13 **MR. PARCHER:** YOU KEEP SAYING "THE NINTH CIRCUIT."
14 PLEASE STOP SAYING "THE NINTH CIRCUIT." I DON'T HAVE THE NINTH
15 CIRCUIT ON MY MIND.

16 **THE COURT:** BUT I THINK WHAT I DID WAS A FAIR ATTEMPT
17 TO CLARIFY THE ANSWER ON THE LINE OF QUESTIONS THAT MR. HUMMEL
18 WAS ASKING.

19 NONETHELESS, THAT HAVING BEEN SAID, I DID GIVE A
20 CAUTIONARY INSTRUCTION IMMEDIATELY AFTERWARDS.

21 **MR. PARCHER:** YES, YOU DID.

22 **THE COURT:** AND I DON'T THINK IT WENT QUITE FAR
23 ENOUGH, SO THIS IS WHAT WE'RE GOING TO GIVE.

24 **MR. PARCHER:** YOUR HONOR, I WOULD APPRECIATE IT IF
25 YOU WOULD GIVE THIS YOUNG MAN JUST A MINUTE TO SAY HIS PEACE.

1 **THE COURT:** ALL RIGHT.

2 **MR. PARCHER:** THANK YOU.

3 **THE COURT:** GO AHEAD, MR. HUMMEL.

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

5 THE ONLY POINT I WANTED TO MAKE WITH RESPECT TO THE
6 INSTRUCTION IS THE INSINUATION THAT THIS WAS STARTED BY
7 PLAINTIFFS' COUNSEL.

8 THE POINT OF MY QUESTIONING WAS SIMPLY THIS: TO SAY
9 THAT LICENSEES HAD TO COME TO DEFENDANTS. THEY HAD NO CHOICE.
10 THEY HAD A MONOPOLY ON ACTIVE PLAYERS.

11 ONCE THEY CAME, THERE WAS ABSOLUTELY NOTHING WRONG.
12 AND, IN FACT, THEY SHOULD HAVE SAID AFFIRMATIVELY: "TAKE OUR
13 GUYS, TAKE OUR GUYS," MEANING THE GLA CLASS.

14 NOW, YOUR HONOR THEN -- I DO ASK FOR FAIRNESS HERE --
15 YOUR HONOR THOUGHT I WAS SAYING:

16 "WE WON'T SELL YOU OUR ACTIVES, UNLESS YOU TAKE
17 OUR RETIRED."

18 THAT WAS ABSOLUTELY NOT THE IMPORT OF MY QUESTIONS.
19 WHAT I WAS ASKING WAS PERFECTLY CONSISTENT WITH DR. RASCHER'S
20 OPINION ABOUT LEVERAGE, WHICH DR. NOLL THEN CRITICIZED.

21 AND THE FACT OF THE MATTER IS, AND THIS IS WHAT WE
22 ARE, YOU KNOW, I THINK, FAIRLY ENTITLED TO ARGUE IS, FOR
23 LICENSEES IN THE MARKET, YOUR HONOR, IF THEY WANTED ACTIVE
24 PLAYERS AS A GROUP FOR GROUP LICENSING, THEY HAD TO COME TO THE
25 DEFENDANTS.

1 AND WHEN THEY DID, THE DEFENDANTS HAD A CHOICE. AND
2 THE CHOICE WAS TO SAY: "WE HAVE THIS GROUP OF RETIRED, PLEASE
3 TAKE THEM" OR NOT.

4 OUR ARGUMENT IS THEY NEVER REALLY DID THAT. THAT WAS
5 THE ENTIRE POINT OF THE QUESTION. YOUR HONOR THEN, TO BE FAIR,
6 ASKED QUESTIONS ABOUT TYING. ACTUALLY, MR. KESSLER RAISED IT
7 BY OBJECTION.

8 SO I HOPE YOUR HONOR UNDERSTANDS MY POINT, AND I
9 WOULD ONLY ASK --

10 **THE COURT:** YOU KNOW, YOU WERE USING WORDS LIKE
11 "MONOPOLY."

12 **MR. HUMMEL:** ABSOLUTELY RIGHT.

13 **THE COURT:** "MONOPOLY POWER," "LEVERAGE."

14 **MR. HUMMEL:** RIGHT.

15 **THE COURT:** WHAT ELSE IS SOMEONE LIKE ME, WHO
16 UNDERSTANDS THE ANTITRUST LAW, TO THINK WHAT YOU'RE GETTING AT
17 IN SOME KIND OF ROUNDABOUT, EVASIVE WAY?

18 **MR. HUMMEL:** YOUR HONOR, YOU KEEP -- YOU KNOW WHAT?
19 ALL I'M ASKING, YOUR HONOR, IS THAT YOU TAKE OUT THE PHRASE IN
20 THE INSTRUCTION THAT IT WAS PLAINTIFFS' COUNSEL'S QUESTIONING.
21 BECAUSE I'VE GAVE GIVEN YOU A GOOD FAITH ANSWER. I'M TELLING
22 YOU THAT'S WHAT I WAS GETTING AT.

23 THE TRUTH IS --

24 **THE COURT:** I'M GOING TO CHANGE IT TO SAY:

25 "QUESTIONS WERE ASKED."

1 **MR. HUMMEL:** "QUESTIONS WERE ASKED."

2 THANK YOU, YOUR HONOR. THAT'S ALL I WANTED.

3 **MR. KESSLER:** YOUR HONOR, I WOULD NOTE FOR THE RECORD
4 THAT MR. HUMMEL -- AND I'M READING FROM THE TRANSCRIPT AT
5 2252-14 -- SPOKE ABOUT THE NFLPA'S POWER IN CONNECTION WITH THE
6 ACTIVE PLAYERS AFTER ASKING MR. NOLL TO ASSUME THERE'S A
7 RELEVANT ECONOMIC MARKET, AND THAT THERE WERE NO OTHER
8 ALTERNATIVES.

9 YOUR HONOR'S INTERPRETATION OF HIS QUESTION WERE VERY
10 REASONABLE AND FAIR. AND THE JURY WOULD HAVE THE SAME
11 IMPRESSION, WHICH IS WHY THE INSTRUCTION IS NECESSARY.

12 **THE COURT:** WELL, I THINK THE SUBSTANCE -- I'M JUST
13 GOING TO SWITCH THAT PART, BECAUSE QUESTIONS WERE ASKED. I
14 THINK THAT'S -- I DID ASK ONE OF THE QUESTIONS, BUT IT WAS
15 BECAUSE THAT'S WHAT I THOUGHT WERE YOU GETTING AT.

16 **MR. HUMMEL:** BUT I WASN'T.

17 **THE COURT:** WELL, THEN, YOU BETTER STOP USING WORDS
18 LIKE "MARKET POWER."

19 **MR. HUMMEL:** NO.

20 **THE COURT:** "LEVERAGE."

21 **MR. HUMMEL:** NO. BECAUSE THAT'S --

22 **THE COURT:** YOU USED THOSE TERMS.

23 **MR. HUMMEL:** -- ABSOLUTELY RIGHT. AND THAT'S WHAT
24 THEY HAVE OVER ACTIVE PLAYERS. AND THEY HAVE LICENSEES.

25 OH, MR. KESSLER, YOU KNOW WHAT? THEY HAD TO COME TO

1 THEM. THAT WAS MY ONLY POINT.

2 I APPRECIATE YOU CHANGING THE INSTRUCTION, YOUR
3 HONOR.

4 **THE COURT:** YOU WERE USING ANTITRUST AND MONOPOLY
5 TERMS TO MAKE SOME KIND OF OTHER POINT THAT YOU WERE TRYING TO
6 USE. AND YOU SUGGESTED TO THE JURY SOMETHING THAT WOULD HAVE
7 BEEN ILLEGAL, EVEN THOUGH YOU DIDN'T USE IT IN SO MANY TERMS.
8 OR IF IT WASN'T INTENTIONAL, IT HAD THE EFFECT.

9 **MR. HUMMEL:** ALL RIGHT, YOUR HONOR.

10 **THE COURT:** THIS LINE -- THIS CAUTIONARY INSTRUCTION
11 IS IN ORDER.

12 **MR. HUMMEL:** YOUR HONOR, AND I WANTED TO -- JUST TO
13 PRESERVE THE RECORD, I WANT TO NOTE OUR OBJECTION TO IT IN ANY
14 FORM, BUT I APPRECIATE YOUR HONOR'S CHANGES.

15 **THE COURT:** IN OUR NEXT TRIAL, IF THE NINTH CIRCUIT
16 DIRECTS US TO HAVE A NEW TRIAL, THEY WILL FIX ALL THIS UP, AND
17 THESE ISSUES WILL NOT BE BEFORE US.

18 ALL RIGHT. WHAT DO YOU HAVE TO SAY?

19 **MR. KESSLER:** I HAVE AN ADMINISTRATIVE MATTER IS THAT
20 I HAD ERRONEOUSLY MOVED IN TRIAL EXHIBIT 1263-108. I CALLED IT
21 "1268-108."

22 SO I'VE BEEN ADVISED BY YOUR STAFF THAT I SHOULD
23 FORMALLY STATE THAT IT WAS TRIAL EXHIBIT 12 --

24 **THE COURT:** I'M NOT GOING TO CHANGE A THING UNLESS
25 IT'S STIPULATED TO.

1 **MR. KESSLER:** WELL, THE STAFF ASKED US TO CORRECT IT,
2 BECAUSE I JUST MISREAD IT.

3 **MR. HUMMEL:** I'LL LOOK AT THIS.

4 YOUR HONOR, MAY I ASK ONE QUESTIONS ABOUT THE
5 GRAPHICS?

6 **THE COURT:** YES.

7 **MR. HUMMEL:** WE SPENT A LOT OF TIME DOING THIS. OUR
8 INTENT WAS NOT TO MISLEAD.

9 WOULD IT BE OKAY, IF WE PUT IT ON THE BOARD, IF AT
10 THAT TIME THERE'S AN OBJECTION, I READ THE REMAINDER OF THE
11 QUESTION?

12 **THE COURT:** NO, I'M NOT GOING TO HAVE YOU PUT UP
13 SOMETHING THAT YOU SHOULD HAVE KNOWN THAT WAS SO LIKELY TO DRAW
14 AN OBJECTION. I'M NOT GOING TO LET YOU --

15 **MR. KESSLER:** AND WE OBJECTED LAST NIGHT, YOUR HONOR,
16 AS SOON AS WE RECEIVED THEM. THEY COULD HAVE CHANGED IT LAST
17 NIGHT. THEY DELIBERATELY DIDN'T CHANGE IT, BECAUSE THEY
18 THOUGHT THEY COULD ARGUE --

19 **THE COURT:** YOU CAN PUT UP ON THE SCREEN THE ACTUAL
20 TRANSCRIPT. WE'VE GOT AN ELMO. IT WOULD BE EASY TO DO. YOU
21 COULD EVEN HIGHLIGHT THE PART YOU'RE INTERESTED IN AND NOT
22 HIGHLIGHT THE PART YOU'RE NOT INTERESTED IN, BUT ALL OF IT
23 OUGHT TO BE UP ON THE SCREEN --

24 **MR. HUMMEL:** ALL RIGHT.

25 **THE COURT:** -- SO THEY CAN SEE IT.

1 **MR. HUMMEL:** THANK YOU.

2 **MR. KESSLER:** I'M SORRY. MY LAST QUESTION, YOUR
3 HONOR, IS, WILL THIS BOARD -- OF COURSE IT WILL HAVE TO COME
4 DOWN, PROFESSOR NOLL'S, BECAUSE IT'S MISLEADING, AS YOUR HONOR
5 HAS RULED.

6 **THE COURT:** DID I RULE ON THAT?

7 **MR. PARCHER:** THAT'S NOT THE ONE.

8 **THE COURT:** I DON'T REMEMBER RULING ON THAT ONE.

9 **MR. KESSLER:** I'M SORRY. NO. NO. NO. SORRY.
10 THAT'S MY MISTAKE, YOUR HONOR.

11 **MR. PARCHER:** HE JUST WANTS TO SAY --

12 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY, WHICH
13 WAS NOT REPORTABLE.)

14 **MR. KESSLER:** MY QUESTION IS: IS YOUR HONOR
15 COMFORTABLE WITH CUTTING OFF THE VIEW OF THE ENTIRE AUDIENCE BY
16 SURROUNDING ALL -- I DON'T MIND PUTTING UP ONE BOARD AT A TIME,
17 OR SOMETHING, BUT I THINK IT'S UNFAIR. THE PUBLIC HAS A RIGHT
18 TO SEE THESE PROCEEDINGS.

19 **THE COURT:** ALL RIGHT.

20 **MR. KATZ:** WELL, YOU ASKED FOR THE GAG ORDER.

21 **THE COURT:** I'M SORRY. I'M SORRY. I HAVE AN IDEA,
22 THOUGH. WHY DON'T YOU LAWYERS GET A GIGANTIC MIRROR UP HERE,
23 AND THEN THE AUDIENCE CAN USE SOME KIND OF REVERSE GLASSES THAT
24 ALLOW IT TO BE READ.

25 LOOK. AS A CONCESSION TO -- I WANT THE LAWYERS -- AS

1 LONG AS IT'S FAIR GAME, YOU CAN SURROUND THAT JURY BOX. AND AS
2 LONG AS THEY CAN'T TELL WHAT YOU HAD FOR BREAKFAST, YOU CAN
3 SURROUND THE JURY BOX WITH ANY KIND OF DEMONSTRATIVES YOU WANT.

4 I WANT TO GIVE YOU AS MUCH OPPORTUNITY TO ARGUE
5 FAIRLY. AND THIS IS FAIR ARGUMENT TO PUT UP THESE --

6 **MR. PARCHER:** THE WHOLE THING ABOUT PUTTING IT THERE
7 IS -- I DON'T WANT TO MAKE COMPARISONS -- BUT IN THE SOUTHERN
8 DISTRICT, WHICH I KNOW IS NOT NEARLY AS GOOD AS THE NORTHERN
9 DISTRICT OF CALIFORNIA, I UNDERSTAND THAT --

10 **THE COURT:** I'M GOING TO GET A COPY OF THE TRANSCRIPT
11 AND SEND THAT TO --

12 **MR. PARCHER:** I LEARNED THAT FROM MY PAL AND OTHER
13 PEOPLE. YOU KNOW WHAT OUR PROBLEMS ARE THERE. WE GET TO ASK
14 THE QUESTIONS BACK THERE.

15 I HAVE A HERKY-JERKY WAY OF DOING THINGS THAT EVEN
16 MR. KESSLER SAID:

17 "LOOK AT HIM WAVING HIS ARMS."

18 AND ALL OF THAT, YOU KNOW? MY MOTHER DIDN'T BRING ME
19 UP THAT WAY. SO I TRIED TO PUT IT IN A PLACE WHERE IT WOULD BE
20 A SMOOTHER DELIVERY.

21 AND HE'S LIKE A CHOREOGRAPHER. HE'S NOT ONLY THE
22 DEFENSE COUNSEL, HE'S A CHOREOGRAPHER. HE'S A DIRECTOR. YOU
23 KNOW, HE'S AN ASSISTANT JURIST.

24 **THE COURT:** WHO IS?

25 **MR. PARCHER:** MR. KESSLER.

1 **THE COURT:** WHAT ARE YOU?

2 **MR. PARCHER:** WHAT AM I?

3 **MR. KESSLER:** RINGMASTER, YOUR HONOR.

4 (LAUGHTER)

5 **MR. PARCHER:** 3,000 MILES FROM HOME. A STRANGER IN A
6 FOREIGN LAND, YOU KNOW.

7 **THE COURT:** NOW, AS LONG AS THE CHARTS ARE NOT
8 MISLEADING, I ENCOURAGE IT. I THINK IT HELPS TO MAKE THE
9 ARGUMENT MOVE FASTER. THIS IS LIKE A STAGED PERFORMANCE. WE
10 HAVE TWO GOOD ACTORS HERE.

11 **MR. PARCHER:** ADVOCATES. ADVOCATES.

12 **MR. KESSLER:** YOUR HONOR, WE HAVE A STIPULATION FROM
13 PLAINTIFFS.

14 MR. HUMMEL AGREES THE CORRECT TRIAL EXHIBIT THAT
15 SHOULD HAVE BEEN ENTERED IS 1263-108. 1268-108 SHOULD NOT HAVE
16 BEEN ENTERED. THAT WAS A DIFFERENT EXHIBIT.

17 **THE COURT:** DAWN, PLEASE MAKE THAT CHANGE.

18 **THE CLERK:** OKAY.

19 (TRIAL EXHIBIT 1263-108 RECEIVED IN EVIDENCE AND
20 1268-108 WAS WITHDRAWN.)

21 **MR. PARCHER:** I HAVE TWO REQUESTS. PLEASE DON'T
22 SHOOT ME AFTER I ASK THEM, BECAUSE I NEED TO GIVE THE
23 SUMMATION.

24 OKAY. THE FIRST IS --

25 **THE COURT:** I'LL SHOOT YOU AFTERWARDS.

1 **MR. PARCHER:** I JUST GO LIKE THIS (INDICATING) ON
2 THESE TWO QUESTIONS.

3 THE FIRST QUESTION IS: CAN WE HAVE A VERY FEW
4 MINUTES TO SEE IF WE CAN'T STRAIGHTEN OUT THE PROBLEM THAT WE
5 CAUSED WITH THE GRAPHICS? THAT'S QUESTION ONE.

6 **THE COURT:** HOW MANY IS "A VERY FEW MINUTES"?

7 **MR. HUMMEL:** FIVE MINUTES.

8 **THE COURT:** ALL RIGHT. FIVE MINUTES. I'LL GIVE YOU
9 FIVE MINUTES.

10 **MR. PARCHER:** THAT'S NICE. THANK YOU.

11 AND THE SECOND IS -- HERE IT COMES -- I GOT A LOT OF
12 GROUND TO COVER. AND I DID A LOT OF EDITING ON THE GROUND.
13 AND WE'VE BEEN HERE -- I DON'T KNOW HOW LONG THE TRIAL HAS
14 BEEN. I'M SAYING A MONTH, BECAUSE I'VE BEEN HERE ABOUT A
15 MONTH.

16 WOULD IT BE VERY OFFENSIVE TO YOUR HONOR IF WE TOOK
17 AN EXTRA TEN MINUTES IF -- IF WE NEEDED IT? I MEAN, IS IT SO
18 IMPORTANT?

19 **THE COURT:** IT IS IMPORTANT. YOU KNOW, I HAVE TO --
20 I WANT TO GET THE CASE TO THE JURY TODAY. I HAVE TO TAKE INTO
21 ACCOUNT, WHEN I HAVE A COURT REPORTER, BREAKS THAT ARE
22 NECESSARY.

23 I HAVE WORKED MY WAY THROUGH THIS IN MANY TRIALS, AND
24 I'M TELLING YOU, THE EXTRA TEN MINUTES IS GOING TO MEAN MORE
25 BREAKS. IT DOESN'T TRANSLATE THAT -- TEN MINUTES EXTRA ON EACH

1 SIDE TRANSLATES TO AN HOUR ADDITIONAL.

2 **MR. PARCHER:** I JUST NEED TO SAY, JUDGE, THAT
3 MR. KESSLER WHO IS A VERY FINE LAWYER, EVEN IF HE AGGRAVATES ME
4 SOMETIMES, MR. KESSLER HAS AN EASIER PRESENTATION. NOT A MORE
5 EFFECTIVE PRESENTATION. I DON'T THINK HE HAS A BETTER CASE.

6 **THE COURT:** HOW COULD THAT BE?

7 **MR. PARCHER:** BECAUSE HE'S GOT A SIMPLER THING. ALL
8 HE'S GOING TO SAY IS:

9 "THESE GUYS ARE WORTHLESS, WORTHLESS, WORTHLESS.
10 SEPARATE THEM, SEPARATE THEM, SEPARATE THEM. EVERYBODY KNOWS
11 YOU WANT TO TAKE THE MONEY FROM THE ACTIVES. LET'S GO HOME."
12 YOU KNOW? "LET'S TRY TO CATCH THE PLANE TO NEW YORK QUICKLY."

13 **THE COURT:** ALL YOURS IS GOING TO BE IS:

14 "DOUBLE-TALK, DOUBLE-TALK, DOUBLE-TALK."

15 **MR. PARCHER:** NO, I'M GOING RIGHT TO THE GLA. I
16 HEARD THE COURT.

17 **THE COURT:** "DOUBLE-TALK, DOUBLE-TALK, GLA, GLA,
18 DOUBLE-TALK, DOUBLE-TALK."

19 **MR. PARCHER:** NO, "DOUBLE-TALK" --

20 **THE COURT:** HE'LL COME BACK AND SAY:

21 "WORTHLESS, WORTHLESS, WORTHLESS."

22 AND YOU'LL COME BACK AND SAY:

23 "GLA, DOUBLE-TALK."

24 **MR. KESSLER:** YOUR HONOR, I DON'T THINK THERE SHOULD
25 BE ANY MORE TIME ALLOTTED.

1 **MR. PARCHER:** OF COURSE HE DOESN'T.

2 **MR. KESSLER:** AND I'M GOING TO HAVE, FRANKLY, THE
3 GREATER BURDEN, BECAUSE HE'S GOING TO MAKE EVERY WILD
4 ALLEGATION UNDER THE SUN, AND I'M GOING TO HAVE TO DEAL WITH IT
5 IN MY TIME, WHICH I WILL.

6 **MR. PARCHER:** WOW.

7 **THE COURT:** AN HOUR AND 20 MINUTES PER SIDE IS IT.

8 **MR. PARCHER:** OKAY. BUT LET ME UNDERSTAND THIS,
9 THOUGH. IF I TAKE MORE THAN THE HOUR, IT JUST COMES OFF THE
10 20, RIGHT?

11 **THE COURT:** RIGHT.

12 **MR. PARCHER:** THAT'S NUMBER ONE. AND NUMBER TWO, IF
13 I DON'T GET TO EVERYTHING I WANT TO IN AN HOUR, SO LONG AS
14 BEFORE I SIT DOWN I TELL THE JURY WHERE I'M GOING LATER SO THAT
15 HE'S'S NOT SURPRISED, BECAUSE HE HAS GOT ALL MY DOUBLE-TALK
16 THINGS, YOU KNOW.

17 **THE COURT:** YOU HAVE TO AT LEAST TOUCH ON THE ISSUE.
18 YOU DON'T HAVE TO SAY IT IN THE SAME WORDS, BUT YOU HAVE TO
19 GIVE FAIR NOTICE.

20 **MR. PARCHER:** RIGHT. THAT'S WHAT I MEAN.

21 **THE COURT:** FOR EXAMPLE, IF YOU JUST SAY:

22 "AND YOU GOT TO GIVE THEM PUNITIVE DAMAGES," THAT
23 MAY NOT BE ENOUGH.

24 YOU'VE GOT TO AT LEAST HAVE A COHERENT 30-SECOND
25 ARGUMENT THAT PUTS MR. KESSLER ON -- FOR EXAMPLE, ON PUNITIVE

1 DAMAGES, TO USE THAT AS AN EXAMPLE, YOU CAN SAY:

2 "IN THIS CASE YOU OUGHT TO AWARD, IN ADDITION,
3 PUNITIVE DAMAGES, BECAUSE THE CONDUCT IN THIS CASE WAS" -- AND
4 THEN, WHATEVER THE STANDARD IS.

5 AND THEN SAY:

6 "AT THE END OF THE CASE, YOU TELL US WHETHER OR
7 NOT YOU AGREE WITH THAT."

8 THAT WOULD BE ENOUGH.

9 AND THEN, IF MR. KESSLER WANTED -- THEN, YOU COULD
10 COME BACK, AND YOU COULD ADD 10 OR 12 SENTENCES WHY PUNITIVES
11 WOULD BE IN ORDER. THAT WOULD BE OKAY.

12 BUT WHAT YOU CAN'T DO IS JUST SAY:

13 "AND ON MY NEXT PRESENTATION I'M GOING TO ADDRESS
14 YOU ON PUNITIVE DAMAGES."

15 **MR. PARCHER:** LET ME GIVE FROM MY POINT OF VIEW A
16 MORE REALISTIC EXAMPLE. REMEMBER, I'M CONCERNED ABOUT TIME.
17 THAT'S THE ONLY REASON FOR BRINGING IT UP.

18 MR. KESSLER HAS EVERY GRAPHIC THAT WE THOUGHT WE WERE
19 GOING TO USE ON DOUBLE-TALK, AND SOME THAT MAYBE WE'LL END UP
20 NOT USING, YOU KNOW, BECAUSE OF, YOU KNOW, SOME OF THE VALID
21 POINTS HE MAY BE MAKING HERE.

22 HE'S NOT SANDBAGGED IF I SAY TO THIS JURY, IF I RUN
23 OUT OF TIME:

24 "I'M GOING TO TELL YOU ABOUT ALL THE DOUBLE-TALK
25 THAT WAS DONE BY WITNESS A AND B AND C AND D AND Q."

1 HE KNOWS EXACTLY WHAT I'M TALKING ABOUT, BECAUSE
2 THEY'RE IN THE GRAPHICS.

3 **THE COURT:** IF YOU BRING UP THE GENERAL SUBJECT OF
4 DOUBLE-TALK --

5 **MR. PARCHER:** RIGHT.

6 **THE COURT:** -- AND LET'S SAY THAT YOU HAVE FIVE
7 WITNESSES THAT YOU WANT TO PRESENT ON THAT. AND LET'S SAY THAT
8 YOU PRESENT THREE OF THEM. AND THEN, IN YOUR REBUTTAL YOU WANT
9 TO PRESENT TWO MORE, THAT'S OKAY, BECAUSE YOU BROUGHT UP THE
10 GENERAL SUBJECT OF DOUBLE-TALK.

11 **MR. KESSLER:** YOUR HONOR, THE PROBLEM I HAVE WITH
12 THAT --

13 **THE COURT:** I'M SORRY. THAT IS THE WAY IT WORKS. HE
14 IS ENTITLED TO BRING UP NEW EVIDENCE IN HIS REBUTTAL.

15 **MR. KESSLER:** I UNDERSTAND THAT, YOUR HONOR. JUST
16 GIVE ME A MINUTE, PLEASE.

17 I DON'T THINK SIMPLY SAYING THE WORDS "DOUBLE-TALK"
18 IS SUFFICIENT. IF HE AT LEAST MENTIONS THE WITNESSES, WHAT
19 THEY ARE, AND I'LL TELL YOU WHY. HE GAVE ME 70 SLIDES LAST
20 NIGHT.

21 HE CLEARLY IS GOING TO USE, I DON'T KNOW, 15, 20 IN
22 HIS OPENING. AND THEN, I HAVE TO ALLOCATE MY TIME.

23 SO HE SHOULDN'T BE ABLE -- THAT IS SANDBAGGING TO
24 MAKE ME SAY I'M GOING TO DEAL WITH EVERY SLIDE HE DID JUST
25 BECAUSE HE SAID THE WORD "DOUBLE-TALK" AND USED MY TIME.

1 AND THE THOUGHT THAT HE'LL DO IT AT THE END AND
2 MISLEAD THE JURY, IT'S NOT FAIR.

3 **THE COURT:** NO. LOOK. PERHAPS THERE'S A MINOR
4 DEGREE OF UNFAIRNESS THERE, BUT AS LONG AS THE GENERAL TOPIC
5 AND SOME EVIDENCE IS PRESENTED, HE CAN THEN GO BACK TO IT WITH
6 ADDITIONAL EVIDENCE ON THAT SAME THEME IN HIS REBUTTAL. THAT
7 IS OKAY. IT'S DONE IN EVERY CASE.

8 AND WHAT YOU HAVE TO SAY TO MEET THAT IS:

9 "MR. PARCHER IS GOING TO GET THE LAST WORD. I
10 DON'T KNOW WHAT HE'S GOING TO SAY. HE'S GOING TO BRING UP
11 THINGS" --

12 **MR. PARCHER:** DON'T TELL HIM HOW TO SUM UP, JUDGE.
13 COME ONE.

14 **THE COURT:** "AND YOU, IN THE JURY ARE ROOM, ARE GOING
15 TO HAVE TO SAY 'WHAT WOULD MR. KESSLER HAVE SAID?'"

16 **MR. KESSLER:** THANK YOU, YOUR HONOR. I UNDERSTAND.

17 **THE COURT:** THAT HAPPENS IN EVERY SINGLE TRIAL.

18 **MR. KESSLER:** I UNDERSTAND.

19 **THE COURT:** THERE'S THIS DEGREE OF UNFAIRNESS,
20 PERHAPS, BUT THAT'S THE WAY IT WORKS.

21 YES.

22 **MR. KATZ:** YOUR HONOR, ON A LIGHTER NOTE, WE HAVE A
23 NUMBER OF DISTINGUISHED GUESTS IN THE COURTROOM TODAY.

24 I CAN'T MENTION THEM ALL BY NAME, BUT I DO WANT TO
25 MENTION THAT ONE OF MR. ADDERLEY'S TEAMMATES TRAVELED HERE FROM

1 ALABAMA.

2 **THE COURT:** WHERE IS HE?

3 **MR. KATZ:** MR. BART STARR, MVP OF TWO SUPER BOWLS AND
4 A HALL OF FAMER.

5 **THE COURT:** OKAY. WELCOME TO OUR COURTROOM,
6 MR. STARR.

7 **MR. KATZ:** AND ALSO, YOUR HONOR, MY MVP'S OF MY LIFE,
8 MY WIFE AND TWO OF MY SONS, ARE HERE TODAY.

9 **THE COURT:** WHERE ARE THEY? OKAY.

10 **MR. KATZ:** THANK YOU, YOUR HONOR.

11 **THE COURT:** ALL RIGHT. WELL, WELCOME TO ALL OF YOU.
12 I'M GLAD YOU'RE HERE.

13 OKAY. WHAT ELSE?

14 **MR. HUMMEL:** YOUR HONOR?

15 **THE COURT:** MR. HUMMEL.

16 **MR. HUMMEL:** THANK YOU. JUST STAGECRAFT.

17 YOUR HONOR IS PARTICULAR ABOUT WHERE BOARDS GO. I
18 WANTED TO PUT ONE HERE.

19 **THE COURT:** THAT'S FINE.

20 **MR. HUMMEL:** AND THE REST HERE, IS THAT OKAY WITH
21 YOU, YOUR HONOR? THANK YOU.

22 **THE COURT:** JUST AS LONG AS YOU MOVE IT WHEN THE JURY
23 GOES IN AND OUT.

24 **MR. HUMMEL:** WILL DO, SIR. THANK YOU.

25 **MR. KESSLER:** FINALLY, YOUR HONOR, DID WE GET ANY

1 FURTHER INFORMATION AS TO WHETHER THE JURY IS DELIBERATING THIS
2 AFTERNOON, SO PEOPLE CAN PLAN THEIR SCHEDULES?

3 **THE CLERK:** 4:00 P.M.

4 **THE COURT:** 4:00 P.M.

5 ALL RIGHT. DAWN IS SAYING EXHIBIT 2370 IS BEING
6 WITHDRAWN TOTALLY?

7 **MR. KESSLER:** WE KNOW NOTHING ABOUT THIS, YOUR HONOR.

8 **THE CLERK:** THAT'S ACTUALLY ANOTHER DOCUMENT NUMBER.

9 **MR. HUMMEL:** YES, 2370 IS WITHDRAWN.

10 **THE COURT:** ALL RIGHT. IT'S WITHDRAWN.

11 (TRIAL EXHIBIT 2370 WAS WITHDRAWN.)

12 (TRIAL EXHIBIT 2370 WAS WITHDRAWN.)

13

14 **MR. HUMMEL:** THANK YOU.

15 **THE COURT:** JUST SHOW ON THE LIST THAT IT WAS

16 WITHDRAWN.

17 **THE CLERK:** THANKS.

18 **MR. PARCHER:** I HAVE A QUICK ADMINISTRATIVE QUESTION,

19 JUDGE.

20 **THE COURT:** ALL RIGHT.

21 **MR. PARCHER:** IF WE'RE HERE ON MONDAY -- AND IT'S
22 REASONABLE TO ASSUME WE MAY BE -- I'M A SPECIAL MASTER IN SOME
23 CASE BACK IN MANHATTAN, LOTS OF PEOPLE. AND I NEED TO USE A
24 PHONE FOR A CONFERENCE CALL. IS THERE A PHONE -- I MEAN, I
25 WANT TO BE IN THE COURTROOM, BECAUSE YOU'VE GOT THE TWO-MINUTE

1 RULE, WHICH I UNDERSTAND.

2 **THE COURT:** WE WILL CERTAINLY WORK SOMETHING OUT. WE
3 DO HAVE THE ATTORNEYS' LOUNGE DOWN THERE THAT HAS PHONES.

4 **MR. PARCHER:** THEN, THAT'S FINE.

5 **THE COURT:** ESPECIALLY FOR THAT. IT'S LIKE A RED
6 CARPET ROOM DOWN THERE. I THINK YOU'LL FIND IT WORKS GOOD.

7 **MR. PARCHER:** THEY LET PEOPLE FROM THE SOUTHERN
8 DISTRICT IN THERE?

9 **THE COURT:** WELL, WITH A COURT ORDER I GUESS IT CAN
10 BE ARRANGED.

11 (LAUGHTER)

12 **MR. KATZ:** ONE FINAL THING, YOUR HONOR, AND THAT IS
13 YOUR HONOR SAID THE OTHER DAY THAT WE WOULD GO INTO A PUNITIVE
14 DAMAGES HEARING WITHIN 15 MINUTES OR SO OF VERDICT, IF THAT WAS
15 APPROPRIATE. AND WE WOULD PROBABLY PUT MR. BERTHELSEN ON THE
16 STAND, IF THAT'S THE CASE. AND WE WOULD LIKE YOUR HONOR TO
17 ORDER MR. BERTHELSEN TO REMAIN.

18 **THE COURT:** MR. BERTHELSEN, YOU'VE GOT TO REMAIN IN
19 THAT EVENT.

20 OKAY. BUT THE ONLY TOPIC WOULD BE THE FINANCIAL
21 CONDITION.

22 **MR. KATZ:** RIGHT.

23 **THE COURT:** WE WOULDN'T BE GETTING BACK INTO ISSUES
24 OF REPREHENSIBLE CONDUCT.

25 **MR. KATZ:** I UNDERSTAND, YOUR HONOR.

1 **THE COURT:** ALL RIGHT.

2 **MR. KESSLER:** YOUR HONOR, I HAVE TO TELL
3 MR. BERTHELSEN. HE IS THE EXECUTIVE DIRECTOR OF THE UNION. I
4 DON'T KNOW HOW MANY DAYS THE JURY IS GOING TO SIT. I DON'T
5 OBJECT TO HIM COMING BACK, FOR HIM TO HAVE TO STAY, IF IT GOES
6 ON LONGER, IT REALLY COULD DISRUPT THE UNION'S BUSINESS AT SOME
7 POINT WITH RESPECT TO THAT.

8 FOR THEM TO RECALL HIM AGAIN FOR SOMETHING ELSE,
9 PERHAPS YOUR HONOR WOULD CONSIDER THAT IF HE HAS A NEED TO BE
10 AWAY HE WOULD COME BACK THE NEXT DAY, BUT HE DOESN'T
11 NECESSARILY HAVE TO BE HERE EACH DAY.

12 I JUST RAISE IT, YOUR HONOR. I HAVEN'T SPOKEN TO HIM
13 YET. BUT HE HAS SUBSTANTIALLY BEEN HERE, WHICH OBVIOUSLY MEANT
14 HE'S NOT BE BEEN DOING A LOT OF THINGS HE NEEDS TO DO FOR THE
15 UNION.

16 **THE COURT:** ALL RIGHT. I WILL VACATE THE ORDER AND
17 NOT RULE ON THIS YET.

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

19 **THE COURT:** WE WILL TAKE THAT UP LATER.

20 WE HAVE SOME TIME WHILE THE JURY IS DELIBERATING.

21 BUT DON'T LEAVE TOWN, MR. BERTHELSEN, UNTIL I GIVE
22 YOU PERMISSION TO.

23 ALL RIGHT. WE'LL TAKE FIVE MINUTES SO YOU CAN
24 ARRANGE YOUR BOARDS, AND THEN WE'LL BRING IN OUR JURY FOR THE
25 CLOSING ARGUMENTS.

1 THE COURT REPORTER SAYS YOU BETTER KEEP YOUR VOICES
2 UP IF YOU WANT YOUR THING TO BE TRANSCRIBED, OTHERWISE I'M
3 GOING TO INSTRUCT THE COURT REPORTER TO INTERRUPT YOU AND SAY
4 SHE CAN'T HEAR YOU.

5 SO YOU PLEASE DO THAT, MADAM REPORTER. AND IF THESE
6 LAWYERS ARE NOT COURTEOUS TO YOU, AND YOU JUST SAY SO RIGHT
7 THERE IN FRONT OF THE JURY, AND LET THE JURY TAKE THAT INTO
8 ACCOUNT.

9 (RECESS WAS TAKEN.)

10 **THE COURT:** REMAIN SEATED. LET'S GO TO WORK. THANK
11 YOU.

12 BE SEATED, PLEASE.

13 ARE WE READY TO BRING IN THE JURY AND PROCEED WITH
14 CLOSING ARGUMENTS?

15 **MR. PARCHER:** YES, YOUR HONOR.

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

17 **THE COURT:** OKAY. LET'S DO SO.

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

19 **THE COURT:** WELCOME BACK, EVERYONE. PLEASE HAVE A
20 SEAT.

21 WE'RE ABOUT TO HAVE OUR CLOSING ARGUMENTS. LET ME
22 JUST TAKE A MOMENT TO TELL YOU HOW THAT'S GOING TO WORK.

23 I THINK I TOLD YOU THE OTHER DAY ROUGHLY HOW LONG IT
24 WOULD TAKE. AND EACH SIDE GETS AN HOUR AND 20 MINUTES TOTAL
25 ARGUMENT TIME.

1 AND IN OUR SYSTEM, THE PLAINTIFF, OF COURSE, HAS THE
2 BURDEN OF PROOF, SO THERE'S A SPECIAL RULE THAT GIVES THE
3 PLAINTIFF THE OPPORTUNITY TO OPEN THE CLOSINGS, WHICH SOUNDS
4 CONTRADICTORY, TO START, MAKE THEIR MAIN ARGUMENT.

5 THEN, WE HEAR FROM THE DEFENSE. AND THEN, THE
6 PLAINTIFF GETS TO COME BACK AND MAKE A REBUTTAL. BUT THE GRAND
7 TOTAL OF TIME FOR BOTH SIDES IS STILL AN HOUR AND 20 MINUTES.

8 SO YOU ARE GOING TO HEAR THREE CHAPTERS, PLAINTIFF,
9 DEFENDANT, PLAINTIFF. OKAY?

10 AND THEN, AFTER ALL THAT'S DONE, I HAVE THE DUTY TO
11 TELL YOU WHAT THE LAW IS THAT GOVERNS THIS CASE. AND THE
12 LAWYERS AND I HAVE WORKED HARD TO COME UP WITH SOME
13 INSTRUCTIONS THAT WILL TELL YOU WHAT THE LAW IS.

14 AND THEN, OF COURSE, IT WILL BE YOUR DUTY TO GO INTO
15 THE JURY ROOM AND TALK, TALK, TALK, NOT BEING ALLOWED TO DO
16 THAT ABOUT THE CASE, BUT THEN IT WILL BE YOUR DUTY TO DO THAT
17 AND TO DECIDE THE CASE.

18 SO THAT'S WHERE WE ARE TODAY. NOW, YOU KNOW, MANY
19 TIMES DURING THE TRIAL I TOLD YOU THAT WHAT THE LAWYERS SAY IS
20 NEVER, NEVER, NEVER EVIDENCE. NEVER.

21 THE EVIDENCE IN THE CASE IS WHAT THE WITNESSES SAY
22 FROM THE WITNESS STAND AND WHAT THE DOCUMENTS SAY THAT YOU HAVE
23 IN THE JURY ROOM.

24 IN THE CLOSING ARGUMENTS, THOUGH, IT IS ARGUMENT.
25 AND IT'S PERFECTLY LEGITIMATE AND PROPER AND TIME HONORED FOR

1 THE LAWYERS TO BE AS EXERCISED AS THEY WANT TO GET, TO MAKE
2 WHATEVER ARGUMENTS THAT THEY WOULD LIKE TO MAKE, PUT THE
3 EVIDENCE TOGETHER IN WAYS THAT MAYBE YOU HAVEN'T SEEN IT IN
4 THAT LIGHT YET.

5 IT'S PERFECTLY OKAY. BUT ALWAYS KEEP IN MIND THAT
6 YOU NEED TO DECIDE THE CASE BASED ON THE EVIDENCE IN THE CASE.

7 I HAVE ENCOURAGED THE LAWYERS TO -- THEY CAN'T DO
8 THIS IN EVERY INSTANCE, BUT ON THINGS THEY BELIEVE TO BE OF
9 UTMOST IMPORTANCE TO PUT IT UP ON THE BOARD, LIKE SOME OF THE
10 ONES YOU SEE HERE, AND ACTUALLY QUOTE THE EVIDENCE OR PUT IT UP
11 ON THE SCREEN SO YOU CAN SEE FOR YOURSELF OR BE REMINDED FOR
12 YOURSELF WHAT THE WITNESSES SAID OR WHAT THE DOCUMENTS SAID.

13 THEY WON'T BE ABLE TO DO THAT IN EVERY CASE. AND IF
14 YOU REMEMBER THE EVIDENCE IN A WAY THAT'S DIFFERENT FROM THE
15 WAY THE LAWYERS ARE PRESENTING IT, OF COURSE YOUR MEMORY ALWAYS
16 CONTROLS OVER WHAT THE LAWYERS SAY.

17 SO I GIVE YOU THAT WORD OF CAUTION. THIS APPLIES TO
18 BOTH SETS OF LAWYERS. WE HAVE AN EXCELLENT, EXCELLENT SET OF
19 LAWYERS ON BOTH SIDES TO MAKE THESE ARGUMENTS. WE'RE
20 PRIVILEGED TO HAVE THAT.

21 SO WITH THAT WORD OF CAUTION, I AM NOW GOING TO YIELD
22 THE FLOOR TO MR. PARCHER, WHO WILL MAKE THE CLOSING ARGUMENT
23 FOR THE PLAINTIFFS.

24 MR. PARCHER.

25

CLOSING ARGUMENT

1
2 **MR. PARCHER:** THANK YOU SO MUCH, YOUR HONOR.

3 IF COURT PLEASES, LADIES AND GENTLEMEN OF THE JURY,
4 MR. KESSLER AND HIS TEAM, MY CLIENTS, SOME OF MY CLIENTS, I
5 NEED TO SAY THAT IT'S A PRIVILEGE FOR ME TO BE MAKING THIS
6 ARGUMENT ON BEHALF OF THE PLAINTIFFS.

7 YOU KNOW, FOR ME, FOR ME, SIMILARLY TO THE COURT, THE
8 JURY SYSTEM IS ONE OF THE GREATEST THINGS AMERICA HAS, YOU
9 KNOW.

10 SO I'M GOING TO TAKE MY BEST SHOT AT TELLING YOU WHAT
11 OUR CASE IS. I'M SURE MR. KESSLER IS GOING TO DO THE SAME.
12 AND THE JUDGE WILL GIVE YOU THE LAW, AND THEN IT'S IN YOUR
13 HANDS, WHICH IS THE WAY IT SHOULD BE.

14 IF I PERSUADE YOU THAT WE PROVED OUR CASE, I'M SURE
15 YOU'LL COME THROUGH. AND IF HE PERSUADES YOU THAT I HAVEN'T,
16 I'M SURE YOU'LL COME THROUGH, TOO. THAT'S THE WAY IT'S
17 SUPPOSED TO BE. I'M EASY WITH THAT.

18 SO HERE I GO.

19 I REPRESENT 2,062 RETIRED PLAYERS WHOSE CONTRACTUAL
20 RIGHTS HAVE BEEN BREACHED. THEIR AGENTS -- THAT'S THE
21 DEFENDANTS, IN MY ESTIMATION -- BREACHED ITS FIDUCIARY
22 OBLIGATIONS TOWARD THEM. I USED A HARSH WORD. I HAVE GOT TO
23 USE IT AGAIN: DESPICABLY. I USED IT IN THE OPENING.

24 THEY LIED. THEY CHEATED. THEY TRICKED. AND THEY
25 DEMEANED THEM.

1 FOR ALL THIS THEY ARE SEEKING THE MONEY TO WHICH THEY
2 ARE ENTITLED TO. IT'S THE GLA. IT'S THE GLA. IT'S THE GLA.
3 AND PUNITIVE DAMAGES TO PUNISH THE DEFENDANTS FOR THEIR
4 CONDUCT.

5 NOW, THE GLA, WHICH IS UP HERE ON THE BOARD, WE CAN
6 FLASH IT ON THE SCREEN. THE GLA IS CLEAR, DOUG ALLEN -- DOUG
7 ALLEN ACKNOWLEDGED IT WAS CLEAR. HE HAD A DIFFERENT VERSION OF
8 THE CLARITY THAN OUR SIDE DOES, BUT WHAT I'M COUNTING ON IS
9 THAT WITH ALL THE TESTIMONY THAT'S BEEN GIVEN HERE, THE JURY
10 WILL SEE ITS CLARITY, BECAUSE I PERSONALLY DON'T THINK IT'S A
11 COMPLICATED DOCUMENT AT ALL.

12 UNDER THE GLA, THE PLAINTIFFS WERE ENTITLED TO SHARE
13 EQUALLY, AN EQUAL SHARE OF GROUP LICENSING, BUT RECEIVED
14 NOTHING.

15 THAT'S MY CLUMSY DRAWING EVERYBODY HAD FUN WITH,
16 EXCEPT ME. YOU KNOW? 63/37/0. THEY RECEIVED NOTHING.

17 THE LICENSEES, OF WHICH THERE ARE 96 INVOLVED IN THIS
18 CASE, REPEATEDLY REQUESTED AND OBTAINED RIGHTS TO SIX OR MORE
19 CURRENT OR FORMER PLAYERS. AND UNDER THE GLA, IF SIX OR MORE
20 CURRENT OR FORMER PLAYERS ARE LICENSED, MY CLIENTS ARE ENTITLED
21 TO THEIR SHARE OF THE MONEY.

22 SO WE SAY THE DEFENDANTS BREACHED THE CONTRACT.

23 NOW, I WANT TO BE CLEAR ABOUT THIS. THE FACT SOME OF
24 THE SIX OR MORE MAY HAVE BEEN RETIRED PLAYERS WHO DID NOT SIGN
25 GLA'S, AND SOME WERE PLAYERS WHO DID, IS OF NO CONSEQUENCE

1 WHATSOEVER.

2 YOU'LL NEVER SEE THE WORD "AD HOC" IN THE GLA. THAT
3 WAS A WORD THAT WAS INVENTED BY THE DEFENDANTS TO THROW YOU
4 WAY, WAY, WAY OFF THE TRACK.

5 WHAT THE CONTRACT SAYS IS "SIX OR MORE CURRENT OR
6 FORMER PLAYERS." A FORMER PLAYER IS A FORMER PLAYER WHETHER HE
7 SIGNED A GLA AGREEMENT, WHETHER HE GOT WHAT THEY CALL AN "AD
8 HOC AGREEMENT," WHICH IS AN INDIVIDUAL CONTRACT, OR EVEN IF HE
9 WAS AN ACTIVE FELLOW THAT DIDN'T SIGN THE GLA. SIX OR MORE IS
10 SIX OR MORE.

11 THE WORD "AD HOCS" IS AN ARTIFICIAL CONSTRUCT OF THE
12 DEFENDANTS IN AN ATTEMPT TO CONFUSE THE CLARITY OF THE GLA.

13 ON THE FIDUCIARY SIDE, WHAT I WOULD LIKE TO SAY IS
14 THAT PLAYERS INC WAS THE TRUSTED AGENT, THE LICENSING AGENT
15 REPRESENTING THE CLASS.

16 NOW, A TRUSTED AGENT REPRESENTED THEM. THEY SAID
17 THEY WERE REPRESENTING THE 2100 PEOPLE. I DON'T HAVE TO SHOW
18 YOU ANY BULLETIN BOARDS OF THAT.

19 AS A TRUSTED AGENT REPRESENTING THEM, THE DEFENDANTS
20 OWED THE PLAINTIFFS A FIDUCIARY DUTY.

21 LOOK, I'M HERE AS AN AGENT OF THE PLAINTIFFS. I'M
22 THEIR LAWYER. I HAVE A DUTY NOT TO SELL THEM OUT DOWN THE
23 RIVER. I HAVE A DUTY TO DO MY BEST FOR THEM.

24 I HAVE A DUTY TO TRY AS HARD AS I POSSIBLY CAN TO
25 PERSUADE YOU IN THE JUSTICE OF THEIR CAUSE. THAT'S A

1 FIDUCIARY. THAT'S WHAT I SAID YOU'LL FIND -- I HOPE YOU'LL
2 FIND -- THAT THE DEFENDANTS WERE IN THIS CASE.

3 THE DEFENDANTS DID EVERYTHING IN THEIR POWER TO
4 DEPRIVE PLAINTIFFS OF THEIR JUST ENTITLEMENTS. AND WORSE THAN
5 THAT, WORSE THAN THAT, THEY PRETENDED TO BE DOING GOOD DEEDS.
6 THEY PRETENDED TO BE DOING GOOD DEEDS.

7 NO WORSE PERSON THAN A PERSON WHO PRETENDS TO BE YOUR
8 FRIEND, WHO PRETENDS TO BE YOUR ALLY, WHO PRETENDS TO BE ON
9 YOUR SIDE, AND THE TRUTH IS HE'S NOT AT ALL. HE'S NOT AT ALL.

10 MY CLIENTS, A BUNCH OF WHOM ARE OUT THERE, TRUSTED
11 THESE PEOPLE. AND THE DEFENDANTS ACTED ENTIRELY TO PROTECT
12 THEIR OWN INTERESTS TO THE DETRIMENT OF THE PLAINTIFFS BY
13 DOUBLE-TALK, WHICH I HOPE I GET TO IN THIS HOUR, DOUBLE-DEALING
14 AND DOUBLE STANDARDS.

15 THE DEFENDANTS BREACHED THEIR DUTY. THEY DID NOT
16 HONOR THEIR FIDUCIARY DUTY, AND HERE'S THE POINT: IT'S TIME
17 FOR THEM TO LIVE UP TO THE DEAL THEY MADE.

18 RIGHT? WHAT IT FINALLY COMES DOWN TO, AT THE BOTTOM
19 LINE, IS: A DEAL IS A DEAL. IF I SAID THE DEAL WAS THIS, THAT
20 IS WHAT THE DEAL IS. THE DEAL ISN'T "THIS," BUT YOU DON'T
21 REALIZE IT'S REALLY "THAT." IT'S TIME FOR THEM TO LIVE UP TO
22 THE DEAL THEY MADE.

23 LET'S GO TO THE GLA. IF YOU COULD BLOW IT UP. I
24 GUESS YOU GOT TO GO PARAGRAPH-BY-PARAGRAPH.

25 AND I DON'T WANT TO BE A GUY THRASHING AROUND NOW.

1 IF SIX OR MORE PRESENT OR FORMER PLAYERS' IMAGES ARE
2 UTILIZED, THEN THE PLAINTIFFS, ALL 2,062 OF THEM WHO SIGNED
3 GLA'S IN EFFECT FOR THE YEARS 2004 TO 2007, ARE ENTITLED TO
4 SHARE THE GROUP LICENSING REVENUE.

5 YOU GET ALL THESE EXPERTS UP HERE. I PERSONALLY
6 DON'T THINK AN EXPERT WAS AT ALL NECESSARY IN THIS CASE FOR
7 EITHER SIDE. THAT'S MY OWN OPINION.

8 YOU GET ALL THE EXPERTS UP HERE, AND THEY'RE USING
9 THE WORD "GROUP LICENSING REVENUE." GROUP LICENSING REVENUE,
10 IN OTHER WORDS, THE MONIES DERIVED FROM THE LICENSEES AND
11 RECEIVED BY PI. THEY ARE ENTITLED TO DIVIDE THAT MONEY UNDER
12 THE GLA WITH ALL ELIGIBLE NFLPA MEMBERS WHO SIGNED GLA'S.

13 VERY SIMPLY, A DOLLAR COMES IN. WHAT DID THE UNION
14 OR PI GIVE THE ACTIVE PLAYERS? OUR GUYS ARE ENTITLED -- EXCUSE
15 ME -- THE PLAINTIFFS ARE ENTITLED TO AN EQUAL SHARE.

16 NOW, LOOK. THERE'S BEEN SOME FIGHTING ABOUT THE WORD
17 "ELIGIBLE." TAKE A LOOK AT THE -- I GUESS IT'S THE FIFTH --
18 THE LAST PARAGRAPH THERE.

19 IF WE CAN GO DOWN TO -- WE HAVE "ELIGIBLE" IN IT.

20 (DOCUMENT DISPLAYED.)

21 THANK YOU.

22 WHAT DOES THE WORD "ELIGIBLE" MEAN? I WAS STUNNED --
23 I DON'T KNOW IF YOU WERE -- TO HEAR MR. ALLEN SUGGEST THAT
24 "ELIGIBLE" MEANT RETIRED PLAYERS.

25 HE ACKNOWLEDGES VERY PLAINLY THAT THE "PLAYER" IN

1 THAT PARAGRAPH IS THE SIGNATORY, MEANING ALL 2,062 OF THE
2 PLAINTIFFS. BUT THEN HE SAYS "ELIGIBLE MEANS RETIRED."

3 NOW, LOOK. I DON'T HAVE TIME IN ONE HOUR TO GO OVER
4 EVERY SINGLE DOCUMENT. PAPI AND PI MADE AN AGREEMENT AMONGST
5 THEMSELVES THAT THEY WOULD FOLLOW THE ELIGIBILITY RULES BETWEEN
6 EACH OTHER. AND THEN, THEY WENT TO SOME MINUTES. WE CAN GET
7 THE MINUTES ON THE BOARD.

8 AND IN THE MINUTES, AND IT'S THERE, THEY SAID, "IN
9 ORDER FOR A PLAYER TO BE CONSIDERED ELIGIBLE ..." AND IT GOES
10 ON. YOU CAN TAKE IT INTO THE JURY ROOM, IF YOU WANT TO.

11 THE BOTTOM LINE OF THAT IS THAT'S AN ACTIVE PLAYER
12 MEMORANDUM. THERE'S NO IF'S, ANDS OR BUTS ABOUT IT.

13 IF YOU WANT TO BE ELIGIBLE, AN ELIGIBLE MEMBER OF THE
14 NFLPA, YOU HAVE GOT TO BE ACTIVE. FORGET WHETHER YOU ARE OFF
15 TO THE LEFT OR OFF TO THE RIGHT A LITTLE BIT. YOU HAVE TO BE
16 ACTIVE.

17 THERE IS NO OTHER DEFINITION.

18 THE FACT THAT MR. ALLEN SAYS "ELIGIBLE MEANS RETIRED"
19 IS A FARCE, AN ABSOLUTE FARCE.

20 LISTEN, ALLEN HIMSELF TESTIFIED -- I THINK DR. NOLL
21 DID, TOO, BUT I COULD BE WRONG -- AND, OF COURSE, AS THE JUDGE
22 SAID YOUR MEMORY, YOU KNOW -- I WON'T INTENTIONALLY MISSTATE
23 ANYTHING, BUT I COULD BE WRONG. I THINK DR. NOLL SAID IT, TOO.
24 BUT CERTAINLY I KNOW MR. ALLEN DID, BECAUSE I CROSS-EXAMINED
25 HIM. HE ACKNOWLEDGED THAT THERE WERE RETIRED SIGNATORIES OF

1 THE GLA THAT WERE NOT MEMBERS OF THE NFLPA.

2 SO HOW IN THE WORLD, ASIDE FROM THE FACT THAT THERE'S
3 NO DEFINITION THAT MADE THEM ANYBODY BUT ACTIVES RETIRED, HOW
4 IN THE WORLD, HOW IN THE WORLD CAN YOU SAY THAT "ELIGIBLE"
5 MEANS "RETIRED"?

6 THAT WOULD MEAN THAT A GOOD PORTION OF THE PEOPLE WHO
7 SIGNED THE GLA'S WOULDN'T BE ELIGIBLE, BECAUSE THEY WEREN'T
8 MEMBERS OF THE GLA.

9 AND, FINALLY, IF "ELIGIBLE" MEANT "RETIREDS," THEN IF
10 YOU HAD SIX OR MORE ACTIVES, THEY COULDN'T SHARE, EITHER,
11 BECAUSE "ELIGIBLE" ONLY MEANT "RETIREDS."

12 THE ONLY, ONLY -- I DON'T MEAN THIS IS A THEORY --
13 THE ONLY POSSIBLE CONSTRUCTION YOU CAN GET OUT OF THE PLAYERS
14 WHO WERE ELIGIBLE NFLPA MEMBERS WOULD SHARE, RIGHT, IS THE
15 PLAYERS, AS MR. ALLEN CONCEDED, MEANS MY CLIENTS AND ELIGIBLE
16 AS THEY DEFINED IT UP ON THE BOARD BEFORE IN THE MINUTES THAT
17 WERE PUT UP BY MR. KESSLER HIMSELF WITH A LINE ITEM, ELIGIBLE
18 WAS ACTIVE PLAYERS.

19 OKAY. I WANT TO JUST SAY A FEW THINGS SO THAT WHAT
20 WE FEEL THE CASE IS ABOUT IS CLEAR.

21 NUMBER ONE, WHAT COMBINATION IT TAKES TO GET TO SIX
22 OR MORE IS IRRELEVANT.

23 YOU KNOW, MR. KESSLER, THE DEFENDANTS -- I DON'T WANT
24 TO PERSONALIZE THIS. HE IS DOING HIS JOB. HE IS DOING A GOOD
25 JOB.

1 THE DEFENDANTS HAVE TAKEN YOU DOWN A PATH, A PATH
2 OF -- I DON'T KNOW WHAT TO SAY. IT'S LIKE A CIA THING OR
3 SOMETHING. JUST TAKES YOU DOWN THE ROAD, AND HE GETS YOU
4 GOING.

5 IT DOESN'T SAY IT'S GOT TO BE SIX ACTIVES. IT
6 DOESN'T SAY IT'S GOT TO BE SIX RETIRED. IT DOESN'T SAY
7 AD HOCS CAN'T BE IT.

8 ANY COMBINATION OF SIX OR MORE, AND THIS GLA KICKS
9 IN. THERE'S NO OTHER EXPLANATION THEY CAN GIVE YOU.

10 HE'LL GET UP THERE -- AND THE JUDGE WILL SAY:
11 "FAIRNESS ISN'T WHAT IT'S ABOUT," ALTHOUGH I BELIEVE I'M GOING
12 TO CONVINCING YOU IT IS FAIR, YOU KNOW.

13 BUT HE'S GOING TO GET UP THERE AND INSINUATE:

14 "WELL, IT'S NOT FAIR. THE ACTIVES DROVE THE
15 ENGINES. THE RETIRED WERE WORTHLESS." YOU KNOW?

16 "YOU DON'T UNDERSTAND AD HOCS. THE STARS WERE
17 THE ONLY ONES PEOPLE WANTED."

18 IT HAS NOTHING TO DO WITH THE CASE. EXCUSE ME. IT'S
19 GOT NOTHING TO DO WITH THE GLA.

20 SIX OR MORE ACTIVE OR RETIRED. THAT'S IT. THAT'S
21 IT.

22 AND HE COULD TALK TO SWEET TUESDAY. HE COULD TALK
23 HIS WAY THROUGH ARMISTICE'S DAY. THAT'S IT. SIX OR MORE
24 ACTIVE OR RETIRED. AND A DEAL IS A DEAL.

25 OKAY. IT DOES NOT EVEN MATTER WHETHER RETIRED ARE

1 INCLUDED OR EXCLUDED FROM THE LICENSE, IF IT'S SIX OR MORE. WE
2 BELIEVE WE'RE GOING TO PERSUADE YOU THAT THE EA LICENSE, YOU
3 REMEMBER THAT. WE FOUGHT ABOUT PARAGRAPHS 1(A) AND 2 AND
4 PARAGRAPH 13.

5 WE BELIEVED WE WERE GOING TO PERSUADE YOU THAT THE
6 RETIRED WERE IN IT. BUT IT DOESN'T MAKE ANY DIFFERENCE.
7 DOESN'T MAKE ANY DIFFERENCE. COULD HAVE TRIED THE CASE WITHOUT
8 GETTING INTO THAT ISSUE AT ALL.

9 IF IT WAS ALL ACTIVE PLAYERS IN THE EA LICENSE,
10 THAT'S SIX OR MORE. SIX OR MORE. BALL GAME. DIVIDE THE MONEY
11 UP RIGHT NOW.

12 IF IT HAPPENED -- WHICH IT NEVER DID HAPPEN -- THAT
13 IT WAS ALL RETIRED PLAYERS IN THE DEAL WITH EA, THEY'D HAVE HAD
14 TO DIVIDE THE MONEY.

15 THIS IS A GROUP LICENSE. IT'S NOT A GROUP LICENSE OF
16 RETIRED AND A GROUP LICENSE OF ACTIVES. THAT'S NOT WHAT IT
17 SAYS. IT'S A GROUP LICENSE. IT'S A RETIRED PLAYERS' GROUP
18 LICENSE. WHAT YOUR RIGHTS WILL BE IS SIX OR MORE ACTIVE OR
19 RETIRED PLAYERS GIVE UP THEIR NAMES AND IMAGES.

20 TAKE A LOOK AT EA FOR JUST A MOMENT. IN THE BOTTOM
21 PARAGRAPH OF EA, IT REFERS TO RETIRED PLAYERS WHO HAVE NOT
22 ENTERED INTO SUCH GROUP LICENSING AUTHORIZATION.

23 THOSE ARE OUR GUYS. EXCUSE ME. THOSE ARE THE
24 PLAINTIFFS. THOSE ARE THE PLAINTIFFS.

25 THE REALITY IS THAT IF YOU READ THAT WHOLE PARAGRAPH

1 YOU'LL SEE IT COULD ONLY BE TALKING ABOUT US. PARAGRAPH 2
2 SAYS:

3 "WHATEVER RIGHTS WE GAVE YOU IN 1(A), WHATEVER
4 RIGHTS WE GAVE YOU IN 1(A), YOU GOT THEM," WHICH MEANS THEY
5 LICENSED RETIRED, TOO.

6 AND THE CLINCHER WILL BE, THE FINAL PROOF WOULD BE,
7 IF YOU TURN TO PARAGRAPH 13, JUST MAKE BELIEVE THAT RETIRED
8 AREN'T IN THE EA AGREEMENT. JUST MAKE BELIEVE IT. WOULD YOU
9 TELL ME WHY IN THE WORLD THEY GET THE LICENSEE TO SIGN AN
10 AGREEMENT THAT SAYS -- THIS IS EA, RIGHT? THESE ARE MY WORDS.
11 YOU GOT TO READ IT FOR YOURSELF -- "YOU CAN'T GO ANYWHERE NEAR
12 ANYBODY WHO AT ANY TIME IN THE PAST WAS UNDER CONTRACT TO AN
13 NFL CLUB."

14 WHO ARE WE TALKING ABOUT HERE? WHO? WHO IN THE PAST
15 WAS UNDER CONTRACT TO AN NFL CLUB? RETIRED BALLPLAYERS.
16 THEY'RE SITTING OUT THERE.

17 SO THE FACT IS, YOU KNOW, YOU COULD CREDIT
18 MR. LINZNER. YOU COULD NOT CREDIT MR. LINZNER. I SUGGEST TO
19 YOU THAT HE WAS IN THE DEFENDANTS' POCKET. YOU KNOW?

20 MAYBE YOU DON'T THINK SO. MAYBE YOU THINK HE WAS THE
21 NICEST GUY UP IN THE WORLD UP THERE SMILING AT YOU, ACTING LIKE
22 HE WAS TOTALLY NEUTRAL AND ALL THAT.

23 THAT'S YOUR PREROGATIVE. THAT'S YOUR PREROGATIVE.
24 BUT THE FACT OF THE MATTER IS IT WOULD APPEAR TO BE A GROUP
25 LICENSE OF ACTIVES AND RETIRED.

1 BUT SAY IT WAS NOT. SAY IT WAS A LICENSE. YOU
2 DON'T -- YOU, I'M RESPECTFULLY SAYING THIS, YOU CAN DO WHATEVER
3 YOU WANT. SAY IT WAS LICENSE, YOU KNOW, OF 1800 ACTIVES AND A
4 WHOLE BUNCH OF -- USING MR. KESSLER'S WORDS -- "RETIRED
5 AD HOCS." THAT'S AN AGREEMENT OF SIX OR MORE CURRENT OR FORMER
6 PLAYERS. THAT'S IT. THAT IS IT.

7 LET'S TALK ABOUT THE ORIGINS OF THIS PARTICULAR
8 AGREEMENT, BECAUSE I THINK IT WILL LEND SOME IMPORTANT THOUGHTS
9 TO YOUR UNDERSTANDING IN THIS CASE.

10 IN 1994 -- AND MAYBE I GOT THE WRONG YEAR, BUT, YOU
11 KNOW, IN THE '90S SOMEWHERE THE DEFENDANTS DECIDED TO GO INTO
12 THE TALENT AGENCY BUSINESS.

13 NOW, UNDERSTAND THIS. THE BUSINESS OF A UNION IS TO
14 BE A UNION. THE BUSINESS OF A TALENT AGENCY -- AND THEY USED
15 THE WORD "LICENSING." DO YOU KNOW? BUT LICENSING IS A LOT
16 BIGGER WORD THAN JUST GOING TO VIDEO GAME PEOPLE AND POSTER
17 PEOPLE AND T-SHIRT PEOPLE, YOU KNOW?

18 LICENSING IS TELEVISION, AND TELEVISION SHOWS, AND
19 MOVIE DOCUMENTARIES, AND RADIO, AND STORIES IN NEWSPAPERS, AND
20 ADVERTISEMENTS, AND ALL KINDS OF THINGS THAT AN AGENCY --
21 REMEMBER THAT TRACE ARMSTRONG? YOU KNOW? THE FELLOW WAS A
22 FORMER BALL PLAYER WHO CAME IN OUT OF CENTRAL CASTING FROM
23 HOLLYWOOD, YOU KNOW?

24 THEY HAD 13,000 RETIRED PEOPLE TO PICK ON, AND THEY
25 PICKED TRACE ARMSTRONG. JOHN WAYNE, DO YOU KNOW? SEEMED LIKE

1 A PRETTY NICE GUY TO ME, ACTUALLY. YOU KNOW?

2 HE WORKS WITH CAA. AND HE ACKNOWLEDGES CAA IS ONE OF
3 THE MOST POWERFUL AGENCIES IN THE COUNTRY. AND THERE WERE
4 PLENTY OF OTHERS.

5 THEY ARE IN HOLLYWOOD. NO OFFENSE TO ANYBODY. THEY
6 ARE IN MY CITY, TOO, NEW YORK, NEW YORK. HOLLYWOOD THEY WEAR
7 T-SHIRTS, YOU KNOW, AND OPEN COLLARS. AND IN NEW YORK THEY PUT
8 ON PINSTRIPE SUITS.

9 BUT THEY'RE AGENTS, AND THEY FIGHT LIKE HECK TO GET
10 THEIR CLIENTS' NAMES AND LIKENESSES PUT ALL OVER THE PLACE.
11 ALL OVER THE PLACE.

12 THEY DON'T GO OVER TO SOMEBODY AND SAY:

13 "WELL, ARE YOU INTERESTED IN MY RETIRED'S?

14 "NO, NOT REALLY.

15 "OH, THAT'S OKAY. THEY'RE WORTHLESS, ANYWAY.

16 NOTHING MUCH I CAN DO ABOUT IT."

17 NO, THEY GO TO WAR. THEY GO TO WAR TO FIGHT FOR
18 THEIR GUYS.

19 AT ANY RATE, THAT'S NOT REALLY THEIR BUSINESS,
20 ALTHOUGH THEY'RE MAKING HUNDREDS OF MILLIONS OF DOLLARS OUT OF
21 IT; DO YOU KNOW?

22 BUT THAT'S NOT THEIR BUSINESS.

23 SO THEY DECIDED THAT THEY WERE GOING INTO THE
24 BUSINESS OF LICENSING. WHEN THEY STARTED IN THE '90'S, PLEASE
25 UNDERSTAND THIS: THEY HAD NO CREDIBILITY IN THIS FIELD. IT

1 WAS LIKE: WHOA.

2 NO CAA. I DON'T KNOW IF YOU KNOW THE NAMES OF THE
3 OTHER AGENCIES, YOU KNOW? NO, WE'RE GOING TO SELF-LICENSE. WE
4 ARE FORMING PLAYERS INC FOR PROFIT, AND WE'RE GOING TO
5 SELF-LICENSE.

6 THEY NEEDED -- THEY, THE DEFENDANTS, NEEDED TO CREATE
7 CREDIBILITY IN THE FIELD. NO CREDIBILITY, NOBODY IS GOING TO
8 GO TO YOU.

9 DID YOU HEAR MR. ARMSTRONG SAY:

10 "WELL, CAA REPRESENTS SOME FOOTBALL PLAYERS."

11 OKAY. YOU'RE A LICENSEE. YOU WANT FOOTBALL PLAYERS
12 FOR YOUR BRAND. YOU WANT THEM FOR A BIG TELEVISION
13 DOCUMENTARY. YOU WANT THEM FOR A REALITY TV SHOW. THESE GUYS
14 MIGHT MAKE A GOOD REALITY TV SHOW, THESE WORTHLESS GUYS?

15 YOU KNOW? YOU KNOW WHAT YOU DO? YOU KNOW WHAT YOU
16 DO? CALL UP CAA. CALL UP TRACE, AND SAY:

17 "WHO HAVE YOU GOT AT CAA?"

18 THEY NEEDED TO KNOCK THE COMPETITION OUT BEFORE IT
19 BEGAN. THAT'S CALLED "ONE-STOP SHOPPING." THAT'S CALLED "THE
20 ONLY GAME IN TOWN."

21 NOW, UNDERSTAND, YOU KNOW, THIS IS THE STUFF THAT
22 COMES IN A VIDEO OR COMES IN A DOCUMENT. BUT FOLLOW IT
23 THROUGH. IF THEY'RE NOT ON TOP, THEY DON'T CONTROL. THEY
24 DON'T CONTROL THE FIELD.

25 SO WHAT DID THEY DO? THEY SOLICIT. THEY GOT THE

1 ACTIVES. AND THEY SOLICIT ALL THE GLA'S WHO ARE RETIRED. AND
2 THEY PUSH, AND THEY PUSH.

3 YOU SAW THAT ALLEN LETTER. YOU SAW THE HEADLINE THAT
4 SAID: "GROUP LICENSING IS ESSENTIAL."

5 LONG AFTER, EIGHT YEARS OR SO, EIGHT YEARS OR SO
6 AFTER, NOT ONE PENNY.

7 ACCORDING TO MR. ALLEN, HAS COME IN FOR THE RETIRED, S
8 HE HAS A HEADLINE IN TOUCHBACK -- HOPE I GET TO IT ON THIS --
9 THAT SAYS:

10 "GROUP LICENSING IS ESSENTIAL."

11 NOW, WHY, WHY FROM THE VERY START ARE THEY PUSHING SO
12 HARD? FROM THE FIRST MINUTE OF THE FIRST SECOND THAT THEY
13 DECIDED THEY WANTED TO GO INTO THE TALENT AGENCY BUSINESS
14 UNTIL THE LAST. MR. KESSLER WOULD HAVE YOU BELIEVE IT WAS FROM
15 THE GOODNESS OF THEIR HEARTS.

16 OH, DO THEY LOVE THOSE RETIRED PLAYERS, YOU KNOW?
17 OH, DO THEY LOVE THEM. THEY BROUGHT IN ABOUT \$200 MILLION
18 DURING THE YEARS IN QUESTION. I THINK IT WAS 215. THEY
19 BROUGHT IN A LOT MORE, BUT I'M JUST TALKING ABOUT '04 THROUGH
20 '07. DO YOU KNOW?

21 OH, DID THEY LOVE THEM. DID THEY TAKE CARE OF THEM.
22 THEY GAVE THEM NOT ONE SINGLE PENNY. THEY GAVE THEM A LITTLE
23 NIBBLE HERE AND A LITTLE NIBBLE THERE. TAKE THEM TO THE
24 CONVENTION, LIKE THAT LOVELY FELLOW, MR. GOICH.

25 DON'T YOU THINK HE'S A HAPPY GUY? GETS TO GO TO

1 HAWAII TWICE A YEAR, OR WHATEVER IT IS? THEY DON'T HAVE ANY
2 CONFERENCES IN ROMANIA, YOU KNOW?

3 THEY GO RIGHT TO WHERE THE SUN SHINES, YOU KNOW? AND
4 THE PINA COLADAS. AND THE PINA COLADAS ARE THERE, YOU KNOW?
5 HE SEES ALL HIS GUYS. EVERYBODY PATS EACH OTHER ON THE BACK,
6 YOU KNOW? AND HE'S A HAPPY MAN.

7 MEANWHILE, THEY'RE MAKING A COUPLE HUNDRED MILLION
8 DOLLARS, AND HE DOESN'T EVEN KNOW IT.

9 YOU KNOW, THE FACT IS -- AND THIS IS NOT HIS CASE --
10 THE ACTIVES WERE DUPED, TOO. BUT MAYBE I'LL GET TO IT, AND
11 MAYBE I WON'T GET TO IT.

12 BUT THE REALITY IS HERE THEY NEEDED TO ACHIEVE
13 ONE-STOP SHOPPING. THEY NEEDED TO DEFEAT THE COMPETITION
14 BEFORE THE GAME BEGAN.

15 SO WHAT DID THEY DO? THEY WANTED TO CREATE -- YOU
16 KNOW, THE ECONOMIST'S WORD, DO YOU KNOW? AND MR. ALLEN, WHO IS
17 NOW IN HOLLYWOOD WITH THE SCREEN ACTORS GUILD, HE'S GOT THE
18 WORD: CRITICAL MASS. DO YOU KNOW?

19 WE GO TO WAR IN IRAQ, AND WE WENT TO WAR IN KOREA
20 WHEN I WAS A KID. IT'S CONFLICT, YOU KNOW. CRITICAL MASS,
21 LIKE THAT'S SOME WORD THAT GOES OVER EVERYBODY'S HEAD.

22 WHAT HE MEANS IS, WHAT THEY MEAN IS: IF YOU GET
23 THOUSANDS AND THOUSANDS OF BALLPLAYERS, AND YOU ANNOUNCE TO THE
24 WORLD -- AND THEY DO IT ON THEIR WEB SITE. THEY DO IT ON THEIR
25 WEB SITE, RIGHT? YOU ANNOUNCE TO THE WORLD: "WE REPRESENT

1 MORE THAN 1800 ACTIVE PLAYERS AND OVER 3,000 RETIRED PLAYERS."

2 YOU KNOW WHAT YOU'RE TELLING THE WORLD? "IF YOU'RE
3 INTERESTED IN LICENSING A FOOTBALL PLAYER, FAT, SKINNY, GOOD,
4 BAD, RICH, POOR, STAR, BENCH WARMER, IF YOU'RE INTERESTED COME
5 TO US. DON'T GO TO CAA. DON'T GO TO NEW YORK TO ALL THESE
6 TALENT AGENTS, BECAUSE WE'RE THE GUYS WITH THE MOST INFLUENCE.
7 WE'RE THE GUYS WITH THE MOST POWER."

8 AND THEY GOT IT. SURE THE ACTIVES WERE IMPORTANT IN
9 THEIR GETTING IT, YOU KNOW? AND THE FOOTBALL LEAGUE MADE SURE
10 THAT THE ACTIVES WERE -- ALL WENT OVER THERE.

11 BUT THEY HAVE A SECOND THING, YOU KNOW? WHICH IS
12 THEY WANTED TO SAY IT WAS EVERYBODY. THEY DIDN'T WANT ANY
13 DISSENSION. THEY DIDN'T WANT ANY IDEA THAT MAYBE, YOU KNOW,
14 YOU COULD GET -- YOU COULD GET HERB -- WELL, LEAVE OUT HERB.
15 ANY -- ANY -- I DON'T MEAN LEAVE HIM OUT. BELIEVE ME, HE
16 COUNTS. BELIEVE ME, HE DOES, YOU KNOW?

17 BUT GET ONE OF THESE FELLOWS. MAYBE. JUST MAYBE HE
18 PLAYS BALL WITH BART STARR, OR SOMETHING LIKE THAT, YOU KNOW?
19 AND MAYBE HE'LL SAY:

20 "BUT I'VE GOT THE MOST TERRIFIC AGENT IN THE
21 WORLD. WHY DON'T YOU COME HERE INSTEAD OF THE UNION?"

22 AND BEFORE YOU KNOW IT, THERE'S A SEAM. THERE'S A
23 CRACK. THERE'S A LEAK IN THE DAM.

24 SO THEY, TO GET THEIR CREDIBILITY, GET ALL OUR GUYS
25 TO SIGN. AND WHAT DID THEY DO? THEY MERGE THEIR LICENSING

1 RIGHTS, IMAGE RIGHTS, IDENTITY RIGHTS WITH THE ACTIVES.

2 NOW, UNDERSTAND SOMETHING. IF ANYTHING WAS OFFENSIVE
3 IN THIS CASE, I DON'T THINK MR. KESSLER CONSCIOUSLY MEANT TO BE
4 OFFENSIVE. HE'S JUST TRYING THE CASE FOR HIS GUYS AS BEST HE
5 COULD. THAT'S WHAT HE'S SUPPOSED TO DO IN THE SYSTEM, YOU
6 KNOW? YOU KNOW, SUGGESTED THAT THEY WERE WORTHLESS; THAT THEY
7 GAVE NOTHING; THAT ALL IT COST THEM WAS A POSTAGE STAMP.

8 WELL, NUMBER ONE, LET ME ASK YOU THIS: WHAT DID IT
9 COST THE UNION TO GET ALL THESE GUYS TO SIGN UP? I THINK THEY
10 WERE THE ONES WHO BOUGHT THE POSTAGE STAMP. I DON'T REMEMBER
11 WHETHER THEY GAVE YOU A POSTAGE STAMP OR THE RETIREDS HAD TO
12 PUT ONE ON.

13 BUT WHOEVER HAD TO PUT A STAMP ON, THE WAY
14 MR. KESSLER LOOKS AT IT, THAT'S WHAT IT COST THEM. IF THEY PUT
15 THE STAMP ON, THAT'S WHAT IT COST THEM. OTHERWISE, IT COST
16 THEM NOTHING.

17 THEY PLAYED ON -- ON THE RETIRED'S PATRIOTISM. THEY
18 PLAYED ON THEIR SENSE OF BELONGING. THEY PLAYED ON THEIR SENSE
19 OF FAMILY. THEY PLAYED ON THEIR SENSE OF TRUST.

20 THESE ARE NOT ORGANIZED MEN. THEY WEREN'T ORGANIZED
21 UNTIL THE LAWSUIT. THESE ARE 2100 INDIVIDUAL GUYS, LIVING ALL
22 OVER THE COUNTRY. GUYS WHO HAD THEIR GLORY DAYS, YOU KNOW?
23 WHO WERE CALLED UPON TO GIVE THEIR IDENTITY RIGHTS.

24 NOW, LOOK, YOU KNOW, I DON'T -- I DON'T WANT TO
25 PERSONALIZE THIS, YOU KNOW? BUT I DON'T THINK -- DON'T

1 THINK -- I HOPE THIS JURY DOESN'T THINK THAT MATERIAL THINGS
2 ARE WHERE IT'S AT.

3 THE JUDGE WILL INSTRUCT YOU, NO DOUBT, THAT EVERY
4 CONTRACT REQUIRES CONSIDERATION. "CONSIDERATION" MEANS YOU'VE
5 GOT TO GIVE SOMETHING TO GET SOMETHING.

6 WHAT DID THESE MEN GIVE? THEY GAVE THEIR IDENTITY
7 RIGHTS. THEY GAVE WHO THEY WERE. THEY TURNED OVER THEIR MOST
8 VALUABLE RIGHT, YOU KNOW, NEXT TO THEIR WIVES OR THEIR CHILDREN
9 OR THEIR GRANDCHILDREN FOR SOME OF THEM, YOU KNOW? WHAT'S MORE
10 VALUABLE THAN THAT?

11 "TAKE MY NAME. TAKE MY LICENSE, IF IT WILL HELP
12 YOU TO GET WHERE YOU WANT TO GO. AND THEN, HOPEFULLY, I'LL GET
13 MY SHARE, LIKE YOU SAID." DO YOU KNOW? "BUT I'LL GIVE IT TO
14 YOU WHETHER I DO OR I DON'T."

15 ALL THESE GUYS LOVED THE GAME. THEY LOVED THE
16 COMRADERY OF IT. YOU KNOW?

17 SO THEY GAVE THEIR NAME AND LIKENESS WHICH IS OF
18 INCREDIBLE VALUE. IT'S PRICELESS. REALLY PERSONAL. GIVE ME
19 YOUR NAME AND LIKENESS. PUT IT IN MY POCKET. LET ME GO OUT
20 AND DO WHAT I THINK IS APPROPRIATE WITH IT.

21 SEE IF YOU JUST SAY:

22 "WELL, THAT'S JUST A CASUAL THING."

23 NOT EVEN WORTH A BUCK AND A QUARTER, YOU KNOW? I
24 DON'T THINK SO. I DON'T THINK SO.

25 THEY GAVE THEM THAT. AND WITH THAT, COMBINED WITH

1 THE ACTIVES, BECAUSE IT WAS A GROUP, WHAT DID THEY GIVE THE
2 DEFENDANTS? A MONEY-MAKING MACHINE. HUNDREDS OF MILLIONS OF
3 DOLLARS. THIS ISN'T LIKE:

4 "COME ON, MAN, YOU KNOW? WE ONLY MADE 10 BUCKS,
5 AND NOW YOU'RE GOING TO ASK ME FOR HALF OF IT? WHAT'S WRONG
6 WITH YOU? I'VE GOT TO PUT THE FOOD ON THE TABLE."

7 NO, GAVE THEM THE ABILITY TO MAKE HUNDREDS AND
8 HUNDREDS OF MILLIONS OF DOLLARS. AND I DON'T WANT TO GET TOO
9 CARRIED AWAY WITH MYSELF, AS I CAN, AS YOU JURORS, YOU GUYS ALL
10 KNOW, YOU KNOW? BUT THAT'S DISGRACEFUL. THAT'S DISGRACEFUL.

11 SO WHAT WOULD A DEFENDANT SAY? BECAUSE, YOU KNOW,
12 MR. KESSLER GETS HIS HOUR AND 20 MINUTES, RIGHT? AS HE SHOULD.
13 WELL, THE DEFENDANTS WILL SAY:

14 "IT'S ACTIVE PLAYER MONEY, NOT RETIRED MONEY.
15 ONLY THE ACTIVES DROVE THE ENGINE."

16 NOW, THAT'S NOT WHAT THE GLA SAYS. THAT'S NOT WHAT
17 THE GLA SAYS. THAT'S NOT WHAT THEY WROTE. THAT'S NOT WHAT
18 THEY SENT OUT YEAR AFTER YEAR AFTER YEAR. THEY COULD HAVE DONE
19 THAT. THEY COULD HAVE SEPARATED IT. YOU KNOW, MAYBE THEY
20 SHOULD HAVE SEPARATED IT. I DON'T KNOW. I DON'T KNOW.

21 BUT THAT'S NOT WHAT THEY DID. THAT'S NOT WHAT THEY
22 DID. A DEAL IS A DEAL. THEY DIDN'T SEPARATE ACTIVES FROM
23 RETIRED.

24 THEN, THEY'LL SAY:

25 "WELL, ACTIVES SHARE WITH ACTIVES. RETIRED

1 SHARE WITH RETIRED."

2 WHERE DOES IT SAY THAT? WHERE DOES IT SAY THAT?
3 WHERE DOES IT SAY IT? NOT ONLY IN THE GLA, WHERE DOES IT SAY
4 THAT?

5 OH, I SUPPOSE, YOU KNOW, IF YOU HAD YOUR PH.D., OR
6 SOMETHING, AND YOU CHOSE TO READ THEIR FINANCIAL STATEMENTS
7 SOMEWHERE YOU COULD FIGURE IT OUT. YOU KNOW. IT DOESN'T SAY
8 ANYTHING OF THE SORT.

9 IT'S SMOKE AND MIRRORS. IT'S SMOKE AND MIRRORS.
10 WANT TO KNOW WHY IT'S SMOKE AND MIRRORS? BECAUSE THEY CAN'T
11 DEFEND AGAINST THE GLA. THEY CAN'T DEFEND AGAINST THE GLA.
12 AND THEY HIRED A VERY CAPABLE LAWYER.

13 AND HE CAME UP WITH A WAY, CAME UP WITH A DIVERSION,
14 YOU KNOW? HE CAME UP WITH A WAY TO GET YOUR EYE OFF THE BALL
15 AND TRIED THREE-QUARTERS OF THE CASE WITH THAT. THREE-QUARTERS
16 OF THE CASE WAS ABOUT THAT.

17 "ACTIVES GO WITH ACTIVES. RETIRED GO WITH
18 RETIRED. AD HOCS ARE NOT PART OF THIS THING. SINCE WE'RE NOT
19 ASKING FOR THE MONEY, THEY'RE NOT REALLY RETIRED PEOPLE."

20 OKAY. EVERY ONE OF THE 95 LICENSEES THAT ARE AT
21 ISSUE IN THIS CASE HAD A COMBINATION OF SIX OR MORE ACTIVE OR
22 RETIRED PLAYERS. THERE'S JUST NO QUESTION ABOUT IT.

23 THE DEFENDANTS WILL SAY THE ONLY RETIRED THE
24 LICENSEES WANTED ARE THE AD HOCS. WELL, I DON'T THINK THEY
25 TRIED VERY HARD. I DON'T THINK THEY PUSHED THE ENVELOPE.

1 SUPPOSE THAT'S TRUE. FOR PURPOSES OF THIS SUMMATION,
2 SUPPOSE THAT'S TRUE. SO WHAT? AN AD HOC IS NOT A RETIRED? AN
3 AD HOC DID NOT PLAY THE GAME? AN AD HOC IS SEPARATED OUT FROM
4 THIS DOCUMENT? NOT A CHANCE.

5 I HAVE TO SAY THIS, YOU KNOW: IT WOULD BE NICE TO
6 TRY A CASE WHERE WE WERE JUST TALKING ABOUT A BREACH OF
7 CONTRACT. THEN, YOU DON'T HAVE TO CALL PEOPLE NAMES. YOU
8 DON'T HAVE TO SAY:

9 "LIAR, LIAR, PANTS ON FIRE." YOU KNOW?
10 EVERYBODY COULD BE ABOVE THE FRAY IN OUR BLUE SUITS AND STRIPED
11 TIES, YOU KNOW?

12 BUT THE FACT IS -- IT IS A FACT -- THAT THE
13 PLAINTIFFS ARE AGENTS, AND THEY'RE INVENTING THINGS BECAUSE OF
14 THEIR CONFLICT OF INTEREST.

15 OH, THAT'S A BAD WORD: "CONFLICT OF INTEREST."

16 THAT'S NOT A LAWYER'S WORD. LET'S BREATHE A LITTLE
17 LIFE IN THIS. CONFLICT OF INTEREST.

18 I'M SUPPOSED TO REPRESENT YOU AND YOU AND YOU AND YOU
19 AND YOU AND YOU AND YOU AND YOU. BUT I'M ONLY GOING TO
20 REPRESENT FIVE OF YOU. THE REST OF YOU, I'M SORRY. I'M SORRY.
21 YOU HAVE NO VALUE, RIGHT? YOU GOT NOTHING TO COMPLAIN ABOUT.
22 WE'LL TAKE YOU TO HAWAII, DRINK A PINA COLADA. NO PROBLEM. NO
23 PROBLEM. YOU KNOW?

24 THAT'S NOT THE WAY IT WORKS. THAT'S NOT THE WAY IT
25 WORKS.

1 IF I TAKE ON EACH OF YOU AS A CLIENT, I OWE THE SAME
2 HIGH DUTY TO EACH ONE OF YOU. AND IF I LET YOU DOWN ON
3 PURPOSE, IT'S TERRIBLE. IF I LET YOU DOWN TO FAVOR SOMEBODY
4 ELSE -- I DON'T KNOW WHAT WORD TO USE FOR IT. BUT THAT'S WHAT
5 HAPPENED.

6 AND THEN, HE COMES UP WITH -- "HE," I WILL STOP
7 PERSONALIZING IT.

8 THE DEFENDANTS COME UP WITH ANOTHER TRICK.

9 "WELL, WE GAVE THE RETIRED PLAYERS \$30 MILLION."

10 WE'RE NOT SEEKING AN INDIVIDUAL'S MONEY. CALL HIM AN
11 "AD HOC," BECAUSE HE DID. IT GETS CONFUSING IF I DON'T.

12 WE'RE NOT SEEKING AN INDIVIDUAL'S MONEY WHO SIGNED AN
13 INDIVIDUAL AGREEMENT. BUT THAT'S NOT TAKING CARE OF THE
14 RETIRED GLA 2100 GUYS. THAT'S TAKING CARE OF SUPERSTARS WHO
15 DESERVE THEIR MONEY, YOU KNOW.

16 YOU'RE TOO YOUNG, EVERY ONE OF YOU, TO KNOW WHO BART
17 STARR IS, OR SOMETHING LIKE THAT, YOU KNOW, PLAYED IN THE FIRST
18 SUPER BOWL. PROBABLY YOU DON'T CARE ABOUT FOOTBALL, MOST OF
19 YOU, YOU KNOW?

20 BUT -- OKAY. SKIP THAT PART, YOU KNOW?

21 I DON'T BEGRUDGE ANY OF THEM THEIR SHARE OF THE
22 \$30 MILLION.

23 BUT THAT'S NOT TAKING CARE OF THE GROUP. WHAT ARE
24 YOU TALKING ABOUT? THAT'S NOT GROUP MONEY.

25 AND LATER ON, YOU'LL SEE HOW THEY ADD THAT MONEY IN,

1 IF I GET THE TIME, TO INFLATE THE FIGURES AS TO WHAT THEY DID.
2 YOU WATCH.

3 NOW, IN OTHER WORDS, USING THE RIGHT WORD, THE
4 "UNSHARED MONEY," THE "AD HOC MONEY" IS NOT GLA MONEY, AND
5 PLAINTIFFS AREN'T ASKING FOR IT.

6 THEY WILL SAY THAT THE PLAINTIFFS WERE NOT USED IN
7 THE LICENSES. WELL, FIRST, I THINK YOU'LL FIND, IF YOU STUDY
8 1(A) AND 2 AND 13, THAT THEY MAY VERY WELL DID, NO MATTER WHAT
9 MR. LINZNER WANTS TO SAY.

10 REMEMBER SOMETHING ABOUT MR. LINZNER, RIGHT? NOT TO
11 KNOCK HIM. I DON'T WANT TO GO AROUND AND BASH-EVERYBODY-BUT-US
12 BUSINESS, YOU KNOW?

13 BUT LINZNER IS THE SAME GUY THAT GOT THE BENEFITS OF
14 THAT HALL OF FAME TRICKERY. REMEMBER WHAT I'M TALKING ABOUT?
15 MAYBE I'LL GET TO IT LATER. WHERE THEY KNOCK OUT TAKE TWO, AND
16 SAVE THEM ABOUT A MILLION -- ABOUT A MILLION BUCKS. SAVE EA
17 ABOUT A MILLION BUCKS.

18 LINZNER'S IN THEIR POCKET. LINZNER'S GOT AN
19 EXCLUSIVE LICENSE. KNOCKS OUT ALL THE COMPETITION FOR HIMSELF.
20 PAYS A NICE CHECK FOR IT, WHICH WE DON'T GET NONE OF IT; DO YOU
21 KNOW?

22 BUT LINZNER, LINZNER, HE DOESN'T WANT TO MESS -- HE
23 DOESN'T WANT TO MESS WITH THE UNION. THEY'RE THE ONLY GAME IN
24 TOWN.

25 MAYBE HE GETS A LITTLE ANNOYING, MAYBE HE GETS A

1 LITTLE ANNOYING TO THEM, YOU KNOW, THEY'LL GO TO TAKE TWO NEXT
2 TIME AND MAKE THEM RICH FOR 25 MILLION BUCKS.

3 MAYBE IF TRACE ARMSTRONG DOESN'T SHOW UP HERE --
4 BECAUSE HE FORGOT TO TELL YOU THIS -- MAYBE THEY WON'T GET HIM
5 ELECTED PRESIDENT OF THE UNION. YOU KNOW?

6 THIS UNION IS A POWERFUL, POWERFUL MACHINE. YOU
7 KNOW, YOU PLAY BALL WITH THEM, YOU GET ALONG WITH THEM, YOU
8 KNOW, YOU'LL DO PRETTY WELL, UNLESS YOU'RE VALUELESS, UNLESS
9 YOU DON'T HAVE A COLLECTIVE POWER. UNLESS ALL YOU'VE GOT IS
10 YOUR NAME AND YOUR LIKENESS, YOU KNOW? AND YOU GAVE IT ALL,
11 AND YOU TRUSTED PEOPLE.

12 LET'S TAKE A LOOK AT HOW THE DEFENDANTS REWROTE THE
13 GLA.

14 PUT IT UP ON THE BOARD. LET'S GET TO THE "SIX OR
15 MORE" PARAGRAPH.

16 LOOK, I'M SUPPOSED TO WRITE THIS DOWN WITH A RED
17 PENCIL. BUT I'M AFRAID TO DO IT, BECAUSE I'LL MESS IT UP THE
18 WAY I DID MY DRAWINGS. FOLLOW IT ALONG, AND I THINK YOU'LL
19 UNDERSTAND WHAT I MEAN, YOU KNOW?

20 IF YOU LISTEN TO MR. ALLEN, YOU HAVE TO BELIEVE THAT
21 "SIX OR MORE" DOESN'T MEAN "SIX OR MORE CURRENT OR FORMER";
22 THAT WHAT IT MEANS IS "2,062 RETIRED." "

23 IN OTHER WORDS, CROSS OUT THE WORD "CURRENT OR
24 FORMER." JUST CROSS IT OUT IN THE REWRITE, WHICH IS AGAINST
25 THE LAW. CROSS IT OUT IN THE REWRITE. INSTEAD OF JUST SAYING

1 "CURRENT OR FORMER," CROSS OUT "CURRENT," YOU KNOW. AND FOR
2 "FORMER" PUT "ALL 2,062."

3 WELL, THAT'S NOT THE DEAL. THAT'S HIS TESTIMONY.
4 LOOKED JUDGE ALSUP IN THE EYE. TURNED AROUND, LOOKED YOU IN
5 THE EYE, YOU KNOW? PERFECT DIRECTION, YOU KNOW? HOLLYWOOD
6 DIRECTOR COULDN'T HAVE DONE IT BETTER.

7 FIRST TURNS TO JUDGE ALSUP, THEN TURNS TO THE JURY,
8 "ALL 262 -- 2,062."

9 IT'S MADE UP. IT'S ALICE IN WONDERLAND.

10 THEN, ESCROW ACCOUNT. SEE THE WORD "ESCROW ACCOUNT"
11 UP THERE? IT'S IN PARAGRAPH 5.

12 I WOULD LIKE TO SHOW IT ON THE -- WHATEVER YOU DO,
13 OMAR, PUT A CIRCLE AROUND IT OR SOMETHING SO EVERYBODY CAN SEE
14 IT. I'M SURE YOU KNOW WHAT I'M TALKING ABOUT NOW. I HOPE YOU
15 DO.

16 (DOCUMENT DISPLAYED.)

17 SEE THE WORD "ESCROW ACCOUNT"? CROSS IT OUT. CROSS
18 IT OUT. THERE'S NO ESCROW ACCOUNT. NO ESCROW ACCOUNT.

19 WHY NO ESCROW ACCOUNT? WELL, HE SAID THERE WAS NEVER
20 ANY MONEY TO GIVE THEM.

21 IF I TELL YOU I'M GOING TO OPEN UP AN ESCROW ACCOUNT
22 WHEN YOU SIGN THIS PIECE OF PAPER, WHAT AM I SUPPOSED TO DO?

23 SUPPOSED TO WALK OVER TO THE BANK OF AMERICA OR WELLS
24 FARGO -- I DON'T KNOW THE NAMES OF ALL THE BANKS IN CALIFORNIA.
25 AFTER THIS ECONOMIC CRISIS I DON'T KNOW IF THERE'S ANY BANKS

1 ANYMORE, YOU KNOW?

2 LET'S WALK OVER TO THE BANKS, AND OPEN UP AN ESCROW
3 ACCOUNT. NO ESCROW ACCOUNT WHATSOEVER.

4 AND THEN, HE GOES TO ELIGIBILITY, WHICH HE TALKS
5 BEFORE. AND HE ADMITS IN HIS TESTIMONY, ALLEN, THAT PLAYER --
6 PLEASE GO DOWN TO THE NEXT -- TO THE GLA.

7 OKAY. OKAY. DO IT THERE. YOU'RE RIGHT. I'M WRONG.
8 GO BACK TO THAT.

9 "THE PLAYER, PRESUMABLY, IS THE PERSON WHO SIGNS
10 THE GLA, RIGHT?

11 "ANSWER: YES.

12 "SO WHEN YOU GO TO THE PARAGRAPH IN THE GLA THAT
13 SAYS HOW THE MONEY GETS DIVIDED" -- BLOW IT UP, PLEASE --
14 "YOU'LL SEE THAT WHAT IT'S SAYING IS IT GETS DIVIDED BETWEEN
15 THE PLAYER."

16 THAT'S THESE GUYS. THAT'S THE 262 [SIC]. EVEN ALLEN
17 ACKNOWLEDGES THAT.

18 YOU KNOW, "AND THE ELIGIBLE MEMBERS OF THE NFLPA,"
19 WHICH CAN ONLY MEAN ACTIVES. HE WANTS TO SAY:

20 "NO, RETIREDs WOULD SHARE WITH RETIREDs. BUT
21 THERE'S NO MONEY THERE."

22 THE ONLY DEFINITION OF "ELIGIBLE" COMES FROM THOSE
23 BOARD MINUTES THAT SAYS "ACTIVES."

24 HE SAID:

25 "WELL, THAT DOESN'T COUNT."

1 BUT HE NEVER BOTHERED TO WRITE DOWN AN ELIGIBLE FOR
2 RETIRED THAT WAS DIFFERENT OR TELL ANYBODY THAT ELIGIBLE FOR
3 RETIRED WAS DIFFERENT.

4 SO WHY WOULD THE PLAYER BE SHARING WITH THE RETIRED
5 WHO ARE NFLPA MEMBERS? A LOT OF THOSE GUYS BY THEIR OWN
6 TESTIMONY, RETIRED GUYS, ARE NOT NFLPA MEMBERS.

7 "TOO BAD. WE DIDN'T TELL YOU THIS WHEN YOU
8 SIGNED THE GLA, BUT YOU ALSO GOT TO JOIN THE UNION."

9 AND LAST -- AND LAST BUT NOT LEAST, IF THAT MEANT
10 "RETIRED," IF "ELIGIBLE" MEANT "RETIRED," SUPPOSE YOU HAD --
11 I DON'T WANT TO MAKE UP NUMBERS -- 1800 ACTIVES AND SIX
12 RETIRED LICENSED, WHICH YOU DON'T HAVE TO. ALL YOU HAVE TO
13 HAVE IS SIX OR MORE TO BE IN THE CATEGORY.

14 HOW WOULD YOU PAY THOSE 1800 ACTIVES? THEY ARE NOT
15 ELIGIBLE, SO WHO WOULD THE PLAYER, THE MAN WHO SIGNED THE GLA,
16 BE DIVIDING IT WITH? IT'S A JOKE. IT'S A JOKE.

17 IT'S NOT A JOKE. IT'S NOT A JOKE, BECAUSE IT'S NOT
18 FUNNY. IT'S HEARTBREAKING, AS A MATTER OF FACT.

19 OKAY. AT LEAST 95 OF THE LICENSEES WERE GRANTED
20 RIGHTS TO SIX OR MORE ACTIVES OR RETIRED DURING THE YEARS 2004
21 TO 2007.

22 DR. NOLL, THE ECONOMIST FROM STANFORD, HE HIMSELF
23 ACKNOWLEDGED THAT. DR. NOLL ADMITTED THAT EVERY LICENSEE IN
24 THIS CASE HAD A DEMAND FOR GROUPS OF SIX OR MORE ACTIVE OR
25 RETIRED PLAYERS. FORGET WHAT CATEGORY THEY FELL INTO. THERE'S

1 NO QUESTION ABOUT THAT. EVERY ONE OF THOSE LICENSES, JUST LIKE
2 EA, ALL THE ACTIVES WENT OVER THERE. THE AD HOCS WENT OVER
3 THERE.

4 AND, BY THE WAY, SOME OF THOSE AD HOCS -- NOBODY TOLD
5 YOU THIS -- ARE MEN, FOOTBALL PLAYERS WHO SIGNED GLA'S. TWO
6 HATS ON. BUT THERE'S NO QUESTION THAT WE MEET THE DEFINITION.

7 NOW, AS A RESULT OF THE LICENSING OF THESE 95
8 LICENSEES -- AND THIS IS JUST DR. ROWLEY'S MATH. THIS ISN'T:
9 BELIEVE DR. ROWLEY'S TESTIMONY; DON'T BELIEVE DR. ROWLEY'S
10 TESTIMONY. SINCE MR. KESSLER WENT AFTER HIM PRETTY GOOD. I
11 HOPE I GET TO THAT.

12 I'M TELLING YOU, IF YOU DO THE MATH, TAKE THE
13 DOCUMENTS IN AND DO THE MATH, YOU'RE GOING TO FIND OUT THAT
14 \$161 MILLION WAS PAID TO THE DEFENDANTS DURING THE YEARS 2004
15 THROUGH 2007. THAT'S A LOT OF MONEY.

16 AND IF YOU ADD IN THERE THE INTERNET SPONSORSHIP
17 MONEY, WHICH IS CERTAINLY LICENSING MONEY, THEN THE MONEY COMES
18 TO \$215 MILLION.

19 THAT'S JUST A FACT. THAT'S NOT, YOU KNOW:

20 "I THINK THIS. THEY THINK THAT."

21 \$215 MILLION IS WHAT THEY COLLECTED.

22 THERE'S AN EXHIBIT, 1217. IT'S TOO LONG TO SHOW IT
23 TO YOU, BUT IF YOU HAVE ANY QUESTION ABOUT THE NUMBERS TAKE
24 THAT EXHIBIT IN WITH YOU, AND YOU'LL SEE THAT I'M CORRECT.

25 NOW, FOR THE YEARS 2004 THROUGH 2007, THE DEFENDANTS

1 RETAINED 63 TO 69 PERCENT OF THE MONEY AND GAVE THE BALANCE,
2 37 PERCENT OR 31 PERCENT TO THE ACTIVE PLAYERS.

3 NOW, THE DIFFERENCE IS THE \$8 MILLION, HOWEVER YOU
4 WANT TO FIGURE IT. THAT'S MY DRAWING THAT EVERYBODY LAUGHED
5 AT: 63/37/0.

6 THERE ARE NO IF'S, ANDS AND BUTS ABOUT THAT IT WAS 63.
7 THEN, DO THE MATH, IF YOU WANT TO, ABOUT \$8 MILLION, AND YOU'LL
8 SEE HOW IT GOES UP TO 69 AND 31.

9 ALL OF THE ACTIVE PLAYERS SHARED IN THAT MONEY,
10 37 PERCENT MONEY. THEY SHARED WHETHER THEY WERE BENCH WARMERS
11 OR WHETHER AT THE WERE STARS. THEY SHARED WHETHER THEY GOT IN
12 THE GAME, OR THEY DIDN'T GET IN THE GAME. DO YOU KNOW?

13 MR. KESSLER, AROUND THE EDGES, SAID:

14 "WELL, NOT QUITE THIS GUY OR NOT QUITE THAT
15 GUY."

16 BUT 99.9 PERCENT OF THE ACTIVE PLAYERS SHARED IN THIS
17 MONEY.

18 ANY REASON YOU DIDN'T SHARE WITH THE RETIRED'S IN A
19 GROUP LICENSE?

20 WELL, ONE OF THE REASONS WAS THAT THE UNION DIDN'T
21 WANT TO GIVE IT TO THEM. ANOTHER REASON WAS THEY NEVER TOLD
22 THE ACTIVE PLAYERS.

23 THIS TRACE ARMSTRONG, THIS YOUNG MAN SHOWED UP HERE,
24 HE HAD NO IDEA. THEY NEVER ONCE GAVE HIM WHAT GLA, AND SAID:

25 "YOU READ IT. YOU READ IT. YOU LOOK LIKE A

1 REALLY SHARP GUY, EVEN THOUGH YOU'RE 22, 23, 24" AT THE TIME.
2 HE WAS THE PRESIDENT, YOU KNOW? IT'S NOT THAT WE'RE YOUR
3 FATHER FIGURES.

4 UPSHAW AND THE GENERAL COUNSEL, MR. BERTHELSEN, WHO
5 I'M SURE IS VERY FINE LAWYER, YOU KNOW? AND MR. ALLEN, YOU
6 KNOW? THEY NEVER SHOWED IT TO HIM. THEY NEVER SHOWED IT TO
7 HIM. BUT THEY SHARE WITH THEIR OWN GUYS, THE ACTIVES, EQUALLY.

8 SO THE ACTIVES SHARE WITH ACTIVES, USED OR NOT USED,
9 BEST OR WORST.

10 HERE'S ONE EXAMPLE: ONE OF THE FELLOWS GOT UP THERE,
11 STEVE BYRD, HE WAS FROM STATS, THE FANTASY FOOTBALL FELLOW.
12 AND HE ACKNOWLEDGED -- AND, BY THE WAY, THEY ONLY PUT UP TWO
13 LICENSEES. THERE'S 93 MISSING CHAIRS HERE. THERE ARE 93
14 MISSING LICENSEES THAT DIDN'T GET UP AND LOOK YOU IN THE EYE.

15 OKAY. RIGHT. STEVE BYRD ACKNOWLEDGES THAT IN
16 FANTASY FOOTBALL, A GAME THAT SOME OF YOU KNOW, PROBABLY MOST
17 OF YOU DON'T KNOW, YOU CAN'T USE OFFENSIVE LINEMEN, BUT THE
18 OFFENSIVE LINEMEN STILL GET PAID THEIR SHARE IF THEY'RE
19 ACTIVES.

20 ACCORDING TO ROWLEY, WHO DID THE MATH -- PUT A CHART
21 UP HERE -- IF YOU THOUGHT IT WAS FAIR FOR THE DEFENDANTS TO
22 KEEP 63 TO 69 PERCENT -- AND I, FOR ONE, AM GOING TO URGE YOU
23 IN A MINUTE THAT IT IS NOT FAIR.

24 BUT ASSUMING FOR THE MINUTE -- NOT FAIR TO MY
25 CLIENTS. ACTIVES CAN DO WHAT THEY WANT. AND THEY'RE PUTTING

1 THE MONEY IN A STRIKE FUND OR A DO-WHAT-YOU-WANT-WITH-IT FUND.
2 I THINK IT'S CALLED "AN ALLOCATED FUND," \$68 MILLION.

3 BUT IF YOU THINK IT'S FAIR -- AND THE PLAINTIFFS
4 DON'T -- THAT AN EQUAL SHARE TO THE RETIRED OR THE AMOUNT PAID
5 BY THE UNION TO THE ACTIVES WOULD BE \$29 MILLION. AND AFTER
6 INTEREST IT WOULD BE \$32 MILLION.

7 THAT'S IT. THAT'S NOT FIGHTING FOR THESE GUYS, NOT
8 SAYING:

9 "YOU LEFT TOO MUCH MONEY IN THE UNION. YOU
10 SHOULD HAVE GIVEN MORE TO THE PLAYERS FOR THE RETIRED TO
11 SHARE, TOO."

12 IF YOU JUST WENT WITH THAT, IT'S \$29 MILLION, AND
13 AFTER INTEREST IT'S 32.

14 RIGHT. NOW, REMEMBER THIS, PLEASE, BECAUSE IT'S
15 IMPORTANT TO YOUR OWN SENSE OF WHAT YOU'RE DOING HERE, NOT JUST
16 GOING IN THERE BLIND.

17 RIGHT NOW, OR AT LEAST AS OF THE DATE OF THE EXHIBIT
18 THAT CAME INTO EVIDENCE, THERE WAS APPROXIMATELY \$68 MILLION IN
19 WHAT I'LL CALL "A SLUSH FUND," WHAT THEY CALL "AN UNDESIGNATED
20 FUND" OR A FUND THAT YOU CAN DO WHATEVER YOU WANT WITH. IT'S
21 JUST MONEY SITTING THERE, 68 MILLION BUCKS.

22 AND THAT'S GOT NOTHING TO DO WITH THE STRIKE FUND
23 MONEY, FOR WHICH THERE IS NO STRIKE, AND FOR WHICH THEIR
24 TEMPLATE OF 63/37 IS FROM 1994. AND MOST OF THOSE YEARS THERE
25 WAS NO STRIKE AND NO THREAT OF A STRIKE.

1 BUT IF YOU JUST GO WITH WHAT THEY DID, THEY GAVE THE
2 ACTIVES 37 PERCENT OF THE MONEY. AND INSTEAD OF CONSIDERING
3 FOR A MOMENT GIVING THE RETIRED'S THEIR GLA SHARE, THEY PUT
4 \$68 MILLION IN AN UNALLOCATED MONEY FUND, NOT DESIGNATED FOR
5 STRIKE OR ANYTHING.

6 SO IF THIS JURY DECIDES THAT I AM RIGHT IN WHAT I'M
7 TELLING YOU -- AND I FOR ONE -- I'M NOT GOING TO SAY THAT.
8 YOU'LL DECIDE WHAT YOU'LL DECIDE. JUST TELL ME MY TRUTH, DO
9 YOU KNOW?

10 BUT IF YOU DECIDE THAT THE ACTIVES ARE -- THE
11 RETIRED'S ARE ENTITLED TO SHARE IN THE MONEY, THERE'S
12 \$68 MILLION JUST SITTING THERE.

13 NOW, WE COULD BE ASKING -- NOT "WE." EXCUSE ME.
14 PLAINTIFFS COULD BE ASKING, THEY COULD BE ASKING FOR THEIR
15 SHARE OF THE STRIKE FUND, BECAUSE THEY DON'T BENEFIT FROM THE
16 STRIKE. AN ELECTION WAS PAID. NOBODY IS ASKING FOR THAT. THE
17 PLAINTIFFS COULD BE ASKING TO TAKE MORE MONEY OUT OF THAT.
18 DON'T MAKE IT 63/37.

19 THE PLAINTIFFS COULD BE ASKING FOR SOME EXPENSES.

20 YOU KNOW, IT GALLS A LITTLE BIT FROM OUR EYES TO SEE
21 MR. ALLEN'S SALARY BEING PAID OUT OF THE MILLIONS THAT ARE
22 BROUGHT IN, DO YOU KNOW, AFTER HE AND OTHERS DID WHAT THEY DID
23 TO THE PLAINTIFFS.

24 BUT NOBODY IS ASKING FOR THAT. ALL THEY'RE SAYING IS
25 IT IS THE RETIRED'S HAVE BEEN PAID WHAT THEY BARGAINED FOR WITH

1 THEIR UNION. I DON'T THINK IT WAS ARM'S-LENGTH.

2 BUT WHAT THEY BARGAINED FOR IS 37 PERCENT. KEEP THE
3 REST OF THE MONEY IN THE TILL. AFTER YOU GET THROUGH WITH THE
4 STRIKE FUND AND PAID ALL THE SALARIES AND THE CARS AND THE
5 TRIPS TO HAWAII AND ALL OF THAT, WHAT YOU GET DOWN TO IS THERE
6 IS STILL \$68 MILLION IN A BANK SOMEPLACE. AND THERE'S NO
7 REASON IN THE WORLD THAT THE RETIRED'S CAN'T GET THEIR 29- TO
8 \$32 MILLION FOR THAT.

9 **MR. KESSLER:** YOUR HONOR? YOUR HONOR, I ASK FOR AN
10 ADMONISHMENT TO THE JURY ABOUT THIS LAST LINE OF QUESTIONING,
11 PLEASE -- OR ARGUMENTS.

12 **THE COURT:** WELL, YOU CAN RESPOND TO IT IN YOUR
13 CLOSING.

14 YOU'VE USED 45 MINUTES. YOU ASKED ME TO TELL YOU.

15 **MR. PARCHER:** THANK YOU. I'M MOVING ON QUICKLY.

16 **THE COURT:** YOU'RE AT THE 45-MINUTE MARK.

17 **MR. PARCHER:** THANK YOU.

18 REMEMBER IN 2007 ALONE, THE UNION REBATED
19 \$8.7 MILLION IN DUES TO THE ACTIVES, AND THE UNION STILL HAS A
20 BUNDLE. SO IF YOU THINK THAT THE TEMPLATE OF 63 TO 69 IS FAIR,
21 \$32 MILLION IS THE NUMBER.

22 NOW, THERE WAS TALK ABOUT MAJOR LEAGUE BASEBALL. AND
23 THAT'S WHERE MR. KESSLER, GOT TO GIVE HIM CREDIT, HE TORE RIGHT
24 INTO DR. RASCHER. TORE RIGHT INTO DR. RASCHER ON CROSS
25 EXAMINATION.

1 AND BY THE TIME HE WAS DONE, HE MADE IT LOOK --
2 BECAUSE THAT'S THE ONE THAT'S MOST COMPARABLE. BY THE TIME HE
3 GOT DONE HE MADE IT LOOK AS IF BASEBALL PLAYERS RETAINED VERY
4 LITTLE OF THEIR MONEY AND GAVE THE UNION A WHOLE LOT MORE.

5 THE TRUTH IS BASEBALL PLAYERS RETAIN 61 PERCENT OF
6 THEIR MONEY, AND FOOTBALL PLAYERS SHARE IN 37 PERCENT OF THE
7 GROUP MONEY.

8 NOW, HOW DID MR. KESSLER MANAGE TO KNOCK US OFF THE
9 TRACK THERE? BY GOING INTO THE YEARS, A COUPLE OF YEARS WHERE
10 THERE WERE STRIKE FUNDS.

11 WELL, IT WOULD BE UNDERSTANDABLE WHEN YOU PUT MONEY
12 IN THE STRIKE FUND YOU DON'T PUT IT IN YOUR POCKET. YOU GIVE
13 IT TO THE UNION.

14 BUT AT THE END OF THE DAY, WHEN THERE WAS NO STRIKE,
15 THEY GAVE ALL THE MONEY OR MOST OF THE MONEY BACK TO THE
16 BALLPLAYERS. SO THE CORRECT FIGURES ARE EXACTLY AS DR. RASCHER
17 SAID.

18 BASEBALL PLAYERS RETAINED 61 PERCENT OF THEIR MONEY.
19 FOOTBALL PLAYERS RETAINED 37 PERCENT.

20 AND THEN, MR. KESSLER, WITH -- OKAY. IT IS A SHOT AT
21 HIM. WHAT I CALL VOODOO ECONOMICS. HE DREW SOMETHING. I
22 DON'T KNOW. HE WAS OVER THERE. VERY POLITELY DREW SOMETHING
23 THAT MADE IT LOOK LIKE THE FOOTBALL ACTIVES WERE SHARING
24 68 PERCENT, WHICH IS EXACTLY THE WAY THIS CASE WAS TRIED BY
25 THEM.

1 IT'S EXACTLY WHAT ALL THEIR WITNESSES DID.

2 IN ORDER TO GET TO THAT NUMBER, YOU HAD TO ADD IN THE
3 AD HOCS, WHICH IS UNSHARED MONEY. IF YOU TAKE OUT THE AD HOCS
4 WHICH DON'T BELONG THERE, BECAUSE IT NEVER WAS SHARED, DO YOU
5 KNOW? THAT MONEY THAT THEY SAY THEY, QUOTE, "GAVE TO
6 RETIRED, " DO YOU KNOW? THEN, THE NUMBER IS 37 PERCENT.
7 THERE'S NO DOUBT ABOUT IT.

8 IT'S NOT LIKE, YOU KNOW, GET A PH.D. AT BERKELEY, AND
9 THEN YOU GOT IT. YOU KNOW? IT'S JUST A MADE-UP CONSTRUCTION
10 TO THROW YOU OFF.

11 OKAY. NOW, THE CHART ALSO TELLS YOU WHAT THE DOLLAR
12 AMOUNTS ON A SHARED BASIS WOULD BE. FOR EXAMPLE, IF YOU
13 THOUGHT THAT THE PLAYERS SHOULD HAVE GOTTEN 61 PERCENT ACTIVES,
14 THEN WHAT WOULD, YOU KNOW, WHAT WOULD THE FOOTBALL PLAYERS GET,
15 AND SO ON.

16 I'M JUST GOING TO LEAVE THAT UP TO YOU BECAUSE OF
17 TIME.

18 NOW, REMEMBER THIS ON FIDUCIARY DUTY. THE PLAINTIFFS
19 RECEIVED SOLICITATION LETTERS ON A REGULAR BASIS. YOU HAVE
20 SEEN SOME OF THEM. THE PLAINTIFFS WERE TOLD THAT IT WAS
21 ESSENTIAL.

22 THAT'S THE TOUCHBACK, IF WE CAN GET IT UP THERE.

23 THEY WERE TOLD THAT ALL RETIRED MEMBERS SIGNED
24 CURRENT GROUP LICENSING AUTHORIZATIONS.

25 WHY WAS IT ESSENTIAL? DOES ANYBODY REALLY BELIEVE

1 THAT MR. ALLEN WAS JUST OPTIMISTIC? IT WAS ESSENTIAL. AND
2 THEY COMPLIED, BECAUSE YOU DO WHAT YOUR AGENT TELLS YOU TO DO.
3 YOU DO WHAT YOUR FIDUCIARY TELLS YOU TO DO. YOU TRUST YOUR
4 AGENT. YOU TRUST YOUR FIDUCIARY.

5 AND THEN, THERE WAS THIS QUESTION IN ALLEN'S
6 TESTIMONY.

7 "SO ANYBODY WHO WAS RETIRED THAT WAS ASKED TO
8 SIGN THE GLA AND SIGNED A GLA, WOULD HAVE THE RIGHT TO BELIEVE
9 THAT WHAT PLAYERS INC WAS GOING TO DO FOR THEM WAS TAKE THE
10 HELMETS OFF THE PLAYERS AND MARKET THEM AS PERSONALITIES, AS
11 WELL AS PROFESSIONAL ATHLETES, CORRECT?

12 "YES."

13 WELL, THAT'S WHAT A FIDUCIARY DOES. THE WEB SITE
14 SAYS -- YOU SAW IT BEFORE -- THAT THEY REPRESENTED OVER 3,000
15 PLAYERS.

16 LAIRD TESTIFIED:

17 "I ASSUME THEY'RE ACTING AS AN AGENT FOR ACTIVE
18 AND RETIRED PLAYERS, AND THEY WOULD TRY TO GET -- THEY WERE
19 GOING TO TRY TO GET DEALS FOR US AND WE WOULD GET PAID.

20 "MR. LINZNER, IS IT TRUE THAT YOU UNDERSTOOD
21 THAT, IN EFFECT, THAT PLAYERS INC WAS ACTING AS A SORT OF AGENT
22 FOR RETIRED PLAYERS IN DEALING WITH YOU?"

23 ARE YOU READY? THIS IS LINZNER, THEIR GUY:

24 "YEAH, THEY WERE AN AGENT OR MIDDLEMAN BETWEEN
25 THE RETIRED PLAYERS AND US TO LICENSE THE RIGHTS OF THOSE

1 RETIRED PLAYERS."

2 THAT'S AN AGENT.

3 AND ON THE QUESTION OF CONTROL, MR. ADDERLEY

4 TESTIFIED:

5 "YOU KNOW, IF I DIDN'T WANT TO GO INTO TOBACCO
6 OR SOMETHING LIKE THAT OR LIQUOR I COULD ALWAYS WALK AWAY."

7 NOW, MR. KESSLER IS SUGGESTING BECAUSE THE GLA IS
8 SILENT, THAT THERE WAS NO RIGHT TO TERMINATE THE AGREEMENT.

9 BUT THE FACT IS, IF YOU TAKE A LOOK AT THE NEW GLA,
10 THE ONE THAT BY COINCIDENCE -- NOT SO COINCIDENTALLY, THEY SENT
11 OUT, RIGHT AFTER THEY GOT \$25 MILLION FROM ELECTRONIC ARTS,
12 RIGHT AFTER THEY WENT FROM 500,000 TO 25 MILLION, THEY CHANGED
13 THE GLA.

14 AND RIGHT THERE DOWN AT THE BOTTOM IT SAYS:

15 "IT MAY NOT BE REVOKED OR TERMINATED BY THE
16 UNDERSIGNED PLAYER UNTIL SUCH DATE."

17 WELL, YOU KNOW, IT'S A FUNNY THING. YOU GO DOWN THE
18 STREET AND YOU SEE A SIGN THAT SAYS -- THAT'S FADED. YOU SEE A
19 SIGN THAT'S FADED, AND SOMEBODY GETS INTO AN ACCIDENT. AND
20 YOU'RE WONDERING WHETHER THAT FADED SIGN HAD SOMETHING TO DO
21 WITH THE ACCIDENT.

22 AND THEN, THE NEXT DAY AFTER THE ACCIDENT YOU SEE A
23 SIGN UP THERE THAT'S CLEAR AND BRIGHT AS CAN BE, OR THAT
24 CHANGES WHAT THE SIGN SAYS.

25 YOU KNOW, YOU COULD DRAW AN INFERENCE MAYBE THAT THE

1 FIRST SIGN WASN'T ADEQUATE. IF THERE WAS NO RIGHT TO REVOKE OR
2 TERMINATE THE GLA THAT WE'RE FIGHTING ABOUT, WHY WAS IT SILENT,
3 AND THEN WHY DID THEY SAY IT'S NECESSARY TO PUT IT IN THERE?

4 WHY DIDN'T THEY SAY "YOU'RE NOT ALLOWED TO REVOKE IT
5 OR TERMINATE IT" IF YOU WEREN'T ALLOWED TO REVOKE IT OR
6 TERMINATE IT ALL ALONG?

7 I WANT TO TALK ABOUT TRUST. THESE ARE ATHLETES, MY
8 CLIENTS. THEY SIGNED THIS GLA AND CONTINUED TO SIGN THIS GLA
9 JUST BASED ON TRUST. THERE'S NO LAWYER. YOU DON'T SIGN A
10 CONTRACT WITH A STRANGER WITHOUT A LAWYER, IF IT'S AN IMPORTANT
11 CONTRACT.

12 THERE'S NO NEGOTIATION. NO NEGOTIATION. WHAT'S HIS
13 NAME, WALTER BEACH, TRIED WITH A FEW QUESTIONS THAT HE ASKED
14 THAT WERE NEVER ANSWERED. BUT 2100 GUYS, I DON'T KNOW HOW MANY
15 GLA'S, THERE'S NO NEGOTIATION.

16 THERE'S NO REAL UNDERSTANDING OF THEIR RIGHTS. THESE
17 ARE LAYPEOPLE. THEY DON'T HAVE A LAWYER SITTING THERE WITH
18 THEM.

19 THEY NEVER MAKE A COMPLAINT. THEY DON'T KNOW. THEY
20 TRUSTED THEIR UNION. THEY CONTINUED TO SIGN, THESE MEN WHO
21 BUILT THE GAME. AND MAKE NO MISTAKE ABOUT IT. ALL THE MONEY
22 THAT'S COMING IN, ALL MONEY THAT'S COMING IN FOR LICENSING NOW
23 STARTS WITH THEM. THEY BUILT THE GAME. THESE MEN HAVE BUILT
24 THE GAME.

25 THEY'RE LIKE CHILDREN TRUSTING THEIR FATHER. YOU

1 DON'T CHALLENGE YOUR FATHER. YOU DON'T CHALLENGE -- I'M UNCLE
2 DICK -- I DON'T HAVE TIME TO TELL YOU ABOUT HIM. I THOUGHT HE
3 WAS THE GREATEST GUY, YOU KNOW. TURNS OUT MAYBE HE WASN'T. I
4 DON'T KNOW. NO PLACE TO TALK ABOUT THAT HERE.

5 I TRUST HIM WITH MY LIFE. I TRUST HIM WITH MY LIFE.
6 THESE MEN TRUSTED THEIR FAMILY. THEY TRUSTED THE
7 UNION THAT THEY HAD BELONGED TO, WHETHER THEY BELONGED TO IT OR
8 NOT. THEY GAVE THEM THEIR IDENTITY RIGHTS.

9 YOU KNOW, I THINK THAT YOU'LL FIND THAT THE CLEAREST
10 OF ALL BREACHES OF CONTRACT AND THE BREACH OF FIDUCIARY IS
11 MADDEN.

12 MADDEN, IF WE CAN GET IT UP ON THE BOARD MAYBE, I
13 DON'T KNOW, MADDEN HAS 147 VINTAGE TEAMS AND ONLY 32 ACTIVE
14 TEAMS. STRIP IT DOWN TO BASICS, PLEASE. JUST STRIP IT DOWN TO
15 BASICS.

16 YOU'LL HEAR THAT THERE ARE 147 VINTAGE OR 32 ACTIVE.
17 YOU THINK YOU MIGHT THINK THAT'S A RETIRED PLAYERS' GROUP
18 LICENSE, EVEN THE WAY THEY WANT TO DEFINE IT? TEAMS AND
19 PLAYERS AND I DON'T KNOW WHAT.

20 BUT RIGHT FROM THE GET-GO THEY WAKE UP ONE MORNING.
21 THEY'RE MAKING \$500,000 FROM ELECTRONIC ARTS. AND THROUGH NO
22 EFFORT ON THEIR PART, NO AGENCY EFFORT ON THEIR PART, NO
23 SELLING, PUSHING, MARKETING, NOTHING, EA'S TEAM, ACCORDING TO
24 MR. LINZNER, COMES UP WITH A GAME.

25 AND, FINALLY, NEVER MIND WHAT THE GLA SAYS, BECAUSE

1 WE'RE ENTITLED WHETHER WE'RE IN IT OR NOT, IF IT'S SIX OR MORE,
2 FINALLY THEY'RE IN HEAVEN. THERE'S GOING TO BE A MADDEN GAME,
3 AND THEY'RE GOING TO GET \$25 MILLION BUCKS, WHETHER OR NOT
4 NAMES OR LIKENESSES ARE USED OR NOT. WHETHER THEY'RE USED OR
5 NOT.

6 NOW, WOULDN'T YOU THINK THAT WOULD BE A PERFECT
7 OPPORTUNITY, RIGHT, TO HAND IN A LICENSE, WHICH WE THINK THEY
8 DID -- MAYBE NOT IN THE CLEAREST WAY -- THAT SAID YOU'VE GOT
9 1300 ACTIVES AND YOU'VE GOT 2100 RETIRED.

10 WOULDN'T YOU THINK THAT'S WHAT YOUR AGENT WOULD DO
11 FOR YOU? DON'T YOU THINK THAT'S WHAT YOUR FIDUCIARY WOULD DO
12 FOR YOU? WOULDN'T YOU THINK THAT THE CONTRACT IMPLIES THAT,
13 AND THAT'S WHAT YOU'RE ENTITLED TO?

14 SO WHAT DID THEY DO? AND I DON'T MEAN -- I DON'T
15 MEAN COERCE ANYBODY. I DON'T MEAN DEMAND IT. I DON'T MEAN
16 FORCE THEM, DO YOU KNOW? I SIMPLY MEAN -- DON'T EVEN MEAN
17 LEVERAGE THEM, BECAUSE THEY'RE THE ONLY GAME IN TOWN. JUST
18 SIMPLY SAY TO THEM:

19 "LOOK, I'M AN AGENT FOR 2100 RETIRED, 1800
20 ACTIVES. YOU GUYS GOT A MADDEN GAME OR EITHER YOU DON'T HAVE A
21 MADDEN GAME. EVERYBODY THAT YOU TAKE IS GOING TO GET -- WE'RE
22 GOING TO GET PAID WHETHER YOU USE THEM OR NOT."

23 SO HERE'S THE LIST, 3900 GUYS. NO, SIR. THEY DON'T
24 GIVE THEM THE RETIRED. THEY DON'T GIVE THEM THE RETIRED.
25 WHY? WHY?

1 NOW, PROFESSOR MADDEN -- PROFESSOR NOLL WAS
2 QUESTIONED AT HIS DEPOSITION ABOUT MADDEN. AND THERE WAS A
3 MOMENT IN TIME WHEN HE DIDN'T REALIZE WHAT THE MADDEN STORY
4 WAS.

5 IN HIS WORDS, HE HAD AN UNREALIZED HOPE. THE HOPE
6 WAS THERE WOULD AN VINTAGE TEAM OF STAR VALUE THAT COULD
7 GENERATE INCOME FOR PLAINTIFFS. HE DID NOT KNOW AT THE TIME
8 THAT THE MADDEN GAME EXISTED. HE BELIEVED YOU COULD GET A
9 SIGNIFICANT LICENSING REVENUE, AT LEAST FOR THOSE RETIRED
10 PLAYERS WITH NO NAME RECOGNITION, WHO PLAYED ON THE BEST TEAMS.

11 THAT'S NORMAL. THAT'S NORMAL. YOU'VE GOT A NONUSE
12 LICENSE. YOU'VE GOT ALL THESE TEAMS. WHY CAN'T YOU PUT ALL
13 THE PLAYERS IN WITH THEIR NAMES AND LIKENESSES? WHY CAN'T YOU
14 JUST HAND OVER ONE LICENSE FOR THAT?

15 YOU KNOW, UNLESS YOU'VE GOT A CONFLICT OF INTEREST.
16 UNLESS YOU FAVORED ONE SET OF GUYS, THE GUYS WHO VOTE, OVER THE
17 GUYS WHO HAVE NO POWER WHATSOEVER. DO YOU KNOW?

18 YOU KNOW, THE RETIRED, YOU KNOW, IN A CULTURE THAT
19 I'M FROM YOU TAKE CARE OF YOUR OWN. YOU DON'T TURN YOUR BACK
20 ON THEM, STAB THEM IN THE BACK, MAKE BELIEVE YOU'RE WITH THEM,
21 AND YOU'RE NOT.

22 IN A FAMILY YOU DON'T TAKE THE GRANDFATHER AND WALK
23 AWAY FROM HIM AND MAKE BELIEVE YOU'RE TAKING CARE OF HIM.

24 WHY COULDN'T THEY HAVE DONE THAT? NOT FORCE ANYBODY.
25 NOT INSIST ON ANYTHING. JUST SAY:

1 "HERE'S YOUR LIST, GUYS. OKAY. WE'LL GET
2 \$25 MILLION BUCKS. HERE'S YOUR LIST. 1800 AND 2100. YOU WANT
3 SOME OTHER GUYS?"

4 I DON'T KNOW WHO, JOE NAMATH OR WHOEVER IT IS.
5 "WE'LL GO OUT THERE AND TRY TO GET IT. HE'S A RETIRED PLAYER,
6 BUT WE'LL TRY TO GET IT."

7 NO, THEY DON'T DO THAT. NO, THEY DON'T DO THAT.
8 WHAT DO THINK DO? WELL, YOU SAW LASHUN LAWSON'S LETTER. I
9 MEAN, REALLY. PLEASE, REALLY. YOU KNOW, I DON'T WANT TO -- I
10 DON'T WANT TO HIT THE ROOF, BUT I'M RUNNING OUT OF TIME.

11 YOU KNOW, IT'S A DISGRACE, THAT LETTER. YOU WOULD
12 THINK THE LETTER WOULD SAY:

13 "OH, WE'RE SO GLAD YOU'RE TAKING OUR GUYS, YOU
14 KNOW. NOW, WE CAN DO RETIRED AND ACTIVES. WHAT COULD WE DO
15 NOW? WHAT COULD WE DO TO HELP YOU?"

16 SHE TELLS THEM THEY MUST BE SCRAMBLED. AND THEN,
17 THEY -- I THINK IT'S MR. LINZNER. I DON'T KNOW WHO ELSE DID
18 IT. I THINK IT MIGHT HAVE BEEN DR. NOLL -- BELIEVED THEY WERE
19 ONLY TALKING ABOUT THE NUMBER HERE. WHICH WOULD HAVE BEEN BAD
20 ENOUGH, BY THE WAY.

21 YOU KNOW, THAT'S PART OF WHO A BALLPLAYER IS. HERB
22 ADDERLEY HAS GOT A NUMBER. HE KNOWS WHAT HIS NUMBER IS, YOU
23 KNOW? RIGHT?

24 BUT, NO. THEY TOLD THEM:

25 "YOU CAN'T DO THIS."

1 WHY CAN'T YOU DO IT? WELL, I'LL ADD A TRUTHFUL
2 COMMENT TO THAT LETTER:

3 "YOU CAN'T DO IT, BECAUSE IF YOU DO AND THE
4 RETIRED'S FIGURE OUT THAT WE'RE STABBING THEM IN THE BACK, WE'LL
5 HAVE TO SHARE THE MONEY WITH THEM."

6 THAT'S WHY.

7 **THE COURT:** MR. PARCHER, YOU'RE COMING UP ON AN HOUR
8 NOW.

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

10 WANT TO TALK ABOUT MARKETING FOR A MINUTE. THERE WAS
11 NO MARKETING HERE. TAKE INTO THE ROOM WITH YOU THE FOUR
12 BROCHURES. TAKE INTO THE ROOM WITH YOU PAT ALLEN'S MONTHLY
13 REPORTS AND ADD THAT UP FOR THE YEARS IN QUESTION.

14 FIRST OF ALL, THAT'S ALL? THAT'S ALL THEY DID?
15 OTHER THAN UPSHAW'S -- MR. UPSHAW'S TESTIMONY, WAS TELLING YOU
16 THE TRUTH. WE ASKED HIM THE QUESTION, WHICH PROBABLY HE DID.
17 THEY SAY:

18 "NO, WE DIDN'T PUSH ANY MORE. NOT REALLY."
19 THAT'S ALL THEY DID FOR THESE MEN.

20 NOW, JUST IMAGINE IN TAKE TWO, WHEN TAKE TWO WANTED
21 200 AND SOME ODD RETIRED PLAYERS, JUST IMAGINE IF THEY HAD
22 LICENSED THEM AS A GROUP, INSTEAD OF KNOCKING THEM OUT SO THAT
23 THEIR ELECTRONIC ARTS CLIENT COULD CONTINUE TO BE SUPREME IN
24 THE VIDEO GAME FOOTBALL PLAYER MARKET.

25 HOW COULD YOU DO THAT TO GUYS? TAKE TWO WANTED THEM.

1 AND THEY GO GET EA A LICENSE FOR CHEAP. MAYBE EA DIDN'T THINK
2 IT WAS CHEAP, BUT PLAYERS INC THOUGHT IT WAS FOR CHEAP. AND
3 THEY KNOCK OUT TAKE TWO.

4 IMAGINE IF THEY HAD GONE TO TAKE TWO, GIVEN THEM THE
5 GROUP LICENSE, NAME AND LIKENESS, EA, NAME AND LIKENESS, AND
6 THEN STARTED A MEDIA BLITZ.

7 LOOK, I'M NO AGENT, YOU KNOW. BUT I KNOW WHAT AGENTS
8 DO. I SUSPECT YOU'VE GOT SOME IDEA WHAT AGENTS DO.

9 THEY GO ON TELEVISION. THEY GO ON THE RADIO. THEY
10 GO TO THE NEWSPAPERS. THEY BRING THE GUYS OUT FOR DINNERS AND
11 DANCES. AND THE WHOLE WORLD STARTS TO KNOW WHAT -- WHAT THIS
12 GRANDFATHER KNOWS, DO YOU KNOW? AND EVERY OTHER GRANDFATHER OR
13 GRANDMOTHER MAYBE KNOWS, YOU KNOW, WHICH IS THESE PLAYERS IN
14 THEIR DAY HAD GREATNESS IN THE GAMES THEY PLAYED.

15 AND WOULDN'T IT BE WONDERFUL TO PLAY THESE GAMES, TO
16 HAVE MOVIES, TO HAVE TELEVISION SHOWS, YOU KNOW, WHERE WE COULD
17 TALK ABOUT THEM AND SHARE IT WITH OUR GRANDCHILDREN AND OUR
18 CHILDREN?

19 AND IT WOULD START BUILDING THIS THING UP. BUT NO,
20 THEY DIDN'T WANT THAT. THEY DIDN'T WANT THAT, BECAUSE THEY
21 WEREN'T REALLY OUR AGENT. THEY WERE THERE TO KNOCK US OUT.

22 AND AS SOON AS -- AS SOON AS THEY REALIZED THAT BIG
23 MONEY WAS COMING -- WAS COMING IN, THEY CHANGED THE -- THE GLA.

24 YOU GOT TO TAKE A LOOK AT THE CHANGED GLA, BECAUSE
25 UNDER THE GLA IT DOESN'T SAY THAT THE PLAYER SHARES WITH THE

1 ELIGIBLE NFLPA MEMBERS. IT DOESN'T SAY THAT AT ALL.

2 IT SAYS:

3 "WE'LL FOLLOW THE OBJECTIVES OF THE UNION,"
4 WHICH MEANS THEY DON'T HAVE TO GIVE THEM A PENNY. THAT'S WHAT
5 THEY DID. WHY DO YOU THINK THEY CHANGED IT? THEY CHANGED IT
6 FOR ONE REASON AND ONE REASON ONLY: DIRTY TRICK.

7 OKAY. I WANT TO TALK ABOUT DOUBLE-TALK, AND I'LL TRY
8 TO GET TO MORE OF IT. YOU KNOW, YOU'VE GOT DOUG ALLEN, RIGHT?
9 HE SAYS THAT "SIX OR MORE PRESENT OR FORMER" DOESN'T MEAN THAT.
10 RIGHT?

11 HE SAYS THAT IT ONLY MEANS RETIRED. AND IT MEANS
12 THE ENTIRE GROUP OF RETIRED. IF YOU CAN'T LICENSE ALL 2,062
13 CLASS MEMBERS, THEN YOU CAN'T HAVE A DEAL.

14 THAT'S OUTRAGEOUS. IT DOESN'T SAY THAT.

15 TALK ABOUT RICHARD BERTHELSEN. THE DEFENDANTS SAY
16 THAT "PRESENT OR FORMER" MEANS "RETIRED ONLY."

17 "I CONSISTENTLY SAID THAT IT WAS THE INTENT THAT
18 THEY BE CONSISTENTLY SEPARATE PROGRAMS, YES."

19 IT JUST -- IT JUST BOGGLES MY MIND.

20 THE DEFENDANTS NEVER CREATED AN ESCROW ACCOUNT.
21 ALLEN ACKNOWLEDGED THAT.

22 THE DEFENDANTS' MOTTO WAS: "PAST, PRESENT AND
23 FUTURE."

24 AND ALONG COMES THE LATE GENE UPSHAW:

25 "WE COULD HAVE THE GREATEST DOG FOOD IN THE

1 WORLD, BUT IF THE DOGS DON'T LIKE IT, WE CAN'T SELL IT."

2 HOW DOES THAT FEEL? HOW DOES THAT FEEL? DOG FOOD?

3 HOW DOES THAT FEEL? THAT'S YOUR AGENT. THAT'S YOUR AGENT

4 TELLING IT TO THE WORLD. HOW DOES THAT FEEL?

5 YOU THINK THAT'S A FIDUCIARY? YOU THINK THAT'S

6 SOMEBODY IN YOUR CORNER FIGHTING, EVERY OUNCE OF HIS BODY, OR

7 HER BODY, FIGHTING FOR YOU? DOG FOOD.

8 "RETIRED PLAYERS ARE EXPRESSLY INCLUDED IN THE

9 THIRD-PARTY LICENSE AGREEMENT," NOT THAT IT MATTERS. READ THE

10 ALLEN TESTIMONY AT A DEPOSITION WHERE HE SAYS:

11 "I BELIEVE SO."

12 READ THE ALLEN TESTIMONY NOW IN THE COURTROOM WHERE

13 HE SAYS:

14 "NO."

15 THE TOUCHBACK ARTICLE:

16 "THE VIDEO GAME COMPANY'S RESPONSE HAS BEEN

17 RESTRAINED."

18 TAKE A LOOK AT THE EXHIBIT FOR THE YEARS 2003 TO

19 2007. IT TELLS YOU THERE WERE 147 RETIRED TEAMS IN THEIR

20 MADDEN.

21 AND TAKE A LOOK AT THAT TOUCHBACK, THE HEADLINE,

22 PLEASE:

23 "GROUP LICENSING IS ESSENTIAL."

24 WHY KEEP WRITING THESE GUYS TELLING THEM GROUP

25 LICENSING IS ESSENTIAL? WHY? ASK YOURSELF THAT QUESTION.

1 ALLEN:

2 "DID YOU EVER FAVOR THE INTERESTS OF THE
3 LICENSEES OVER THE INTERESTS OF THE PLAYERS THAT YOU
4 REPRESENTED? YES OR NO?

5 "NO."

6 THEN, READ THE HALL OF FAME LETTER. OF COURSE, HE
7 DID.

8 STABBED THE HALL OF FAMERS. NEVER MIND THE CLASS,
9 THE STABBED THE HALL OF FAMERS IN THE BACK.

10 ARE YOU TELLING THE COURT AND JURY THAT YOU USED YOUR
11 BEST EFFORTS FOR THE RETIRED GUYS?

12 LASHUN:

13 "IT MUST BE SCRAMBLED."

14 DO YOU REALLY THINK HE WAS TRYING TO USE BEST IN
15 MADDEN, OR ANYPLACE ELSE, FOR THAT MATTER?

16 PAT ALLEN: THE DEFENDANTS CONTEND THEY MARKETED THE
17 ENTIRE GLA GROUP WITH A LIST.

18 TAKE A LOOK AT HOWARD SKALL FOR PLAYERS INC:

19 "IS THERE A LIST OF APPROXIMATELY 3,000 RETIRED
20 PLAYERS THAT'S MADE AVAILABLE?

21 "NOT THAT I WAS AWARE OF."

22 AND IT GOES ON WITH UPSHAW AND ALLEN AND OTHERS,
23 WHICH I JUST DON'T HAVE TIME TO READ TO YOU RIGHT NOW. I'LL
24 GET TO IT, I PROMISE YOU, ON THE RESPONSE.

25 PUNITIVE DAMAGES. LADIES AND GENTLEMEN, I JUST

1 SHOWED YOU HOW THE DEFENDANTS, I HOPE, BREACHED THE GLA AND
2 THEIR FIDUCIARY DUTIES.

3 THERE'S ONE MORE THING THAT I'M GOING TO ASK YOU TO
4 FIND. AND THAT IS THAT THE DEFENDANTS ACTED WITH AN INTENT TO
5 INJURE THE PLAINTIFFS, WITH WILLFUL DISREGARD FOR THEIR RIGHTS,
6 AND THAT THEIR CONDUCT WAS OUTRAGEOUS.

7 THE COURT WILL INSTRUCT YOU ON THE STANDARDS. I
8 DIDN'T SHOW THE SLIDES. I ONLY TOUCHED ON IT. I'LL SAY MORE
9 IN THE SUMMATION.

10 BUT WHAT I WAS JUST READING YOU ILLUSTRATED THE
11 DOUBLE-TALK, THE DOUBLE-DEALING, THE DECEIT, THE DOUBLE
12 STANDARDS, THE STABBINGS IN THE BACK, THE CONFLICT OF
13 INTERESTS.

14 THESE WERE MERELY EXAMPLES THAT I THINK PROVE BEYOND
15 A DOUBT THAT THE DEFENDANTS ACTED HORRIBLY. IF YOU FIND THAT,
16 THE COURT WILL INSTRUCT THAT YOU CAN CONSIDER PUNITIVE DAMAGES.

17 MR. BERTHELSEN, THE GENERAL COUNSEL, HE SAID IT BEST.
18 THERE'S A CARD OR A SLIDE ABOUT THAT. HE ACKNOWLEDGED IT. I
19 THINK CHAD HUMMEL WAS QUESTIONING HIM.

20 "THE DEFENDANTS HAVE TO TAKE RESPONSIBILITY FOR
21 THE DOCUMENT."

22 I'M JUST GOING TO ASK YOU THIS. WHEN YOU GO TO
23 LISTEN TO MR. KESSLER, KEEP THESE QUESTIONS IN MIND, PLEASE.
24 ANYTIME MR. KESSLER SHOWS YOU RETIRED PLAYER LICENSING REVENUES
25 PAID TO RETIRED PLAYERS OR COMPARES WHAT THE UNION DID IN THIS

1 CASE TO OTHER SPORTS UNIONS, ASK YOURSELF:

2 ARE THESE AD HOCS PAYMENTS? IS HE INCLUDING AD
3 HOC PAYMENTS?

4 IF SO, THEY ARE IRRELEVANT AND AN ATTEMPT TO DISTRACT
5 YOU. HE MIXES APPLES AND ORANGES. NOT A PENNY OF AD HOC
6 PAYMENTS WENT INTO AN ESCROW ACCOUNT TO BE DIVIDED AMONG
7 PLAINTIFFS.

8 AND, LASTLY, ASK YOURSELF:

9 DOES ANYTHING HE'S SAYING DEFEAT THE PLAYER
10 LANGUAGE OF THE GLA THAT THEY DRAFTED?

11 "FUNDS RECEIVED FROM GROUP LICENSING INVOLVING SIX OR
12 MORE PRESENT OR FORMER PLAYERS WILL BE DIVIDED BETWEEN THE
13 PLAYER AND AN ESCROW ACCOUNT, FROM AN ESCROW ACCOUNT WITH THE
14 ELIGIBLE NFLPA GUYS."

15 NOTHING HE WOULD TELL YOU SHOULD ALTER YOUR VIEW OF
16 THE DEAL. A DEAL IS A DEAL.

17 AND YOU'RE GOING TO HEAR, I BELIEVE, A WHOLE BUNCH OF
18 EXCUSES. I WILL COME BACK WITH WHATEVER TIME I HAVE LEFT TO
19 SAY A FEW MORE WORDS TO YOU.

20 THANKS FOR LISTENING TO ME. WHATEVER YOU DO IS ALL
21 RIGHT WITH ME.

22 **THE COURT:** THANK YOU, MR. PARCHER.

23 **MR. PARCHER:** THANK YOU.

24 **THE COURT:** IS THERE ROOM FOR THE JURY TO SCOOT BY
25 THERE?

1 **MR. PARCHER:** I'LL --

2 **THE COURT:** ALL RIGHT. WE WILL TAKE A 15-MINUTE
3 RECESS. REMEMBER THE ADMONITION. PLEASE DON'T TALK ABOUT THE
4 CASE. YOU WILL HAVE A DUTY TO DO SO IN ABOUT AN HOUR AND A
5 HALF OR TWO, BUT NOT YET. THANK YOU.

6 WE'LL SEE YOU BACK HERE IN 15 MINUTES.

7 **THE CLERK:** ALL RISE.

8 (THEREUPON, THE JURY LEFT THE COURTROOM.)

9 **THE COURT:** PLEASE BE SEATED.

10 MR. PARCHER, YOU USED AN HOUR AND 8 MINUTES. I'M
11 GOING TO ENLARGE YOUR TIME SLIGHTLY. YOU CAN HAVE 15 MINUTES.

12 **MR. PARCHER:** THAT'S NICE OF YOU, JUDGE.

13 **THE COURT:** 15 MINUTES.

14 AND YOU CAN HAVE AN HOUR AND 25 MINUTES IN YOUR
15 ARGUMENT, MR. KESSLER.

16 **MR. PARCHER:** THAT'S VERY NICE.

17 **THE COURT:** 15 MINUTES. THAT'S AN ENLARGEMENT --

18 **MR. PARCHER:** I APPRECIATE IT. I REALLY DO.

19 **MR. KESSLER:** YOUR HONOR?

20 **THE COURT:** YES.

21 **MR. KESSLER:** YOUR HONOR, I WOULD NOTE, AGAIN, SINCE
22 YOUR HONOR WAS CAREFUL ABOUT THIS IN OPENING AND WARNED US,
23 THERE WAS QUITE A BIT OF VOUCHING, PARTICULARLY AT THE END.
24 THE DISCUSSIONS OF STUFF OUT OF THE RECORD ABOUT HOLLYWOOD
25 AGENTS.

1 HE MENTIONED "OUR ARGUMENTS," YOUR HONOR.

2 AGAIN, I DON'T --

3 **THE COURT:** HE CAN MENTION YOUR ARGUMENT.

4 **MR. KESSLER:** NO, NO. HE SAID "OUR ARGUMENT."

5 **THE COURT:** YES, HE DID.

6 **MR. KESSLER:** WITH RESPECT TO THAT THEN --

7 **THE COURT:** IT'S -- I KNOW YOU'RE GOING TO DO THE
8 SAME THING.

9 **MR. PARCHER:** I TRIED TO CORRECT IT QUITE A FEW
10 TIMES.

11 **MR. KESSLER:** YOUR HONOR, I WON'T DO ANY MORE. I
12 JUST WANT TO KNOW THAT HE HAS PUT THIS INTO PLAY A LITTLE BIT.

13 **THE COURT:** YOU CAN HAVE THE SAME DEGREE OF
14 FLEXIBILITY THAT HE TOOK --

15 **MR. KESSLER:** THAT'S ALL I'M ASKING FOR.

16 **THE COURT:** -- TO PERSONALIZE THE CASE.

17 **MR. PARCHER:** I DON'T WANT TO HURT MR. KESSLER'S
18 FEELINGS, BUT I'LL BE PERFECTLY HAPPY FOR THE JURY TO IDENTIFY
19 THE DEFENDANTS WITH HIM. VERY CONTENT.

20 **THE COURT:** WELL, YOU ALL CAN FIND OUT WHAT THE JURY
21 THINKS --

22 **MR. PARCHER:** RIGHT.

23 **THE COURT:** -- IN A FEW DAYS. ALL RIGHT.

24 MR. KESSLER, DO YOU WANT TO TAKE THE 15 MINUTES TO
25 REARRANGE THE COURTROOM AND BE READY TO GO IN 15 MINUTES?

1 **MR. KESSLER:** I WILL, YOUR HONOR.

2 **THE COURT:** WE WILL TAKE A SHORT BREAK.

3 **MR. KESSLER:** THANK YOU.

4 (RECESS WAS TAKEN.)

5 **THE COURT:** EVERYONE HAVE A SEAT. ARE WE READY,
6 MR. KESSLER?

7 **MR. KESSLER:** I'M READY.

8 **THE COURT:** IF THERE ARE PEOPLE IN THE HALLWAY WHO
9 WANT TO COME IN, LET'S GET THEM IN SO WE DON'T HAVE
10 INTERRUPTIONS.

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

12 **THE COURT:** PLEASE BE SEATED.

13 AT THIS TIME WE WILL HAVE THE CLOSING ARGUMENT OF THE
14 DEFENDANTS.

15 MR. KESSLER.

16 **MR. KESSLER:** YOUR HONOR, IF YOU WOULD BE KIND ENOUGH
17 TO LET ME KNOW WHEN I'M ONE HOUR IN, I WOULD APPRECIATE THAT.

18 **THE COURT:** I WILL. IT WILL BE APPROXIMATE,
19 PROBABLY. BUT AT SOME LOGICAL BREAKING POINT I'LL GIVE YOU A
20 HEADS UP.

21 **CLOSING ARGUMENT**

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

23 GOOD MORNING, LADIES AND GENTLEMEN OF THE JURY.
24 WE'RE FINALLY HERE.

25 ON BEHALF OF MY CLIENTS, THE NATIONAL FOOTBALL LEAGUE

1 PLAYERS ASSOCIATION AND PLAYERS INC, I WANT TO THANK YOU ON
2 THEIR BEHALF FOR DEVOTING YOUR TIME AND CAREFUL ATTENTION TO
3 THIS CASE.

4 WE KNOW THERE ARE MANY THINGS GOING ON IN YOUR LIVES,
5 AND THAT JURY SERVICE IS BOTH A WONDERFUL OBLIGATION, BUT IT IS
6 ALSO A BURDEN AT TIMES. AND WE REALLY DO APPRECIATE YOUR
7 DEVOTING YOURSELF TO THIS SERVICE.

8 FROM THE VERY BEGINNING, THIS CASE, AS YOU KNOW,
9 BECAUSE YOU'VE BEEN SITTING HERE, HAS BEEN FILLED WITH
10 FINGER-POINTING, ACCUSATIONS, JERSEY-WAVING, A LOT OF SOUND, A
11 LOT OF FURY. THAT'S BEEN THE STORY OF THIS CASE.

12 BUT WHAT YOU'VE SEEN IS TIME AND TIME AGAIN, TIME AND
13 TIME AGAIN, WHEN THE EVIDENCE IS LOOKED AT IN ITS FULL CONTEXT,
14 WHEN YOU'VE SEEN THE WITNESSES, WHEN YOU'VE HEARD THE
15 TESTIMONY, THE PICTURE WAS NOT QUITE HOW PLAINTIFFS' COUNSEL
16 HAS PRESENTED IT.

17 TODAY IS NO DIFFERENT. TODAY IS NO DIFFERENT.

18 WE'RE GOING TO CAREFULLY REVIEW THE EVIDENCE WITH YOU
19 TODAY. WE CANNOT DO IT ALL. THERE'S TIME CONSTRAINTS. BUT
20 WE'RE GOING TO SHOW YOU THE MOST IMPORTANT PIECES OF EVIDENCE
21 IN ITS FULL CONTEXT.

22 AND WHAT YOU'RE GOING TO SEE IS THAT THE ALLEGATIONS
23 OF DOUBLE-TALKING, DOUBLE-DEALING, DECEIT, UNTRUTHFULNESS BY
24 GENE UPSHAW, DOUG ALLEN, PAT ALLEN, TRACE ARMSTRONG, DAN GOICH,
25 ALL OF THESE PEOPLE TOGETHER IN SOME TYPE OF GIGANTIC

1 CONSPIRACY AGAINST THE RETIRED PLAYERS, WHICH IS THE ONLY WAY
2 MR. PARCHER'S ALLEGATIONS MAKE SENSE, THERE'S NO EVIDENCE OF
3 THAT. THERE'S NO EVIDENCE OF THAT.

4 YOU'VE SEEN THE WITNESSES AND THE EVIDENCE, AND YOU
5 KNOW THAT. YOU KNOW THAT.

6 I WANT TO REMIND YOU OF THAT MORNING WHEN THE SIREN
7 WENT OFF. REMEMBER THE SIREN AND EVERYBODY BECAME ALARMED?
8 SURELY THAT SIREN MUST MEAN SOMETHING. PERHAPS IT WAS A SAFETY
9 ISSUE. WE SHOULD LEAVE OR SOMETHING.

10 BUT WHAT THE JUDGE THEN INFORMED US IS: NO, IT
11 ACTUALLY SIGNIFIED NOTHING. IT WAS THE 10 O'CLOCK SIREN.

12 THAT'S WHAT THIS CASE HAS BEEN ABOUT. IT'S BEEN
13 ABOUT AN ALARMING NOISE, ALARMING ALLEGATIONS. BUT WHEN YOU
14 LOOK AT THE EVIDENCE, THE EVIDENCE, IT'S SIMPLY NOT THERE.
15 THAT'S WHAT I'M GOING TO DO THE REST OF MY TIME. WE'RE GOING
16 TO LOOK AT THE EVIDENCE.

17 YOU'LL RECALL, IF WE TAKE A LOOK AT THE THREE KEY
18 POINTS TO DECIDE THIS CASE, C1. IN MY OPENING I SAID THESE ARE
19 THE THREE POINTS WHICH WOULD HELP YOU DECIDE THIS CASE.

20 STILL TRUE TODAY.

21 THE FIRST POINT WAS THAT THE LICENSING MONEY WAS
22 GENERATED -- THE MONEY THAT THEY'RE SEEKING, THE GLR POOL,
23 REMEMBER THAT'S THE MONEY THEY'RE SEEKING -- WAS GENERATED
24 SOLELY FOR THE RIGHTS OF ACTIVE, NOT RETIRED, PLAYERS.

25 EVIDENCE IS OVERWHELMING ON THAT POINT, AND WE WILL

1 REVIEW IT.

2 SECOND, WHENEVER RETIRED PLAYERS' RIGHTS WERE
3 LICENSED, WHO GOT THE MONEY? THE RETIRED PLAYER GOT THE MONEY,
4 NOT THE ACTIVE PLAYERS.

5 AGAIN, THE EVIDENCE IS OVERWHELMING. MR. PARCHER
6 SAID NOT ONE PENNY WENT TO THE RETIRED PLAYERS.

7 WELL, WHAT THE UNDISPUTED EVIDENCE SHOWS -- AND WE'LL
8 GO THROUGH THIS -- IS \$7 MILLION -- THAT'S A LOT OF PENNIES --
9 WENT TO THE CLASS MEMBERS OF THIS CASE.

10 13,000 WENT TO MR. ADDERLEY. HE DOESN'T THINK IT'S
11 ENOUGH. I UNDERSTAND THAT.

12 BUT THE FACT THAT WE WERE NOT OUT THERE MARKETING AND
13 GENERATING OPPORTUNITIES FOR RETIRED PLAYERS MAKES NO SENSE.
14 COMPLETELY CONTRARY TO THE EVIDENCE.

15 THIRD POINT IS THAT MOST RETIRED CLASS MEMBERS
16 RECEIVED NO LICENSING MONEY. WHY? BECAUSE LICENSEES IN THE
17 MARKETPLACE PUT NO VALUE ON THEIR LICENSING RIGHTS.

18 WHAT WAS THE PROBLEM? WHAT DID THE EVIDENCE SHOW?
19 WE'RE GOING TO REVIEW THIS.

20 THE EVIDENCE SHOWED THE STAR RETIRED PLAYERS WOULDN'T
21 SIGN THE GLA'S ON THE WHOLE. TRIED, COULDN'T GET THEM.

22 IT WAS MENTIONED THAT MR. BART STARR IS HERE. VERY
23 FAMOUS RETIRED PLAYER. MR. BART STARR DIDN'T SIGN A RETIRED
24 PLAYER GLA. WE COULDN'T GET SOMEBODY LIKE A BART STARR TO JOIN
25 IN, OKAY?

1 WITHOUT THOSE STAR PLAYERS, THE GROUP WAS SIMPLY NOT
2 MARKETABLE. IT'S NOBODY'S FAULT. IT'S NOT BECAUSE THERE
3 WASN'T EFFORT. IT'S NOT BECAUSE THERE WAS SOMETHING EVIL GOING
4 ON, AS YOU HEARD. THERE'S NOTHING EVIL GOING ON.

5 THIS WAS AN EFFORT, AND THE EVIDENCE SHOWS, OF THE
6 ONLY SPORTS UNION TO TRY TO DO THIS FOR THEIR RETIRED PLAYERS.

7 YOU HEARD EVIDENCE FROM PROFESSOR NOLL, THE BASEBALL
8 PLAYERS' UNION DIDN'T TRY THIS. THE HOCKEY PLAYERS' UNION
9 DIDN'T TRY THIS. THE BASKETBALL PLAYERS' UNION DIDN'T TRY
10 THIS.

11 BUT GENE UPSHAW, WHO WAS A RETIRED PLAYER HIMSELF,
12 WANTED TO TRY TO DO SOMETHING FOR THE RETIRED PLAYERS.

13 EVEN MY GRANDMOTHER, IF SHE WERE HERE TODAY, WOULD BE
14 SHOCKED AT THE VINDICTIVE ATTACK OF DECEIT, NAME CALLING,
15 REQUESTS FOR PUNITIVE DAMAGES, THAT CAME OUT OF THIS EFFORT TO
16 TRY TO HELP THESE RETIRED PLAYERS.

17 BUT I TOLD THEM IN THE EVIDENCE. I'M NOT GOING TO DO
18 A LOT OF RHETORIC HERE. I REALLY WANT TO FOCUS ON THE
19 EVIDENCE.

20 SO, WHAT SHOULD WE TALK ABOUT FIRST? WELL, THE FIRST
21 AND MOST IMPORTANT THING TO TALK ABOUT IS THE GLA, THE RETIRED
22 PLAYER GLA.

23 IF WE COULD PUT UP EXHIBIT 110. IS IT 110? YES.

24 (DOCUMENT DISPLAYED.)

25 AND I DO WANT TO MENTION TO YOU, AS THE COURT HAS

1 INSTRUCTED YOU, REMEMBER IT'S THE PLAINTIFFS WHO HAVE THE
2 BURDEN OF PROOF. THIS IS VERY IMPORTANT, BECAUSE THAT'S HOW
3 OUR LEGAL SYSTEM WORKS.

4 SO IF THEY HAVEN'T SHOWN THE EVIDENCE, THEY CAN'T
5 PREVAIL.

6 WE ARE HEARD MR. PARCHER SAY WELL, WE, DEFENDANTS,
7 ONLY CALLED THE TWO LICENSEES HERE OUT OF THE 95.

8 IT WASN'T DEFENDANTS' BURDEN TO BRING IN THE 95
9 LICENSEES. IT WAS PLAINTIFFS' BURDEN. THEY HAVE TO COME UP
10 WITH SOME EVIDENCE, NOT JUST ACCUSATIONS.

11 BUT I WANT TO GO TO RETIRED PLAYER GLA.

12 COULD WE GO TO THE BOTTOM PARAGRAPH?

13 WHAT'S EXTRAORDINARY TO ME, EXTRAORDINARY,
14 MR. PARCHER KEPT SAYING "THE GLA," AND HE PUT UP A BIG BOARD OF
15 THE GLA. HE DIDN'T DISCUSS WITH YOU THE MOST IMPORTANT
16 LANGUAGE IN THE RETIRED PLAYER GLA. THE MOST IMPORTANT.

17 THE MOST IMPORTANT IS HOW THE MONEY IS DIVIDED. THE
18 PARAGRAPH THAT TALKS ABOUT HOW IT'S DIVIDED IS WHERE YOU SAY
19 WHEN YOU WOULD GET MONEY AND WHEN. WHEN DO YOU GET MONEY?

20 "IT IS FURTHER UNDERSTOOD THAT THE MONIES
21 GENERATED BY SUCH LICENSING OF" -- AND THIS IS WHAT HE WOULDN'T
22 MENTION. I CAN'T GET THE WORDS OUT -- "RETIRED PLAYER GROUP
23 RIGHTS." NOT ACTIVE PLAYER GROUP RIGHTS. RETIRED PLAYER GROUP
24 RIGHTS.

25 IT'S WHEN YOU HAVE MONEY GENERATED BY LICENSING OF

1 RETIRED PLAYER GROUP RIGHTS, THEN IT WILL BE DIVIDED BETWEEN
2 THE PLAYER AND AN ESCROW ACCOUNT.

3 SO THERE IS NO POSSIBLE WAY TO CONSTRUE THIS
4 AGREEMENT, TO CONSTRUE IT -- AND THE JUDGE WILL SAY: LOOK AT
5 THE WORDS" -- THAT "RETIRED PLAYER GROUP RIGHTS" REFER TO
6 "ACTIVE PLAYER GROUP RIGHTS," WHICH IS WHAT THEIR ARGUMENT IS.
7 IT MAKES NO SENSE.

8 HE WILL NOT DEAL WITH THE RETIRED PLAYER GROUP
9 RIGHTS. JUST CAN'T. HE WON'T.

10 NOW, I'M GOING TO COME BACK AND TALK ABOUT THE ESCROW
11 ACCOUNT, AND I'M GOING TO TALK ABOUT THE ELIGIBILITY CRITERIA.

12 FOR RIGHT NOW I WANT YOU TO FOCUS ON THE FACT THIS
13 WAS -- IF YOU LOOK AT THE TITLE, THIS WAS A RETIRED PLAYER
14 GROUP LICENSING AUTHORIZATION FORM.

15 AND YOU RECALL THE ACTIVE PLAYER FORM IS VERY
16 DIFFERENT, COMPLETELY DIFFERENT. NO ESCROW ACCOUNT MENTIONED.
17 COMPLETELY DIFFERENT FORM. AND IT WAS ABOUT RETIRED PLAYER
18 GROUP RIGHTS.

19 NOW, HE POINTS TO THE SECOND PARAGRAPH -- I DON'T
20 WANT TO IGNORE HIS PARAGRAPH. THE PARAGRAPH HE KEEPS GOING TO
21 IS THE SECOND ONE, WHICH SAYS WHAT GROUP LICENSING PROGRAMS ARE
22 DEFINED AS. AND THERE'S NO DISPUTE GROUP LICENSING COULD
23 INVOLVE SIX OR MORE PRESENT OR FORMER NFL PLAYER IMAGES.

24 BUT THAT JUST TELLS YOU WHAT KINDS OF PROGRAMS YOU
25 COULD PUT RETIRED PLAYERS IN. IT DOESN'T TELL YOU: WHEN DO

1 YOU DIVIDE MONEY? IT TALKS ABOUT THE MONIES GENERATED BY
2 LICENSING OF RETIRED PLAYER GROUP RIGHTS.

3 THE MERE FACT THAT YOU COULD COMBINE PRESENT AND
4 FORMER PLAYERS WAS NEVER UNDERSTOOD BY ANYONE, ANYONE, NOT ANY
5 OF THE PLAYERS IN THIS CASE -- THE PLAINTIFFS WILL TALK ABOUT
6 THAT -- NOT BY THE DEFENDANTS, NOT BY ANYONE, THAT RETIRED
7 PLAYERS, BY SIGNING A PIECE OF PAPER, BY SIGNING A PIECE OF
8 PAPER YOU COULD GET TENS OF THOUSANDS OF DOLLARS A YEAR OF THE
9 ACTIVE PLAYER LICENSING MONEY.

10 DOES THIS MAKE ANY SENSE TO YOU?

11 FIRST OF ALL, IF THAT WAS TRUE, WOULDN'T ALL 13,000
12 HAVE SIGNED? WHY WOULD WE HAVE TO BE GOING OUT AND TELLING
13 PEOPLE: OH, PLEASE, SIGN THESE.?

14 IF YOU JUST SIGNED THE PIECE OF PAPER AND YOU GOT
15 TENS OF THOUSANDS OF DOLLARS OF ACTIVE PLAYER MONEY, WOULDN'T
16 ALL 13,000 HAVE SIGNED?

17 AND IF WE WERE GOING TO DO THAT, WOULDN'T WE HAVE TO
18 TELL THE ACTIVE PLAYER BOARD OF PLAYER REPS WHO RAN THIS UNION?
19 I'M GOING TO TALK ABOUT THAT.

20 LET ME GO NEXT TO TESTIMONY. MR. ROWLEY, THEIR
21 DAMAGES EXPERT, WAS ASKED BY MR. HUMMEL THIS QUESTION. IT WAS
22 AN EXTRAORDINARY BIT OF TESTIMONY:

23 "NOW, MR. KESSLER, MR. KESSLER WROTE THESE
24 [SIC] WORDS ON THE BOARD HERE: 'ACTIVE PLAYER MONEY.' WHERE
25 IN THE GLA DOES IT SAY 'ACTIVE PLAYER MONEY'?"

1 THIS IS THEIR WITNESS:

2 "IT DOESN'T, COUNSEL."

3 HE'S RIGHT. THE RETIRED PLAYER GLA NEVER TALKS ABOUT
4 "ACTIVE PLAYER MONEY."

5 THE COURT'S GOING TO INSTRUCT YOU THAT ADMISSIONS
6 AGAINST SELF-INTEREST ARE FAIRLY SIGNIFICANT IN YOUR
7 EVALUATION.

8 YOU CAN LOOK ALL THROUGH THE GLA, AND THERE'S NO
9 REFERENCE TO ACTIVE PLAYER LICENSING MONEY. THERE'S ALSO NO
10 REFERENCE TO THE GROSS LICENSING REVENUE POOL.

11 YOU MAY ALL REMEMBER HOW FIRST COUNSEL KEPT CALLING
12 IT "GROUP LICENSING REVENUE POOL." BUT WHEN WE LOOKED AT IT,
13 IT WAS "GROSS LICENSING."

14 AGAIN, THERE'S NO REFERENCE TO "GROSS LICENSING" IN
15 THE RETIRED PLAYER GLA. ONLY TO THE GROUP LICENSE. WE'LL COME
16 BACK TO THAT.

17 I WANT TO GO NEXT TO MR. ADDERLEY'S TESTIMONY. THIS
18 IS VERY SIGNIFICANT, AGAIN, BECAUSE THIS WAS HIS TRUTHFUL
19 UNDERSTANDING BEFORE THIS LITIGATION WAS FILED. AND THE
20 COURT'S GOING TO TELL YOU THAT'S VERY SIGNIFICANT.

21 "MR. ADDERLEY" -- THIS IS THE QUESTION -- "AT
22 THE TIME YOU SIGNED THE GLA" -- THAT'S THE CRITICAL TIME WHEN
23 HE SIGNED IT -- "YOU DIDN'T THINK YOU WERE ENTITLED TO ANY
24 ACTIVE PLAYER LICENSING MONEY"?

25 "ANSWER: IS THAT 2001 WHEN I FIRST SIGNED?"

1 "QUESTION: YES.

2 "ANSWER: NO.

3 "QUESTION: YOU ONLY CAME TO THAT UNDERSTANDING
4 SOMETIME AFTER THIS LAWSUIT, CORRECT?"

5 LOOK AT THIS ANSWER:

6 "WHEN THE THEORY WAS CHANGED."

7 I WANT TO FOCUS ON THAT FOR A SECOND.

8 FACTS ARE FACTS. THEORIES ARE THEORIES. THE FACT
9 THAT AFTER THIS LAWSUIT THE LAWYERS CAME UP WITH SOME THEORIES
10 TO TRY TO TWIST THE DEFINITION OF GROUP LICENSING, PRESENT OR
11 FORMER, TO ARGUE THAT RETIRED PLAYERS WERE BEING GIVEN AN
12 AGREEMENT TO GIVE THEM ACTIVE PLAYER LICENSING MONEY, IF THE
13 THEORY CHANGES, THE FACTS DON'T CHANGE.

14 THE FACTS WERE MR. ADDERLEY UNDERSTOOD UNTIL HIS
15 LAWYER SPOKE TO HIM AFTER THIS LAWSUIT WAS FILED AND CHANGED
16 THE THEORY THAT HE WAS NOT ENTITLED TO ACTIVE PLAYER LICENSING.

17 C3, NEXT SLIDE.

18 WHAT ELSE DID MR. ADDERLEY TESTIFY TO?

19 "QUESTION: NOW, YOU MENTIONED THE LANGUAGE IN
20 THE GLA WHICH SAID 'SIX OR MORE FORMER OR PRESENT PLAYERS.' DO
21 YOU RECALL THAT?

22 "YES.

23 "OKAY. NOW, THAT LANGUAGE EXISTED IN THE GLA
24 WHEN YOU SIGNED IT, RIGHT?

25 "YES.

1 "AND DESPITE THAT FACT, YOUR BELIEF WAS THAT YOU
2 WOULD ONLY GET PAID IF YOUR IMAGE WAS USED, CORRECT?

3 "AT THAT PARTICULAR TIME, YES."

4 WELL, THE PARTICULAR TIME WAS WHEN HE SIGNED THE GLA.
5 SO HE READ THE LANGUAGE ABOUT "SIX OR MORE FORMER OR PRESENT
6 PLAYERS," AND HE UNDERSTOOD THAT HE WOULD GET PAID IF HIS IMAGE
7 WAS USED, NOT IF SOMEBODY ELSE'S IMAGE WAS USED.

8 THIS IS JUST A THEORY. IT'S A THEORY OF PLAINTIFFS'
9 COUNSEL, AND THEY'RE TRYING TO USE THAT THEORY AND DISTORTION
10 TO ENFORCE TERMS THAT DON'T EXIST.

11 YOU KNOW, IT'S INTERESTING. THEY MADE A BIG ISSUE OF
12 THE FACT -- I DON'T KNOW WHAT THEY WERE SAYING -- THAT
13 DEFENDANTS SAID:

14 "WE TAKE RESPONSIBILITY FOR THE GLA, RETIRED
15 PLAYER GLA."

16 YOU BET WE DO. SHOULDN'T SAY "WE." YOU BET DEFENDANTS
17 DO. YOU BET THEY DO.

18 BOTH SIDES TO THE AGREEMENT, TO THE DEAL, HAVE TO
19 TAKE RESPONSIBILITY FOR IT. AN AGREEMENT IS A TWO-WAY STREET.
20 IT'S A TWO-WAY STREET.

21 AND THE OTHER SIDE OF THIS AGREEMENT, THE RETIRED
22 PLAYERS, THEY KNEW IT WASN'T ACTIVE PLAYER LICENSING MONEY.
23 AND WE KNEW -- THE DEFENDANTS KNEW IT WASN'T ACTIVE PLAYER
24 LICENSING MONEY. BOTH SIDES KNEW. THE PLAINTIFFS KNEW THEY
25 WOULD ONLY GET PAID IF THEIR RIGHTS WERE USED. AND THE

1 DEFENDANTS KNEW THAT.

2 SO BOTH SIDES HAVE TO TAKE RESPONSIBILITY FOR THIS
3 AGREEMENT.

4 NOW, I'D LIKE TO SHOW WHAT MR. GOICH TESTIFIED ABOUT
5 THIS. MR. GOICH SIGNED ONE OF THESE RETIRED PLAYER GLA'S. I
6 THINK HE WAS A CREDIBLE WITNESS. YOU WILL BE THE JUDGE OF
7 THAT. I CANNOT VOUCH FOR HIM. YOU HAVE TO DETERMINE. YOU
8 HAVE TO DETERMINE WHETHER HE WAS CREDIBLE.

9 WHAT DID HE SAY?

10 "QUESTION: AND, SIR, AT THE TIME -- AT THE TIME
11 YOU SIGNED YOUR RETIRED PLAYER GLA, WHAT WAS YOUR UNDERSTANDING
12 AS TO WHETHER IT MADE YOU ELIGIBLE FOR A SHARE OF ANY ACTIVE
13 PLAYER LICENSING MONEY?

14 "ANSWER: IT IS SO FAR OUT, I CAN'T COMPREHEND
15 WHY ANYONE WOULD ASK. THE ACTIVE PLAYERS' MONEY WAS NEVER PART
16 OF THIS ISSUE. AND I WENT TO EVERY CONVENTION. I LISTENED
17 INTENTLY. TO STATE THAT WE WERE GOING TO MINGLE WITH THE
18 ACTIVE PLAYERS, THEIR MONIES, IS WAY OUT OF LEFT FIELD. THAT
19 WAS THE ACTIVE PLAYERS TRYING TO HELP US IN THEIR WAY. IT'S
20 THE WAY I UNDERSTOOD IT, VERY SIMPLY PUT. BUT THEY WEREN'T --
21 THEIR LICENSING MONEY WASN'T GOING TO BE OUR LICENSING MONEY?
22 IS THAT WHAT YOU'RE SAYING? IT NEVER WOULD HAVE HAPPENED."

23 YOU JUDGE THE CREDIBILITY OF DAN GOICH. HE AGREES
24 WITH HERB ADDERLEY AT THE TIME THEY SIGNED THE AGREEMENTS,
25 WHICH IS THE RELEVANT POINT.

1 **THE COURT:** MR. KESSLER, I THINK YOU OUGHT TO -- I
2 DON'T THINK -- YOU MISREAD THE LAST LINE THERE.

3 **MR. KESSLER:** "IS THAT WHAT YOU'RE SAYING? IT NEVER
4 WOULD HAVE HAPPENED."

5 **THE COURT:** NO, IT SAYS:

6 "BUT THEY WEREN'T -- THEIR LICENSING" --
7 (COUNSEL AND THE COURT SPEAKING SIMULTANEOUSLY, WHICH
8 WAS NOT REPORTABLE.)

9 **MR. KESSLER:** YOU'RE SAYING --

10 **THE COURT:** "QUESTION: IS THAT WHAT YOU'RE SAYING?"
11 BE CLEAR ON THAT.

12 **MR. KESSLER:** YES, AND THEN:

13 "IT NEVER WOULD HAVE HAPPENED."
14 THANK YOU.

15 LOOK AT WHAT ELSE MR. GOICH SAID.

16 "QUESTION: MY QUESTION IS, SIR, AT THE TIME
17 YOU SIGNED YOUR RETIRED PLAYER GLA, DID YOU HAVE ANY
18 UNDERSTANDING AS TO WHETHER YOU WOULD RECEIVE MONEY IF YOU WERE
19 NOT PART OF A LICENSED GROUP?

20 "I WOULDN'T RECEIVE MONEY.

21 "WOULD NOT?

22 "YEAH.

23 "QUESTION: OKAY.

24 "IF I WASN'T LICENSED, IF I WASN'T PART OF THE
25 GROUP, I WOULDN'T RECEIVE ANY MONIES."

1 THAT'S EXACTLY WHAT THE PLAYERS UNDERSTOOD. ALL THE
2 EVIDENCE IN THE CASE IS CONSISTENT ABOUT THIS.

3 LET'S LOOK AT MR. BEACH. WE'RE GOING TO GO THROUGH
4 THE DIFFERENT WITNESSES, BECAUSE THAT'S WHAT YOU HAVE TO DECIDE
5 ON, NOT ON PLAINTIFFS' ARGUMENTS, NOT ON MY ARGUMENTS.

6 WHAT THE COURT IS GOING TO TELL YOU IS DECIDE BASED
7 ON THE EVIDENCE.

8 LET'S TAKE A LOOK, IF WE CAN, MR. BEACH.

9 "QUESTION: OKAY. SO IT'S ALSO TRUE, SIR, THAT
10 YOUR UNDERSTANDING AT THE TIME IF THERE WAS NO MONEY GENERATED
11 FROM THIS RETIRED PLAYER GLA, THEN YOU WOULD GET NOTHING."

12 AND WHAT DID MR. BEACH SAY?

13 "OF COURSE.

14 "QUESTION: OKAY. YOU ALSO UNDERSTAND, SIR" --

15 **THE COURT:** "UNDERSTOOD." "UNDERSTOOD."

16 **MR. KESSLER:** SORRY.

17 "OKAY. YOU ALSO UNDERSTOOD, SIR, IF THERE WAS
18 NO MONEY GENERATED FROM THE SPECIFIC RIGHTS THAT YOU GRANTED,
19 YOU WOULD GET NOTHING?

20 "ANSWER: THAT'S CORRECT."

21 MR. BEACH UNDERSTOOD IT HAD TO BE FROM HIS RIGHTS,
22 NOT FROM ACTIVE PLAYER LICENSING RIGHTS.

23 I'D ALSO LIKE TO GO TO THE NEXT TESTIMONY FROM
24 MR. BEACH. MR. BEACH WAS A SMART GUY. HE UNDERSTOOD THAT HOW
25 COULD HE GET ACTIVE PLAYER LICENSING MONEY IN AN ESCROW ACCOUNT

1 UNLESS THE ACTIVE PLAYER SIGNED A SIMILAR AGREEMENT?

2 SO HE SAID:

3 "QUESTION: SO IT'S TRUE, ISN'T IT, THAT YOUR
4 UNDERSTANDING AT THE TIME YOU SIGNED THE GLA WAS THAT IF THE
5 ACTIVE PLAYERS DIDN'T SIGN THIS TYPE OF FORM, THAT YOU WOULD
6 NOT BE ENTITLED -- NOT BE ENTITLED -- TO ANY REVENUE GENERATED
7 BY ACTIVE PLAYER LICENSING? THAT WAS YOUR UNDERSTANDING?

8 "ANSWER: THAT'S CORRECT. THAT'S MY
9 UNDERSTANDING."

10 WELL, IF YOU LOOK AT C6, AS YOU KNOW WHAT'S IN
11 EVIDENCE, THE ACTIVE PLAYER LICENSING FORM IS A COMPLETELY
12 DIFFERENT FORM FROM THE RETIRED PLAYER LICENSING FORM. IT HAS
13 NO REFERENCE TO AN ESCROW ACCOUNT.

14 IT'S EXCLUSIVE. THE RETIRED PLAYER FORM IS
15 NON-EXCLUSIVE. SO MR. BEACH, LIKE MR. ADDERLEY, LIKE
16 MR. GOICH, ALL UNDERSTOOD THEY WOULD GET PAID IF THEIR OWN
17 RIGHTS WERE USED, AND THEY WOULD NOT GET ACTIVE PLAYER
18 LICENSING MONEY.

19 NOW, MR. LAIRD, LET'S LOOK AT C7, BRUCE LAIRD.

20 "QUESTION: BUT WHAT YOU MEAN BY THAT IS YOUR
21 UNDERSTANDING IN 2006 IS THAT IF YOUR RIGHTS WERE USED, SO YOU
22 WOULD BE ONE OF THE 358, YOU WOULD GET MONEY?

23 "YES."

24 AND THAT WAS REFERRING TO THE 358 RETIRED PLAYERS WHO
25 GOT PAID LICENSING MONEY THAT YEAR.

1 "QUESTION: AND IF YOUR RIGHTS WEREN'T USED,
2 YOU DIDN'T GET MONEY, BECAUSE THEY DIDN'T USE YOUR RIGHTS.
3 THAT WAS YOUR UNDERSTANDING, CORRECT?

4 "ANSWER: YES."

5 YES.

6 BRUCE LAIRD. NOW, BRUCE LAIRD ALSO TESTIFIED. HE
7 DOES HAVE SOME TESTIMONY, AND HE TRIES UNDER PLAINTIFFS'
8 COUNSEL'S COACHING TO SAY HE THOUGHT HE WOULD SOMETIMES BE
9 ENTITLED TO ACTIVE PLAYER MONEY. HE TRIED TO SAY THAT. YOU'LL
10 BE THE JUDGE OF WHAT HIS TESTIMONY MEANS ON THE WHOLE, WHAT HIS
11 REAL ANSWERS WERE, WHAT WERE TRUTHFUL OR NOT.

12 BUT EVEN HE HAD TO ADMIT THAT HE DIDN'T THINK HE WAS
13 ENTITLED TO MONEY FROM TRADING CARD AGREEMENTS OR OTHER
14 AGREEMENTS LIKE VIDEO GAMES THAT ALREADY EXISTED.

15 WE ASKED HIM:

16 "AND YOU TESTIFIED THAT A FEW MOMENTS AGO THAT
17 THE GLA WOULD ONLY APPLY TO NEW PROGRAMS GOING FORWARD?

18 "ANSWER: THAT WAS MY BELIEF."

19 AND YOU WILL RECALL WHAT THAT WAS IS HE HAD SAID:

20 "IF THERE WAS AN EXISTING LICENSEE, IF IT WAS
21 SOMEONE, A CATEGORY YOU'RE ALREADY DEALING WITH, I DON'T GET
22 ANY MONEY FROM THAT."

23 THAT WAS HIS UNDERSTANDING.

24 "NOW, IT'S ALSO TRUE, IS IT NOT, SIR, THAT AT
25 THE TIME YOU SIGNED YOUR RETIRED PLAYER GLA, YOUR EXPECTATION

1 IS THAT YOU WOULD NEVER RECEIVE ANY LICENSING MONEY FROM
2 TRADING CARDS?

3 "ANSWER: PROBABLY SO. PROBABLY SO."

4 THAT'S THE TRUTHFUL TESTIMONY ABOUT THE UNDERSTANDING
5 OF THESE PLAYERS. AND THEY COULD HAVE BROUGHT IN ANY MEMBERS
6 OF THIS CLASS THAT THEY WANTED TO BRING IN. PRESUMABLY THEY
7 BROUGHT IN THE FOUR WHO THEY THOUGHT WOULD MOST STRONGLY
8 SUPPORT THEIR CLAIMS.

9 AND WHAT WE SEE IS THAT NONE OF THEM SUPPORT THE
10 CLAIMS, THE INTERPRETATION OF MR. PARCHER, WHICH SOUNDS REAL
11 GOOD IN THE ABSTRACT AS A THEORY. THERE'S NO EVIDENCE. NO
12 EVIDENCE.

13 NOW, ALSO, WHAT THE JUDGE IS GOING TO INSTRUCT YOU IN
14 HIS INSTRUCTIONS IS ONE IMPORTANT FACT TO CONSIDER IS IF ONE
15 PARTY, PLAYERS INC, NFLPA, ACTS ONE WAY, DOESN'T GIVE ACTIVE
16 PLAYER LICENSING MONEY TO RETIRED PLAYERS UNDER THE GLA, WHICH
17 WE DIDN'T DO BECAUSE IT WAS NOT THE DEAL, AND THE OTHER PARTY
18 KNOWS THEY'RE NOT GETTING SOMETHING IN THE ACTIVE PLAYER
19 LICENSING MONEY, AND THEY DO NOTHING ABOUT IT, THEY DON'T
20 COMPLAIN, THEY DON'T RAISE IT FOR YEARS, THEY ACQUIESCE, YOU'LL
21 SEE IN THE JUDGE'S INSTRUCTIONS, THEY ACQUIESCE, YOU SHOULD
22 GIVE GREAT SIGNIFICANCE TO THAT.

23 IF WE LOOK AT C8, WHAT YOU'LL SEE IS NONE OF THE
24 PLAYERS -- AND, IN FACT, NO RETIRED PLAYERS EVER COMPLAINED
25 THAT THEY WEREN'T GETTING ACTIVE PLAYER LICENSING MONEY UNTIL

1 WHEN? UNTIL THIS CASE WAS FILED, LONG AFTER THIS CASE WAS
2 FILED.

3 ASK YOURSELF: IF YOU HAD SIGNED SOMETHING AND YOU
4 REALLY THOUGHT YOU WERE ENTITLED TO THOUSANDS OF DOLLARS EACH
5 YEAR OF ACTIVE PLAYER LICENSING MONEY, AND YOU NEVER GOT A
6 CHECK FOR YEARS, WOULD YOU CALL UP? WOULD YOU ASK, SAY:

7 "HEY, WHERE'S MY MONEY?"

8 NO ONE ASKED. NO ONE DID ANYTHING UNTIL THEY MET
9 WITH THE LAWYERS THAT CAME UP WITH THE THEORY THAT NO ONE
10 BELIEVED WAS A FACT.

11 "QUESTION:" THIS WAS MR. LAIRD:

12 "YOU NEVER ONCE TOLD ANYONE IN THE UNIVERSE FROM
13 2000 UNTIL AFTER THIS LAWSUIT WAS FILED, ANYBODY, THAT YOU WERE
14 OWED MONEY FROM ACTIVE PLAYER LICENSING, CORRECT?"

15 "ANSWER: CORRECT."

16 MR. BEACH:

17 "IT'S ALSO TRUE THAT YOU NEVER COMPLAINED TO
18 ANYONE AT THE UNION THAT YOU WEREN'T RECEIVING ANY MONEY UNDER
19 YOUR RETIRED PLAYER GLA, CORRECT?"

20 "ANSWER: THAT'S CORRECT."

21 "YOU NEVER COMPLAINED ABOUT IT TO ANYBODY IN THE
22 WORLD?"

23 "ANSWER: THAT'S CORRECT."

24 "OKAY. AND YOU -- IT'S ALSO CORRECT THAT THIS
25 WHOLE ISSUE OF RETIRED PLAYER LICENSING WAS NOT THAT

1 SIGNIFICANT TO YOU?

2 "ANSWER: THAT'S CORRECT."

3 YOU HEARD MR. PARCHER SAY HOW THEY WERE MISLED, HOW
4 THIS WAS AN IMPORTANT POINT, IT WAS AN ISSUE OF TRUST. IT
5 WASN'T EVEN THAT SIGNIFICANT TO MR. BEACH, ACCORDING TO HIS
6 SWORN TESTIMONY.

7 WE LOOK AT THE NEXT ONE, MR. ADDERLEY AND MR. MCNEIL.

8 "MR. ADDERLEY, WHEN YOU SIGNED YOUR GLA GOING
9 FORWARD, YOU NEVER COMPLAINED TO ANYONE AT THE UNION ABOUT NOT
10 GETTING MONEY UNDER YOUR GLA UNTIL AFTER THIS LAWSUIT WAS
11 FILED, CORRECT?

12 "ANSWER: CORRECT."

13 MR. MCNEIL, THE FOURTH PLAYER WHO TESTIFIED FOR
14 PLAINTIFFS:

15 "NOW, YOU NEVER COMPLAINED -- I THINK WE
16 ESTABLISHED EARLIER YOU NEVER COMPLAINED UNTIL YOU BECAME
17 INVOLVED IN THIS CASE, CORRECT?

18 "ANSWER: CORRECT."

19 AND YOU'LL RECALL MR. MCNEIL DIDN'T EVEN BECOME
20 INVOLVED IN THIS CASE UNTIL MORE THAN A YEAR AFTER IT WAS
21 FILED. HE WAS CONTACTED VERY LATE IN THE PROCESS.

22 NOW, LOOK AT MR. LAIRD'S TESTIMONY, C40. I'M SORRY
23 TO SPEND SO MUCH TIME GOING OVER THIS, BUT THIS IS THE
24 EVIDENCE. THIS IS WHAT YOU NEED TO DECIDE THE CASE FROM.

25 MR. LAIRD:

1 "QUESTION: BUT AT THE TIMES YOU DID TALK TO
2 RETIRED PLAYERS ABOUT LICENSING" -- AND REMEMBER, MR. LAIRD WAS
3 A PRESIDENT OF A CHAPTER OF RETIRED PLAYERS. HE SPOKE TO THEM
4 QUITE A BIT.

5 "BUT AT THE TIME YOU DID TALK TO RETIRED PLAYERS
6 ABOUT LICENSING, DID ANY RETIRED PLAYER EVER SAY TO YOU 'I
7 SHOULD GET PAID, EVEN IF THEY DON'T USE MY RIGHTS'?

8 "ANSWER: NO.

9 "QUESTION: DID ANY RETIRED PLAYER BEFORE THIS
10 LAWSUIT EVER SAY TO YOU 'I SHOULD GET PAID OUT OF ACTIVE
11 LICENSING'?

12 "NO. GLA'S WEREN'T EVEN BROUGHT UP."

13 WELL, IF ALL OF THESE THOUSANDS OF PLAYERS THOUGHT
14 THEY WEREN'T GETTING MONEY THEY WERE ENTITLED TO, BECAUSE THEY
15 ALL KNEW THERE WERE TRADING CARDS, THEY ALL KNEW THERE WERE
16 VIDEO GAMES, THEY ALL KNEW THERE WAS ACTIVE PLAYER LICENSING.
17 WOULDN'T SOMEBODY BRING IT UP SOMEWHERE?

18 NOW, WE ALSO HAVE TESTIMONY FROM THE OTHER PARTY TO
19 THESE CONTRACTS. DOUG ALLEN TESTIFIED ON BEHALF OF THE NFLPA
20 AND PLAYERS INC. THEY CALLED HIM AS A WITNESS IN THEIR CASE.

21 BUT THE JUDGE WILL INSTRUCT YOU THE EVIDENCE APPLIES
22 FOR BOTH OF US. WHATEVER EVIDENCE THAT COMES IN GOES TO ALL
23 PARTIES.

24 WHAT DID HE SAY?

25 "QUESTION: MR. ALLEN, UNDER THIS FORM, WERE

1 RETIRED PLAYERS GOING TO RECEIVE ANY MONEY FROM ACTIVE PLAYER
2 LICENSING?

3 "ANSWER: NO.

4 "QUESTION: WHAT TYPE OF MONEY WOULD THE RETIRED
5 PLAYERS RECEIVE UNDER THIS FORM?

6 "ANSWER: UHM, MONEY THAT WOULD HAVE BEEN
7 GENERATED BY A LICENSE THAT WAS THE RESULT OF PROVIDING ALL OF
8 THE RETIRED PLAYER GROUP LICENSING AUTHORIZATION FORM PLAYERS
9 TO SIGN ONE IN RETURN FOR PAYMENT, FOR THE RIGHT TO USE ANY OR
10 ALL OF THEM."

11 NOW, THIS IS SIGNIFICANT, TOO. YOU RECALL THE
12 EVIDENCE IS THAT FOR ACTIVE PLAYERS THE LICENSEES WOULD
13 GENERALLY WANT TO GET A LICENSE TO ALL THE ACTIVE PLAYERS. AND
14 THAT'S HOW THE SHARED LICENSING WAS DONE. THAT'S WHAT WAS PUT
15 INTO THE GLR, GROSS LICENSING REVENUE POOL.

16 YOU HEARD TESTIMONY, YOU'LL RECALL, IF IT WAS 35 OR
17 FEWER ACTIVE PLAYERS, EVEN THAT MONEY DIDN'T GO INTO THAT. IT
18 WAS GIVEN DIRECTLY TO THE PLAYERS, JUST LIKE THE AD HOCS FOR
19 THE RETIRED PLAYERS.

20 BUT FOR THE RETIRED PLAYERS, BECAUSE THE STARS
21 WEREN'T IN THE RETIRED PLAYER GLA, DESPITE MARKETING -- AND
22 WE'LL SHOW THIS -- THEY JUST COULDN'T GENERATE A MARKETPLACE
23 DEMAND FOR THE WHOLE GROUP.

24 SO WHAT THEY HAD TO DO, THE EVIDENCE WILL BE -- NOT
25 GOING TO REVIEW IT -- THAT THEY HAD TO GO OUT AND GET A JOE

1 MONTANA, OR OTHER STAR PLAYER, GET THEM TO SIGN UP IN GROUPS,
2 BY THE WAY, OF SIX OR MORE. THERE'S NO DISPUTE ABOUT THAT.
3 AND DO AD HOC LICENSES, AND GAVE THEM ALL THE MONEY.

4 AND THEN, IF THE LICENSEES WANTED GLA MEMBERS WHO WE
5 WERE PROMOTING, WHO WE ARE MARKETING -- HOW ELSE WOULD THEY GET
6 THESE DEALS -- THEN THEY WOULD ALSO GET ALL THE MONEY.

7 \$7 MILLION TOTAL TO THE CLASS. ABSOLUTELY UNDISPUTED ABOUT
8 THAT.

9 AND IT'S VERY IMPORTANT THAT YOU KNOW, THE COURT WILL
10 INSTRUCT YOU, NOT ONLY IS THERE NO CLAIM THAT PLAINTIFFS ARE
11 SEEKING TO REALLOCATE THE MONEY TO TAKE AWAY MR. ADDERLEY'S
12 MONEY AND SHARE IT WITH THE OTHER RETIRED PLAYERS.

13 MR. ADDERLEY DOESN'T WANT TO DO THAT. I RESPECT HIM FOR THAT.
14 THAT'S FINE.

15 BUT THERE ALSO IS NO CLAIM IN THIS CASE THAT USING
16 SIX OR MORE RETIRED PLAYERS AND AD HOCS -- BECAUSE AD HOCS
17 FREQUENTLY INVOLVE SIX OR MORE -- TRIGGERED ANY RIGHTS UNDER
18 THE RETIRED PLAYER GLA.

19 THINK ABOUT THAT. IF USING SIX OR MORE PLAYERS IN
20 AD HOCS TRIGGERED NO RIGHTS UNDER THE RETIRED PLAYER GLA, AS
21 THE COURT WILL INSTRUCT YOU, THEN MR. PARCHER'S CLAIM CAN'T BE
22 RIGHT.

23 HE SAYS ANYTIME THAT SIX OR MORE RETIRED PLAYERS.
24 WELL, IT'S GOT TO ALL GO INTO THE ESCROW ACCOUNT.

25 BUT THE COURT IS GOING TO INSTRUCT YOU, NO, THERE IS

1 NOTHING WRONG AT ALL WITH USING THE AD HOC LICENSES INVOLVING
2 SIX OR MORE RETIRED PLAYERS. THERE'S NOTHING WRONG AT ALL.
3 DOESN'T VIOLATE THE GLA, INSTEAD OF USING THE GLA FORM.

4 BECAUSE WHAT MR. ALLEN SAID IS THAT:

5 "IF WE DIDN'T GET THE CRITICAL MASS OF PLAYERS,
6 WHICH HE HOPED TO DO, AND THERE WAS NO DEMAND FOR THE WHOLE
7 GROUP, THEN IT MADE MUCH MORE SENSE TO USE THE AD HOC PROGRAM."

8 AND THERE'S ABSOLUTELY NO VIOLATION EVEN ALLEGED IN
9 THIS CASE FROM THE AD HOC PROGRAMS. NOT EVEN ALLEGED.

10 SO DON'T BE MISLED BY MR. PARCHER'S FOCUS ON THAT
11 "SIX OR MORE" LANGUAGE. IT WAS NOT THE LANGUAGE THAT SAID WHEN
12 YOU WOULD GET PAID. YOU GOT PAID THROUGH RETIRED PLAYER
13 LICENSING, AS THE FORM UNEQUIVOCALLY STATES.

14 NOW, LET'S LOOK NEXT ABOUT MR. -- MR. ARMSTRONG,
15 BECAUSE WHAT I WANT TO TURN TO NOW IS MR. ARMSTRONG WAS
16 ASKED -- IF WE CAN GO TO TRANSCRIPT AT 2073, PLEASE.

17 HE EXPLAINED WHY THE GLR POOL COULDN'T BE USED FOR
18 RETIRED PLAYERS, BECAUSE IT WAS ACTIVE PLAYER LICENSING MONEY.

19 LET'S SEE WHAT MR. ARMSTRONG SAID.

20 "QUESTION: NOW, MR. ARMSTRONG, IF THERE HAD
21 BEEN A DECISION MADE IN THE UNION WHILE YOU WERE THERE TO GIVE
22 EVERY RETIRED PLAYER AN EQUAL SHARE INTEREST IN THE LICENSING
23 MONEY OF ACTIVE PLAYERS IN THE GLR POOL, WOULD THAT HAVE TO
24 HAVE BEEN PRESENTED TO THE BOARD OF ACTIVE PLAYER REPS FOR
25 APPROVAL?

1 "ANSWER: YES. YES, IT WOULD HAVE HAD TO BEEN
2 PRESENTED TO THE BOARD AND VOTED ON.

3 "OKAY.

4 "ANSWER: I CAN TELL YOU THAT THERE WOULD NOT
5 HAVE BEEN MUCH OF A CHANCE THAT THAT WOULD HAVE HAPPENED.

6 "QUESTION: WELL, DON'T SPECULATE WHAT WOULD
7 HAVE HAPPENED. WAS IT EVER PRESENTED?

8 "NO.

9 "WAS IT EVER -- DID ANYONE EVER PROPOSE DOING
10 THAT?

11 "NO."

12 NOW, THE TESTIMONY YOU HEARD ABOUT WHY IT COULDN'T BE
13 DONE -- AND THIS CAME FROM MR. ARMSTRONG. AND I MAY GET TO
14 THIS A LITTLE BIT LATER TO SHOW YOU -- WAS BECAUSE IF ALL
15 13,000 PLAYERS, RETIRED PLAYERS, WERE SHARING IN ACTIVE
16 LICENSING, THEN EVERY PLAYER WOULD SIGN. IF ALL YOU HAD TO DO
17 WAS SIGN YOUR NAME, YOU WOULD GET TENS OF THOUSANDS OF DOLLARS,
18 YOU WOULDN'T HAVE THE MONEY LEFT TO RUN THE UNION.

19 WHAT HE TESTIFIED IS THE REASON THEY TOOK 40 PERCENT
20 OF THE GLR POOL AND GAVE IT TO THE UNION, THEY NEEDED IT TO
21 FIGHT THE MANAGEMENT. OKAY? THEY'RE A LABOR UNION.

22 THEY WERE AFRAID OF BEING LOCKED OUT. THEY WERE
23 AFRAID OF STRIKES. THEY HAD TO USE THAT MONEY TO RUN THEIR
24 UNION.

25 AND IT WAS ACTIVE PLAYER MONEY. THERE'S NOTHING

1 WRONG WITH THAT.

2 SO IT WOULD HAVE MADE NO SENSE AT ALL, NO SENSE, TO
3 SAY ACTIVE PLAYER MONEY SHOULD JUST BE GIVEN OUT TO THE RETIRED
4 PLAYERS. WE WOULD ALL LIKE TO GET MORE MONEY, ESPECIALLY IN
5 THESE TIMES. WE WOULD ALL LIKE TO GET MORE MONEY. OKAY.

6 BUT THE ACTIVE PLAYERS, THEY HAD TO RUN THE UNION,
7 WHICH BENEFITED NOT ONLY THEM, BUT BENEFITED THE RETIRED
8 PLAYERS, AS WELL.

9 TAKE A LOOK AT C72, IF WE CAN.

10 BY THE WAY, MR. PARCHER SAID, OH, WE PICKED
11 MR. ARMSTRONG, I GUESS, BECAUSE HE'S LIKE SO HANDSOME OR
12 SOMETHING, TO TESTIFY HERE. I'M SURE HE WILL LIKE TO HEAR
13 MR. PARCHER'S COMPLIMENTS TO HIM.

14 MR. ARMSTRONG WAS THE PRESIDENT OF THE NFLPA DURING
15 THE RELEVANT TIME PERIOD. THAT'S WHY WE CALLED HIM AS A
16 WITNESS.

17 WHAT DID HE SAY?

18 "QUESTION: COULD MR. UPSHAW AND MR. ALLEN TAKE
19 ANY POLICY ACTIONS ON HALF OF THE NFLPA WITHOUT THE APPROVAL OF
20 THE BOARD OF PLAYER REPS?

21 "NO. ALL THE ACTIONS HAD TO HAVE BEEN APPROVED
22 BY THE BOARD OF PLAYER REPS. SO ANY DECISION WOULD -- THAT
23 MIGHT HAVE BEEN MADE WOULD HAVE BEEN MADE WITHIN THE PARAMETERS
24 THAT WERE AGREED TO BY THE BOARD FIRST."

25 NOW, WHY IS THAT SIGNIFICANT? REMEMBER IN HIS

1 OPENING, MR. PARCHER TRIED TO DISPLAY THIS AS IF DOUG ALLEN,
2 GENE UPSHAW COULD GO OFF IN A ROOM AND MAKE SECRET DEALS AND NO
3 ONE WOULD KNOW ABOUT IT. THEY WOULD BE EXPLOITING THE ACTIVE
4 PLAYERS.

5 THE ACTIVE PLAYERS, YOU WOULD HAVE GOTTEN THE
6 IMPRESSION, DIDN'T KNOW ABOUT THE 40 PERCENT, DIDN'T KNOW ABOUT
7 THE 23 PERCENT GOING TO PLAYERS INC.

8 YOU HEARD FROM MR. ARMSTRONG. WHAT YOU HEARD FROM
9 MR. ARMSTRONG WAS THE ACTIVE PLAYERS APPROVED EVERY DECISION,
10 KNEW ABOUT IT, RAN THE UNION, HAD THE POWER TO FIRE MR. UPSHAW.

11 AND YOU SAW MR. UPSHAW -- YOU SAW MR. BERTHELSEN. I
12 AM SORRY. YOU SAW MR. ARMSTRONG.

13 DO YOU THINK MR. ARMSTRONG COULD BE PUSHED AROUND?
14 DO YOU THINK THAT THE ACTIVE PLAYERS WERE INCAPABLE OF KNOWING
15 WHAT WAS GOING ON IN THEIR UNION? I'LL LET YOU BE THE JUDGE OF
16 THAT.

17 NOW, AGAIN, LET'S LOOK AT C11. THERE'S NO DOUBT.
18 THERE IS ONLY EVIDENCE ONE WAY. THERE IS NO OTHER EVIDENCE
19 THAT ALL THE MONEY IN THE GLR POOL IS ACTIVE PLAYER LICENSING
20 MONEY.

21 THIS WILL BECOME CRITICAL LATER, BECAUSE WHEN WE GET
22 TO THE ISSUE OF DAMAGES -- YOU SHOULD NEVER GET THE DAMAGES.
23 THE REASON IS THE JUDGE WILL INSTRUCT YOU, IF THERE'S NO BREACH
24 OF CONTRACT, NO BREACH OF FIDUCIARY DUTY, YOU DON'T HAVE TO
25 WASTE YOUR TIME WITH DAMAGES. YOU CAN GO HOME AND RETURN TO

1 YOUR LIVES.

2 BUT IF YOU DO GET TO DAMAGES, THE ONLY DAMAGES THAT
3 MR. ROWLEY CLAIMED IS AN EQUAL SHARE OF THE ACTIVE PLAYER
4 LICENSING MONEY.

5 THAT'S NOT GOING TO GIVE YOU ANY BASIS TO AWARD ANY
6 DAMAGES IN THIS CASE, BECAUSE THERE'S NO EVIDENCE THEY WERE
7 ENTITLED TO AN EQUAL SHARE OF THE GLR POOL. BUT WHAT WAS THE
8 EVIDENCE HERE?

9 QUESTION TO DOUG ALLEN:

10 "EXPLAIN TO THE JURY WHAT TYPE OF MONEY WAS IN
11 THIS GLR POOL.

12 "IT WAS IN THE MONEY THAT WAS GENERATED BY
13 LICENSING ACTIVE PLAYERS."

14 QUESTION TO MR. ARMSTRONG:

15 "THE MONEY THAT THIS WAS, THE 40 PERCENT, THE 23
16 PERCENT, AND THE 37 PERCENT, DID YOU HAVE AN UNDERSTANDING
17 WHILE YOU WERE ON THE BOARD OF PLAYER REPS AND PRESIDENT,
18 WHETHER THIS MONEY WAS ACTIVE PLAYER LICENSING MONEY, RETIRED
19 PLAYER LICENSING MONEY OR SOME COMBINATION OF IT?

20 "ANSWER: IT WAS ACTIVE PLAYER LICENSING MONEY.

21 "WAS THERE ANY RETIRED PLAYER LICENSING MONEY IN
22 HERE?

23 "ANSWER: NO."

24 MR. EYRICH, WHO TESTIFIED BY DEPOSITION, THE
25 ACCOUNTANT:

1 "EQUAL SHARE POOL IS REFERRED TO AS 'THE ACTIVE
2 PLAYER LICENSING POOL' THAT IS ALLOCATED BY PLAYERS INC AND THE
3 NFLPA AND ACTIVE PLAYERS."

4 I'LL ALSO SHOW YOU TRIAL EXHIBIT 95. TRIAL EXHIBIT
5 95 WAS THE 2000 AGREEMENT, YOU'LL REMEMBER, WHICH DEFINES THE
6 GROSS LICENSING REVENUE.

7 THIS WAS AN IMPORTANT PART OF THE CASE THAT HAPPENED
8 BECAUSE THIS IS WHERE THE CONFUSION IS WHERE PLAINTIFFS IN
9 THEIR QUESTIONS KEPT TALKING ABOUT GROUP LICENSING REVENUE,
10 GROUP LICENSING REVENUES, TRYING TO CONFUSE THE ISSUE AS IF
11 THAT'S WHAT WAS REFERRED TO IN THE RETIRED PLAYER GLA.

12 OF COURSE, WHAT WE KNOW AND YOU KNOW FROM THE
13 EVIDENCE IS IT'S GROSS LICENSING REVENUE.

14 AND IF WE LOOK AT PAGE -- LAUREN, PAGE 3 OF THE
15 DOCUMENT, THERE IS THE DEFINITION -- START WITH THE DEFINITION
16 UNDERNEATH THAT, THE DEFINITION. THAT'S FINE.

17 "THE TERM GROSS LICENSING REVENUES SHALL
18 MEAN..."

19 SO IT'S GROSS LICENSING REVENUE, RIGHT? GROSS
20 LICENSING.

21 AND LET'S LOOK AT (V), A(V). YOU GOT TO SHOW WHAT IT
22 IS, ALL THE WAY DOWN.

23 "GROSS LICENSING REVENUE SHALL EXCLUDE ANY
24 REVENUES DERIVED FROM THE FOLLOWING: AMOUNTS RECEIVED BY
25 RETIRED PLAYERS PURSUANT TO GROUP LICENSING ASSIGNMENTS OR

1 GROUP LICENSING RIGHTS."

2 SO WHAT DO THE DOCUMENTS SHOW? THE RETIRED PLAYER
3 GLA ONLY SPOKE ABOUT REVENUES FROM RETIRED PLAYER LICENSING.

4 REVENUES FROM RETIRED PLAYER LICENSING ARE EXCLUDED
5 FROM THE GROSS LICENSING REVENUE POOL.

6 HOW COULD THEY ARGUE THAT SOMEHOW THEY HAVE A CLAIM
7 TO THIS? THAT'S NOT WHAT HAPPENED.

8 IN FACT, MR. ROWLEY ADMITTED, IF YOU LOOK AT C50,
9 WHEN HE HAD TO:

10 "AND, IN FACT, WHEN THEY SAY THE ACTIVE PLAYERS
11 WOULD GET 37 PERCENT LATER IN THE AGREEMENT" -- IT WAS THE 2000
12 AGREEMENT -- "THEY SAY 37 PERCENT OF GROSS LICENSING REVENUES,
13 NOT GROUP LICENSING REVENUES. IS THAT TRUE?

14 "YES."

15 AND THIS IS REALLY, REALLY IMPORTANT TESTIMONY.
16 REALLY IMPORTANT.

17 "NOW, IT'S ALSO TRUE THAT THE RETIRED PLAYER
18 GLA DOESN'T REFERENCE GROSS LICENSING REVENUE ANYWHERE IN THE
19 RETIRED PLAYER GLA, DOES IT?

20 "IT DOES NOT SAY 'GROSS LICENSING REVENUE.'"

21 AND YOU CAN SEE THAT FOR YOURSELF WHEN YOU LOOK AT
22 TRIAL EXHIBIT 110.

23 NOW, MR. BERTHELSEN, IF YOU GO TO TRANSCRIPT 1655,
24 EXPLAINED WHY THE RETIRED PLAYER LICENSING REVENUE WAS KEPT
25 SEPARATE FROM THE ACTIVE PLAYER REVENUE. AND IT WAS A VERY

1 GOOD REASONS, AND IT WAS CONSISTENT WITH THE GLA, AND IT WAS
2 CONSISTENT WITH THE FIDUCIARY DUTY. VERY CONSISTENT.

3 "MR. BERTHELSEN, EXPLAIN TO THE JURY, PLEASE,
4 WHY RETIRED PLAYER MONEY WAS KEPT SEPARATE FROM ACTIVE PLAYER
5 MONEY."

6 NOT LICENSING, BY THE WAY. THEY TRY TO SAY
7 MR. BERTHELSEN SAID "KEEP THE LICENSING SEPARATE." HE SAID:

8 "NO, KEEP THE MONEY SEPARATE."

9 EVERYBODY'S MONEY BELONGS TO EVERYONE. IF I HAVE
10 SOME MONEY THAT BELONGS TO ME, AND MR. PARCHER HAS SOME MONEY
11 THAT BELONGS TO HIM, IF WE HAD SUMMONED A BANKER WHO WAS
12 KEEPING OUR TWO ACCOUNTS, YOU WOULDN'T WANT THE BANKER TO TAKE
13 ANY OF MR. PARCHER'S MONEY AND GIVE IT TO ME. YOU WOULDN'T
14 WANT THE BANKER TO TAKE ANY OF MY MONEY AND GIVE IT TO
15 MR. PARCHER.

16 SO MR. BERTHELSEN SAID:

17 "BECAUSE IT WAS THE VIEW THAT WHOEVER EARNS THE
18 MONEY SHOULD GET IT. IT WOULDN'T BE FAIR TO HAVE A DOLLAR
19 EARNED BY MR. ADDERLEY GO TO ACTIVE PLAYERS."

20 I THINK MR. ADDERLEY WOULD AGREE WITH THAT. SAYS:

21 "AND IT WOULDN'T BE FAIR FOR A DOLLAR EARNED BY
22 AN ACTIVE PLAYER TO GO TO MR. ADDERLEY."

23 AND WHERE DID THE RETIRED PLAYER MONEY GO? LET'S
24 LOOK AT MR. ALLEN'S TESTIMONY.

25 "QUESTION: MR. PARCHER PUT UP AN EXHIBIT THAT

1 SAID THAT RETIRED PLAYER MONEY WAS EXCLUDED FROM THIS CIRCLE."

2 THAT WAS THE FAMOUS PARCHER CHART, YOU'LL REMEMBER.

3 "DO YOU RECALL THAT FROM THE -- DO YOU RECALL
4 THAT FROM THE GLR POOL?

5 "YES.

6 "NOW, WHERE DID ANY RETIRED PLAYER MONEY GO?

7 "TO THE RETIRED PLAYERS.

8 "IF -- WHEN IT GOES TO THE RETIRED PLAYERS, DOES
9 ANY OF THIS GO TO PLAYERS ASSOCIATION?

10 "NO."

11 SO THE RETIRED PLAYERS GIVE NONE OF THEIR LICENSING
12 MONEY TO THE PLAYERS ASSOCIATION, AND THIS CLASS GOT \$7 MILLION
13 OF THAT MONEY. AND ALL RETIRED PLAYERS GOT 30 MILLION DURING
14 THIS PERIOD OF TIME.

15 "DOES ANY OF IT GO TO THE ACTIVE PLAYERS?

16 "NO."

17 AND THIS IS AN IMPORTANT QUESTION:

18 "SO WOULD IT BE BETTER -- SO IS IT BETTER OR
19 WORSE FOR THE RETIRED PLAYERS TO STAY OUT OF THE GLR POOL FOR
20 THEIR MONEY?

21 "IT'S BETTER, BECAUSE THEY GET ALL OF IT."

22 AND WHAT'S BEING REFERRED TO HERE IS THE ACTIVE
23 PLAYERS FOR THEIR MONEY IN THE GLR POOL SAYING:

24 "WE'RE GOING TO GIVE 40 PERCENT TO THE UNION TO
25 SUPPORT THE UNION ACTIVITIES," AND THEY GIVE 23 PERCENT TO

1 PLAYERS INC TO RUN THE LICENSING OPERATIONS.

2 WHEN THE RETIRED PLAYERS GET THEIR LICENSING MONEY,
3 THEY GET 99 PERCENT OF IT.

4 SO WOULD IT BE BETTER, AS MR. PARCHER ARGUES, TO MIX
5 IT ALL INTO THE GLR POOL? AND BY THE WAY, THEY DON'T WANT TO
6 DO THAT. YOU HAVEN'T HEARD THEIR DAMAGES EXPERT SAY:

7 "YEAH, LET'S TAKE MR. ADDERLEY'S MONEY AND THE
8 OTHER 30 MILLION GIVEN TO ALL RETIRED PLAYERS AND PUT THEM IN
9 THE POOL WITH THE ACTIVE PLAYERS."

10 THEY JUST WANT TO KEEP THE RETIRED PLAYER MONIES FOR
11 RETIRED PLAYERS, WHICH IS THEIR RIGHT. BUT THEN, THEY ALSO
12 WANT TO TAKE THE ACTIVE PLAYERS' MONEY, WHICH IS NOT THEIR
13 RIGHT.

14 IT'S NOT THEIR RIGHT UNDER THE CONTRACT. AND THERE'S
15 CERTAINLY NO FIDUCIARY DUTY TO TAKE ACTIVE PLAYER MONEY AND
16 GIVE IT TO ANOTHER ONE, ANY MORE -- MR. PARCHER TALKED ABOUT
17 LAWYERS. IF I WAS A LAWYER, AND I HAD A TRUST ACCOUNT, AND I
18 HAD MULTIPLE CLIENTS, AND I HAD ONE CLIENT'S TRUST ACCOUNT, AND
19 I HAVE A FIDUCIARY DUTY TO EVERY CLIENT, BECAUSE LAWYERS HAVE
20 SPECIAL FIDUCIARY DUTIES, COULD I TAKE ONE CLIENT'S TRUST
21 ACCOUNT MONEY AND GIVE IT TO ANOTHER CLIENT? NO, OF COURSE
22 NOT.

23 YOU HAVE TO KEEP IT SEPARATE. COULD YOUR LANDLORD
24 TAKE YOUR MONEY THAT'S IN AN ACCOUNT AND GIVE IT TO SOME OTHER
25 TENANT, IF YOU ARE A TENANT? NO.

1 YOU KNOW WHAT HE'S ARGUING MAKES NO SENSE AT ALL.

2 NOW, WHAT I'D LIKE TO TURN TO NEXT IS WE ALSO KNOW
3 THAT A LOT OF THE MONEY IN THE GLR POOL -- AND I HAVE TO DO
4 THIS QUICKLY -- IS NOT POSSIBLY RETIRED PLAYER MONEY.

5 THE NFL SPONSORSHIP AGREEMENT IS THERE. THAT'S TRIAL
6 EXHIBIT 99. I'M NOT GOING TO SHOW IT NOW. YOU RECALL IT ONLY
7 APPLIES TO ACTIVE PLAYERS WHO SIGNED IN THE CBA, REFERENCED IN
8 THE CBA.

9 SO THE GLR POOL HAS ALL THAT SPONSORSHIP MONEY. AND,
10 BY THE WAY, MR. ROWLEY SAYS AWARD THE RETIRED PLAYERS A SHARE
11 OF THAT? NOTHING TO DO WITH RETIRED PLAYERS.

12 YOU KNOW ABOUT FANTASY FOOTBALL. IF YOU LOOK AT C14,
13 YOU SAW MR. BYRD TESTIFY. FANTASY FOOTBALL HAS NO USE FOR
14 RETIRED PLAYERS. AND THAT MONEY IS IN THE GLR POOL. HOW COULD
15 IT GO TO RETIRED PLAYERS?

16 MR. BYRD:

17 "QUESTION: WOULD -- AS THE NEGOTIATOR FOR STATS
18 IN 2006, WOULD YOU HAVE BEEN WILLING TO PAY ANY EXTRA MONEY TO
19 GET RETIRED PLAYER RIGHTS?

20 "NO. THERE IS NO VALUE FOR RETIRED PLAYERS IN
21 FANTASY FOOTBALL."

22 THAT'S NOT DEMEANING. THAT'S JUST THE MARKETPLACE
23 REALITY.

24 "QUESTION: SO BASED ON YOUR KNOWLEDGE OF
25 FANTASY FOOTBALL PRODUCTS, DO FANTASY FOOTBALL PRODUCTS HAVE

1 ANY USE AT ALL FOR RETIRED PLAYERS?"

2 DO WE HAVE THE ANSWER SOMEWHERE? WE MESSED UP THAT
3 SLIDE. SORRY. DISREGARD THAT QUESTION. I JUST DON'T KNOW WHY
4 IT'S NOT ON THE SLIDE.

5 LET'S GO NEXT. WHAT WAS THE UNDERSTANDING -- I'M NOT
6 GOING TO SPEND A LOT OF TIME ON THIS, BECAUSE MR. PARCHER
7 DIDN'T, ABOUT THE MEANING OF THE EA LICENSE AGREEMENT, THE
8 PARAGRAPH 1(A), 1(B), THE GRANT. YOU HEARD EXTENSIVE TESTIMONY
9 OF WHAT THE PARTIES UNDERSTOOD. SO I'M JUST GOING TO DO THIS
10 VERY QUICKLY.

11 MR. BYRD, FOR EXAMPLE, TESTIFIED THAT -- AS FOLLOWS:

12 "QUESTION: AT THE TIME YOU WERE NEGOTIATING
13 THIS AGREEMENT, WHAT PLAYERS DID YOU UNDERSTAND THAT YOU WERE
14 LICENSING UNDER THIS PROVISION?

15 "CURRENT NFL PLAYERS THAT WERE PLAYING IN THE
16 LEAGUE THAT YEAR.

17 "ANSWER: AT THE TIME YOU WERE NEGOTIATING THIS
18 AGREEMENT, MR. BYRD, WHAT WAS YOUR UNDERSTANDING OF THIS
19 PROVISION OF THE AGREEMENT" -- THAT WAS PARAGRAPH 1(A) -- "IF
20 ANY?

21 "THE -- THAT SOMETIMES PLAYERS INC MAY DO THINGS WITH
22 THE RETIRED PLAYERS. THAT'S WHAT IT SAYS. IT HAD NOTHING TO
23 DO WITH OUR LICENSE OF FANTASY FOOTBALL, BECAUSE WE DIDN'T NEED
24 ANY RETIRED PLAYERS TO PLAY FANTASY FOOTBALL."

25 EA, I THINK IT'S CRITICAL. NOW, YOU HEARD

1 MR. PARCHER QUESTION MR. LINZNER'S TRUTHFULNESS. YOU SAW
2 MR. LINZNER TESTIFY. YOU SHOULD JUDGE MR. LINZNER'S
3 CREDIBILITY. I WILL LEAVE THAT IN YOUR HANDS.

4 WHAT DID MR. LINZNER TESTIFY?

5 "QUESTION: DID YOU HAVE ANY UNDERSTANDING AT THIS
6 TIME THIS AGREEMENT WAS NEGOTIATED AS TO WHAT THIS REFERRED TO,
7 'THE NFL PLAYERS,' IN TERMS OF ACTIVE VERSUS RETIRED?"

8 YOU'LL REMEMBER THAT'S THE KEY LANGUAGE IN THE EA
9 LICENSE AGREEMENT, WHICH APPEARS IN THE 95 AGREEMENTS HE'S
10 TALKING ABOUT, THAT LANGUAGE, "NFL PLAYERS."

11 "NFL PLAYERS ARE THE PLAYERS ACTIVELY PLAYING IN
12 THE NFL. AND THAT'S WHAT I UNDERSTOOD AT THE TIME, AND THAT'S
13 WHAT THE INTENDED LICENSE THROUGH EXHIBIT 28 WAS, WAS RIGHTS TO
14 ACTIVE NFL PLAYERS."

15 EVERYBODY UNDERSTOOD THIS. DOUG ALLEN TESTIFIED TO
16 THAT. I'M NOT GOING TO PUT IT UP NOW. YOU RECALL MR. ALLEN
17 TESTIFIED THAT THE EA LICENSE AGREEMENT, THE \$25 MILLION
18 PAYMENT HE TALKS ABOUT, THE 40 PERCENT OF THEIR DAMAGES NUMBER,
19 WAS ALL JUST FOR ACTIVE PLAYER LICENSING RIGHTS.

20 AGAIN, I'M NOT GOING TO HAVE TIME TO GO THROUGH THE
21 AGREEMENT NOW. IT'S TRIAL EXHIBIT 28. YOU SAW THIS DISCUSSED
22 AT LENGTH IN MR. ALLEN'S TESTIMONY, MR. LINZNER'S TESTIMONY AND
23 AS TO WHAT THEIR UNDERSTANDING WAS.

24 IN FACT, WHAT THE EVIDENCE SHOWS, BECAUSE THE EA
25 LICENSE DID NOT LICENSE RETIRED PLAYER RIGHTS, WHEN MR. LINZNER

1 WANTED TO PAY FOR SOME RETIRED PLAYERS HE HAD TO DO A SEPARATE
2 LICENSE, AN AD HOC LICENSE.

3 WHY WOULD HE DO THAT IF HE ALREADY HAD THE RIGHTS?
4 WHY WOULD HE PAY TWICE?

5 TAKE A LOOK AT C18.

6 "IF EA ALREADY HAD THE RIGHTS TO RETIRED PLAYERS
7 THROUGH THE MAIN LICENSE AGREEMENTS, AS PLAINTIFFS CONTEND,
8 WOULD YOU EVER HAVE PAID ANY ADDITIONAL -- AN ADDITIONAL PENNY
9 TO SECURE THOSE ADDITIONAL RIGHT?

10 "ANSWER: I DON'T KNOW ABOUT WHAT PLAINTIFFS
11 CONTEND, BUT OBVIOUSLY I WOULDN'T PAY EXTRA FOR RIGHTS THAT I
12 ALREADY HAD."

13 OKAY. THE BEHAVIOR OF THE PARTIES UNDER THE
14 AGREEMENT, THE JUDGE WILL INSTRUCT YOU, IS VERY PERSUASIVE
15 EVIDENCE.

16 THE JUDGE WILL ALSO TELL YOU THE PARTIES TO THIS
17 AGREEMENT WERE EA AND PLAYERS INC. OR THE LICENSEES AND
18 PLAYERS INC, NOT THE PLAYERS, TO THE LICENSE AGREEMENTS.

19 AND SO THE UNDERSTANDING OF THE PARTIES TO THE
20 AGREEMENTS IS WHAT YOU MUST PAY ATTENTION TO IN THE EVIDENCE,
21 NOT SOME THIRD PARTY, WHICH IS WHAT THE PLAYERS HERE, SAYING:

22 "OH, LET'S ARGUE WHAT SOMEBODY ELSE'S AGREEMENT
23 MEANS."

24 THAT'S NOT EVIDENCE YOU SHOULD GAVE WEIGHT TO.

25 NOW, WHAT DOES THIS ALL MEAN? I BELIEVE THIS ALL

1 MEANS THAT THE EVIDENCE IS OVERWHELMING THAT THE MONEY THEY
2 SEEK IS ACTIVE PLAYER LICENSING RIGHTS, MY FIRST POINT. IT
3 DEFEATS THEIR BREACH OF CONTRACT CLAIM, SO YOU SHOULD ANSWER
4 "NO" ON THE QUESTION: "WAS THERE BREACH OF CONTRACT?"

5 AND IT ALSO DEFEATS THEIR FIDUCIARY DUTY CLAIM, AS I
6 WILL DISCUSS SOON.

7 I WANT TO TALK NOW ABOUT THE OTHER TWO CRITICAL
8 POINTS. SOME OF THIS WE COVERED ALREADY. THE FACT THAT WHEN
9 RETIRED PLAYER LICENSING WAS DONE, WHEN THERE WAS RETIRED
10 PLAYER RIGHTS, THE RETIRED PLAYERS GOT THE MONEY. LET'S LOOK
11 AT TRIAL EXHIBIT 2056.

12 THIS WAS A COMPILATION OF ALL OF THE LICENSING MONEY
13 PAID TO THE RETIRED PLAYERS. ALL THE MONEY EARNED AND THE
14 PAYOUT. AND WHAT WAS IT UNDISPUTED?

15 IF WE CAN JUST GO FROM THE BOTTOM, FROM "TOTAL
16 NUMBER" DOWN. THANK YOU, LAUREN.

17 THE TOTAL NUMBER OF CLASS MEMBERS WHO RECEIVED
18 LICENSING MONEY, THE ONES LICENSEES WANTED, WERE 378; TOTAL
19 ROYALTIES PAID WAS 7,116,196.29.

20 HOW MUCH WAS KEPT BY PLAYERS INC? \$66,000 AND
21 CHANGE.

22 93 PERCENT WENT TO THE RETIRED PLAYERS.

23 NOW, WHY, PLAINTIFFS ASKED, DIDN'T WE JUST LICENSE
24 THE ENTIRE RETIRED PLAYER GROUP?

25 WELL, THAT'S OUR BART STARR PROBLEM. PLAYERS LIKE

1 MR. STARR, THE STARS, WOULD NOT SIGN RETIRED PLAYER GLA'S.

2 TAKE A LOOK AT THE TESTIMONY OF DR. RASCHER, C20.

3 "DR. RASCHER" -- QUESTION -- "AND YOU KNOW, DO
4 YOU NOT, THAT IN THIS CLASS MOST OF THE CLASS MEMBERS WERE NOT
5 STAR PLAYERS? YOU KNOW THAT, DON'T YOU?"

6 "ANSWER: YES."

7 IN FACT, IF YOU LOOK AT C19, ANY PLAYER -- OH, BY THE
8 WAY, I'VE BEEN TOLD BY MY COLLEAGUES I SAID "93 PERCENT."
9 99 PERCENT WAS PAID TO THE RETIRED PLAYERS, WE'VE SHOWN ON THE
10 FORM. I MISSPOKE, AND YOU'LL LOOK AT THAT EXHIBIT YOURSELF.
11 DON'T BELIEVE ME ON 93 OR 90 PERCENT. LOOK AT THE TRIAL
12 EXHIBIT. BUT I THINK YOU WILL SEE IT'S 99 PERCENT.

13 ANY RETIRED PLAYER COULD SIGN A GLA. THIS IS
14 IMPORTANT. QUESTION TO MR. ALLEN:

15 "ARE THERE PLAYERS WHO SIGNED NFL PLAYER
16 CONTRACTS WHO NEVER MAKE A TEAM?"

17 "CERTAINLY. THERE ARE LOTS OF PLAYERS WHO SIGN
18 AND TRY OUT AND DON'T MAKE THE TEAM."

19 SO THAT WOULD BE A PLAYER WHO SIGNED AN NFLPA PLAYER
20 CONTRACT AND NEVER PLAYED A GAME. NEVER PLAYED A GAME.

21 "QUESTION: NOW, FROM THE STANDPOINT OF SIGNING
22 A RETIRED PLAYER GROUP LICENSING AUTHORIZATION, ARE ALL THOSE
23 DIFFERENT KINDS OF PLAYERS ALLOWED TO SIGN RETIRED PLAYER
24 GLA'S?"

25 "ANSWER: ABSOLUTELY."

1 "SO IF A PLAYER SIGNED AN NFL PLAYER CONTRACT
2 AND NEVER PLAYED A GAME, COULD HE HAVE SIGNED ONE?

3 "YES. AND DID."

4 AND DID.

5 "WERE THERE RETIRED PLAYERS WHO SIGNED GLA'S WHO
6 WERE NOT EVEN MEMBERS OF THE UNION?

7 "YES."

8 THE WHOLE POINT HERE IS THAT MR. ROWLEY TESTIFIED HE
9 DID NO ANALYSIS OF WHO THESE RETIRED PLAYERS WERE. HE WAS THE
10 DAMAGES EXPERT. HE DOESN'T KNOW WHETHER THEY PLAYED ONE GAME,
11 NO GAMES, FOUR GAMES, HOW MANY. HE DIDN'T DO ANY ANALYSIS.

12 YET, HE WANTS YOU TO AWARD EACH OF THEM TENS OF
13 THOUSANDS OF DOLLARS? AGAIN, WE ALL WOULD LIKE TO RECEIVE SUCH
14 MONEY. WE ALL WOULD LIKE TO RECEIVE THAT.

15 BUT IF SOMEONE DIDN'T PLAY A GAME IN THE NFL,
16 SHOULDN'T MR. ROWLEY CHECK THAT FIRST BEFORE SAYING "GIVE THEM
17 \$10,000 OF THE ACTIVE PLAYER LICENSING MONEY," WHICH THE ACTIVE
18 PLAYERS NEED TO FUND THE UNION AND FIGHT MANAGEMENT? SHOULDN'T
19 MR. ROWLEY HAVE DONE THAT SOMEWHERE?

20 NOW, THE EVIDENCE ALSO SHOWS THAT MOST RETIRED
21 PLAYERS IN THE GLA CLASS ARE NOT MARKETABLE. LET'S TAKE A LOOK
22 AT MR. ARMSTRONG. HE'S NOT IN THE CLASS, MR. ARMSTRONG, BUT
23 HE'S A RETIRED PLAYER.

24 "QUESTION: DESCRIBE TO THE JURY WHAT YOU
25 PERCEIVE ABOUT YOUR OWN NOTORIETY TO THE PUBLIC SINCE YOU'VE

1 RETIRED.

2 "ANSWER: I WAS, I WOULD SAY, A GOOD PLAYER FOR
3 A LONG PERIOD OF TIME IN THE NFL. IT'S FUN, AND THERE'S A LOT
4 OF NOTORIETY THAT GOES WITH THAT. AND SOME OF THAT FOLLOWS YOU
5 IN YOUR FIRST YEAR OR TWO OUTSIDE THE GAME. BUT THAT VERY
6 QUICKLY FADES."

7 THAT'S THE TESTIMONY. NOW, MR. ARMSTRONG WAS AN ALL
8 PRO, OKAY? HE WAS PRESIDENT OF THE PLAYERS ASSOCIATION. HE'S
9 A HANDSOME GUY, OKAY? A HOLLYWOOD GUY, ACCORDING TO
10 MR. PARCHER. I DON'T THINK HE'S QUITE LIKE THAT, BUT THAT'S
11 WHAT MR. PARCHER SAID. HE ACTUALLY COMES FROM DOWN SOUTH.

12 BUT HE DOESN'T HAVE THAT NOTORIETY, AND HE ONLY
13 RETIRED A FEW YEARS AGO. THINK ABOUT A PLAYER WHO MAY HAVE
14 RETIRED 20 YEARS AGO OR 30 YEARS AGO.

15 "MR. GOICH, DID RETIRED PLAYERS EVER ASK WHY
16 AREN'T WE GETTING ANY MONEY UNDER?

17 "YES, I DID, TOO. THEY SAID WE'RE NOT
18 MARKETABLE. THE WHOLE THING WAS A TREMENDOUS EFFORT ON THE
19 ACTIVE PLAYERS' PART, AS FAR AS I WAS CONCERNED, TO GET US INTO
20 THIS STUFF, OKAY? I MEAN, IT COST THEM MONEY TIME AND EFFORT."

21 HE'S TALKING ABOUT THE PLAYERS ASSOCIATION.

22 "AND IT SHOWED ME THAT THEY CARED. BUT WE
23 WEREN'T MARKETABLE, AND I UNDERSTAND WHY. AND YOU JUST SAY TO
24 YOURSELF: 'OKAY. IT'S JUST ALWAYS BEEN THAT WAY.' WHEN I WAS
25 ACTIVE, ONLY CERTAINLY PLAYERS ON THE GIANTS GOT DEALS."

1 NOW, DR. RASCHER ADMITTED IN C21 -- I'M NOT GOING TO
2 DO ALL OF THIS -- THAT:

3 "IT'S THE PLAYERS WHO HAVE THE GREATEST
4 ECONOMIC VALUE WILL GET THE MOST LICENSING REVENUE, CORRECT?

5 "CORRECT.

6 "AND PEOPLE OF NO VALUE WOULD GET NO AD HOC
7 LICENSING REVENUE, BECAUSE NOBODY WANTS THEM, RIGHT? YOU WOULD
8 AGREE WITH THAT? I MEAN, IF THEY DON'T SIGN UP DEALS, THEY
9 DON'T SIGN UP DEALS."

10 SO THE WHOLE POINT IS, AGAIN, IT'S NOBODY'S FAULT.
11 MR. ALLEN WOULD HAVE LIKED TO HAVE FOUND LICENSING DEALS FOR
12 EVERYONE. FOR EVERYONE. BUT HE CAN'T FORCE THE LICENSEES TO
13 DO WHAT THEY DON'T WANT.

14 YOU'RE GOING TO GET AN INSTRUCTION FROM THE JUDGE,
15 OKAY? THERE MAY HAVE BEEN SOME SUGGESTIONS IN COUNSEL'S
16 QUESTIONS THAT MADE YOU THINK THAT IT WOULD BE OKAY FOR THE
17 NFLPA AND PLAYERS INC TO SAY TO EA, OR SOMEONE ELSE: HEY, IF
18 YOU WANT THE ACTIVE PLAYERS, YOU MUST TAKE THE RETIRED PLAYERS.
19 USE THE POWER OVER ACTIVE PLAYERS TO FORCE THEM TO DO THAT.

20 THE JUDGE IS GOING TO TELL YOU UNDER THAT SUGGESTION
21 IT'S ILLEGAL.

22 **MR. PARCHER:** JUDGE?

23 **THE COURT:** WHAT?

24 **MR. PARCHER:** THERE IS NO POSITION HERE THAT THEY'RE
25 SUPPOSED TO COERCE ANYBODY. THAT'S --

1 **THE COURT:** WELL, I UNDERSTAND THAT YOU'RE NOT MAKING
2 THAT ARGUMENT, MR. PARCHER. AND THANK YOU FOR MAKING THAT
3 CLARIFICATION. BUT DURING SOME OF THE EXAMINATION OF DR. NOLL,
4 OR CROSS EXAMINATION, THAT POSSIBLE SUGGESTION WAS MADE. AND I
5 AM GOING TO INSTRUCT THE JURY TO MAKE SURE -- CLARIFY THAT.

6 BUT LET'S BE CLEAR: MR. PARCHER IS NOT MAKING THAT
7 ARGUMENT. BECAUSE IT MIGHT OCCUR TO SOME MEMBERS OF THE JURY,
8 I WANT TO, WHEN I GIVE YOU THE INSTRUCTIONS, MAKE SURE YOU
9 DON'T --

10 **MR. PARCHER:** THANK YOU.

11 **THE COURT:** -- STEP OFF INTO THE WRONG DIRECTION
12 THROUGH -- EVEN THOUGH NO ONE IS MAKING THAT ARGUMENT.

13 I'LL DEAL WITH THAT IN THE INSTRUCTIONS.

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

15 **MR. PARCHER:** SORRY TO INTERRUPT.

16 **MR. KESSLER:** THANK YOU, MR. PARCHER.

17 **MR. PARCHER:** YEAH.

18 **MR. KESSLER:** SO THE IMPORTANT POINT HERE IS WHETHER
19 MR. PARCHER IS ARGUING THAT IN CLOSING OR NOT, YOU, AS JURORS,
20 SHOULD UNDERSTAND THAT WE COULDN'T -- NOT "WE" -- THE NFLPA
21 COULDN'T USE THE ACTIVE PLAYERS AS A WEDGE TO TRY TO FORCE
22 LICENSEES TO PAY FOR ALL THE RETIRED PLAYERS IF THEY DIDN'T
23 WANT TO DO THAT.

24 THAT WOULD BE UNLAWFUL, AS THE JUDGE WOULD TELL YOU.
25 AND WE CERTAINLY WEREN'T GOING TO DO ANYTHING UNLAWFUL.

1 NOW, WE KNOW THAT THE REASON WE COULDN'T -- THE NFLPA
2 COULDN'T GET LICENSES FOR THE WHOLE RETIRED PLAYER GROUP, WHICH
3 IS WHAT THEY'RE SAYING, TAKE THE WHOLE GROUP TOGETHER AND PUT
4 IN THE ESCROW ACCOUNT, BECAUSE THE STARS WOULDN'T SIGN.

5 LOOK AT MR. ALLEN'S TESTIMONY:

6 "QUESTION: NOW, FOR THE RETIRED PLAYERS, WERE
7 YOU ABLE TO CONVINCING MOST OF THE STAR RETIRED PLAYERS TO SIGN
8 THE RETIRED PLAYER GLA?

9 "ANSWER: NO.

10 "DID THE FAILURE OR THE UNWILLINGNESS OF THE
11 STAR RETIRED PLAYERS TO SIGN THE RETIRED PLAYER GLA HAVE ANY
12 IMPACT ON YOUR ABILITY TO CONVINCING LICENSEES WHETHER TO LICENSE
13 THE WHOLE GROUP?

14 "ANSWER: YES.

15 "QUESTION: WHAT WAS THE IMPACT?

16 "ANSWER: THEY WEREN'T INTERESTED IN A GROUP
17 THAT DIDN'T INCLUDE THE HIGH PROFILE CELEBRITY PLAYERS THAT
18 THEY KNEW WOULD BE MARKETABLE IN THEIR PRODUCTS."

19 AND EVEN PLAINTIFFS AGREED, EVEN THE PLAINTIFFS
20 AGREED THAT THEY -- IN FACT, I THINK I HAVE SOME -- DO I HAVE
21 SOME TRANSCRIPT TESTIMONY COMING UP NOW ON THIS, LAUREN, ON
22 THIS ISSUE FROM DOUG ALLEN?

23 NO? OKAY.

24 EVEN THE PLAINTIFFS AGREED THAT THEY HAVE LITTLE
25 NOTORIETY AS RETIRED FOOTBALL PLAYERS.

1 MR. BEACH:

2 "ON A REGULAR BASIS DO YOU HAVE KIDS AND PEOPLE
3 COME UP TO YOU FOR AUTOGRAPHS, THINGS LIKE THAT?

4 "NO. NO. NOT ON A REGULAR BASIS AT ALL."

5 YOU RECALL -- I DON'T KNOW WHY -- ON DIRECT
6 EXAMINATION MR. BEACH TESTIFIED TO YOU THE OPPOSITE, BUT THEN
7 HE DID CORRECT HIS TESTIMONY WHEN I CROSS-EXAMINED HIM.

8 MR. MCNEIL:

9 "BUT, FOR EXAMPLE, DALLAS, A PLACE WHERE YOU
10 HAVEN'T PLAYED, YOU WOULDN'T BE RECOGNIZED, OF COURSE.

11 "ANSWER: NO."

12 MR. LAIRD:

13 "WHEN YOU RETIRED IN '86, FROM THAT MOMENT UNTIL
14 2000, WHEN YOU FIRST SIGNED THE RETIRED PLAYER GLA, YOU NEVER
15 HAD ONE LICENSE ENTERED INTO FOR YOUR NAME OR LIKENESS ON ANY
16 PRODUCT OR MERCHANDISE, CORRECT?

17 "NO.

18 "OKAY. SO PRIOR TO SIGNING A RETIRED PLAYER
19 GLA, YOU HAD NO LICENSING DEALS?

20 "NO."

21 SO WHY IS THERE NO ESCROW ACCOUNT? THE REASON THERE
22 WAS NO ESCROW ACCOUNT -- CAN WE PUT UP C24?

23 YOU'LL REMEMBER THIS: AN ESCROW ACCOUNT NEEDS MONEY.
24 WHAT THE RETIRED PLAYER GLA SAID IS THAT IF THERE WERE REVENUES
25 GENERATED FROM THE RETIRED PLAYER LICENSING IN THE GLA, IT

1 WOULD BE DIVIDED BETWEEN THE PLAYER AND AN ESCROW ACCOUNT.

2 WHAT HAPPENED IS, BECAUSE THEY COULDN'T DO THE WHOLE
3 GROUPS, THEY USED THE AD HOC LICENSING, WHICH THE COURT WILL
4 INSTRUCT YOU IS ENTIRELY PROPER.

5 AND SO THAT MONEY WAS PAID OUT A HUNDRED PERCENT TO
6 THE RETIRED PLAYERS, AND THERE WASN'T MONEY TO PUT INTO AN
7 EMPTY ESCROW ACCOUNT. THAT'S NOT A VIOLATION. THAT CAUSED NO
8 HARM.

9 IN FACT, MR. BEACH TESTIFIED HE DIDN'T CARE ABOUT AN
10 ESCROW ACCOUNT.

11 "AND IT'S ALSO TRUE YOU DIDN'T CARE ANYTHING
12 ABOUT WHETHER THERE WOULD BE AN ESCROW ACCOUNT OR NOT? YOU
13 DIDN'T CARE?

14 "NO, I DIDN'T REALLY CARE WHETHER THERE WAS AN
15 ESCROW ACCOUNT OR NOT."

16 MR. BEACH JUST WANTED -- IF HIS IMAGE WAS USED, HE
17 WANTED TO BE PAID. THAT WAS HIS RIGHT. BUT THAT NEVER
18 HAPPENED. NO ONE EVER USED MR. BEACH'S IMAGE WITHOUT PAYING
19 HIM.

20 NOW, THERE WERE A LOT OF QUESTIONS ABOUT WHAT WAS
21 KNOWN, WHAT WAS DISCLOSED, WHAT WERE PEOPLE TOLD.

22 YOU SAW EVIDENCE, FOR EXAMPLE, OF THE TOUCHBACK. I
23 MAY NOT HAVE TIME TO DO THIS, BUT I ASK YOU TO LOOK AT THE
24 TOUCHBACK. THERE WAS A WHOLE DISCLOSURE OF THE DIVISION OF
25 40 PERCENT, 23, 37 PERCENT IN THAT.

1 THERE WAS A DISCLOSURE OF HOW INDIVIDUAL -- HUNDREDS
2 OF INDIVIDUAL RETIRED PLAYERS GOT INDIVIDUAL AD HOCS. THAT WAS
3 ALL DISCLOSED.

4 NOW, THERE WAS TESTIMONY HERE THAT SOME OF THE
5 PLAYERS THREW AWAY TOUCHBACK AND DIDN'T LOOK AT IT. BUT THAT
6 DOESN'T MEAN IT WASN'T DISCLOSED.

7 BUT HERE'S ANOTHER DISCLOSURE, TRIAL EXHIBIT 113.
8 THIS IS ONE OF THE LAST EXHIBITS INTRODUCED. IT WAS
9 MR. UPSHAW'S DEPOSITION TESTIMONY.

10 IF WE COULD DO THE WHOLE THING, PLEASE, SO THEY COULD
11 SEE IT? OKAY.

12 **THE COURT:** YOU'RE AT THE ONE-HOUR MARK.

13 **MR. KESSLER:** THANK YOU. I'LL GO A LITTLE FASTER.

14 GO, THEN, PLEASE, TO THE PARAGRAPH THAT YOU HAVE, THE
15 THIRD PARAGRAPH.

16 IT SAYS:

17 "BASED ON THE RIGHTS -- FEES PAID TO PLAYERS INC
18 BY VIDEO GAME LICENSEES, FOR EACH RETIRED PLAYER UTILIZED UNDER
19 SUCH LICENSE FOR THE PERIOD ENDED FEBRUARY 28, 2003, THE SHARE
20 IS 750."

21 SO THEY WERE GIVING OUT \$750 CHECKS TO THE RETIRED
22 PLAYERS WHOSE WRITES WERE USED.

23 "IN THE PAST, WE HAVE DISTRIBUTED ALL OF THE
24 LICENSING FEES RECEIVED FOR USE OF RETIRED PLAYER NAMES AND
25 IMAGES TO THE RETIRED PLAYERS UTILIZED" -- UNDERSCORE

1 "UTILIZED," IF WE CAN, LAUREN, IT'S VERY IMPORTANT -- "AND WE
2 WILL CONTINUE TO DO SO."

3 THIS WAS A LETTER SENT OUT TO THE GLA CLASS MEMBERS
4 WHO WERE RECEIVING THIS MONEY, TELLING THEM EXACTLY HOW THE GLA
5 WORKED. THERE WERE NO DISCLOSURES -- THERE WAS NO FAILURE TO
6 DISCLOSE HERE.

7 NOW, THERE WAS A REFERENCE TO THE HALL OF FAME
8 AGREEMENT. I HAVE TO DO THIS QUICKLY. TRIAL EXHIBIT 56. I
9 DON'T KNOW WHAT MR. PARCHER IS GOING TO SAY ABOUT THIS.

10 AGAIN, YOU REMEMBER THE WHOLE THING WITH MR. WALKER
11 AND THE HALL OF FAME AND ALLEGING IT WAS BELOW COST, AND THERE
12 WAS SOMETHING WRONG WITH THAT.

13 FIRST OF ALL, THE HALL OF FAME AGREEMENT IS AN AD
14 HOC. THERE'S NO DAMAGES CLAIM OR ANY CLAIM ABOUT THE HALL OF
15 FAME AGREEMENT IN THIS CASE.

16 SECOND, IT INVOLVED 13 CLASS MEMBERS. BECAUSE MOST
17 OF THEM WERE HALL OF FAME PLAYERS, HAD NOTHING TO DO HERE. BUT
18 MOST IMPORTANTLY, IT IS UNDISPUTED: THE MONEY PAID WAS PAID TO
19 THE HALL OF FAME, NOT THE PLAYERS INC.

20 YOU'LL RECALL IT WAS AN AGREEMENT WITH THE PRO
21 FOOTBALL HALL OF FAME. AND THE LICENSE IN PARAGRAPH 2, IF WE
22 LOOK AT THAT, WAS GRANTED BY THE HALL OF FAME.

23 PLAYERS INC DIDN'T GET THE PLAYER RIGHTS FOR THIS.
24 THE HALL OF FAME DID.

25 AND MR. ADDERLEY ADMITTED WHEN HE NEGOTIATED HIS HALL

1 OF FAME PAYMENT HE GOT \$2,000 A YEAR; SAID IT WASN'T ENOUGH FOR
2 HIM, BUT HE AGREED TO IT. HE AGREED TO THAT. HE SAID IT WAS
3 THE HALL OF FAME, NOT PLAYERS INC.

4 TAKE A LOOK AT TRANSCRIPT 1583.

5 (DOCUMENT DISPLAYED.)

6 "MR. ADDERLEY, AT ONE POINT DID YOU ENTER INTO
7 AN AD HOC LICENSE AGREEMENT WITH THE HALL OF FAME?

8 "ANSWER: YES.

9 "AND THAT WAS A LICENSE TO CREATE A MADDEN HALL
10 OF FAME GAME; IS THAT CORRECT?

11 "ANSWER: I BELIEVE SO.

12 "AND YOU WERE SOLICITED DIRECTLY BY THE HALL OF
13 FAME FOR THAT; IS THAT CORRECT?

14 "ANSWER: YES.

15 "OKAY. AND YOU ENTERED INTO A LICENSE WITH THE
16 HALL OF FAME, AND YOU AGREED UPON HOW MUCH MONEY YOU WOULD BE
17 PAID FOR YOUR IMAGE AND NAME, CORRECT?

18 "ANSWER: REPEAT THAT."

19 KEEP GOING.

20 "YOU AGREED WITH THE HALL OF FAME HOW MUCH THEY
21 WOULD PAY YOU TO PUT YOU IN THAT GAME?

22 "ANSWER: YES.

23 "AND YOU WERE SATISFIED WITH HOW MUCH THEY WERE
24 GOING TO PAY YOU TO PUT YOU IN THAT GAME, CORRECT?

25 "ANSWER: NO.

1 "BUT YOU AGREED TO IT?

2 "ANSWER: I CAN'T TURN DOWN THAT MONEY."

3 NEXT QUESTION.

4 "OKAY. THAT'S FAIR ENOUGH. OKAY. AND DO YOU
5 RECALL HOW MUCH YOU WERE PAID?

6 "IT WAS \$8,000. IT WAS 2,000 A YEAR."

7 I AM GOING TO SKIP THAT. THIS IS THE IMPORTANT PART.

8 "OKAY. NOW, FOR THAT, THAT WAS AN AD HOC
9 AGREEMENT WITH THE HALL OF FAME, CORRECT?

10 "AS FAR AS I KNOW, YES."

11 KEY QUESTION:

12 "RIGHT. IN OTHER WORDS, PLAYERS INC DIDN'T
13 NEGOTIATE THAT 2,000 WITH YOU, DID THEY? THAT WAS DIRECTLY THE
14 HALL OF FAME?

15 "ANSWER: YES."

16 SO, MR. PARCHER, TO COME IN ABOUT PLAYERS INC DOING
17 SOMETHING WRONG IN THE HALL OF FAME TO BETRAY THE PLAYERS'
18 TRUST, THERE'S NO EVIDENCE OF THAT. IT'S JUST ALLEGATIONS.

19 HE MIGHT SHOW YOU SOME TESTIMONY FROM DR. NOLL ABOUT
20 THIS, IN WHICH THEY SAID:

21 "DR. NOLL, DO YOU KNOW OF ANY EVIDENCE WHERE
22 PLAYERS WERE SOLD OUT?"

23 AND DR. NOLL STARTS TO TALK ABOUT THE HALL OF FAME.

24 IF HE DOES THAT -- BECAUSE I WON'T BE ABLE TO GET UP
25 AGAIN -- MAKE SURE HE SHOWS YOU DR. NOLL'S ENTIRE ANSWER, NOT A

1 PIECE OF IT.

2 BECAUSE THE ENTIRE ANSWER SHOWS DR. NOLL WAS SAYING
3 THE OPPOSITE. HE WAS SAYING WHAT IT SHOWED. AS YOU WILL
4 RECALL FROM HIS TESTIMONY THAT IT WASN'T A BELOW-MARKET DEAL.
5 EA WAS COMPLAINING IT PAID TOO MUCH TO THE HALL OF FAME, NOT
6 TOO LITTLE.

7 NOW, ON FIDUCIARY DUTY, YOU'RE GOING TO BE CHARGED
8 YOU HAVE TO DETERMINE A DUTY AS TO WHETHER ONE OF THE IMPORTANT
9 FACTORS IS CONTROL. CONTROL. I CAN'T GO THROUGH THIS NOW.

10 BUT YOU WILL RECALL THAT THERE WAS LOTS OF TESTIMONY
11 FROM EACH OF THE PLAYERS THEY HAD NO CONTROL HERE.

12 THE GLA ITSELF DOESN'T SAY "AGENCY." THEY KEEP
13 SAYING IT'S AN AGENCY. THERE ARE AGENCY AGREEMENTS. READ THE
14 TERMS OF THE GLA. THERE WAS NO AGENCY.

15 NOW, THEY ALSO HAD UP HERE, BY THE WAY, A BIG
16 POSTER -- THEY MAY PUT IT UP AGAIN -- PROFESSOR NOLL SAYING
17 THAT THERE WAS SIGNIFICANT VALUE IN THE LICENSING OF RETIRED
18 PLAYERS IN A HYPOTHETICAL QUESTION HE WAS ASKED.

19 HYPOTHETICALS MEANS IT MAY NOT EXIST. WHAT DID
20 PROFESSOR NOLL SAID IN THE REAL WORLD EVIDENCE? C71.

21 "HAVE YOU SEEN ANY EVIDENCE THAT THERE WAS ANY
22 ECONOMIC VALUE FOR A LICENSE TO ALL THE RETIRED PLAYERS IN THIS
23 CLASS WHO SIGNED THE GLA AS A GROUP?

24 "NO. THERE NO SUCH EVIDENCE."

25 PROMOTION OF PLAYERS. I CAN'T GO THROUGH ALL THIS

1 EVIDENCE, BUT LET ME SHOW YOU C33.

2 MR. LINZNER ON WHETHER OR NOT DEFENDANTS PROMOTED THE
3 USE OF RETIRED PLAYERS:

4 "DID THEY, DEFENDANTS, EVER TRY TO MARKET THOSE
5 RETIRED PLAYERS TO YOU?

6 "ANSWER: YES.

7 "QUESTION: WHAT DID THEY SAY?

8 "THEY SAY IF, YOU KNOW, THEY'D ASK US IF WE
9 INTERESTED IN USING FORMER NFL PLAYERS, RETIRED PLAYERS. AND
10 ON THOSE OCCASIONS WHEN WE WERE INTERESTED, WHICH WE WERE ON
11 SEVERAL OCCASIONS, THEY HELPED US LICENSE THEM. AND WE
12 NEGOTIATED A SEPARATE CHARGE FOR THAT.

13 "DID DOUG ALLEN AND OTHERS AT PLAYERS INC MAKE
14 EFFORTS TO PROMOTE RETIRED PLAYERS TO EA TO YOUR KNOWLEDGE?

15 "DOUG ALLEN AND OTHER EXECUTIVES AT PLAYERS INC
16 FREQUENTLY ENCOURAGED US TO LICENSE THE RIGHTS TO RETIRED
17 PLAYERS THROUGH THEM, IF, INDEED, WE WANTED SUCH A FEATURE IN
18 OUR GAME."

19 NOW, I HAVE TO SKIP OVER. I HAVE BROCHURES. I HAVE
20 MARKETING EVIDENCE. YOU'RE GOING TO HAVE TO REVIEW THEM IN THE
21 JURY ROOM.

22 REMEMBER, EVEN MR. BEACH WAS FEATURED IN ONE OF THE
23 BROCHURES. REMEMBER HOW THEY GOT UP AND SAID:

24 "OH, YOU DIDN'T DO CLASS MEMBERS. ONLY TONY
25 DORSETT."

1 THEN, WE SHOWED YOU "TOO TALL" JONES, WHO IS A MEMBER
2 OF THIS CLASS.

3 GENE UPSHAW. THEY DO A LOT TO ATTACK MR. UPSHAW.
4 SEE WHAT MR. UPSHAW SAID IN FULL CONTEXT ABOUT MARKETING
5 PLAYERS. THEY SHOW YOU A LITTLE SNIPPET OF CORRECTED
6 TESTIMONY. THEY DIDN'T EVEN SHOW YOU THE CORRECTION.

7 BUT LET ME GIVE YOU THE FULL CONTEXT OF WHAT WAS
8 PRESENTED TO YOU BY DEPOSITION.

9 "QUESTION: I MEAN, THAT'S NOT YOUR JOB. YOU
10 DON'T GO OUT AND SELL LICENSEES [SIC].

11 "ANSWER: WELL, IT'S NOT MY JOB ON A DAY-TO-DAY
12 BASIS. BUT WHENEVER I HAVE CONTACT WITH LICENSEES OR SPONSORS,
13 OR WHATEVER, I ALWAYS REMIND THEM THAT WE ALSO HAVE THIS GROUP
14 OF PLAYERS BESIDES OUR ACTIVE PLAYERS, AND THAT APPLIES TO ANY
15 OF OUR PLAYERS, BOTH ACTIVE AND RETIRED."

16 FOR THEM TO SUGGEST THAT GENE UPSHAW, WHO THE
17 EVIDENCE WAS, FOUNDED THE RETIRED PLAYER LICENSING PROGRAM,
18 DIDN'T TRY TO PROMOTE RETIRED PLAYERS, IT JUST BOGGLES THE
19 MIND.

20 NOW, ALSO KEEP IN MIND, PLAINTIFFS, ON THE OTHER
21 HAND, THEY COMPLAIN WE DIDN'T MARKET THEM. THEY DID NOTHING TO
22 MARKET THEMSELVES. THESE WERE NON-EXCLUSIVE GLA'S.

23 THEY COULD HAVE TAKEN SOME RESPONSIBILITY. THEY
24 COULD HAVE TRIED. DID THEY DO ANYTHING? LET'S LOOK AT C39.

25 MR. BEACH:

1 "AND, MR. BEACH, IT'S ALSO TRUE THAT YOU NEVER
2 MADE EFFORTS TO MARKET YOURSELF SINCE YOUR RETIREMENT AS AN
3 NFLPA PLAYER, CORRECT?

4 "THAT'S CORRECT.

5 "AND, IN FACT, YOU HAD NO DESIRE TO MARKET
6 YOURSELF AS A RETIRED PLAYER FOR ANY PURPOSE. THAT IS CORRECT,
7 ISN'T IT?

8 "THAT'S CORRECT."

9 BUT HE'S HERE SEEKING NOW TENS OF THOUSANDS OF
10 DOLLARS.

11 "YOU UNDERSTOOD THAT EVEN THOUGH YOU SIGNED THE
12 GLA YOU STILL HAD THE RIGHT TO TRY TO GO OUT YOURSELF AND TO
13 TRY TO GENERATE REVENUE FROM LICENSING YOUR NAME AND IMAGE,
14 RIGHT?"

15 MR. MCNEIL:

16 "YES.

17 "DID YOU EVER TRY TO DO THAT?

18 "I JUST EXPLAINED TO YOU THAT I DIDN'T."

19 MR. ADDERLEY, C45:

20 "MR. ADDERLEY, IT'S TRUE THAT YOU UNDERSTOOD
21 THAT THE GLA YOU SIGNED WAS NOT EXCLUSIVE, CORRECT?

22 "YES.

23 "AND YOU KNEW THAT MEANT YOU COULD LICENSE YOUR
24 RIGHTS TO ANYBODY ELSE YOU WANTED TO, CORRECT?

25 "YES.

1 "AND DESPITE THAT FACT, MR. ADDERLEY, YOU NEVER
2 MADE ANY EFFORT AT ALL TO MARKET YOUR NAME TO BE USED ON ANY
3 PRODUCT, DID YOU?

4 "NO."

5 LADIES AND GENTLEMEN OF THE JURY, THERE'S NO BREACH
6 OF FIDUCIARY DUTY IN THIS CASE. THIS INFORMATION WAS REVEALED,
7 YOU HEARD FROM MR. GOICH AT RETIRED PLAYER CONVENTIONS. IT WAS
8 ALL DISCUSSED WHEN THEY WENT OVER THE GLA.

9 THEY INVITED STEERING MEMBERS OF THE RETIRED PLAYERS
10 ASSOCIATION TO COME TO THE ACTIVE PLAYER MEETINGS WHERE THEY
11 HEARD AND SAW EVERYTHING.

12 FOR THEM TO COME IN THAT THERE WAS SOME GRAND
13 CONSPIRACY INVOLVING MR. ARMSTRONG, MR. ALLEN, MRS. ALLEN, GENE
14 UPSHAW, DAN GOICH, EVERYONE IN THE HISTORY OF THE ASSOCIATION,
15 IT FRANKLY IS ABSOLUTELY OUTRAGEOUS.

16 NOW, I HAVE TO SKIP FORWARD HERE, BECAUSE I'M RUNNING
17 OUT OF TIME.

18 I CAN'T TALK ABOUT THE \$8 MILLION EXCEPT TO NOTE THE
19 EVIDENCE WAS ALL ACTIVE PLAYER MONEY. YOU REMEMBER THAT. IT
20 WAS THE ACTIVE PLAYER DECISION. IT WAS BASED ON THE TRADEMARK.
21 THAT'S WHAT DR. NOLL TESTIFIED. THE VALUE OF THE TRADEMARK,
22 18 MILLION FOR THEM, 11 MILLION FOR THE NBA. YOU RECALL THAT
23 TESTIMONY. THERE WASN'T ANYTHING WRONG WITH THAT.

24 NOW, I THINK I NEED TO SPEND A LITTLE TIME, EVEN
25 THOUGH THERE'S NO BASIS FOR ANY CLAIM HERE, ON THE SCRAMBLING

1 THING. THIS IS THE BIGGEST DISTRACTION OF ALL. OKAY, START
2 WITH C35.

3 THE REASON WHY EA DECIDED TO SCRAMBLE -- AND THE
4 COURT WILL INSTRUCT YOU IT VIOLATED NO PLAYER RIGHTS TO
5 SCRAMBLE. IT'S VERY IMPORTANT. THEY USE NO NAME. THEY USE NO
6 NUMBER. THEY USE NO PICTURE. SO IT VIOLATED NO RIGHTS. SO
7 THIS IS A TOTAL DISTRACTION.

8 THE REASON IS THEY DIDN'T WANT TO PAY ANY MONEY FOR
9 IT.

10 "QUESTION: WOULD YOU HAVE PAID ADDITIONAL MONEY
11 FOR THE RETIRED PLAYERS YOU WEREN'T INTERESTED IN?

12 "IF THEY HAD NO VALUE TO US IN THE GAME FOR
13 WHATEVER REASON, THEN WE WOULDN'T HAVE PAID ANY ADDITIONAL
14 MONEY FOR THAT. OKAY. WHEN WE HAVE BEEN INTERESTED IN RETIRED
15 PLAYERS FOR THE GAME, WE HAVE PAID THEM ADDITIONAL MONEY.

16 "QUESTION: WAS EA EVER INTERESTED, DURING THIS
17 PERIOD OF TIME, IN LICENSING THE RIGHTS TO RETIRED PLAYERS WHO
18 WERE NOT STARS?

19 "AGAIN, THE TEAM DOWN IN ORLANDO WOULD DECIDE
20 WHICH PLAYERS THEY WERE INTERESTED IN LICENSING. BUT BASED ON
21 MY DISCUSSION WITH THEM, MY UNDERSTANDING IS TYPICALLY WE
22 WANTED WELL-KNOWN PLAYERS WHO WOULD BE OF INTEREST TO OUR
23 CUSTOMERS."

24 NOW, THEY PUT UP THE LETTER, TRIAL EXHIBIT 1320 FROM
25 LASHUN LAWSON. SHE WAS PROTECTING PLAYER RIGHTS BECAUSE EA

1 WOULDNT PAY FOR THEM. ALL SHE DID IS SAY:

2 "THE ADDENDUM THAT WAS SIGNED LAST JULY WAS A
3 THREE-YEAR AGREEMENT THAT GRANTED ELECTRONIC ARTS THE RIGHT TO
4 USE THE IMAGES AND IDENTITIES OF PLAYERS LISTED IN ATTACHMENTS
5 A AND B."

6 YOU REMEMBER WE PUT THAT AS ATTACHMENTS INTO
7 EVIDENCE. THOSE WERE SPECIFIC RETIRED PLAYERS THEY PAID MONEY
8 FOR. WHERE DID THAT MONEY GO? TO THE RETIRED PLAYERS. THAT
9 WAS THE \$750.

10 "AND FOR ALL RETIRED PLAYERS THAT ARE NOT LISTED
11 IN EITHER ATTACHMENT A OR B, THEIR IDENTITY MUST BE ALTERED SO
12 IT CANNOT BE RECOGNIZED."

13 WHAT'S WRONG WITH THAT? IF YOU DONT PAY FOR IT, YOU
14 CANT USE SOMEONE ELSE'S RIGHTS. WE HAD TO DO THAT TO PROTECT
15 THE RETIRED PLAYERS. NOW THEY TWIST IT AND MAKE IT SEEM LIKE
16 THERE'S SOMETHING WRONG FOR THAT.

17 IT'S ABSOLUTELY UNBELIEVABLE. UNBELIEVABLE.

18 AND, IN FACT, WE ASKED MR. BEACH:

19 "DO YOU BELIEVE THE NFLPA SHOULD HAVE GIVEN AWAY
20 YOUR NAME FOR FREE?"

21 TRANSCRIPT 1185 TO 1186.

22 AND WHAT DID MR. BEACH SAID? HE SAID:

23 "NO.

24 "OKAY. SO IT IS YOUR BELIEF THAT THE NFLPA
25 SHOULD HAVE GIVEN AWAY YOUR NAME FOR FREE TO EA?

1 "ANSWER: NO."

2 SO THIS WHOLE CLAIM WE SHOULD HAVE JUST THROWN IN THE
3 RETIRED PLAYERS IN FOR FREE, MR. BEACH DIDN'T BELIEVE THAT.
4 NOBODY WOULD BELIEVE THAT.

5 NOW, DAMAGE. THIS IS VERY IMPORTANT. THE COURT IS
6 GOING TO TELL YOU, IF YOU EVER GET TO DAMAGE -- YOU SHOULDN'T
7 GET THERE, BUT I CAN'T LEAVE IT OUT. IF YOU GET TO DAMAGES,
8 YOU CAN'T USE SPECULATION, CONJECTURE. THERE HAS TO BE
9 EVIDENCE. EVIDENCE THAT GIVES YOU A REASONABLE BASIS TO
10 DETERMINE DAMAGES. YOU GOT NOTHING LIKE THAT FROM MR. ROWLEY.

11 WHAT DID YOU GET? AND I ASKED HIM -- IF WE CAN,
12 FIRST, LET'S LOOK AT 1915.

13 LET'S SAY YOU WERE TO FIND -- AND YOU SHOULDN'T --
14 THAT DEFENDANTS DID NOT ADEQUATELY MARKET THE RETIRED PLAYERS.
15 AND THAT'S SOME BREACH OF FIDUCIARY DUTY. WE BELIEVE THE
16 EVIDENCE SHOWS EXACTLY THE OPPOSITE. I SHOULDN'T SAY "WE."

17 DEFENDANTS BELIEVE THE EVIDENCE SHOWS EXACTLY THE
18 OPPOSITE. BUT LET'S SAY YOU FOUND THAT. DID MR. ROWLEY GIVE
19 YOU ANY BASIS TO DECIDE THE DAMAGES?

20 LET ME SHOW YOU WHAT HE SAID.

21 "QUESTION: LET ME ASK THIS: LET'S SAY THE JURY
22 WERE TO FIND THERE WAS NO BREACH OF CONTRACT, OKAY? AND THERE
23 WAS A BREACH OF FIDUCIARY DUTY FOR NOT MARKETING, NOT
24 SUFFICIENTLY MARKETING THE RETIRED PLAYERS WHO SIGNED THE
25 GLA'S, OKAY? HAVE YOU DONE ANY ANALYSIS OF SPECIFICALLY HOW

1 MUCH THE RETIRED PLAYERS WOULD HAVE EARNED FOR THEIR RIGHTS IF
2 THEY HAD BEEN MORE AGGRESSIVELY MARKETED, JUST ON THAT CLAIM
3 SEPARATELY?"

4 LOOK AT THIS ANSWER. THE ANSWER IS:

5 "NO."

6 NO. SO IF THEY PRESENT NO EVIDENCE, IT'S THEIR
7 BURDEN OF PROOF. YOU CAN'T AWARD ANY DAMAGES ON A MARKETING
8 CLAIM. AND EVEN IF IT WAS A BREACH OF CONTRACT CLAIM.

9 LOOK WHAT MR. ROWLEY TESTIFIED. C48:

10 "NOW, YOU'VE GIVEN THE JURY NO BASIS TO
11 CALCULATE ANY DAMAGES IF THEY FIND THAT RETIRED PLAYERS ARE NOT
12 ENTITLED TO ACTIVE PLAYER LICENSING MONEY, AND ALL THE MONEY IN
13 THE GLR POOL IS ACTIVE PLAYER LICENSING MONEY, CORRECT?

14 "IF THOSE TWO ASSUMPTIONS ARE TRUE, THEN, YES."

15 HE IS ADMITTING TO YOU -- HE'S AN HONEST GUY IN THIS,
16 HONEST GUY -- IF YOU FIND THE GLR POOL WAS ALL ACTIVE PLAYER
17 LICENSING MONEY, HE HAS GIVEN YOU NO BASIS TO MEASURE ANY
18 DAMAGES IN THIS CASE.

19 AND THE JUDGE WILL TELL YOU YOU CAN'T BASE DAMAGES ON
20 SPECULATION, CONJECTURE. IT WAS THEIR BURDEN.

21 PLAINTIFFS ADMITTED, C37, THEY HAD NO IDEA HOW THE
22 MONEY WOULD BE DIVIDED UP. THERE'S NO REFERENCE IN THE GLA TO
23 A GROSS LICENSING REVENUE POOL. LOOK AT THE LANGUAGE.

24 THERE'S NO REFERENCE TO EQUAL SHARES OF A GROSS
25 LICENSING REVENUE POOL. DAMAGES HAVE TO BE DONE WITH SOME

1 ELEMENT OF CAUSATION.

2 MR. ROWLEY TESTIFIED WHEN I ASKED HIM IN OTHER CASES
3 HE'S A DAMAGE EXPERT HE STUDIED CAUSATION. HERE THE LAWYERS,
4 HE TESTIFIED, JUST TOLD HIM WHAT NUMBERS TO TAKE AND DIVIDE UP.
5 WELL, THAT'S NOT ADEQUATE.

6 AND, FINALLY, ON THIS POINT. HE WOULD AWARD DAMAGES
7 TO PEOPLE WHO PLAYED -- HE DOESN'T KNOW WHETHER THEY PLAYED ONE
8 GAME, TWO GAMES, NO GAMES. HE DOESN'T KNOW WHAT SEASONS. HE
9 DOESN'T -- YOU DON'T HAVE A BASIS TO KNOW WHAT SEASONS THEY
10 ARE.

11 LET'S TAKE A LOOK AT TRIAL EXHIBIT 2,074.

12 **THE COURT:** TEN MINUTES TO GO.

13 **MR. KESSLER:** TEN MINUTES. THANK YOU.

14 2074, PLEASE. 2057. SORRY. GOT A LITTLE DISTRACTED.

15 THIS IS IN EVIDENCE. IT SHOWS HOW MANY CLASS MEMBERS
16 HAD A GLA EFFECT EVERY YEAR. WELL, IN 2007, THERE WERE ONLY
17 22.

18 DID YOU EVER HEAR THAT FROM PLAINTIFFS BEFORE? WERE
19 YOU EVER TOLD THAT THE NUMBER OF CLASS MEMBERS DECLINED EACH
20 YEAR FROM 2003 TO 22? WHY IS THIS SIGNIFICANT?

21 THIS IS SIGNIFICANT BECAUSE THEY OFFER YOU DIFFERENT
22 YEARS OF DAMAGES AMOUNTS. THEY HAVE GIVEN YOU NO BASIS TO
23 DECIDE, NO BASIS TO DECIDE WHICH PLAYERS SHOULD GET WHICH
24 MONEY. YOU CAN'T SPECULATE. YOU JUST -- THAT'S NOT OUR FAULT.
25 IT WAS THEIR BURDEN TO DO SOMETHING.

1 NOW, IF WE COULD PUT UP THAT OTHER DAMAGES EXHIBIT
2 WITH THE LICENSING. IT'S TRIAL EXHIBIT 1217.

3 (DOCUMENT DISPLAYED.)

4 THEY ALSO PUT IN, IF YOU LOOK HERE, FOUR YEARS OF THE
5 DAMAGES. 2004 TO 2007. THE JUDGE IS GOING TO INSTRUCT YOU
6 IT'S A THREE-YEAR DAMAGE PERIOD.

7 THEY'VE GIVEN YOU NO BASIS TO DECIDE HOW FOUR FITS
8 INTO THREE. OKAY? OR WHETHER OR NOT WHICH OF THE FOUR FITS
9 INTO THREE.

10 DID YOU HEAR ANY EXPLANATION FROM THAT FROM THEIR
11 DAMAGES EXPERT?

12 MAYBE MR. PARCHER NOW WILL TRY TO EXPLAIN THAT TO
13 YOU. BUT THEY HAVE TO HAVE EVIDENCE, NOT MR. PARCHER'S
14 ARGUMENT. THEY'VE GOT TO HAVE EVIDENCE. THEY'VE DONE NOTHING
15 HERE.

16 AND WHAT IS THE INJURY? THINK ABOUT THAT. IF YOU
17 SIGNED THE PAPER, PIECE OF PAPER, AND YOU AUTHORIZE SOMEONE TO
18 LICENSE IT, HOW WERE ANY OF THESE PLAINTIFFS WORSE OFF?

19 IF THEY GOT AD HOC LICENSING, THEY MADE MONEY. SOME
20 OF THEM MADE A LOT OF MONEY. MR. ADDERLEY MADE \$13,000.

21 IF THEY DIDN'T MAKE THE MONEY -- I HEARD MR. PARCHER
22 SAY:

23 "WELL, THEY GAVE THE RIGHT TO USE THEIR
24 IDENTITY."

25 IT'S TRUE. IT'S NOT IDENTITY THEFT. IT WAS SIMPLY

1 AN OPPORTUNITY.

2 IF YOU FOUND SOMETHING, AS MR. GOICH TESTIFIED:

3 "WELL, IF IT WAS GENERATED FROM MY RIGHTS, THEY
4 WOULD GET A BENEFIT."

5 BUT THEY WEREN'T HURT. THEY WEREN'T INJURED. THEIR
6 LIVES DIDN'T CHANGE. THEY PAID NOTHING. NOTHING HAPPENED
7 HERE.

8 THAT BRINGS ME, AGAIN, TO THIS INCREDIBLE SUBJECT OF
9 PUNITIVE DAMAGES.

10 THE JUDGE IS GOING TO CHARGE YOU PUNITIVE DAMAGES,
11 THERE HAS TO BE SOMETHING OUTRAGEOUS, MALICE, EVIL INTENT, SOME
12 HORRIBLE BEHAVIOR, THREATS TO SAFETY.

13 DID YOU SEE ANY OF THAT? DID YOU SEE IN THE
14 WITNESSES HERE -- WHEN YOU SAW MR. ARMSTRONG, WOULD HAVE TO BE
15 PART OF THIS CONSPIRACY? HE SAID:

16 "MR. ARMSTRONG LIED TO YOU BECAUSE MAYBE HE'LL BE
17 THE FUTURE HEAD OF THE UNION."

18 DO YOU THINK MR. ARMSTRONG WAS LYING TO YOU? DO YOU
19 THINK MR. GOICH WAS LYING TO YOU? DO YOU THINK THEY ARE EVIL,
20 THEY ARE IN SOME CABAL ALL THIS TIME?

21 PLAINTIFFS' LAWYERS WILL SAY ANYTHING IN AN EFFORT TO
22 TRY TO INFLAME YOU, INFLAME YOU TO SAY: "YEAH, LET'S GIVE SOME
23 PUNITIVE DAMAGES," YET, WHEN THERE ARE NO INDIVIDUAL DAMAGES.
24 THERE ARE NO INDIVIDUAL DAMAGES.

25 LADIES AND GENTLEMEN OF THE JURY, I COME BACK TO MY

1 THREE POINTS AGAIN.

2 IF WE CAN PUT UP C1, PLEASE.

3 THE LICENSING MONEY WAS GENERATED SOLELY FOR THE
4 RIGHTS OF ACTIVE, NOT RETIRED PLAYERS. IT'S ESTABLISHED WITH
5 ALL THE EVIDENCE BEYOND ANY POSSIBLE DISPUTE.

6 WHENEVER RETIRED PLAYERS' RIGHTS WERE LICENSED, THE
7 RETIRED PLAYERS GOT THAT MONEY. 99 PERCENT OF IT. NOT 93,
8 BECAUSE I MAY HAVE MISSPOKEN.

9 MOST RETIRED CLASS MEMBERS RECEIVED NO LICENSING
10 MONEY BECAUSE LICENSEES -- BECAUSE LICENSEES AND THE
11 MARKETPLACE PUT NO VALUE IN THEIR LICENSING RIGHTS. THAT'S NOT
12 A BREACH OF FIDUCIARY DUTY. IT'S NOT A LACK OF EFFORT. IT'S
13 NOT A CONSPIRACY. IT'S NOT DECEITFUL. IT'S NOT
14 DOUBLE-TALKING. IT'S THE WAY THE MARKETPLACE WORKS.

15 WHAT THE EVIDENCE SHOWS IS THAT THIS IS THE ONLY
16 UNION THAT TRIED TO DO LICENSING FOR RETIRED PLAYERS, BECAUSE
17 GENE UPSHAW WAS DEDICATED TO THOSE PLAYERS.

18 AND THEY PUT UP THIS QUOTE, THIS THING ABOUT "IF YOU
19 DON'T HAVE THE WORLD'S BEST DOG FOOD, YOU CAN'T SELL IT IF THE
20 DOGS DON'T EAT IT."

21 IS THAT OFFENSIVE TO YOU? NOT OFFENSIVE TO ME. IS
22 THAT ANY DIFFERENT THAN MR. GOICH TESTIFYING ON THE STAND, YOU
23 REMEMBER, TRYING TO SELL HIS RIGHTS WAS LIKE TRYING TO SELL A
24 DEAD HORSE?

25 I MEAN, THEY ARE BOTH PEOPLE OF THE SOUTH. OKAY?

1 WHAT THEY WERE SAYING IS -- AND MR. UPSHAW, BY THE
2 WAY, WAS ONE OF THE RETIRED PLAYERS WHOSE RIGHTS HE WAS TALKING
3 ABOUT COULDN'T BE SOLD.

4 FOR THEM TO SAY THAT'S THEIR CASE, THAT QUOTE, THAT'S
5 THE REASON TO FIND GENE UPSHAW, THE MAN TO DID MORE FOR RETIRED
6 AND ACTIVE NFL PLAYERS IN HISTORY, THAT'S THE REASON TO CONDEMN
7 HIM AND FIND HE HAD AN EVIL INTENT AND DESTROY HIS LEGACY?

8 THAT'S WHAT MR. PARCHER WANTS TO DO IN THIS CASE.

9 HAS THERE BEEN ANY EVIDENCE, ANY EVIDENCE THAT YOU'VE
10 SEEN TO JUSTIFY THOSE ALLEGATIONS AND CLAIMS?

11 LADIES AND GENTLEMEN OF THE JURY, YOU'VE BEEN
12 EXTRAORDINARILY PATIENT.

13 I APOLOGIZE FOR SHOUTING. I GET A LITTLE BIT
14 EMOTIONAL ABOUT THIS CASE. I TOLD YOU I WOULDN'T SHOUT, BUT I
15 DID. I APOLOGIZE.

16 YOU'VE BEEN EXTREMELY PATIENT. WHAT HAPPENS NOW IS
17 MR. PARCHER GETS TO GO AGAIN. I DON'T GET TO GO AGAIN.

18 REMEMBER THE HISTORY OF THIS CASE. HOW MANY TIMES
19 DID PLAINTIFFS SAY SOMETHING, THEIR LAWYERS OR THEIR WITNESSES,
20 AND THEN WE WERE ABLE TO GET UP AND SHOW YOU THE FULL PICTURE
21 AND THE EVIDENCE, AND IT WAS THE OPPOSITE?

22 DID IT HAPPEN TODAY? DID IT HAPPEN TODAY? I CAN'T
23 CORRECT ANYTHING AGAIN. YOU'RE GOING TO HAVE TO DO THE
24 CORRECTIONS. DEFENDANTS RELY UPON YOU, AFTER MR. PARCHER GOES,
25 TO REVIEW THE EVIDENCE, TO APPLY YOUR COMMON SENSE TO THAT

1 EVIDENCE.

2 DEFENDANTS ARE CONFIDENT YOU WILL LOOK AT THAT
3 EVIDENCE AND RENDER A JUST AND FAIR VERDICT IN THIS CASE. AND
4 THAT'S ALL DEFENDANTS COULD POSSIBLY HOPE FOR.

5 THANK YOU SO MUCH FOR YOUR TIME AND YOUR PATIENCE.

6 **THE COURT:** ALL RIGHT. WE'RE GOING TO TAKE A
7 15-MINUTE BREAK.

8 WHEN WE COME BACK WE WILL HAVE THE LAST PART OF
9 MR. PARCHER'S ARGUMENT, AND THEN I WILL PROCEED TO GIVE YOU THE
10 INSTRUCTIONS OF LAW. AND THEN, IT WILL BE YOUR DUTY TO
11 DELIBERATE ON THE CASE. BUT NOT YET. PLEASE DON'T DISCUSS THE
12 CASE YET.

13 THANK YOU. WE'LL SEE YOU BACK HERE IN 15 MINUTES.

14 **THE CLERK:** ALL RISE.

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

17 **THE COURT:** OKAY. EVERYONE HAVE A SEAT.

18 SO REARRANGE THE COURTROOM WITH POSTER BOARDS OR
19 WHATEVER, BUT YOU'VE GOT 15 MINUTES, MR. PARCHER.

20 **MR. PARCHER:** YES, SIR. APPRECIATE THE EXTRA THREE.

21 **THE COURT:** ALL RIGHT.

22 NOW, I'M GOING TO SAY TO THE AUDIENCE, YOU'RE WELCOME
23 TO STAY THROUGH THE READING OF THE INSTRUCTIONS, WHICH WILL
24 IMMEDIATELY FOLLOW MR. PARCHER. BUT I WILL PAUSE A LITTLE
25 BEFORE TO LET ANY OF YOU LEAVE WHO WANT TO LEAVE.

1 USUALLY THE PUBLIC FINDS THE READING OF THE
2 INSTRUCTIONS TO BE BORING. THEY ARE VERY BORING.

3 AND I WANT TO MAKE SURE THE JURY HEARS IT. SO TO
4 AVOID DISTRACTIONS OF PEOPLE COMING IN AND OUT, IF YOU WANT TO
5 LEAVE, THAT'S FINE.

6 BUT TRY TO LEAVE IN THAT BREAK SO THAT YOU DON'T BE
7 WALKING IN AND OUT AS THE INSTRUCTIONS ARE READ.

8 WE'LL TAKE A 15-MINUTE BREAK OURSELVES AT THIS POINT,
9 AND THEN RETURN.

10 THANK YOU.

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

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

13 (RECESS WAS TAKEN.)

14 **THE COURT:** ALL RIGHT. LET'S GO BACK TO WORK.

15 **MR. PARCHER:** CAN I HAVE 15 MINUTES?

16 **THE COURT:** 15.

17 **MR. PARCHER:** I GET FIVE MORE, OR THAT'S OUTRAGEOUS?
18 I TRIED TO READ MY NOTES.

19 **THE COURT:** SORRY, 15.

20 **MR. PARCHER:** ALL RIGHT. RULES ARE RULES.

21 (DISCUSSION HELD OFF THE RECORD.)

22 **THE COURT:** ARE READY TO BRING IN THE JURY? LET'S GO
23 GET THEM.

24 **MR. PARCHER:** CAN I RUN TO THE MEN'S ROOM?

25 **THE COURT:** YOU NEED TO GO. GO AHEAD.

1 **MR. PARCHER:** "NEED" IS A BIG WORD, BUT I'D LIKE TO.

2 **THE COURT:** WE'LL WAIT. PLEASE. EVERYONE BE SEATED.
3 WE'RE GOING TO HAVE A SHORT FACILITIES BREAK.

4 (RECESS TAKEN.)

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

7 **THE COURT:** WELCOME BACK, EVERYONE. HAVE A SEAT,
8 PLEASE.

9 MR. PARCHER, YOU HAVE 15 MINUTES.

10 **REBUTTAL ARGUMENT**

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

12 ALL RIGHT. LET'S GO. THIS IS MY LAST CHANCE TO
13 SPEAK UP FOR THE GUYS, FOR THE PLAINTIFFS.

14 LOOK, IN NO PARTICULAR ORDER -- MY COLLEAGUE IS
15 TALKING TO ME TO TELL ME TO SPEAK SLOWLY, EVEN THOUGH I'M IN A
16 HURRY. LET ME JUST GO WITH THIS.

17 YOU KNOW, YOU SAW MR. KESSLER FLASH UP ON THE BOARD
18 THAT CLAUSE OF THE PA/PI AGREEMENT BETWEEN MR. UPSHAW AND
19 MR. ALLEN AND MR. UPSHAW AND MR. ALLEN AND RATIFIED BY THE
20 ACTIVE PLAYERS, IN WHICH IT SAID THE RETIRED PLAYERS DON'T GET
21 ANYTHING.

22 ASIDE FROM THE FACT THAT IT'S AN OUTRAGE, IF IT
23 APPLIES, THAT'S NOT THE GLA. WE DIDN'T SIGN A PA/PI AGREEMENT.
24 2100 GUYS DIDN'T SIGN A PA/PI AGREEMENT. NOBODY ELSE US ABOUT,
25 DID EXCUSE PLEASE, PLAINTIFFS ABOUT WHAT'S IN AN PA/PI

1 AGREEMENT.

2 YOU CAN'T WRITE PEOPLE OUT OF YOUR LITTLE PA/PI
3 AGREEMENT THAT'S BETWEEN ALL OF YOU AND YOUR SECRET CLUB. THIS
4 IS WHAT COUNTS (INDICATING).

5 JUDGE ALSUP IS GOING TO TELL YOU LOTS OF STUFF. I'M
6 NOT GOING TO PRETEND TO TELL YOU WHAT JUDGE ALSUP IS GOING TO
7 TELL YOU. BUT IT'S THE GLA. IT'S THE GLA. IT'S THE GLA.

8 DOUBLE-TALK. THE NERVE OF THE MAN. THE HALL OF
9 FAME, WELL, HE SAYS THE HALL OF FAME IS NOT REALLY A GLA
10 AGREEMENT, SO IT'S GOT NOTHING TO DO WITH THIS CASE.

11 READ THE HALL OF FAME AGREEMENT. THEY STABBED THE
12 STAR PLAYERS IN THE BACK. THAT'S WHO THESE PEOPLE ARE. WHAT
13 DOES HE MEAN IT HAS NOTHING TO DO WITH IT?

14 IT DOESN'T COUNT. I STAB PEOPLE IN THE BACK, BUT IT
15 DOESN'T COUNT BECAUSE IT'S NOT A GLA.

16 LASHUN LAWSON WAS PROTECTING, DID YOU HEAR? LASHUN
17 LAWSON WAS PROTECTING THE RETIRED PLAYERS. PROTECTING THEIR
18 IDENTITIES BY MAKING SURE THAT THEY DIDN'T GET A SHARE OF
19 \$25 MILLION FOR THREE YEARS IN A ROW. LASHUN LAWSON WAS
20 PROTECTING THEM.

21 MAN ALIVE, WITH FRIENDS LIKE THAT, I DON'T WANT
22 ENEMIES. I DON'T WANT ENEMIES.

23 WHAT ARE WE TALKING ABOUT? I FEEL LIKE I'M IN THE
24 TWILIGHT ZONE.

25 TAKE TWO WANTED 200 SOME ODD RETIRED GUYS. THEY

1 DROVE THEM OUT OF BUSINESS.

2 ELIGIBLE, WHICH IS THE KEY WORD. NOBODY IS WALKING
3 AWAY FROM THE GROUP LICENSING AGREEMENT LANGUAGE THAT
4 MR. KESSLER TALKED TO YOU. WHAT IS A GROUP LICENSING
5 AGREEMENT?

6 A GROUP LICENSING AGREEMENT IS "SIX OR MORE CURRENT
7 OR ACTIVES." OR ACTIVES. OR ACTIVES OR CURRENTS. OR CURRENTS
8 OR RETIRED. EXCUSE ME.

9 AND IF IT'S LICENSE, IF IT'S LICENSE, THAT'S A GLA
10 AGREEMENT. I -- LOOK. I'M RELYING ON YOU. I'M RELYING ON
11 YOU.

12 THE IDEA THAT YOU COULD STAB US IN THE BACK, AND THEN
13 SAY IT'S NOT DESPICABLE, IT'S NOT DISGRACEFUL.

14 THE IDEA THAT YOU GOT AN OPPORTUNITY TO ISSUE A
15 LICENSE THAT INCLUDES ALL ACTIVES AND ALL RETIRED, WHICH IS
16 YOUR MANDATE. THAT'S WHAT THE GROUP LICENSING AGREEMENT IS.
17 AND THAT YOU WOULD TURN AROUND AND SAY:

18 "IT'S JUST AN ACTIVE AGREEMENT. IT'S JUST ACTIVE
19 MONEY," FIRST OF ALL, IT'S NOT THE CONTRACT, WHICH IS WHAT
20 YOU'RE SUPPOSED TO DECIDE ON.

21 BUT SECOND OF ALL, IT'S THE RANKEST OF CONFLICT OF
22 INTEREST.

23 "I'LL PROTECT YOU, BUT I WON'T PROTECT YOU.
24 I'LL PROTECT YOU, BUT I WON'T PROTECT YOU."

25 AND, ALSO, DO YOU KNOW? YOU KNOW, WHO ARE YOU

1 PROTECTING? YOU'RE PROTECTING THE GUYS WHO VOTE. YOU'RE
2 PROTECTING THE GUYS WHO MAKE MILLIONS OF DOLLARS, YOU KNOW.

3 BUT THE LITTLE PEOPLE? WE DON'T PROTECT YOU. WHAT
4 WE TO DO WITH YOU IS WE TURN OUR BACK ON YOU AND MAKE BELIEVE,
5 AND MAKE BELIEVE THAT WE CARE. MAKE BELIEVE THAT WE'RE YOUR
6 REPRESENTATIVES.

7 THEY'RE NOT OUR AGENT? WHAT DO YOU CALL IT WHEN
8 SOMEBODY SAYS:

9 "GIVE ME YOUR LICENSING RIGHTS, YOUR NAME AND
10 LICENSING RIGHTS. GIVE ME YOUR IDENTITY RIGHTS, AND I'LL DO MY
11 BEST TO MARKET IT."

12 WHAT DO YOU CALL THAT PERSON, BUT YOUR AGENT?

13 AND HOW WOULD I EXPLAIN THE FACT THAT MR. LINZNER,
14 MR. LINZNER HIMSELF TESTIFIED THAT THEY WENT TO HIM AND TOLD
15 HIM THAT THEY WERE THE AGENTS.

16 HONESTLY, HONESTLY, MAYBE IT'S BECAUSE OF TIME. I
17 DON'T KNOW. I DON'T KNOW. I DON'T KNOW WHERE TO BEGIN.

18 THEY MAKE A BIG THING OF NO COMPLAINTS.

19 YOU KNOW, FOR ME, I CAN ONLY PICTURE THE NFLPA THE
20 WAY I COULD PICTURE MY FATHER OR MY GRANDFATHER. I DON'T HAVE
21 A LAWYER. I DON'T HAVE A NEGOTIATOR. I DON'T HAVE SOMEBODY
22 EXPLAINING THE DOCUMENT TO ME.

23 I'M ASKED TO GIVE AWAY MY IDENTITY RIGHTS. I GIVE
24 YOU MY IDENTITY RIGHTS. I BELIEVE YOU. I TRUST YOU. I
25 BELIEVE YOU'RE ON MY SIDE. I BELIEVE YOU'LL SEND ME A CHECK

1 WHEN I'M ENTITLED TO IT.

2 I'M NOT REALLY SURE WHAT THE AGREEMENT MEANS. I
3 DIDN'T GO TO LAW SCHOOL. I'M NOT A SCHOLAR. I'M TRUSTING YOU
4 GUYS.

5 IF YOU WANT TO GIVE ME MY MONEY WHEN I'M ENTITLED TO
6 IT, THANK YOU. HOWEVER, IF YOU DON'T GIVE ME MY MONEY, MAYBE
7 IT DOES TAKE A LAWYER. MAYBE EVENTUALLY YOU DO GO TO A LAWYER,
8 FINALLY, AND SAY:

9 "SOMETHING'S WRONG HERE."

10 WHAT'S WRONG WITH THAT? LOOK, YOU DON'T HAVE TO LOVE
11 ME, BUT IT'S NOT A DIRTY WORD. "LAWYER" IS NOT A DIRTY WORD.
12 PEOPLE WHO ARE DISENFRANCHISED, WHO HAVE BEEN BETRAYED, WHO
13 HAVE BEEN IGNORED, WHO HAVE BEEN DEMEANED WHO HAVE BEEN CALLED
14 "WORTHLESS," WHO HAVE BEEN CALLED "DOG FOOD."

15 MR. KESSLER HAS THE TEMERITY TO GET UP HERE AND
16 JUSTIFY THE USE OF THE WORD "DOG FOOD." MAN'S FROM THE SOUTH.
17 OH, I GET IT. IF YOU'RE A SOUTHERNER IT'S OKAY TO CALL PEOPLE
18 "DOG FOOD."

19 I DON'T THINK SO. THOSE PEOPLE ARE ENTITLED TO A
20 LAWYER. AND, GUESS WHAT? LAWYERS LOOK AT AN AGREEMENT, AND
21 LAWYERS POINTS OUT WHAT YOUR RIGHTS ARE AND WHAT YOUR RIGHTS
22 AREN'T.

23 AND THEN, IT BEGINS. AND THEN, IT BEGINS. AND WHAT
24 HE DOESN'T LIKE IS THESE PEOPLE DIDN'T LIE DOWN. THEY DIDN'T
25 LIE DOWN LIKE DOGS. THEY CAME HERE.

1 THEY CAME HERE TO TESTIFY, AND TO THEIR BEST.

2 YOU KNOW, TRACE ARMSTRONG, I SAY HE'S A HOLLYWOOD
3 GUY. MAYBE THAT'S A GOOD THING. MAYBE YOU LOVE HOLLYWOOD
4 GUYS, YOU KNOW.

5 I DON'T THINK HE'S PART OF ANY CONSPIRACY. I THINK
6 IT'S A LITTLE -- PICK YOUR WORD. THE MAN COMES, AND HE GETS TO
7 MENTION THAT HE'S NOT JUST A, YOU KNOW, SWEET OBJECTOR,
8 SIX-TEN, 240-POUND GUY. BUT HE'S RUNNING AS PRESIDENT FOR THE
9 UNION. I THINK THAT'S A LITTLE DISINGENUOUS.

10 I THINK IT'S ALL PART OF THE SAME THING THAT THEY DO
11 HERE ALL ALONG. BUT HE'S NOT A CONSPIRACY GUY.

12 WHAT HE IS IS A GUY WHO NEVER WAS TOLD -- HE SAID IT
13 HIMSELF ON CROSS EXAMINATION. HE NEVER WAS EVER TOLD THAT
14 MAYBE OUR GUYS HAD RIGHTS UNDER THE GLA.

15 AND, BY THE WAY, IF HE WAS, HE MIGHT HAVE BEEN PRETTY
16 UPSET AT MR. UPSHAW AND MR. ALLEN.

17 AND, BY THE WAY, IT WAS AT THE TIME IN HIS
18 SELF-INTEREST, NOT TO MAKE A FUSS ABOUT ANY OF THAT. BECAUSE
19 IF YOU MAKE A FUSS ABOUT ANY OF THAT, THE MONEY IS GOING TO BE
20 SHARED. AND NOBODY WANTED TO SHARE THE MONEY. NOBODY WANTED
21 TO SHARE THE MONEY.

22 YOU KNOW, THERE'S A CHANGED GLA. I DON'T KNOW IF WE
23 HAVE TIME TO GET IT ON THE BOARD. IF WE DO, WE DO. IF WE
24 DON'T, WE DON'T.

25 THE CHANGED GLA REMOVES THE LANGUAGE ABOUT ELIGIBLE

1 NFLPA MEMBERS, THAT IT WILL BE DIVIDED AMONG ELIGIBLE NFLPA
2 MEMBERS. AND IT SAYS:

3 "THE MONEY WILL BE DISPENSED PURSUANT TO THE
4 OBJECTIVES OF THE UNION."

5 THE REASON THEY MADE THAT CHANGE WAS AFTER THE
6 \$25 MILLION STARTED TO COME IN, WHERE THEY DIDN'T WANT IT TO
7 CONTINUE. IF THEY DIDN'T GET CAUGHT IN WHAT THEY WERE DOING,
8 THEY DIDN'T WANT TO MAKE THE SWITCH EVER AGAIN.

9 AND SO THEY VIRTUALLY WROTE THE RETIRED PLAYERS OUT
10 OF GETTING MONEY IN THE REVISED GLA AGREEMENT. BUT WE'RE NOT
11 SUING UNDER THE REVISED GLA AGREEMENT.

12 WE'RE SUING ON THE AGREEMENT THAT WAS IN EFFECT IN
13 2004, 2005, 2006, 2007, WHEN IT SAID: "DIVIDE IT WITH THE
14 ELIGIBLE NFLPA MEMBERS," WHICH WOULD ONLY MEAN THE ACTIVE
15 MEMBERS. THERE'S NO POSSIBILITY, NONE, THAT IT COULD HAVE BEEN
16 TO ANYBODY ELSE.

17 ONE, IT'S IN THE MINUTES, WHICH MR. KESSLER HAS PUT
18 ON THE BOARD.

19 TWO, THERE WAS TESTIMONY THAT MANY OF THE RETIRED
20 GLA'S WERE NOT MEMBERS OF THE NFLPA THAT WOULD WIPE THEM OUT
21 COMPLETELY.

22 AND, THREE, IF THAT'S WHAT IT MEANT, THEN ANY ACTIVE
23 THAT WAS IN THE DEAL -- SAY IT WAS 1800 ACTIVE AND 2100
24 RETIRED'S DID SOME DEAL, NONE OF THE ACTIVES COULD GET ANY MONEY
25 BECAUSE YOU WOULD HAVE TO READ THE "ELIGIBLE" TO BE THE

1 RETIRED. THE RETIRED SHARING WITH THE -- WITH THE ELIGIBLE,
2 MEANING RETIRED.

3 IT'S JUST -- IT'S THE TWILIGHT ZONE. IT'S THE
4 TWILIGHT ZONE. AND WHAT MR. KESSLER IS HOPING, YOU KNOW, IS
5 THAT SOMEHOW NOBODY IS GOING TO LIKE TAKE FIVE MINUTES TO THINK
6 ABOUT IT.

7 AND SO HE SAYS, YOU KNOW, "PARCHER IS HYSTERICAL" OR
8 WHATEVER HE IS SAYING. I DON'T KNOW, WAVING HIS ARMS AROUND OR
9 SOMETHING LIKE THAT.

10 YOU SEE HOW IT WOULD FEEL, GOD FORBID -- NOT YOU, I
11 SHOULDN'T SAY IT, YOU KNOW?

12 THINK ABOUT HOW A PERSON FEELS WHO'S IN A FAMILY AND
13 TRUSTS SOMEBODY, TRUSTS A FAMILY MEMBER, TRUSTS A FAMILY UNIT
14 WHICH I THINK EVERYBODY -- I THINK EVERYBODY -- NOT BEING
15 PRESUMPTUOUS, HAS A RIGHT TO HONOR, YOU KNOW. AND THEN, FIND
16 OUT THAT THE MAIN PERSONS IN THE FAMILY UNIT, WHICH IS UPSHAW
17 AND ALLEN, NOT MR. GOICH, NOT MR. LINZNER, NOT TRACE ARMSTRONG.
18 EVERYBODY'S NOT IN THE CONSPIRACY. SOME OF THESE PEOPLE CAME
19 HERE IN THEIR GOOD WILL TO DO THEIR BEST.

20 I THINK MR. LINZNER WAS IN THEIR POCKET. I DO. YOU
21 KNOW, YOU DON'T HAVE TO IF YOU DON'T WANT TO. THAT'S OKAY WITH
22 ME.

23 BUT HOW DOES IT FEEL, YOU KNOW, IF YOU'RE THE -- IF
24 YOU'RE -- WELL, MAYBE IF YOU WERE THE OLDER PERSON, IS WHAT I
25 WANT TO SAY. YOU'RE THE RETIRED PERSON. YOU'RE THE ONE WHO

1 MAYBE BUILT THE GAME, YOU KNOW.

2 BUT YOU DON'T HAVE THAT INDIVIDUAL TALENT, YOU KNOW?
3 COLLECTIVELY, YOU'VE GOT SOMETHING. AND YOU GIVE IT YOUR BEST.
4 AND YOU GIVE IT WHAT YOU'RE ASKED FOR, YOU KNOW, WHICH IS YOUR
5 IDENTITY.

6 AND THEN, THEY MASSACRE YOU. COME ON. NOBODY'S
7 SAYING COERCE MR. LINZNER, PUT A GUN TO HIS HEAD AND SAY:

8 "YOU'VE GOT TO TAKE THE RETIRED." "

9 YOU KNOW, NOBODY IS SAYING THAT, YOU KNOW.

10 WHY DIDN'T THEY JUST HAND IT OVER IN THE BEGINNING?

11 "WE REPRESENT -- MR. LINZNER, WE REPRESENT 1800
12 ACTIVE PEOPLE, 2100 RETIRED PEOPLE. HERE'S YOUR LICENSE.

13 HERE'S YOUR LICENSE FOR \$25 MILLION."

14 HE SAYS:

15 "WELL, THAT WOULD BE FOR FREE, BECAUSE THE
16 ACTIVES DROVE THE ENGINE." DO YOU KNOW?

17 WELL, THE FACT IS: THAT'S THE DEAL HE MADE TO GET
18 THESE GUYS TO SIGN, MR. ALLEN DID.

19 BUT, SECONDLY, IF IT HAD BEEN THE REVERSE, IF THE
20 WORLD TURNED AROUND AND SUDDENLY THERE WAS A RETIRED PLAYERS'
21 GAME THAT MADE TRILLIONS, THE ACTIVES WOULD BE ENTITLED TO A
22 SHARE, WOULDN'T IT?

23 THIS PRESUMPTION THAT THEY ARE WORTHLESS, NO AGENT
24 HAS REALLY GOTTEN IN THERE AND TRIED.

25 I MEAN, THE NERVE. I SHOULDN'T SAY THAT. THAT'S

1 LIKE A PERSONAL ATTACK. I ALWAYS DO THAT, YOU KNOW?

2 COME ON. "TOO TALL" JONES, TONY DORSETT, YOU KNOW,
3 THAT'S YOUR MARKETING PLAN? THAT'S YOUR MARKETING PLAN AS YOU
4 MARCH OUT TO FIGHT FOR THESE GUYS? IT'S REALLY -- IT'S
5 REALLY -- IT IS SO HURTFUL. IT IS SO HURTFUL TO THINK -- TO
6 THINK -- YOU KNOW, THIS IS A BEAUTIFUL MAN.

7 THIS IS A BEAUTIFUL MAN THAT SPEAKS FOR THE CLASS, DO
8 YOU KNOW? RIGHT?

9 TALK ABOUT A PROUD ATHLETE. THEY ARE ALL PROUD
10 ATHLETES, WHETHER THEY WERE CONFUSED OR THEY WEREN'T CONFUSED.

11 AND TO TRUST, YOU KNOW, AND THEN BE TREATED THIS WAY,
12 AND THEN RIDICULED. THAT'S NOT RIGHT. I MEAN, THAT'S NOT
13 RIGHT. IT REALLY ISN'T RIGHT.

14 SO GO TO THE GLA. PLEASE, GO TO THE GLA. JUST GO TO
15 IT.

16 HE SAYS:

17 "THERE'S NO EVIDENCE. IT'S JUST PETER PARCHER
18 TALKING."

19 THE GLA IS THE EVIDENCE IN THE CASE. THE REST OF THE
20 EVIDENCE IS THE EVIDENCE OF BAD DEEDS ON THEIR PART.
21 OUTRAGEOUS ACTIONS ON THEIR PART.

22 BUT THE GLA IS THE EVIDENCE IN THE CASE. THERE'S NO
23 AMBIGUITY IN THE GLA. NONE WHATSOEVER.

24 AND IF THEY HADN'T HAD 2100 GUYS SIGN THE GLA, OR
25 OVER 3,000, THEY SAID AT THE BEGINNING, IF THEY HADN'T HAD THAT

1 THEY COULDN'T HAVE BUILT THEIR ONE-STOP SHOP.

2 ONCE YOU GOT IT IN THE MINDS OF THE PUBLIC THAT
3 YOU'RE THE ONLY GAME IN TOWN, ONCE YOU GOT IT IN YOUR MIND THAT
4 YOU'RE THE ONLY GAME IN TOWN, IT'S OVER. EVERYBODY'S COMING TO
5 YOU. YOU KNOW?

6 AND, YET, THEY KEPT ON. THERE'S A GROUP LICENSING
7 HEADLINE IN THE 2004 TOUCHBACK. FOR THE LIFE OF ME, TO THIS
8 MINUTE, IT CONTINUES TO PUZZLE ME.

9 THE HEADLINE SAYS -- TAKE IT INTO THE ROOM WITH YOU.
10 IT'S THE ONLY TOUCHBACK IN THE THING -- "GROUP LICENSING IS
11 ESSENTIAL."

12 AND IF YOU READ FURTHER DOWN, THE SAME THING WHERE,
13 IF YOU READ IT, WHICH MOST OF THESE GUYS DON'T READ IT. IS
14 THAT HOW YOU ADVISE PEOPLE THEIR RIGHTS? YOU SEND THEM OUT A
15 TOUCHBACK MAGAZINE?

16 BUT IF YOU READ IT, YOU KNOW, YOU WOULD SEE THAT IN
17 THAT DOCUMENT, THE SAME DOCUMENT WHERE THEY SAY WE HAVEN'T BEEN
18 DOING SO GOOD IN LICENSING RETIRED PEOPLE, THEY TELL YOU THAT
19 IT'S ESSENTIAL THAT YOU KEEP SIGNING IT.

20 WHY IS IT ESSENTIAL, IF NOT TO MAINTAIN THIS IMAGE
21 THAT YOU'RE A POWER STRUCTURE?

22 AND BY THE WAY, THEY DIDN'T PUT INTO TOUCHBACK, THAT
23 SAME TOUCHBACK, THEY DIDN'T PUT IN:

24 "HEY, THERE'S MADDEN."

25 MADDEN IS MADDENING. I DON'T MEAN THAT. I JUST MADE

1 THAT UP. MADDEN IS MADDENING.

2 LOOK WHAT THEY DID. LOOK WHAT THEY DID.

3 YOU GET THE SAN FRANCISCO 49ERS ALL LINED UP. ALL
4 YOU GOT TO SAY TO EA IS:

5 "IT'S IN THE LICENSE, 1 (A) AND 2, AND PARAGRAPH
6 13," OR "HERE IT IS, GUYS."

7 THIS IS THE GREATEST CHANCE IN THE WORLD FOR ME TO
8 TREAT MY PEOPLE EQUALLY. RETIRED AND ACTIVES EQUALLY.

9 HERE'S YOUR -- HERE IS YOUR GUYS. HERE'S YOUR GUYS.
10 GIVE THEM A NAME. THEY HAVE NAMES. GIVE THEM A FACE. THEY
11 HAVE FACES. GIVE THEM A NUMBER. THEY HAD NUMBERS. THEY HAD
12 NUMBERS.

13 AND INSTEAD, LASHUN WRITES THAT LETTER. SHE WRITES
14 THAT LETTER: "KNOCK THESE GUYS OUT. YOU MUST SCRAMBLE."

15 THEY DON'T PUT THAT INTO A TOUCHBACK. THEY DON'T PUT
16 THAT INTO ANYTHING. THEY COVERED IT UP.

17 **THE COURT:** MR. PARCHER, TAKE TWO MORE MINUTES. 15
18 MINUTES IS UP. TAKE TWO MORE MINUTES TO CLOSE.

19 **MR. PARCHER:** THANK YOU. THANK YOU VERY MUCH.

20 THE MINIMUM OF \$29 MILLION, THE MINIMUM OF
21 \$29 MILLION MAY SOUND LIKE A LOT OF MONEY. IT'S SHARING
22 EQUALLY WITH THE ACTIVE PLAYERS. IT COULD BE TAKEN OUT OF THE
23 \$68 MILLION SLUSH FUND THAT THEY HAVE, WHICH WAS REALLY OUR
24 MONEY.

25 IT WOULD AMOUNT TO APPROXIMATELY -- I DON'T HAVE THE

1 MATH PERFECT. IT WOULD AMOUNT TO ABOUT \$15,000 A PLAYER, IF
2 YOU DIVIDE THE NUMBERS INTO 2100.

3 THAT'S NOT A LOT OF MONEY TO BE ASKING FOR HELPING TO
4 BUILD THE GAME, FOR HELPING YOU TO BECOME A ONE-STOP SHOP.

5 THAT'S NOT A LOT OF MONEY TO BE ASKING, IF THE
6 CONTRACT IS WHAT WE SAY IT IS. AND I DEFY ANYBODY TO COME TO A
7 CONCLUSION THAT IT ISN'T "PRESENT OR FORMER," MEANS "PRESENT OR
8 FORMER," NOT ONLY 2,062 FORMER. IT JUST DOESN'T. IT JUST
9 DOESN'T.

10 I'LL SAY THIS IN CONCLUSION ABOUT PUNITIVE DAMAGES,
11 BECAUSE MR. KESSLER HAD SOME CONCERN ABOUT IT.

12 YOU KNOW, IN THE ORDINARY COURSE OF EVENTS YOU GET
13 YOUR CONTRACT MONEY. PEOPLE ENTER INTO A CONTRACT, YOU'RE
14 DEALT WITH AT ARM'S LENGTH. YOU COME INTO COURT. YOU HAVE AN
15 HONEST DISPUTE. THE JURY AGREES WITH YOU.

16 OKAY. YOU GET YOUR MONEY, WHICH IS THE 29 MILLION
17 WITH 32 MILLION IN INTEREST. BECAUSE ALL MR. ROWLEY DID WAS
18 THE MATH. THERE'S NOTHING COMPLICATED ABOUT IT.

19 YOU DIDN'T NEED MR. ROWLEY TO DO IT. YOU COULD HAVE
20 DONE IT YOURSELF.

21 BUT WHEN SOMEBODY IS YOUR AGENT, WHEN SOMEBODY IS
22 YOUR REPRESENTATIVE, WHEN SOMEBODY PRETENDS TO BE YOUR FRIEND,
23 WHEN SOMEBODY PRETENDS TO BE YOUR FAMILY, WHEN SOMEBODY
24 PRETENDS, YOU KNOW, TO BE PAST, PRESENT AND FUTURE, TO BE YOUR
25 BROTHER, THERE'S NO WORSE PERSON THAN THAT. THERE'S NO WORSE

1 PERSON THAN THAT, THAT KIND OF PERSON DESERVES TO BE CHARGED
2 MORE, TO SEND THEM A MESSAGE.

3 YOU GOT ALL THE POWER, BUT YOU DON'T STEP ON OTHER
4 PEOPLE. YOU DON'T STEP ON THE NAMELESS FACES OF PEOPLE.

5 NUMBER ONE, LET ME BE CLEAR. I'M ASKING YOU TO
6 ENFORCE THE AGREEMENT. IF YOU DON'T AGREE ON THE AGREEMENT,
7 YOU DON'T AGREE. I BELIEVE YOU WILL.

8 IF THE AGREEMENT IS CLEAR TO YOU WE'RE RIGHT, WE'RE
9 ENTITLED TO A MINIMUM OF THAT AMOUNT OF MONEY. IF YOU AGREE
10 WITH ME THAT THERE WAS A LOT OF DIRTY TRICKS HERE, YOU KNOW,
11 AND THEY WERE CLEVER DIRTY TRICKS. THEY WERE NOT EASILY
12 DISCOVERABLE DIRTY TRICKS, YOU KNOW. THEN, YOU GOT TO PUNISH
13 THESE GUYS, OR AT LEAST YOU'VE GOT TO KEEP AN OPEN MIND ABOUT
14 THAT.

15 THE JUDGE CHARGES YOU.

16 I'VE GONE OVER TIME. I'M NOT GOING TO SAY ANYTHING
17 MORE EXCEPT I FEEL GOOD I'VE SPOKEN MY PEACE. THANK YOU.

18 THANK YOU FOR THE TIME, JUDGE.

19 **THE COURT:** THANK YOU, MR. PARCHER.

20 MAY I HAVE THE ASSISTANCE OF COUNSEL TO TAKE DOWN ALL
21 THE POSTER BOARDS?

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

23 **THE COURT:** I INVITE THE PUBLIC TO STAY DURING THE
24 READING OF THE INSTRUCTIONS, BUT I UNDERSTAND MANY OF YOU WOULD
25 LIKE TO LEAVE AT THIS TIME.

1 SO PLEASE GO AHEAD IF YOU WOULD LIKE, BEFORE WE GET
2 TO THE READING OF THE INSTRUCTIONS.

3 I HAVE ONE REQUEST DURING THE READING OF THE
4 INSTRUCTIONS -- I WANT TO DIRECT THIS TO COUNSEL -- WHEN WE GET
5 TO THE PARAGRAPH 28, WHICH HAPPENS TO DEAL WITH EXHIBIT 28, IT
6 WOULD BE USEFUL TO PUT UP ON THE SCREEN THAT EXHIBIT, THE
7 PORTIONS THAT ARE QUOTED IN THE INSTRUCTIONS.

8 CAN WE DO THAT?

9 **MR. KESSLER:** NO OBJECTION. OBJECTION YOU, YOUR
10 HONOR.

11 **THE COURT:** MAY WE DO THAT, MR. KATZ?

12 **MR. KATZ:** NO PROBLEM.

13 **THE COURT:** WILL ONE OF THE ELECTRONICS PEOPLE BE IN
14 A POSITION TO DO THAT?

15 **MR. KESSLER:** LAUREN WILL DO THAT, YOUR HONOR.

16 **THE COURT:** ALL RIGHT. LET ME GIVE THE JURY A
17 HEADS-UP.

18 THIS IS GOING TO BE THE LAW. ALSO, IT COMES IN THREE
19 PARTS. IT'S LIKE A SANDWICH: THE MEAT OF THE INSTRUCTIONS ARE
20 IN THE MIDDLE. BUT THERE'S SOME IMPORTANT PRELIMINARY
21 INSTRUCTIONS ABOUT EVALUATING WITNESS TESTIMONY, AND THEN
22 THERE'S SOME CONCLUDING INSTRUCTIONS ON YOUR DELIBERATIONS.

23 THIS IS GOING TO TAKE ABOUT 45 MINUTES. AND YOU WILL
24 HAVE A COPY OF THESE IN THE JURY ROOM. BUT THE TIME-HONORED
25 TRADITION OF OUR COURT SYSTEM, WHAT COUNTS IS WHAT I READ TO

1 YOU.

2 SO THIS IS THE OFFICIAL EVENT. AND THE REASON THAT I
3 INVITED MEMBERS OF THE PUBLIC TO LEAVE IS THAT SOMETIMES PEOPLE
4 FIND THIS TO BE THE LEAST INTERESTING PART. THE LAW IS VERY
5 IMPORTANT, OF COURSE. BUT I DON'T WANT ANY DISTRACTIONS WHILE
6 YOU ARE LISTENING TO THE CHARGE.

7 IF DURING THE -- DURING THIS YOU GET THE URGE AND
8 HAVE TO USE THE FACILITY, JUST RAISE YOUR HAND, AND WE'LL TAKE
9 A BREAK. BUT I'M GOING TO TRY TO GO ALL THE WAY THROUGH IT,
10 AND THEN YOU CAN GO TO DELIBERATE. ALL RIGHT.

11 READY?

12 HERE WE GO.

13 MEMBERS OF THE JURY, IT IS MY DUTY TO INSTRUCT YOU ON
14 THE LAW THAT APPLIES TO THIS CASE. COPIES OF THESE
15 INSTRUCTIONS WILL BE AVAILABLE IN THE JURY ROOM FOR YOU TO
16 CONSULT AS NECESSARY.

17 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE
18 EVIDENCE PRESENTED IN THE CASE. TO THOSE FACTS YOU MUST APPLY
19 THE LAW AS I GIVE IT TO YOU.

20 YOU MUST NOT BE INFLUENCED BY ANY PERSONAL LIKES OR
21 DISLIKES, OPINIONS, PREJUDICES OR SYMPATHY. THAT MEANS YOU
22 MUST DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE YOU.

23 IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW ALL OF
24 THEM, AND NOT SINGLE OUT SOME AND IGNORE OTHERS. THEY ARE ALL
25 EQUALLY IMPORTANT.

1 YOU MUST NOT READ INTO THESE INSTRUCTIONS OR INTO
2 ANYTHING THE COURT MAY HAVE SAID OR DONE AS SUGGESTING WHAT
3 VERDICT YOU SHOULD RETURN. THAT IS A MATTER ENTIRELY UP TO
4 YOU.

5 THE EVIDENCE FROM WHICH YOU ARE TO DECIDE WHAT THE
6 FACTS ARE CONSISTS OF:

7 ONE: THE SWORN TESTIMONY OF WITNESSES ON BOTH DIRECT
8 AND CROSS EXAMINATION, REGARDLESS OF WHO CALLED THE WITNESS;

9 TWO: THE EXHIBITS WHICH HAVE BEEN RECEIVED INTO
10 EVIDENCE;

11 THREE: THE SWORN TESTIMONY OF WITNESSES IN
12 DEPOSITIONS READ INTO EVIDENCE;

13 AND, FOUR: ANY FACTS TO WHICH ALL THE LAWYERS HAVE
14 STIPULATED HERE IN THE COURTROOM BEFORE YOU.

15 YOU MUST TREAT ANY STIPULATED FACTS AS HAVING BEEN
16 CONCLUSIVELY PROVEN.

17 IN REACHING YOUR VERDICT, YOU MAY CONSIDER ONLY THE
18 TESTIMONY AND EXHIBITS RECEIVED INTO EVIDENCE. CERTAIN THINGS
19 ARE NOT EVIDENCE, AND YOU MAY NOT CONSIDER THEM IN DECIDING
20 WHAT THE FACTS ARE. I WILL LIST THEM FOR YOU.

21 ONE: ARGUMENTS AND STATEMENTS BY LAWYERS ARE NOT
22 EVIDENCE. THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE SAID
23 IN THEIR OPENING STATEMENTS, CLOSING ARGUMENTS AND AT OTHER
24 TIMES IS INTENDED TO HELP YOU INTERPRET THE EVIDENCE, BUT IT IS
25 NOT EVIDENCE ITSELF.

1 IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE WAY
2 THE LAWYERS HAVE STATED THEM, YOUR MEMORY OF THEM CONTROLS.

3 A SUGGESTION -- NUMBER TWO: A SUGGESTION IN A
4 QUESTION BY COUNSEL OR THE COURT IS NOT EVIDENCE UNLESS IT IS
5 ADOPTED BY THE ANSWER. A QUESTION BY ITSELF IS NOT EVIDENCE.
6 CONSIDER IT ONLY TO THE EXTENT IT IS ADOPTED BY THE ANSWER.

7 THREE: OBJECTIONS BY LAWYERS ARE NOT EVIDENCE.

8 FOUR: TESTIMONY OR EXHIBITS THAT ARE BEEN EXCLUDED
9 OR STRICKEN OR THAT YOU HAVE BEEN INSTRUCTED TO DISREGARD ARE
10 NOT EVIDENCE AND MUST NOT BE CONSIDERED.

11 FIVE: ANYTHING YOU MAY HAVE SEEN OR HEARD WHEN THE
12 COURT WAS NOT IN SESSION IS NOT EVIDENCE. YOU ARE TO DECIDE
13 THE CASE SOLELY ON THE EVIDENCE RECEIVED HERE AT THE TRIAL.

14 NOW, EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL.
15 DIRECT EVIDENCE IS DIRECT PROOF OF A FACT, SUCH AS TESTIMONY BY
16 A WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW OR HEARD OR
17 DID. CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE FACTS
18 FROM WHICH YOU COULD FIND ANOTHER FACT. BY WAY OF EXAMPLE, IF
19 YOU WAKE UP IN THE MORNING AND SEE THAT THE SIDEWALK IS WET,
20 YOU MAY FIND FROM THAT FACT THAT IT RAINED DURING THE NIGHT.
21 HOWEVER, OTHER EVIDENCE, SUCH AS A TURNED-ON GARDEN HOSE, MIGHT
22 EXPLAIN THE PRESENCE OF WATER ON THE SIDEWALK.

23 THEREFORE, BEFORE YOU DECIDE THAT A FACT HAS BEEN
24 PROVEN BY CIRCUMSTANTIAL EVIDENCE, YOU MUST CONSIDER ALL OF THE
25 EVIDENCE IN LIGHT OF REASON, EXPERIENCE AND COMMON SENSE.

1 YOU SHOULD CONSIDER BOTH KINDS OF EVIDENCE. IT IS
2 FOR YOU TO DECIDE HOW MUCH WEIGHT TO GIVE ANY EVIDENCE.

3 IN DECIDING THE FACTS IN THIS CASE, YOU MAY HAVE TO
4 DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY NOT TO
5 BELIEVE. YOU MAY BELIEVE EVERYTHING A WITNESS SAYS OR PART OF
6 IT OR NONE OF IT.

7 IN CONSIDERING THE TESTIMONY OF ANY WITNESS YOU MAY
8 TAKE INTO ACCOUNT, FIRST: THE OPPORTUNITY AND ABILITY OF THE
9 WITNESS TO SEE OR HEAR OR KNOW THE THINGS TESTIFIED TO;

10 SECOND: THE WITNESSES MEMORY;

11 THIRD: THE WITNESS'S MANNER WHILE TESTIFYING;

12 FOUR: THE WITNESS'S INTEREST IN THE OUTCOME OF THE
13 CASE AND ANY BIAS OR PREJUDICE;

14 FIVE: WHETHER OTHER EVIDENCE CONTRADICTED THE
15 WITNESS'S TESTIMONY;

16 SIX: THE REASONABLENESS OF THE WITNESS'S TESTIMONY
17 IN LIGHT OF ALL OF THE EVIDENCE;

18 AND, SEVEN: ANY OTHER FACTORS THAT BEAR ON
19 BELIEVABILITY.

20 THE WEIGHT OF THE EVIDENCE AS TO A FACT DOES NOT
21 NECESSARILY DEPEND ON THE NUMBER OF WITNESSES WHO TESTIFY. NOR
22 DOES IT DEPEND ON WHICH SIDE CALLED THE WITNESSES OR PRODUCED
23 EVIDENCE.

24 A WITNESS MAY BE DISCREDITED OR IMPEACHED BY
25 CONTRADICTORY EVIDENCE OR BY EVIDENCE THAT AT SOME OTHER TIME

1 THE WITNESS HAS SAID OR DONE SOMETHING OR FAILED TO SAY OR DO
2 SOMETHING THAT IS INCONSISTENT WITH THE WITNESS'S PRESENT
3 TESTIMONY.

4 IF YOU BELIEVE ANY WITNESS HAS BEEN IMPEACHED AND
5 THUS DISCREDITED, YOU MAY GIVE THE TESTIMONY OF THAT WITNESS
6 SUCH CREDIBILITY, IF ANY, YOU THINK IT DESERVES. DISCREPANCIES
7 IN A WITNESS'S TESTIMONY OR BETWEEN A WITNESS'S TESTIMONY AND
8 THAT OF OTHER WITNESSES DO NOT NECESSARILY MEAN THAT SUCH A
9 WITNESS SHOULD BE DISCREDITED.

10 INABILITY TO RECALL IS COMMON. INNOCENT
11 MISRECOLLECTION IS NOT UNCOMMON. TWO PERSONS WITNESSING AN
12 INCIDENT OR A TRANSACTION SOMETIMES WILL SEE OR HEAR IT
13 DIFFERENTLY.

14 WHETHER A DISCREPANCY PERTAINS TO AN IMPORTANT MATTER
15 OR ONLY TO SOMETHING TRIVIAL SHOULD BE CONSIDERED BY YOU.

16 HOWEVER, A WITNESS WILLFULLY FALSE IN ONE PART OF HIS
17 OR HER TESTIMONY IS TO BE DISTRUSTED IN OTHERS. YOU MAY REJECT
18 THE ENTIRE TESTIMONY OF A WITNESS WHO HAS WILLFULLY TESTIFIED
19 FALSELY ON A MATERIAL POINT, UNLESS FROM ALL THE EVIDENCE YOU
20 BELIEVE THAT THE PROBABILITY OF TRUTH FAVORS HIS OR HER
21 TESTIMONY IN OTHER PARTICULARS.

22 YOU HAVE HEARD TESTIMONY FROM WITNESSES REFERRED TO
23 AS "EXPERT WITNESSES." THESE ARE PERSONS WHO, BECAUSE OF
24 EDUCATION OR EXPERIENCE, ARE PERMITTED TO STATE OPINIONS AND
25 THE REASONS FOR THEIR OPINIONS.

1 OPINION TESTIMONY SHOULD BE JUDGED JUST LIKE OTHER
2 TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT AND GIVE IT AS MUCH
3 WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE WITNESS'S
4 EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINION,
5 AND ALL THE OTHER EVIDENCE IN THE CASE.

6 IF AN EXPERT WITNESS WAS NOT PRESENT AT THE EVENTS IN
7 QUESTION, HIS OR HER OPINION IS NECESSARILY BASED ON AN ASSUMED
8 SET OF CIRCUMSTANCES. IN EVALUATING THE OPINION DURING THE
9 TRIAL YOU SHOULD TAKE INTO ACCOUNT THE EXTENT TO WHICH YOU DO
10 AGREE OR DO NOT AGREE WITH THE CIRCUMSTANCES ASSUMED BY THE
11 EXPERT WITNESS.

12 IN THESE INSTRUCTIONS, I WILL OFTEN REFER TO THE
13 BURDEN OF PROOF. THE PRINCIPLE BURDEN OF PROOF IN THIS CASE
14 IS KNOWN AS PROOF -- BURDEN OF PROOF BY A PREPONDERANCE OF THE
15 EVIDENCE. I'LL REPEAT THAT: PREPONDERANCE OF THE EVIDENCE.

16 WHEN A PERSON HAS THE BURDEN OF PROOF ON ANY ISSUE BY
17 A PREPONDERANCE OF THE EVIDENCE, IT MEANS YOU MUST BE PERSUADED
18 BY THE EVIDENCE THAT THE ISSUE IS MORE PROBABLY TRUE THAN NOT
19 TRUE.

20 TO PUT IT DIFFERENTLY, IF YOU WERE TO PUT THE
21 EVIDENCE FAVORING PLAINTIFF AND THE EVIDENCE FAVORING DEFENDANT
22 ON OPPOSITE SIDES OF A SCALE, THE PARTY WITH THE BURDEN OF
23 PROOF ON THE ISSUE WOULD HAVE TO MAKE THE SCALE TIP SOMEWHAT
24 TOWARD ITS SIDE. IF THE PARTY FAILS TO MEET THIS BURDEN, THEN,
25 THE PARTY WITH THE BURDEN OF PROOF LOSES ON THAT ISSUE.

1 PREPONDERANCE OF THE EVIDENCE BASICALLY MEANS "MORE
2 LIKELY THAN NOT."

3 NOW, PLAINTIFF HAS THE BURDEN OF PROOF ON ALL ISSUES
4 IN THIS CASE. IF YOU FIND THAT PLAINTIFF CARRIED ITS BURDEN OF
5 PROOF ON -- AS TO AN ISSUE, YOUR VERDICT SHOULD BE FOR
6 PLAINTIFF ON THAT ISSUE. IF YOU FIND THAT PLAINTIFF DID NOT
7 CARRY ITS BURDEN OF PROOF, YOU MUST FIND AGAINST PLAINTIFF ON
8 THAT ISSUE.

9 I WILL NOW TURN TO THE LAW THAT APPLIES TO THIS CASE.
10 SO NOW WE'RE AT THE MIDDLE PART OF THE INSTRUCTIONS.

11 I WILL NOW TURN TO THE LAW THAT APPLIES TO THIS CASE.
12 THIS IS A CLASS ACTION LAWSUIT. A CLASS ACTION LAWSUIT IS ONE
13 WHERE THE PLAINTIFF IS ALLOWED TO BRING A CLAIM ON BEHALF OF A
14 LARGE GROUP WHO SHARE A COMMON INTEREST IN THE SAME ISSUE.

15 AS TO THE CLAIMS MADE IN THIS CASE, YOUR VERDICT WILL
16 GOVERN FOR THE ENTIRE CLASS. THIS CLASS ACTION ARISES OUT OF A
17 FORM AGREEMENT BETWEEN VARIOUS INDIVIDUAL RETIRED PLAYERS AND
18 THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, WHICH I WILL
19 REFER TO AS THE NFLPA.

20 THE FORM IS ENTITLED, QUOTE, "RETIRED PLAYER GROUP
21 LICENSING AUTHORIZATION FORM," CLOSED QUOTE. I WILL REFER TO
22 IT AS THE "RPGLA."

23 MR. HERB ADDERLEY IS THE REPRESENTATIVE OF A CLASS OF
24 2,062 RETIRED NFL PLAYERS WHO, LIKE MR. ADDERLEY, SIGNED
25 RPGLA'S WITH THE NFLPA THAT WERE IN EFFECT BETWEEN FEBRUARY 14,

1 2004 TO FEBRUARY 14, 2007.

2 THE STARTING DATE WAS DETERMINED BY THE STATUTE OF
3 LIMITATIONS, NOT ON ANY CHANGE IN FORMAT OF THE RPGLA.

4 MR. ADDERLEY AND THE CLASS HE REPRESENTS ARE REFERRED
5 TO IN THESE INSTRUCTIONS AS "PLAINTIFF" OR THE "RPGLA CLASS
6 MEMBERS."

7 YOUR JOB IS TO DECIDE THE CLASS CLAIMS ASSERTED ON
8 BEHALF OF THE ENTIRE CLASS. THERE IS NO CLAIM FOR ANY SUBSET
9 OF RETIRED PLAYERS ON ANY PARTICULAR DEAL OR ANY ISOLATED
10 EVIDENCE. RATHER, SINCE THIS IS A CLASS ACTION, THE ONLY
11 CLAIMS FOR YOU TO DECIDE ARE CLAIMS COMMON TO THE ENTIRE CLASS.

12 UNDER THE RPGLA, THE RETIRED PLAYER AUTHORIZED THE
13 NFLPA AND PLAYERS INC TO USE AND TO LICENSE TO THIRD PARTIES
14 HIS NAME, IMAGE, VOICE, SIGNATURE, BIOGRAPHICAL INFORMATION IN
15 THE, QUOTE, "NFLPA RETIRED PLAYER GROUP LICENSING PROGRAM,"
16 CLOSED QUOTE.

17 ON BEHALF OF THE RPGLA CLASS, PLAINTIFF ASSERTS TWO
18 CLAIMS AGAINST DEFENDANTS: ONE, BREACH OF THE RPGLA CONTRACT;
19 AND, TWO: BREACH OF FIDUCIARY DUTY AS IT RELATES TO THE RPGLA.

20 ON THE OTHER HAND, DEFENDANTS CLAIM THERE WAS NO
21 BREACH OF CONTRACT OR BREACH OF ANY FIDUCIARY DUTY RELATING TO
22 THE RPGLA.

23 YOU MUST -- YOU MUST APPLY THE FOLLOWING INSTRUCTIONS
24 IN DECIDING WHETHER PLAINTIFF HAS PROVEN THESE CLAIMS:

25 ON THE BREACH OF CONTRACT CLAIM, PLAINTIFF HAS THE

1 BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE THE
2 FOLLOWING: FIRST, THAT MONIES WERE GENERATED BY DEFENDANTS'
3 LICENSING OF RIGHTS TO WHICH MONEY THE RPGLA CLASS WAS
4 ENTITLED.

5 LET REREPEAT THAT. NUMBER ONE, THAT MONIES WERE
6 GENERATED BY DEFENDANTS' LICENSING OF RIGHTS TO WHICH MONEY THE
7 RPGLA CLASS WAS ENTITLED.

8 AND, NUMBER TWO, THAT AT LEAST SOME OF ANY SUCH MONEY
9 WAS NOT PAID TO THE RPGLA CLASS PURSUANT TO THE RPGLA.

10 NOW, THIS CASE INVOLVES MANY CONTRACTS, SOME OF WHICH
11 WERE LICENSE AGREEMENTS. WITH RESPECT TO THE LICENSE
12 AGREEMENTS, I WANT TO EXPLAIN THREE DIFFERENT LEVELS THAT I
13 WILL IDENTIFY FOR YOU.

14 ONE IS THE RPGLA BETWEEN AN INDIVIDUAL PLAYER AND
15 DEFENDANTS, LIKE THE ONE MR. ADDERLEY SIGNED.

16 A SECOND ARE THE SO-CALLED "AD HOC" AGREEMENTS. THESE
17 WERE LICENSES BETWEEN INDIVIDUAL PLAYERS AND A THIRD PARTY LIKE
18 EA AND DEFENDANTS. UNDER THESE AGREEMENTS CERTAIN RETIRED
19 PLAYERS RECEIVED MONEY, 7 MILLION OF WHICH WENT TO CLASS
20 MEMBERS. NO ONE IN THIS CASE IS SUING TO RECOVER ANY OF THAT
21 MONEY. THAT IS, NO ONE CONTENDS THAT ANY OF THE AD HOC LICENSE
22 REVENUE SHOULD BE REDISTRIBUTED TO ALL CLASS MEMBERS UNDER THE
23 RPGLA OR THAT THE AD HOC AGREEMENTS TRIGGERED ANY RIGHTS UNDER
24 THE RPGLA.

25 RATHER, THE CLASS OF RETIRED PLAYERS IS CONTENDING

1 THAT THEY SHOULD HAVE RECEIVED SOME OF THE THIRD-PARTY
2 LICENSING REVENUE CLAIMED BY DEFENDANTS TO HAVE BEEN FOR ACTIVE
3 PLAYERS ONLY.

4 THAT LEADS TO THE THIRD LEVEL OF LICENSES. THE THIRD
5 LEVEL ARE THE THIRD-PARTY LICENSES. THESE ARE THE LICENSES
6 BETWEEN DEFENDANTS AND THIRD-PARTY MAKERS OR VENDORS OF PLAYER
7 CARDS, VIDEO GAMES AND OTHER FOOTBALL PRODUCTS.

8 THE INDIVIDUAL PLAYERS WERE NOT PARTIES TO THESE
9 THIRD-PARTY LICENSES, FOR THESE AGREEMENTS WERE BETWEEN
10 DEFENDANTS AND VARIOUS THIRD PARTIES, LIKE ELECTRONIC ARTS.

11 I WILL REFER TO THESE AS "THIRD-PARTY LICENSES."
12 THERE ARE ABOUT 95 OF THEM IN EVIDENCE. A BASIC QUESTION YOU
13 WILL NEED TO CONSIDER IS THE EXTENT TO WHICH, IF AT ALL,
14 REVENUES FLOWING OUT OF THE THIRD LEVEL OF LICENSES WERE
15 REQUIRED TO HAVE BEEN PAID TO CLASS MEMBERS UNDER THE RPGLA.

16 THIS IS THE REVENUE THAT WENT INTO THE GLR OR GROSS
17 LICENSING REVENUE POOL, WHICH DEFENDANTS CLAIM WAS ACTIVE
18 PLAYER MONEY, BUT WHICH PLAINTIFF ASSERTS SHOULD HAVE BEEN
19 SHARED WITH CLASS MEMBERS PURSUANT TO THE RPGLA.

20 YOUR RESOLUTION OF THIS QUESTION WILL INVOLVE YOUR
21 INTERPRETATION OF THE RELEVANT AGREEMENTS.

22 IN THIS CONNECTION, THE RPGLA STATED THAT, QUOTE,
23 "THE MONIES GENERATED BY SUCH LICENSING OF RETIRED PLAYER GROUP
24 RIGHTS WILL BE DIVIDED BETWEEN THE PLAYER AND AN ESCROW ACCOUNT
25 FOR ALL ELIGIBLE NFLPA MEMBERS WHO HAVE SIGNED A GROUP

1 LICENSING AUTHORIZATION FORM," CLOSED QUOTE.

2 YOU HAVE HEARD EVIDENCE THAT LITTLE OR NO MONEY WAS
3 EVER PAID TO ANY RETIRED PLAYER PURSUANT TO AN RPGLA, AND THAT
4 NO SUCH ESCROW ACCOUNT WAS EVER ESTABLISHED. TO THIS
5 DEFENDANTS RESPOND THAT LITTLE OR NO MONEY WAS EVER GENERATED
6 OR DUE WITHIN THE MEANING OF THE RPGLA AND, THEREFORE, THERE
7 WAS NOTHING OR VERY LITTLE TO PUT INTO ESCROW.

8 BY CONTRAST, PLAINTIFF CONTENDS THAT LARGE SUMS OF
9 MONIES WERE, IN FACT, GENERATED BY THIRD-PARTY LICENSES AND PUT
10 INTO THE GLR, BUT WERE NOT SHARED WITH RETIRED PLAYERS UNDER
11 THE RPGLA AND INSTEAD WERE SPLIT ONLY BETWEEN ACTIVE PLAYERS
12 AND DEFENDANTS.

13 AGAIN, THE PLAINTIFF CLASS SEEKS TO SHARE IN THE
14 GROUP LICENSING REVENUES THAT DEFENDANTS CLAIM WAS DUE ONLY TO
15 ACTIVE PLAYERS.

16 WHETHER ANY SUCH MONEY WAS DUE TO THE CLASS UNDER THE
17 RPGLA DEPENDS ON THE COVERAGE OF THE RPGLA, AS WELL AS POSSIBLY
18 THE COVERAGE OF THE THIRD-PARTY LICENSES, QUESTIONS OF COVERAGE
19 FOR THE JURY.

20 PLAINTIFF HAS THE BURDEN TO PROVE LIABILITY ON THE
21 CLAIM, AND IT MUST DO SO BY A PREPONDERANCE OF THE EVIDENCE.

22 SO I WILL NOW GIVE YOU THE RULES THAT YOU MUST FOLLOW
23 IN INTERPRETING THE VARIOUS CONTRACTS AT ISSUE.

24 INTERPRETATION OF A CONTRACT IS A DETERMINATION OF
25 THE REASONABLE AND MUTUAL EXPECTATIONS OF THE PARTIES TO A

1 CONTRACT, TAKING INTO ACCOUNT THE WORDS AND PHRASES USED AND
2 THE CIRCUMSTANCES SURROUNDING THE FORMATION OF THE CONTRACT.

3 YOU SHOULD START WITH THE WORDS ACTUALLY USED. THE
4 EXPRESS WRITTEN LANGUAGE OF A CONTRACT IS THE PRIMARY REFERENCE
5 YOU SHOULD CONSULT WHEN INTERPRETING THE MEANING OF THE
6 CONTRACT.

7 THAT IS BECAUSE THE WHOLE POINT OF YOUR WRITTEN
8 CONTRACT IS TO REDUCE THE AGREEMENT TO WRITING. AND THE ONLY
9 WAY TO DO SO IS THROUGH WORDS AND PHRASES. WORDS AND PHRASES
10 USED BY THE PARTIES IN A CONTRACT SHOULD BE GIVEN THEIR USUAL
11 AND ORDINARY MEANING UNLESS IT IS PROVEN THAT THEY HAD A
12 SPECIAL MEANING ACCEPTED BY THOSE IN THE BUSINESS INVOLVED,
13 HERE PROFESSIONAL FOOTBALL, OR WERE DEFINED IN THE CONTRACT
14 ITSELF TO MEAN SOMETHING SPECIAL.

15 SOMETIMES, HOWEVER, WORDS AND PHRASES AS USED IN A
16 CONTRACT ARE SUBJECT TO TWO OR MORE POSSIBLE MEANINGS. THIS IS
17 CALLED "AMBIGUITY."

18 TO RESOLVE SUCH AMBIGUITIES THE LAW HAS DEVELOPED
19 FURTHER GUIDELINES FOR CONTRACT INTERPRETATION THAT I WILL NOW
20 DISCUSS.

21 IN DETERMINING THE REASONABLE AND MUTUAL EXPECTATIONS
22 OF THE PARTIES TO THE CONTRACT IT, YOU SHOULD ALSO CONSIDER THE
23 RELEVANT FACTS AND CIRCUMSTANCES KNOWN TO THE PARTIES AT THE
24 TIME OF MAKING THE AGREEMENT AND EVALUATE HOW THOSE SURROUNDING
25 CIRCUMSTANCES INFORMED THE MUTUAL AND REASONABLE EXPECTATIONS

1 OF THE PARTIES CONCERNING THE AGREEMENT.

2 YOU MAY CONSIDER THE CIRCUMSTANCES THAT EXISTED AT
3 THE TIME THE CONTRACT WAS MADE, INCLUDING THE APPARENT PURPOSE
4 OF THE PARTIES IN ENTERING INTO THE CONTRACT, THE HISTORY OF
5 NEGOTIATIONS LEADING UP TO THE CONTRACT, AND ANY STATEMENTS OF
6 THE PARTIES ABOUT THEIR UNDERSTANDING OF THE CONTRACT AT THE
7 TIME THE CONTRACT WAS ENTERED INTO.

8 FACTS AND CIRCUMSTANCES KNOWN TO BOTH SIDES OF A
9 CONTRACT ARE ENTITLED TO MORE WEIGHT THAN FACTS AND
10 CIRCUMSTANCES KNOWN ONLY TO ONE SIDE OF THE CONTRACT. THAT IS
11 BECAUSE OUR GOAL IS TO DETERMINE THE MUTUAL INTENT AND
12 EXPECTATION OF BOTH SIDES.

13 IN DETERMINING THE REASONABLE AND MUTUAL EXPECTATIONS
14 OF THE PARTIES TO A CONTRACT, YOU MAY ALSO CONSIDER THE CONDUCT
15 OF THE PARTIES IN CARRYING OUT THE CONTRACT BEFORE ANY
16 CONTROVERSY AROSE. THAT IS, HOW THE PARTIES TO A CONTRACT
17 IMPLEMENTED THEIR CONTRACT BEFORE ANY CONTEMPLATION OF
18 LITIGATION.

19 IF BOTH SIDES TO A CONTRACT CONSISTENTLY ACTED AS IF
20 CERTAIN WORDS AND PHRASES MEANT ONE THING AND NOT ANOTHER, THEN
21 THEIR CONDUCT MAY BE VIEWED BY YOU AS THEIR OWN PRACTICAL
22 CONSTRUCTION OF THOSE WORDS AND PHRASES, AND ANY SUCH
23 CONSISTENT AND MUTUAL CONDUCT WOULD BE ENTITLED TO CONSIDERABLE
24 WEIGHT.

25 SIMILARLY, EVEN IF ONLY ONE SIDE ACTED CONSISTENTLY

1 AS IF THE WORDS AND PHRASES MEANT ONE THING AND NOT ANOTHER,
2 AND THAT ACTION WAS MADE KNOWN TO THE OTHER PARTY, AND
3 ACQUIESCED IN WITHOUT OBJECTION, ALL PRIOR TO ANY CONTEMPLATION
4 OF LITIGATION, THEN YOU MAY ALSO CONSIDER THAT COURSE OF KNOWN
5 AND UNPROTESTED CONDUCT AS THE PARTIES' OWN PRACTICAL
6 CONSTRUCTION OF THE WORDS AND PHRASES, AND YOU MAY ADOPT ANY
7 SUCH INTERPRETATION AS THE PROPER INTERPRETATION.

8 THE POINT IN TIME THAT MATTERS IS WHEN THE CONTRACT
9 WAS ENTERED INTO. YOU MUST DETERMINE THE REASONABLE AND MUTUAL
10 EXPECTATIONS OF THE PARTIES AS OF THAT POINT IN TIME. YOU MAY
11 CONSIDER SUBSEQUENT EVENTS, SUCH AS ANY PRACTICAL CONSTRUCTION
12 OF THE PARTIES IN IMPLEMENTING THE CONTRACT, ONLY AS IT SHEDS
13 LIGHT ON THE REASONABLE AND MUTUAL EXPECTATION OF THE PARTIES
14 AT THE TIME THEY MADE THE AGREEMENT.

15 YOU HAVE HEARD MUCH TESTIMONY FROM BOTH SIDES AS TO
16 HOW VARIOUS PARTICIPANTS INDIVIDUALLY EXPECTED THE CONTRACTS AT
17 ISSUE WOULD WORK OR HOW THEY UNDERSTOOD THE CONTRACTS AT THE
18 TIME THEY WERE SIGNED.

19 YOU SHOULD CONSIDER ALL SUCH EVIDENCE, BUT THERE ARE
20 CAVEATS. AGAIN, YOUR PRIMARY CONSIDERATION SHOULD ALWAYS BE
21 THE ACTUAL WORDS OF THE CONTRACT. ONCE LITIGATION ARISES,
22 WITNESSES OFTEN SAY THEY HAD ONE UNDERSTANDING OR THE OTHER OF
23 A CONTRACT. SUCH GENERAL TESTIMONY SHOULD BE VIEWED WITH A
24 MEASURE OF SKEPTICISM, GIVEN THE RISK THAT A WITNESS MIGHT BE
25 TEMPTED SIMPLY TO TESTIFY AFTER THE FACT IN A MANNER CONVENIENT

1 TO HIS INTEREST.

2 IF, HOWEVER, THE WITNESS COMMUNICATED HIS
3 UNDERSTANDING TO THE OTHER PARTY IN THE COURSE OF MAKING THE
4 CONTRACT ITSELF, THEN SUCH A COMMUNICATION IS ENTITLED TO
5 GREATER WEIGHT THAN A STATEMENT FIRST EXPRESSED ONLY AFTER
6 LITIGATION AROSE.

7 THIS IS BECAUSE A DISCLOSURE DURING NEGOTIATIONS OF
8 HOW A PARTY UNDERSTOOD A PROPOSED TERM, ASSUMING IT WAS
9 PLAUSIBLE, PUT THE OTHER SIDE ON FAIR NOTICE AND HELPED INFORM
10 THE REASONABLE EXPECTATIONS AND INTENT OF THE PARTIES.

11 ALSO, YOU MAY CONSIDER WHETHER OR NOT THE SUPPOSED
12 INTERPRETATION WAS EVER EXPRESSED IN A CONTEMPORANEOUS LETTER
13 OR E-MAIL OR OTHER WRITING, EVEN IF IT WAS NOT COMMUNICATED TO
14 THE OTHER SIDE IN THE TRANSACTIONS.

15 CIRCUMSTANCES KNOWN ONLY TO ONE SIDE OF A TRANSACTION
16 CAN BE CONSIDERED BY YOU IN DECIDING THE REASONABLE
17 EXPECTATIONS OF THE PARTY WITH RESPECT TO THE MEANING OF THE
18 CONTRACT. BUT IF THOSE CIRCUMSTANCES WERE NOT DISCLOSED OR
19 KNOWN TO THE OTHER SIDE, THEN THOSE CIRCUMSTANCES ARE ENTITLED
20 TO LESS WEIGHT IN THE REASONABLE EXPECTATIONS OF THE PARTIES.

21 SUCH A CIRCUMSTANCE COULD NOT HAVE INFLUENCED THE
22 REASONABLE EXPECTATIONS OF THE OTHER CONTRACTING PARTY, BUT AT
23 LEAST IT COULD PROVIDE CORROBORATION OF THE TESTIMONY.

24 AGAIN, THE ULTIMATE QUESTION IS A REASONABLE AND
25 MUTUAL EXPECTATION OF THE PARTIES, NOT THE SUBJECTIVE AND

1 UNILATERAL EXPECTATIONS OF ONLY ONE SIDE, ALTHOUGH YOU MAY
2 CONSIDER SUCH EVIDENCE IN DECIDING THE ULTIMATE ISSUE.

3 IN EVALUATING EVIDENCE OF AN UNDERSTANDING TESTIFIED
4 TO BY A PARTY TO A CONTRACT, YOU MAY TAKE INTO ACCOUNT WHETHER
5 THE INTERPRETATION WAS AGAINST THE INTEREST OF THAT TESTIFYING
6 PARTY, RATHER THAN IN THE SELF-INTEREST OF THAT TESTIFYING
7 PARTY.

8 AN ADMISSION AGAINST ONE'S OWN INTEREST IS USUALLY
9 MORE PROBATIVE -- OF MORE PROBATIVE VALUE THAN A SELF-SERVING
10 STATEMENT. THIS IS BECAUSE ADMISSIONS AGAINST INTEREST ARE
11 USUALLY MADE ONLY IF THEY ARE TRUE.

12 A SELF-SERVING INTERPRETATION, HOWEVER, MAY ALSO BE
13 ACCURATE. IT IS ENTIRELY UP TO YOU TO DECIDE HOW MUCH WEIGHT
14 TO GIVE ANY WITNESS TESTIMONY.

15 AGAIN, YOU HAVE HEARD MUCH TESTIMONY ABOUT VARIOUS
16 UNDERSTANDINGS BY WITNESSES AT THE TIME IN QUESTION. SUCH
17 TESTIMONY SHOULD BE EVALUATED IN LIGHT OF THE ACTUAL WORDS USED
18 IN THE CONTRACT ITSELF.

19 IN OTHER WORDS, YOU SHOULD TAKE INTO ACCOUNT WHETHER
20 THE ACTUAL WORDS USED IN THE CONTRACT WERE REASONABLY
21 SUSCEPTIBLE TO ANY SUCH UNDERSTANDING, TAKING INTO ACCOUNT THE
22 CIRCUMSTANCES KNOWN TO THE CONTRACTING PARTIES.

23 IF A CONTRACT WORD OR PHRASE SEEMS AMBIGUOUS, MEANING
24 THAT IT IS SUSCEPTIBLE TO TWO OR MORE DIFFERENT MEANINGS, YOU
25 MAY USE VERBAL TESTIMONY TO HELP SELECT AMONG THE ALTERNATIVE

1 MEANINGS. YOU MAY NOT USE TESTIMONY, HOWEVER, TO ADOPT A
2 MEANING THE WORDS AND PHRASES THEMSELVES WILL NOT REASONABLY
3 BEAR OR THAT WOULD LEAD TO ABSURD RESULTS.

4 THE CONTRACT SHOULD BE CONSIDERED AS A WHOLE. NO
5 PART OF IT SHOULD BE IGNORED. THE CONTRACT SHOULD BE
6 INTERPRETED TO GIVE EFFECT TO ALL OF ITS PARTS. NO WORD OR
7 PHRASE IN A CONTRACT SHOULD BE TREATED AS MEANINGLESS IF ANY
8 MEANING WHICH IS REASONABLE AND CONSISTENT WITH OTHER PARTS OF
9 THE CONTRACT CAN BE GIVEN TO IT.

10 IF A TERM OF A CONTRACT IS AMBIGUOUS, YOU ARE NOT
11 REQUIRED TO CHOOSE BETWEEN ONLY THE INTERPRETATIONS OFFERED BY
12 THE TWO SIDES, BUT YOU ARE FREE TO ADOPT ANY MEANING CONSISTENT
13 WITH THE ACTUAL WORDS OF THE CONTRACT, USING THE RULES OF
14 CONTRACT INTERPRETATION GIVEN ABOVE.

15 IF, AFTER APPLYING ALL OF THE FOREGOING RULES OF
16 CONSTRUCTION, YOU ARE UNABLE TO RESOLVE AN AMBIGUITY IN THE
17 MEANING OF A WORD OR PHRASE IN THE CONTRACT, SUCH DOUBT OR
18 AMBIGUITY MAY BE RESOLVED AGAINST THE PARTY WHO DRAFTED THE
19 CONTRACT, SO LONG AS YOU ADOPT A REASONABLE INTERPRETATION OF
20 THE CONTRACT. THIS IS BECAUSE THE DRAFTER OF THE CONTRACT WAS
21 IN THE BEST POSITION TO HAVE AVOIDED AN AMBIGUITY IN THE FIRST
22 PLACE.

23 AS I INSTRUCTED YOU EARLIER, IN EVALUATING THE CLAIMS
24 IN THIS CASE YOU MAY HAVE TO DECIDE THE MEANING OF THIRD-PARTY
25 LICENSE AGREEMENTS LIKE THE ELECTRONIC ARTS LICENSE AGREEMENTS.

1 IN EVALUATING THAT QUESTION, IF YOU DECIDE YOU NEED
2 TO REACH IT, YOU SHOULD REACH THE SAME RULES OF INTERPRETATION.
3 BUT, OF COURSE, YOU SHOULD APPLY THEM FROM THE POINT OF VIEW OF
4 THE REASONABLE EXPECTATIONS OF THE SPECIFIC PARTIES TO THOSE
5 THIRD-PARTY LICENSE AGREEMENTS.

6 IN THIS CONNECTION, THERE IS A RECITAL IN THE VARIOUS
7 THIRD-PARTY LICENSES THAT DESERVES MENTION. I WILL USE TRIAL
8 EXHIBIT 28 AS AN EXAMPLE.

9 FOR THE RECORD, I'VE ASKED THE LAWYERS TO PUT THAT ON
10 THE SCREEN SO YOU CAN FOLLOW THIS AS I EXPLAIN THE POINT I'M
11 TRYING TO MAKE HERE.

12 I WILL USE TRIAL EXHIBIT 28 AS AN EXAMPLE. EXHIBIT
13 28 IS AN ELECTRONIC ARTS AGREEMENT. THE FIRST PARAGRAPH
14 STARTED WITH A RECITAL THAT STATED AS FOLLOWS, AND I WILL
15 QUOTE:

16 "PLAYERS INC REPRESENTS THAT IT IS A LICENSING
17 AFFILIATE OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION
18 (NFLPA); THAT THE NFLPA HAS BEEN DULY APPOINTED AND IS ACTING
19 ON BEHALF OF THE FOOTBALL PLAYERS OF THE NATIONAL FOOTBALL
20 LEAGUE WHO HAVE ENTERED INTO A GROUP LICENSING AUTHORIZATION,
21 EITHER IN THE FORM ATTACHED HERETO AS ATTACHMENT A, OR THROUGH
22 THE ASSIGNMENT CONTAINED IN PARAGRAPH 4 (B) OF THE NFL PLAYER
23 CONTRACT, WHICH HAVE BEEN ASSIGNED TO PLAYERS INC; AND THAT IN
24 SUCH CAPACITY PLAYERS INC HAS THE RIGHT TO NEGOTIATE THIS
25 CONTRACT AND THE RIGHT TO GRANT RIGHTS AND LICENSES DESCRIBED

1 HEREIN."

2 NOW, PLAINTIFF AND DEFENDANTS AGREE IN THIS CASE THAT
3 THIS PASSAGE REFERRED ONLY TO ACTIVE NFL PLAYERS. I'M GOING TO
4 REPEAT THAT. PLAINTIFFS AND DEFENDANTS, BOTH SIDES IN THIS
5 CASE, AGREE THAT THIS PASSAGE REFERRED ONLY TO ACTIVE NFL
6 PLAYERS.

7 ONE REASON IS THAT ATTACHMENT A REFERENCED IN THE
8 PASSAGE WAS USED EXCLUSIVELY WITH ACTIVE PLAYERS. AS WELL, THE
9 ELECTRONIC ARTS WITNESS TESTIFIED THAT IT REFERRED ONLY TO
10 ACTIVE PLAYERS. THEREFORE, YOU SHOULD TREAT IT AS ESTABLISHED
11 THAT THAT SENTENCE REFERRED SOLELY TO ACTIVE PLAYERS.

12 THE TWO SIDES IN THIS LITIGATION, HOWEVER, DISAGREE
13 ON THE MEANING OF THE NEXT SENTENCE IN THE RECITAL, WHICH
14 STATED AS FOLLOWS:

15 "LICENSEE ACKNOWLEDGES THAT PLAYERS INC ALSO ON
16 OCCASION SECURES AUTHORIZATION FOR INCLUSION IN PLAYERS INC
17 LICENSING PROGRAMS FROM PLAYERS, INCLUDING, BUT NOT LIMITED TO
18 RETIRED PLAYERS, WHO HAVE NOT ENTERED INTO SUCH GROUP LICENSING
19 AUTHORIZATION, BUT WHO, NEVERTHELESS, AUTHORIZE PLAYERS INC TO
20 REPRESENT SUCH PLAYERS FOR DESIGNATED PLAYERS INC LICENSED
21 PROGRAMS."

22 THROUGHOUT THE TRIAL YOU HAVE HEARD COMPETING
23 INTERPRETATIONS OF THIS SENTENCE. AS STATED, THIS WAS A
24 RECITAL. A RECITAL IS SOMETIMES USED IN A CONTRACT TO SET THE
25 STAGE FOR TERMS THAT FOLLOW IN THE DOCUMENT. THE PURPOSE OF A

1 RECITAL IS TO EXPLAIN AT LEAST SOME OF THE BACKGROUND AND
2 SURROUNDING CIRCUMSTANCES SO AS TO PLACE THE CONTRACTUAL TERMS
3 IN A CONTEXT.

4 AFTER THE RECITAL IN TRIAL EXHIBIT 28 CAME THE KEY
5 PROVISION, WHICH WAS THE GRANT OF A LICENSE. IT STATED AS
6 FOLLOWS:

7 "UPON THE TERMS AND CONDITIONS HEREINAFTER SET
8 FORTH, PLAYERS INC HEREBY GRANTS TO LICENSEE AND LICENSEE
9 HEREBY ACCEPTS THE EXCLUSIVE RIGHT, LICENSE AND PRIVILEGE OF
10 UTILIZING THE TRADEMARKS AND NAMES OF PLAYERS INC WHICH MAY BE
11 AMENDED FROM TIME TO TIME BY PLAYERS INC AND THE NAMES,
12 LIKENESSES (INCLUDING, WITHOUT LIMITATION, NUMBERS), PICTURES,
13 PHOTOGRAPHS, VOICES, FACSIMILE SIGNATURES, AND/OR BIOGRAPHICAL
14 INFORMATION (HEREINAFTER 'IDENTITY') OF THE NFL PLAYERS
15 REFERENCED IN PARAGRAPH 1 (A) ABOVE."

16 IN THIS LAWSUIT, PLAINTIFF CONTENDS THAT THE PHRASE
17 "THE NFL PLAYERS REFERENCED IN PARAGRAPH 1 (A) ABOVE," AS JUST
18 QUOTED, INCLUDED BOTH RETIRED AND ACTIVE PLAYERS, WHEREAS
19 DEFENDANTS CONTEND IT INCLUDED ONLY ACTIVE PLAYERS.

20 IN RESOLVING THIS DISPUTE, YOU SHOULD APPLY THE RULES
21 OF INTERPRETATION STATED ABOVE. ALTHOUGH THE PARTIES TO THIS
22 LITIGATION DISAGREE OVER THE MEANING OF THESE TERMS, IF YOU
23 FIND THAT THE ACTUAL PARTIES TO THE ELECTRONIC ARTS CONTRACT
24 ITSELF HAVE CONSISTENTLY AND MUTUALLY UNDERSTOOD AND CARRIED
25 OUT THE TERMS IN QUESTION AS IF THEY MEANT ONE THING AND NOT

1 ANOTHER, THEN, AS I HAVE SAID EARLIER, YOU SHOULD GIVE
2 CONSIDERABLE WEIGHT TO SUCH A PRACTICAL CONSTRUCTION OF THE
3 PARTIES IN CARRYING OUT THEIR OWN CONTRACT.

4 I HAVE REFERRED TO THE ELECTRONIC ARTS AGREEMENT, BUT
5 ONLY AS AN EXAMPLE. YOU SHOULD, OF COURSE, CONSIDER AND
6 EVALUATE EACH OF THE THIRD-PARTY AGREEMENTS IN EVIDENCE OF
7 WHICH THERE ARE 95.

8 TO BE CLEAR AND TO STEP BACK FOR A MOMENT, PLAINTIFF
9 MAKES A LINE OF ARGUMENT BASED ON THE RPGLA ALONE, REGARDLESS
10 OF THE MEANING OF THE THIRD-PARTY AGREEMENTS.

11 THIS ARGUMENT IS THAT THE TERMS OF THE RPGLA ITSELF
12 ENTITLED THE CLASS TO A SHARE OF THE GROUP REVENUE AND THAT ALL
13 OF THE GROSS LICENSING REVENUE WAS SUCH GROUP MONEY.

14 DEFENDANTS, ON THE OTHER HAND, CONTEND THAT THE CLASS
15 WAS ONLY ENTITLED TO MONIES GENERATED BY LICENSING OF RETIRED
16 PLAYER GROUP RIGHTS.

17 IN EVALUATING THESE ARGUMENTS YOU, OF COURSE, WILL
18 NOT NEED TO CONSTRUE ANY THIRD-PARTY LICENSE AGREEMENTS.

19 WITH RESPECT TO THE CONTRACT CLAIM, YOU MUST DECIDE
20 WHETHER OR NOT PLAINTIFF HAS PROVEN THAT MONIES WERE RECEIVED
21 BY DEFENDANTS' LICENSING OF RIGHTS TO WHICH THE RPGLA CLASS WAS
22 ENTITLED AND, IF SO, THE EXTENT TO WHICH THOSE MONIES WERE
23 PAYABLE TO THE CLASS UNDER THE RPGLA.

24 NEW SUBJECT. A SEPARATE CLAIM YOU MUST DECIDE IS A
25 CLAIM FOR BREACH OF FIDUCIARY DUTY AS RELATED TO THE RPGLA.

1 YOU HAVE HEARD SOME TESTIMONY RELATING TO WHETHER OR NOT CLASS
2 MEMBERS WERE UNION MEMBERS. IN THIS REGARD, PLEASE REMEMBER
3 THAT SOME CLASS MEMBERS ARE NOT UNION MEMBERS.

4 PLAINTIFFS' BREACH OF FIDUCIARY CLAIM IS NOT BASED ON
5 UNION MEMBERSHIP. THE FIDUCIARY CLAIM IS ALLEGED TO ARISE ONLY
6 FROM THE RPGLA.

7 ALTHOUGH YOU HAVE HEARD INFORMATION ABOUT PENSIONS,
8 BENEFITS AND COLLECTIVE BARGAINING, THERE IS NO CLAIM IN THIS
9 CASE FOR UNFAIR REPRESENTATION BY THE UNION OF ITS MEMBERS.
10 THIS CASE INVOLVES THE RPGLA.

11 ON PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM,
12 PLAINTIFF HAS THE BURDEN OF ESTABLISHING BY A PREPONDERANCE OF
13 THE EVIDENCE THE FACTS NECESSARY TO PROVE THE FOLLOWING
14 ELEMENTS:

15 ONE: THAT IN CONNECTION WITH THE RPGLA, DEFENDANTS
16 OWED A FIDUCIARY DUTY TO THE RPGLA CLASS MEMBERS TO MARKET AND
17 PROMOTE THEIR NAMES, IMAGES AND IDENTITIES AS AN ENTIRE GROUP;

18 NUMBER TWO: THAT DEFENDANTS BREACHED ANY SUCH
19 FIDUCIARY DUTY;

20 NUMBER THREE: THAT THE RPGLA CLASS MEMBERS SUFFERED
21 DAMAGES AS A RESULT.

22 TO ESTABLISH A FIDUCIARY RELATIONSHIP, PLAINTIFF MUST
23 PROVE AN AGENCY RELATIONSHIP THAT REQUIRED DEFENDANTS TO
24 PROMOTE THE NAMES AND IMAGES OF THE RPGLA CLASS. THE MERE
25 EXISTENCE OF A LICENSE AGREEMENT BY ITSELF DOES NOT GIVE RISE

1 TO A FIDUCIARY OR AGENCY RELATIONSHIP.

2 AN AGENCY RELATIONSHIP RESULTS WHEN ONE PERSON,
3 CALLED THE PRINCIPAL, AGREES THAT ANOTHER PERSON, CALLED THE
4 AGENT, SHALL ACT ON THE PRINCIPAL'S BEHALF AND SUBJECT TO THE
5 PRINCIPAL'S CONTROL, AND THE AGENT AGREES TO DO SO.

6 IN THIS CASE PLAINTIFF ALLEGES THAT THEY WERE THE
7 PRINCIPALS AND THE DEFENDANTS WERE THEIR AGENTS. DEFENDANTS
8 ADMIT THAT A LICENSE WAS ACQUIRED BY THEM, BUT DENY THAT THERE
9 WAS ANY AGENCY OR FIDUCIARY RELATIONSHIP REQUIRING DEFENDANTS
10 TO ACTIVELY PROMOTE RETIRED PLAYERS.

11 AN AGENCY RELATIONSHIP IS SOMETIMES CREATED BY AN
12 EXPRESS CONTRACT.

13 YOU HAVE HEARD EVIDENCE, FOR EXAMPLE, THAT SOME
14 SPORTS FIGURES HAVE AGENTS TO NEGOTIATE ON THEIR BEHALF AND TO
15 PROMOTE THEIR INTEREST. A MERE LICENSE IS NOT THE SAME AS AN
16 AGENCY CONTRACT.

17 A LICENSE BY ITSELF GIVES THE LICENSEE THE OPTION TO
18 USE OR SELL RIGHTS OWNED BY THE LICENSOR AND DOES NOT
19 NECESSARILY REQUIRE THE LICENSEE TO PROMOTE THOSE RIGHTS OR
20 CREATE A FIDUCIARY RELATIONSHIP, IT BEING UP TO THE LICENSEE
21 TO DECIDE HOW TO USE THE RIGHTS FOR ITS PURPOSES.

22 ON THE OTHER HAND -- FOR ITS OWN PURPOSES.

23 ON THE OTHER HAND, A LICENSEE MAY, DEPENDING ON THE
24 CIRCUMSTANCES, ALSO UNDERTAKE TO ACT AS A MARKETING AGENT AND
25 TO AFFIRMATIVELY PROMOTE THE RIGHTS ON BEHALF OF THE LICENSORS.

1 IN THAT CASE, THE LICENSEE IS NOT ONLY A LICENSEE, BUT ALSO AN
2 AGENT WITH FIDUCIARY DUTIES.

3 IN EVALUATING WHETHER DEFENDANTS UNDERTOOK TO BE AN
4 AGENT WITH FIDUCIARY DUTIES, YOU MUST CONSIDER NOT ONLY THE
5 ACTUAL WORDS USED IN THE AGREEMENT, BUT ALL OF THE
6 CIRCUMSTANCES SURROUNDING THE LICENSED RIGHTS AT ISSUE AND THE
7 PARTIES' RELATIONSHIP.

8 AN IMPORTANT FACTOR TO CONSIDER IS CONTROL. IN AN
9 AGENCY RELATIONSHIP, THE PRINCIPAL USUALLY HAS THE ABILITY TO
10 CONTROL THE AGENT'S CONDUCT. FOR EXAMPLE, THE PRINCIPAL MAY
11 DIRECT THE AGENT TO TRY TO MAKE CERTAIN DEALS AND NOT OTHER
12 DEALS. THIS IS CALLED CONTROL.

13 THE PRESENCE OF SUCH CONTROL IS A FACTOR INDICATIVE
14 OF AN AGENCY RELATIONSHIP. ON THE OTHER HAND, THE ABSENCE OF
15 CONTROL IS AN INDICATION THAT THE RELATIONSHIP WAS A MERE
16 LICENSE ARRANGEMENT WHEREBY THE LICENSEE WAS FREE TO TRY MARKET
17 OR NOT MARKET SUCH LICENSE RIGHTS AS IT WISHED.

18 BE AWARE, HOWEVER, THAT THE CONTROL DOES NOT HAVE TO
19 BE ACTUALLY EXERCISED; INSTEAD, IT IS SIMPLY THE RIGHT TO
20 CONTROL, RATHER THAN ITS ACTUAL EXERCISE, THAT CAN BE
21 INDICATIVE OF AN AGENCY RELATIONSHIP.

22 ANOTHER FACTOR YOU MAY CONSIDER IS THE FINANCIAL
23 ARRANGEMENT BETWEEN THE LICENSORS AND THE LICENSEE. REMEMBER
24 THAT PERTAINING TO THE RPGLA THE LICENSORS WERE THE RPGLA CLASS
25 MEMBERS AND THE LICENSEES WERE THE DEFENDANTS.

1 TO THE EXTENT THAT A LICENSEE PAID A SUM CERTAIN FOR
2 THE RIGHTS AND WAS ENTITLED TO KEEP ALL OR MOST OF ANY
3 THIRD-PARTY REVENUE, SUCH A CIRCUMSTANCE WOULD BE INDICATIVE OF
4 A BARE LICENSE WITH NO AGENCY RELATIONSHIP. IN SUCH A CASE THE
5 LICENSEE WOULD BE MAKING ANY MARKETING EFFORTS FOR ITS OWN
6 ACCOUNT AND NOT FOR THE ACCOUNT OF THE LICENSOR.

7 ON THE OTHER HAND, IF THE LICENSOR GAVE CONSIDERATION
8 TO THE LICENSEE TO GO OUT AND TO MARKET THE RIGHTS AND TO PASS
9 THROUGH -- PASS A LARGE PART OF THE REVENUES THROUGH TO THE
10 LICENSORS, THEN THAT WOULD BE INDICATIVE OF AN AGENCY
11 RELATIONSHIP.

12 ANOTHER FACTOR IS A RIGHT TO DISCHARGE. IN AN AGENCY
13 RELATIONSHIP, THE PRINCIPAL USUALLY HAS THE RIGHT TO DISCHARGE
14 THE AGENT AND TO TERMINATE THE RELATIONSHIP.

15 ONE REASON IS SO THAT THE PRINCIPAL CAN ENGAGE
16 SOMEONE ELSE TO PROMOTE HIM OR TO MAKE OTHER PROMOTIONAL
17 ARRANGEMENTS.

18 ON THE OTHER HAND, THE ABSENCE OF A RIGHT TO
19 DISCHARGE IS MORE INDICATIVE OF A BARE LICENSE RELATIONSHIP,
20 WHEREIN THE LICENSEE IS FREE DURING THE LIFE OF THE LICENSE TO
21 USE OR NOT USE THE RIGHTS AS IT WISHES.

22 SO ANOTHER FACTOR YOU SHOULD EXAMINE IS WHETHER THERE
23 WAS OR WAS NOT A POWER TO DISCHARGE.

24 ANOTHER FACTOR YOU SHOULD CONSIDER IS THE REASONABLE
25 EXPECTATIONS OF THE PARTIES SUPPORTED BY THE RELATIONSHIP.

1 THAT IS, WHAT REASONABLE PERSONS IN THE SAME CIRCUMSTANCES
2 WOULD HAVE EXPECTED FROM THE OTHER SIDE IN THE RELATIONSHIP.
3 IN EVALUATING THIS, YOU MAY NOT IMPOSE ON DEFENDANTS A
4 FIDUCIARY DUTY, IF AT ALL, THAT WOULD EXCEED THE REASONABLE
5 EXPECTATIONS OF THE PARTIES IN THE CIRCUMSTANCES OF THIS CASE.

6 THE BASIC ISSUE YOU MUST DECIDE, AS STATED, IS
7 WHETHER OR NOT IN ADDITION TO ACQUIRING LICENSE RIGHTS,
8 DEFENDANTS ALSO UNDERTOOK A FIDUCIARY DUTY TO PROMOTE AND TO
9 MARKET THOSE RETIRED PLAYERS WHO SIGNED RPGLA'S.

10 IF YOU FIND THERE WAS NO SUCH FIDUCIARY UNDERTAKING,
11 APPLYING THE FACTORS STATED ABOVE, THEN YOU MUST FIND FOR
12 DEFENDANTS ON THE FIDUCIARY-DUTY CLAIM.

13 IT IS UP FOR YOU TO DECIDE HOW MUCH WEIGHT TO GIVE
14 THE VARIOUS FACTORS I HAVE LISTED IN MAKING YOUR DECISION. IF
15 YOU FIND SUCH A DUTY EXISTED, THEN YOU MUST CONSIDER WHETHER
16 THAT DUTY WAS BREACHED.

17 SO I WILL NOW TELL YOU THE DUTIES OWED BY A
18 FIDUCIARY.

19 A FIDUCIARY OWES SEVERAL DUTIES TO A PRINCIPAL. A
20 FIDUCIARY MUST EXERCISE GOOD FAITH TO HIS PRINCIPAL. A
21 FIDUCIARY HAS A DUTY TO ACT REASONABLY AND WITH THE CARE,
22 COMPETENCE AND DILIGENCE NORMALLY EXERCISED BY FIDUCIARIES IN
23 SIMILAR CIRCUMSTANCES. SPECIAL SKILLS OR KNOWLEDGE POSSESSED
24 BY A FIDUCIARY ARE CIRCUMSTANCES TO BE TAKEN INTO ACCOUNT IN
25 DETERMINING WHETHER THE FIDUCIARY ACTED WITH DUE CARE AND

1 DILIGENCE.

2 IF A FIDUCIARY CLAIMS TO POSSESS SPECIAL SKILLS OR
3 KNOWLEDGE, THE FIDUCIARY HAS A DUTY TO THE PRINCIPAL TO ACT
4 WITH THE CARE, COMPETENCE AND DILIGENCE NORMALLY EXERCISED BY
5 FIDUCIARIES WITH SUCH SKILL OR KNOWLEDGE.

6 A FIDUCIARY ALSO HAS A DUTY OF LOYALTY TOWARD HIS
7 PRINCIPAL. THIS MEANS THE FIDUCIARY MUST PUT THE PRINCIPAL'S
8 INTERESTS AHEAD OF HIS OWN AS TO ALL MATTERS CONNECTED WITH THE
9 RELATIONSHIP.

10 THE FIDUCIARY IS ALSO REQUIRED TO REFRAIN FROM
11 CONDUCT THAT IS ADVERSE TO OR LIKELY TO DAMAGE THE PRINCIPAL'S
12 INTERESTS.

13 A FIDUCIARY HAS A DUTY TO USE REASONABLE EFFORT TO
14 PROVIDE THE PRINCIPAL WITH FACTS THAT THE AGENT KNOWS, HAS
15 REASON TO KNOW OR SHOULD KNOW WHEN THE AGENT KNOWS OR HAS
16 REASON TO KNOW THAT THE PRINCIPAL WOULD WISH TO HAVE THE FACTS
17 OR THE FACTS ARE MATERIAL TO THE AGENT'S DUTIES TO THE
18 PRINCIPAL.

19 A FIDUCIARY HAS A DUTY NOT TO ACQUIRE A MATERIAL
20 BENEFIT FROM A THIRD PARTY IN CONNECTION WITH TRANSACTIONS
21 CONDUCTED, OR OTHER ACTIONS TAKEN ON BEHALF OF THE PRINCIPAL OR
22 OTHERWISE THROUGH THE FIDUCIARY'S USE OF HIS POSITION.

23 FINALLY, A FIDUCIARY HAS A DUTY TO ACT IN ACCORDANCE
24 WITH THE EXPRESS AND IMPLIED TERMS OF ANY CONTRACT BETWEEN THE
25 FIDUCIARY AND THE PRINCIPAL.

1 PLAINTIFF HAS THE BURDEN TO PROVE THAT DEFENDANTS
2 BREACHED ANY FIDUCIARY DUTY.

3 YOU HAVE HEARD THAT ELECTRONIC ARTS SCRAMBLED THE
4 NAMES AND IDENTITIES OF RETIRED PLAYERS. I REMIND YOU AGAIN
5 THAT THERE IS NO CLAIM IN THIS CASE THAT THIS SCRAMBLING BY
6 ELECTRONIC ARTS VIOLATED ANY PLAYER'S RIGHTS. INSTEAD,
7 PLAINTIFFS' CLAIM IS THAT DEFENDANTS BREACHED A FIDUCIARY DUTY
8 BY INSISTING ON SCRAMBLING RATHER THAN LICENSING THE ENTIRE
9 GROUP OF RPGLA RIGHTS TO ELECTRONIC ARTS.

10 DEFENDANTS RESPOND THAT ELECTRONIC ARTS WAS NOT
11 WILLING TO PAY ANY MONEY TO LICENSE THE ENTIRE GROUP OF RPGLA
12 RIGHTS AND THEREFORE DEFENDANTS WERE ACTING TO PROTECT RETIRED
13 PLAYERS IN INSISTING ON SCRAMBLING.

14 DURING THE CROSS EXAMINATION OF PROFESSOR NOLL,
15 QUESTIONS WERE ASKED SUPPOSING THAT DEFENDANTS HAD CERTAIN
16 MONOPOLY AND MARKET POWER WITH RESPECT TO ACTIVE PLAYER
17 LICENSING AND ASKED WHETHER THERE HAD BEEN ANYTHING TO PREVENT
18 DEFENDANTS FROM USING THAT POWER TO INDUCE THIRD-PARTY
19 LICENSEES TO ALSO TAKE RETIRED PLAYERS AS A GROUP.

20 IN THIS REGARD, I INSTRUCT YOU THAT AN AGENT HAS NO
21 DUTY TO MARKET ITS PRINCIPALS IN A WAY THAT WOULD BE ILLEGAL OR
22 THAT WOULD RAISE A SUBSTANTIAL QUESTION OF ILLEGALITY.

23 ON THE ASSUMPTIONS OF MARKET POWER AND MONOPOLY USED
24 IN THE EXAMINATION OF PROFESSOR NOLL, A SUBSTANTIAL QUESTION OF
25 ILLEGALITY UNDER THE ANTITRUST LAWS WOULD HAVE BEEN RAISED HAD

1 DEFENDANTS REFUSED TO LICENSE ACTIVE PLAYERS TO A THIRD-PARTY
2 LICENSEE, LIKE ELECTRONIC ARTS, EXCEPT ON CONDITION THAT IT
3 ALSO TOOK A LICENSE FOR ALL RPGLA CLASS MEMBERS.

4 ON THE OTHER HAND, NO QUESTION OF ILLEGALITY WOULD
5 HAVE BEEN PRESENTED BY A STANDALONE OFFER BY DEFENDANTS TO
6 LICENSE ALL RPGLA CLASS MEMBERS AS AN ENTIRE GROUP. NEITHER
7 WOULD IT HAVE BEEN ILLEGAL FOR DEFENDANTS TO HAVE OFFERED THE
8 OPTION OF PRESENT AND FORMER PLAYERS TOGETHER AS A PACKAGE SO
9 LONG AS ONE WAS NOT CONDITIONED ON THE OTHER.

10 NEW TOPIC.

11 I WILL NOW INSTRUCT YOU ON DAMAGES. IT IS THE DUTY
12 OF THE COURT TO INSTRUCT YOU ABOUT THE MEASURE OF DAMAGES. BY
13 INSTRUCTING YOU ON DAMAGES THE COURT DOES NOT MEAN TO SUGGEST
14 FOR WHICH PARTY YOUR VERDICT SHOULD BE RENDERED.

15 IF YOU FIND FOR PLAINTIFF, THE RPGLA CLASS MEMBERS,
16 ON A PARTICULAR CLAIM YOU MUST DETERMINE THE AMOUNT OF DAMAGES,
17 IF ANY, THEY SUFFERED. DAMAGES MEAN THE AMOUNT OF MONEY THAT
18 WILL COMPENSATE THE RPGLA CLASS MEMBERS FOR ANY INJURY YOU FIND
19 WAS CAUSED BY DEFENDANTS FOR A PARTICULAR CLAIM.

20 YOU MAY AWARD PLAINTIFF DAMAGES THAT ARE BASED ON A
21 JUST AND REASONABLE ESTIMATE DERIVED FROM RELEVANT EVIDENCE.

22 UNDER THE RELEVANT LAW, THE CLAIMS AT ISSUE MUST BE
23 BROUGHT WITHIN THREE YEARS OF THE TIME WHEN THE BREACH
24 OCCURRED. IN THIS CASE THE LIMITATIONS PERIOD REACHES BACK TO
25 FEBRUARY 14, 2004. NO DAMAGES MAY BE AWARDED FOR ANY CONTRACT

1 VIOLATION OR FIDUCIARY DUTY VIOLATION OCCURRING PRIOR TO
2 FEBRUARY 14, 2004.

3 IF YOU DECIDE THAT PLAINTIFFS HAVE PROVEN THEIR
4 BREACH OF CONTRACT CLAIM AGAINST DEFENDANTS, THEN THE RPGLA
5 CLASS MEMBERS ARE ENTITLED TO RECOVER AS DAMAGES THE SUM OF
6 MONEY THAT WOULD PUT THE RPGLA CLASS MEMBERS IN THE SAME
7 ECONOMIC POSITION AS THEY WOULD HAVE BEEN IF THE CONTRACT HAD
8 NOT BEEN BREACHED BY DEFENDANTS, BUT ONLY TO THE EXTENT SUCH
9 DAMAGES WERE REASONABLY FORESEEABLE BY THE PARTIES IN THE EVENT
10 OF BREACH.

11 THE PLAINTIFF HAS THE BURDEN TO PROVE BY A
12 PREPONDERANCE OF THE EVIDENCE THE AMOUNT OF DAMAGES SUFFERED BY
13 THE RPGLA CLASS MEMBERS.

14 YOU MUST NOT AWARD DAMAGES BASED ON SYMPATHY,
15 CONJECTURE, SPECULATION, GUESSWORK OR PUNISHMENT.

16 ON THE OTHER HAND, THE LAW DOES NOT REQUIRE THAT
17 PLAINTIFF PROVE THE AMOUNT OF DAMAGES WITH MATHEMATICAL
18 PRECISION, BUT ONLY WITH REASONABLE CERTAINTY.

19 THE PURPOSE OF THE LAW OF DAMAGES IS TO COMPENSATE A
20 PLAINTIFF FOR THE LOSS, IF ANY, WHICH RESULTS FROM A
21 DEFENDANTS' CONDUCT. IF YOU FIND THAT PLAINTIFF HAS PROVEN
22 DEFENDANTS BREACHED ANY FIDUCIARY DUTY TO PLAINTIFF, THEN
23 PLAINTIFF ALSO HAS THE BURDEN OF PROVING DAMAGES BY A
24 PREPONDERANCE OF THE EVIDENCE.

25 THE MEASURE OF DAMAGES FOR BREACH OF A FIDUCIARY DUTY

1 IS THE AMOUNT OF MONEY NECESSARY TO PLACE THE RPGLA CLASS
2 MEMBERS IN THE SAME ECONOMIC POSITION THEY WOULD HAVE BEEN IN
3 IF DEFENDANTS' FIDUCIARY DUTY HAD NOT BEEN BREACHED.

4 IN OTHER WORDS, THE PURPOSE OF AWARDING DAMAGES TO
5 THE RPGLA CLASS FOR BREACH OF FIDUCIARY DUTY IS TO MAKE THEM
6 WHOLE FOR ANY INJURIES THEY SUFFERED.

7 PLAINTIFF MUST FIRST PROVE THAT THEY SUFFERED
8 ECONOMIC INJURY AS A RESULT OF DEFENDANTS' BREACH OF FIDUCIARY
9 DUTY. IF PLAINTIFF FAILS TO MEET THEIR BURDEN, THEN YOU MAY
10 NOT AWARD ANY DAMAGES FOR THAT CLAIM.

11 IF, HOWEVER, YOU FIND THAT PLAINTIFFS SUFFERED
12 ECONOMIC INJURY AS A RESULT OF DEFENDANTS' BREACH OF FIDUCIARY
13 DUTY -- THAT, OF COURSE, IS IF YOU FIND A BREACH OF FIDUCIARY
14 DUTY -- THEN YOU MUST NEXT CONSIDER WHETHER PLAINTIFF HAS
15 PROVEN THE AMOUNT OF SUCH DAMAGES.

16 AS THE PARTY SEEKING DAMAGES, PLAINTIFF HAS THE
17 BURDEN OF PROVING THE AMOUNT OF DAMAGES BY A PREPONDERANCE OF
18 THE EVIDENCE. WHILE PLAINTIFF IS NOT REQUIRED TO PROVE DAMAGES
19 WITH MATHEMATICAL PRECISION, IT MUST PROVE THEIR DAMAGES WITH
20 REASONABLE CERTAINTY.

21 IF PLAINTIFF HAS MET THEIR BURDEN, YOUR DAMAGES AWARD
22 SHOULD PUT PLAINTIFF IN APPROXIMATELY THE FINANCIAL POSITION
23 THEY WOULD HAVE BEEN IN HAD THE BREACH NOT OCCURRED.

24 YOU MAY ONLY AWARD PLAINTIFF DAMAGES THAT ARE
25 ADEQUATE TO COMPENSATE FOR THE BREACH. YOU MAY NOT AWARD ANY

1 MORE OR LESS DAMAGES.

2 PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES WHICH
3 ARE SPECULATIVE, REMOTE, IMAGINARY, CONTINGENT OR MERELY
4 POSSIBLE.

5 YOUR AWARD MUST BE BASED UPON EVIDENCE AND NOT UPON
6 SPECULATION, GUESSWORK OR CONJECTURE. NOR MAY YOU INCLUDE ANY
7 AMOUNT FOR THE PURPOSE OF PUNISHING DEFENDANTS FOR SETTING AN
8 EXAMPLE.

9 RECOVERY OF DAMAGES MAY BE LIMITED TO A NOMINAL SUM
10 IF THE PLAINTIFF HAS FAILED IT PROVE THE EXTENT AND AMOUNT OF
11 DAMAGES, EVEN THOUGH THEY HAVE PROVEN THAT THEY HAVE BEEN
12 WRONGED. A NOMINAL SUM IS A SMALL SYMBOLIC AMOUNT OF MONEY,
13 SUCH AS ONE DOLLAR, AWARDED AS RECOGNITION THAT AN INJURY WAS
14 SUSTAINED. IF YOU FIND THAT DEFENDANTS BREACHED THE RPGLA OR
15 THAT THEY BREACHED THEIR FIDUCIARY DUTIES TO RPGLA CLASS
16 MEMBERS, BUT THAT PLAINTIFF HAS NOT PROVEN ANY ACTUAL DAMAGES,
17 OR THAT PLAINTIFFS' PROOF OR VAGUE OR SPECULATIVE, THEN YOU MAY
18 AWARD NOMINAL DAMAGES.

19 PLAINTIFF HAS MADE CLAIMS AGAINST DEFENDANTS FOR
20 BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY. IF YOU DECIDE
21 THAT PLAINTIFF HAS PROVEN MORE THAN ONE OF THESE CAUSES OF
22 ACTION, THE SAME DAMAGES THAT RESULTED FROM MULTIPLE CLAIMS CAN
23 BE AWARDED ONLY ONCE.

24 NEW SUBJECT. PUNITIVE DAMAGES.

25 IN ADDITION TO COMPENSATORY DAMAGES, PLAINTIFF ALSO

1 SEEKS AN AWARD OF PUNITIVE DAMAGES IN THIS CASE AGAINST
2 DEFENDANTS. PUNITIVE DAMAGES ARE DAMAGES ABOVE AND BEYOND THE
3 AMOUNT OF COMPENSATORY OR NOMINAL DAMAGES YOU MAY AWARD.

4 PUNITIVE DAMAGES ARE AWARDED TO PUNISH THE DEFENDANT
5 FOR HIS OR HER CONDUCT AND TO SERVE AS AN EXAMPLE TO PREVENT
6 OTHERS FROM ACTING IN A SIMILAR WAY.

7 YOU MAY AWARD PUNITIVE DAMAGES ONLY IF PLAINTIFF HAS
8 PROVEN WITH CLEAR AND CONVINCING EVIDENCE, NUMBER ONE, THAT THE
9 DEFENDANTS ACTED WITH EVIL MOTIVE, ACTUAL MALICE, DELIBERATE
10 VIOLENCE OR OPPRESSION OR WITH AN INTENT TO INJURE OR A WILLFUL
11 DISREGARD OF THE RIGHTS OF THE RPGLA CLASS MEMBERS, AND NUMBER
12 TWO, THAT THE DEFENDANTS' CONDUCT ITSELF WAS OUTRAGEOUS,
13 GROSSLY FRAUDULENT, OR RECKLESS TOWARD THE SAFETY OF THE RPGLA
14 CLASS MEMBERS.

15 YOU MAY CONCLUDE THAT DEFENDANTS ACTED WITH A STATE
16 OF MIND JUSTIFYING PUNITIVE DAMAGES BASED ON DIRECT EVIDENCE OR
17 BASED ON CIRCUMSTANTIAL EVIDENCE FROM THE FACTS OF THE CASE.

18 CLEAR AND CONVINCING EVIDENCE MEANS EVIDENCE --
19 EVIDENCE OF SUCH CONVINCING FORCE THAT IT DEMONSTRATES, IN
20 CONTRAST TO THE OPPOSING EVIDENCE, A HIGH PROBABILITY OF THE
21 TRUTH OF THE FACTS FOR WHICH IT IS OFFERED. SUCH EVIDENCE
22 REQUIRES A HIGHER STANDARD OF PROOF THAN PROOF BY A
23 PREPONDERANCE OF THE EVIDENCE.

24 IF YOU DECIDE THAT PUNITIVE DAMAGES SHOULD BE
25 AWARDED, YOU WILL HAVE A SHORT, SUPPLEMENTAL PROCEEDING

1 IMMEDIATELY FOLLOWING YOUR VERDICT IN ORDER TO RECEIVE MORE
2 EVIDENCE AND ARGUMENT AS TO THE AMOUNT THAT SHOULD BE AWARDED.

3 NOW WE'RE COMING TO THE VERY LAST PART. WHEN YOU
4 BEGIN YOUR DELIBERATIONS, YOU SHOULD ELECT ONE MEMBER OF YOUR
5 JURY -- OF THE JURY AS YOUR FOREPERSON. THAT PERSON WILL
6 PRESIDE OVER THE DELIBERATIONS AND SPEAK FOR YOU HERE IN COURT.

7 I RECOMMEND THAT YOU SELECT A FOREPERSON WHO WILL BE
8 GOOD AT LEADING A FAIR AND BALANCED DISCUSSION OF THE EVIDENCE
9 AND THE ISSUES.

10 IN YOUR DELIBERATIONS, IT IS USUALLY A MISTAKE TO
11 TAKE A STRAW VOTE EARLY ON. THIS IS DUE TO THE RISK OF JURY
12 MEMBERS EXPRESSING A PREMATURE OPINION, AND THEN OUT OF PRIDE,
13 DIGGING IN THEIR HEELS.

14 RATHER, IT IS USUALLY BEST TO DISCUSS THE EVIDENCE,
15 PRO AND CON, ON THE VARIOUS ISSUES BEFORE PROCEEDING TO TAKE
16 EVEN A STRAW VOTE.

17 IN THIS WAY, ALL OF THE VIEWPOINTS WILL BE ON THE
18 TABLE BEFORE ANYONE EXPRESSES A VOTE.

19 THESE ARE MERELY RECOMMENDATIONS, HOWEVER, AND IT IS
20 UP TO YOU TO DECIDE ON HOW YOU WISH TO DELIBERATE.

21 YOUR VERDICT AS TO EACH CLAIM AND AS TO DAMAGES, IF
22 ANY, MUST BE UNANIMOUS. I'M GOING TO REPEAT THAT.

23 YOUR VERDICT AS TO EACH CLAIM AND AS TO DAMAGES, IF
24 ANY, MUST BE UNANIMOUS.

25 EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT

1 YOU SHOULD DO SO ONLY AFTER YOU HAVE CONSIDERED ALL THE
2 EVIDENCE, DISCUSSED IT FULLY WITH THE OTHER JURORS, AND
3 LISTENED TO THE VIEWS OF YOUR FELLOW JURORS.

4 DO NOT BE AFRAID TO CHANGE YOUR OPINION IF THE
5 DISCUSSION PERSUADES YOU THAT YOU SHOULD. DO NOT COME TO A
6 DECISION MERELY BECAUSE OTHER JURORS THINK IT IS RIGHT. IT IS
7 IMPORTANT THAT YOU ATTEMPT TO REACH A UNANIMOUS VERDICT, BUT,
8 OF COURSE, ONLY IF EACH OF YOU CAN DO SO AFTER HAVING MADE YOUR
9 OWN CONSCIENTIOUS DECISION.

10 DO NOT CHANGE AN HONEST BELIEF ABOUT THE WEIGHT AND
11 EFFECT OF THE EVIDENCE SIMPLY TO REACH A VERDICT.

12 SOME OF YOU HAVE TAKEN NOTES DURING THE TRIAL.
13 WHETHER OR NOT YOU TOOK NOTES, YOU SHOULD RELY ON YOUR OWN
14 MEMORY FOR WHAT WAS SAID. NOTES ARE ONLY TO ASSIST YOUR
15 MEMORY. YOU SHOULD NOT BE OVERLY INFLUENCED BY NOTES.

16 WHEN YOU RETIRE TO THE JURY ROOM TO DELIBERATE, THE
17 CLERK WILL BRING YOU THE FOLLOWING: ONE, ALL OF THE EXHIBITS
18 RECEIVED IN EVIDENCE;

19 NUMBER TWO: AN INDEX OF THE EXHIBITS;

20 NUMBER THREE: A WORK COPY OF THESE JURY -- OF THESE
21 JURY INSTRUCTIONS FOR EACH OF YOU;

22 FOUR: A WORK COPY OF THE VERDICT FORM FOR EACH OF
23 YOU;

24 AND, FIVE, AN OFFICIAL VERDICT FORM.

25 YOU DO NOT HAVE TO DISCUSS THE QUESTIONS IN THE

1 STRICT SEQUENCE INDICATED IN THE SPECIAL VERDICT FORM. BUT YOU
2 MUST BY THE END ANSWER UNANIMOUSLY AS INDICATED IN THE FORM.

3 WHEN YOU RECESS AT THE END OF A DAY, PLEASE PLACE
4 YOUR WORK MATERIALS IN THE BROWN ENVELOPE PROVIDED AND COVER UP
5 ANY EASELS CONTAINING YOUR WORK NOTES, SO THAT IF MY STAFF
6 NEEDS TO GO INTO THE JURY ROOM, THEY WILL NOT EVEN
7 INADVERTENTLY SEE ANY OF YOUR WORK IN PROGRESS.

8 A U.S. MARSHAL WILL BE OUTSIDE THE JURY ROOM DOOR
9 DURING YOUR DELIBERATIONS. IF IT BECOMES NECESSARY DURING YOUR
10 DELIBERATIONS TO COMMUNICATE WITH ME, YOU MAY SEND A NOTE
11 THROUGH THE MARSHAL, SIGNED BY YOUR FOREPERSON, OR BY ONE OR
12 MORE MEMBERS OF THE JURY.

13 NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO
14 COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING. AND I WILL
15 RESPOND TO THE JURY CONCERNING THE CASE ONLY IN WRITING OR HERE
16 IN OPEN COURT.

17 IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE
18 LAWYERS BEFORE ANSWERING IT, WHICH MAY TAKE SOME TIME.

19 YOU MAY CONTINUE YOUR DELIBERATIONS WHILE WAITING FOR
20 THE ANSWER TO ANY QUESTION.

21 REMEMBER THAT YOU ARE NOT TO TELL ANYONE, INCLUDING
22 ME, HOW THE JURY STANDS, NUMERICALLY OR OTHERWISE, UNTIL AFTER
23 YOU HAVE REACHED A UNANIMOUS VERDICT OR HAVE BEEN DISCHARGED.

24 DO NOT DISCLOSE ANY VOTE COUNT IN ANY NOTE TO THE
25 COURT.

1 YOU HAVE BEEN REQUIRED TO BE HERE EACH DAY FROM 7:45
2 TO 1:00. NOW THAT YOU ARE GOING TO BEGIN YOUR DELIBERATIONS,
3 HOWEVER, YOU ARE FREE TO MODIFY THIS SCHEDULE WITHIN REASON.

4 FOR EXAMPLE, IF YOU WISH TO CONTINUE DELIBERATING IN
5 THE AFTERNOONS, AFTER A REASONABLE LUNCH BREAK, THAT IS FINE.
6 THE COURT DOES RECOMMEND, HOWEVER, THAT YOU CONTINUE TO START
7 YOUR DELIBERATIONS BY 8:00 A.M.

8 IT IS VERY IMPORTANT THAT YOU LET THE CLERK KNOW IN
9 ADVANCE WHAT HOURS YOU WILL BE DELIBERATING SO THAT THE LAWYERS
10 MAY BE PRESENT IN THE COURTHOUSE AT ALL TIMES THE JURY IS
11 DELIBERATING.

12 I'M GOING TO REPEAT THAT IN SLIGHTLY DIFFERENT WORDS.

13 ALWAYS LET US KNOW WHEN YOU'RE IN SESSION OR NOT
14 GOING TO BE IN SESSION, OR WHEN YOU'RE GOING TO TAKE A LUNCH
15 BREAK SO I CAN MAKE SURE THE LAWYERS ARE RIGHT HERE AND READY
16 TO RESPOND TO ANY NOTE OR VERDICT THAT YOU MAY BE PREPARED TO
17 RENDER.

18 IT IS VERY IMPORTANT THAT YOU LET THE CLERK -- I'VE
19 ALREADY READ THAT.

20 ALL RIGHT. YOU MAY DELIBERATE ONLY WHEN ALL OF YOU
21 ARE TOGETHER. REPEAT THAT. YOU MAY ONLY DELIBERATE WHEN ALL
22 OF YOU ARE TOGETHER.

23 THAT MEANS, FOR EXAMPLE, THAT IN THE MORNINGS BEFORE
24 EVERYONE HAS ARRIVED, OR WHEN SOMEONE STEPS OUT OF THE JURY
25 ROOM TO GO TO THE RESTROOM, YOU MAY NOT DISCUSS THE CASE. AS

1 WELL, THE ADMONITION THAT YOU ARE NOT TO SPEAK TO ANYONE
2 OUTSIDE THE JURY ROOM ABOUT THIS CASE STILL APPLIES DURING YOUR
3 DELIBERATIONS.

4 AFTER YOU HAVE REACHED A UNANIMOUS AGREEMENT ON A
5 VERDICT, YOUR FOREPERSON WILL FILL IN, DATE AND SIGN THE
6 VERDICT FORM AND ADVISE THE COURT THROUGH THE MARSHAL THAT YOU
7 HAVE REACHED A VERDICT.

8 THE FOREPERSON SHOULD HOLD ON TO THE FILLED-IN
9 VERDICT FORM AND BRING IT INTO THE COURTROOM WHEN THE JURY
10 RETURNS THE VERDICT.

11 THANK YOU FOR YOUR CAREFUL ATTENTION. THE CASE IS
12 NOW IN YOUR HANDS. YOU MAY NOW RETIRE TO THE JURY ROOM AND
13 BEGIN YOUR DELIBERATIONS. THANK YOU.

14 **THE CLERK:** ALL RISE.

15 (THEREUPON, THE JURY RETIRED TO BEGIN DELIBERATIONS.)

16 **THE COURT:** ALL RIGHT. BE SEATED, PLEASE. A COUPLE
17 OF SMALL THINGS. I WILL -- I NOTED A COUPLE OF SMALL ERRORS
18 I'M GOING TO CORRECT IN THE WAY I READ THESE. I'M GOING TO GO
19 GET IT FIXED SO IT WILL CORRESPOND TO WHAT I ACTUALLY TOLD THE
20 JURY. I WILL GIVE EACH SIDE A COPY, BUT I WILL QUICKLY SEND IT
21 IN TO THE JURY ROOM. SO I DON'T THINK THERE'S ANY -- AT THIS
22 POINT IT'S JUST A MATTER OF MAKING SURE IT TRACKS WHAT I SAID.

23 NUMBER TWO, AS SOON AS WE KNOW THEIR SCHEDULE WE WILL
24 LET YOU KNOW. AND YOU SHOULD NEVER GO OUTSIDE THE BUILDING
25 WHILE -- IN OTHER WORDS, DON'T GO DOWN TO THE CUSHY LAW OFFICE.

1 SIT ON THE HARD BENCHES OR GO TO THE LAWYERS' LOUNGE. BUT BE
2 HERE IN THE BUILDING SO THAT I CAN GET YOU ON VERY SHORT
3 NOTICE. DAWN TOLD ME YOU CAME UP WITH A JOINT EXHIBIT LIST, SO
4 THAT'S GREAT. WE'LL SEND THAT IN, AS WELL. DAWN WILL VERY
5 QUICKLY TAKE IN -- PROBABLY WITHIN THREE TO TEN MINUTES -- ALL
6 OF THE EXHIBITS. AND THEN, WE JUST WAIT.

7 SO ANY -- ANYTHING YOU WANT TO SAY BEFORE WE TAKE A
8 SHORT RECESS?

9 **MR. KESSLER:** JUST A QUESTION, YOUR HONOR. SO IN
10 CASE WE'RE DOWN IN THE CAFETERIA OR SOMETHING SHOULD WE LEAVE
11 OUR CELL PHONE WITH YOUR CLERK OR SOMEONE SO THAT YOU WOULD
12 KNOW WE MIGHT BE ON THE SECOND FLOOR?

13 **THE COURT:** THAT'S WHAT YOU SHOULD DO, BUT LET US
14 KNOW WHERE YOU WILL BE IN CASE THE CELL PHONE DOESN'T WORK OR
15 SOMETHING.

16 **MR. KESSLER:** OKAY.

17 **THE COURT:** IF YOU'RE GOING TO BE IN THE CAFETERIA,
18 THAT'S FINE. WHEN THE JURY GOES TO THE CAFETERIA, PLEASE DON'T
19 GO THERE. I JUST DON'T EVEN WANT TO TAKE A CHANCE THAT THEY
20 WOULD THINK THAT YOU'RE TRYING TO -- I DON'T KNOW THAT THEY'RE
21 GOING TO DO THAT. THEY OFTEN HAVE LUNCH BROUGHT IN. IT'S UP
22 TO THEM. BUT IF THEY DO GO TO THE CAFETERIA, YOU OUGHT TO GO
23 SOMEWHERE ELSE.

24 **MR. KESSLER:** YOU TOLD US NOT TO LEAVE THE BUILDING,
25 THOUGH. SO --

1 **THE COURT:** THERE'S ALSO A SMALL STAND THAT SELLS
2 FOOD IN CELLOPHANE PACKAGES ON THE TENTH FLOOR, I BELIEVE.
3 IT'S NOT CUSTOMARY FARE FOR YOUR FIRM, I'M SURE, BUT YOU'LL
4 HAVE TO SUFFER.

5 **MR. KESSLER:** WE'LL MAKE DUE, YOUR HONOR, WITH
6 WHATEVER IS AVAILABLE.

7 **THE COURT:** I KNOW IT'S NOT FOR MR. PARCHER, EITHER,
8 IN YOUR LAW FIRM. BUT IT'S THE KIND OF STUFF WE HAVE TO EAT
9 HERE IN THE FEDERAL COURTHOUSE.

10 ALL RIGHT. ANYTHING MORE? OKAY. WELL, YOU LAWYERS
11 HAVE DONE YOUR JOB NOW. THERE'S NOTHING MORE YOU CAN DO BUT
12 WAIT. I SUPPOSE IF THERE'S A NOTE YOU'LL STILL HAVE TO DO SOME
13 MORE WORK.

14 BUT YOU CAN BREATHE A SIGH OF RELIEF AND SIT BACK AND
15 RELAX A BIT, I GUESS.

16 **MR. KATZ:** WE WOULD LIKE TO THANK YOU, YOUR HONOR,
17 FOR YOUR DILIGENCE AND ATTENTION.

18 **MR. KESSLER:** YES. YES, YOUR HONOR. WE SHARE THAT.
19 AND AFTER 4 O'CLOCK SHOULD WE ASSUME 7:30 ON MONDAY? IS THAT
20 WHEN YOU WOULD LIKE US BACK?

21 **THE COURT:** I SUSPECT WE WILL KNOW THEIR TIME. IF
22 THEY SAY "8 O'CLOCK," THEN YOU DON'T HAVE TO BE HERE UNTIL
23 8 O'CLOCK, EITHER. BUT LET'S SEE WHAT THEY SAY WILL BE THEIR
24 HOURS, AND THEN YOU SHOULD ALWAYS BE HERE.

25 NOW, YOU DON'T ALL HAVE TO BE HERE. YOU CAN JUST

1 HAVE ONE LAWYER PER SIDE. AND, AGAIN, MR. BERTHELSEN SHOULD
2 NOT BE LEAVING WITHOUT ME KNOWING ABOUT IT. I THINK HE SHOULD
3 NOT LEAVE TODAY. IF THIS STARTS TO DRAG OUT, THEN WE'LL HAVE
4 AN ISSUE, UNLESS THERE'S SOME URGENT MATTER --

5 **MR. KESSLER:** I ASSUME, YOUR HONOR, IF HE STAYS UNTIL
6 4:00 TODAY, AND THERE'S NO VERDICT, THAT HE CAN GO OVER THE
7 WEEKEND AND COME BACK BEFORE MONDAY. THAT'S NOT A PROBLEM.

8 **THE COURT:** HE CAN DO THAT.

9 **MR. KESSLER:** YES.

10 **THE COURT:** I WANT HIM HERE IN CASE WE HAVE TO HAVE A
11 SHORT SUPPLEMENTAL PROCEEDING. THAT'S THE -- THAT'S THE
12 BUGABOO. ALL RIGHT. THANK YOU, COUNSEL. WE'LL KEEP YOU
13 POSTED AS SOON AS WE KNOW WHAT THE DEAL IS.

14 **MR. KESSLER:** THANK YOU.

15 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL MONDAY,
16 NOVEMBER 10TH, 2008, AT 7:30 O'CLOCK A.M.)

17 - - - -

18 **CERTIFICATE OF REPORTER**

19 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
20 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

21 DATE: FRIDAY, NOVEMBER 7, 2008

22
23 S/B KATHERINE POWELL SULLIVAN

24 _____
25 KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

I N D E X

2	CLOSING ARGUMENT BY MR. PARCER	2657	13
	CLOSING ARGUMENT BY MR. KESSLER	2708	13
3	REBUTTAL CLOSING ARGUMENT BY MR. PARCER	2773	13
	JURY INSTRUCTED	2787	13

E X H I B I T S

<u>TRIAL EXHIBITS</u>	<u>IDEN</u>	<u>VOL.</u>	<u>EVID</u>	<u>VOL.</u>
1263-108			2643	13
			<u>WITHDRAWN</u>	
1268-108			2643	13
2370			2651	18