

Exhibit 1

To The Declaration of David Greenspan In Support Of Defendants' Renewed Motion For Judgment As A Matter Of Law

Case No. C 07 0943 WHA

Parrish v. National Football League Players Association, et al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

BERNARD PAUL PARRISH,)
HERBERT ANTHONY ADDERLEY,)
WALTER ROBERTS, III, ET AL.,)

Plaintiffs,)

v.)

NO. C 07-00943 WHA

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

Defendants.)

San Francisco, California
Wednesday, October 15, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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BY: RONALD S. KATZ, ESQ.
RYAN S. HILBERT, ESQ.
and
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7 Times Square
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BY: L. PETER PARCHER, ESQ.
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11355 West Olympic Boulevard
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BY: CHAD HUMMEL, ESQ.

(Appearances continued, next page)

1
2 **APPEARANCES, CONTINUED:**

3 **Also for Plaintiffs:**

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6 Suite 1500
7 Dallas, Texas 75201
8 BY: LEWIS T. LECLAIR, ESQ.
 JILL ADLER NAYLOR, ATTORNEY
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9 **For Defendants:**

10 Dewey & LeBoeuf
11 1301 Avenue of the Americas
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13 BY: JEFFREY L. KESSLER, ESQ.
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 DAVID G. FEHER, ESQ.
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14 **Reported by:**

15 BELLE BALL, CSR 8785, RMR, CRR
16 Official Reporter
17
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20
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1 THE COURT: What?

2 MR. HUMMEL: They didn't say "We don't want to give
3 you a license."

4 THE COURT: What did they say?

5 MR. HUMMEL: "Scramble." That letter does nowhere
6 say "We're not going to give you a license." That letter
7 nowhere says, "We've got over 2,000 of GLA-retired players that
8 we could license to you." It simply says "Scramble."

9 THE COURT: What you are saying that they should have
10 said is "Here is an opportunity for us to make some money for
11 the retired players, so let's do" -- what? What is it they
12 should have done, in your view?

13 MR. HUMMEL: They could have done many things. One
14 of the things they could have done is to say, "EA, we have
15 2,051-plus GLA signatories. And you get --- you have those
16 rights. Don't scramble those images." They could have said
17 that.

18 They could have said, "We have this retired player
19 program. And for not a penny more, you get these rights. Use
20 them. Don't scramble them."

21 They could have said, in response to inquiries in
22 2005, "Can we use this in the game," instead of saying no and
23 taking a hard line, they could have said yes. But they didn't.

24 THE COURT: So under the agreements that were in
25 place, without changing a word of the written agreements, if

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 07-0943 WHA, Parrish, et al. v. NFLPA, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

 /s/ Belle Ball

Belle Ball, CSR 8785, RMR, CRR

Saturday, October 18, 2008

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
) Tuesday

October 21, 2008

TRANSCRIPT OF PROCEEDINGS

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Reported By: *Katherine Powell Sullivan, CSR # 5812*
Official Reporter - U.S. District Court

1 had seen myself on cards. I had also seen myself represented
2 in the Madden game.

3 In fact, people had come to me and said -- asked me
4 when I had played. They said that they had played me. I
5 caught touchdowns and whatever.

6 So I had seen that. I never had gotten paid, so I
7 felt like this was my first opportunity to finally get some
8 money.

9 **Q.** Now, did you have anything to do with when the union was
10 out negotiating with a third party, as to whether they were
11 doing a group license, an individual ad hoc agreement? Did you
12 have anything to do with that?

13 **A.** No, I didn't.

14 **Q.** Was that Players Inc and the union that did all of that?

15 **A.** I didn't even know about Players Inc. I didn't know
16 exactly how the players' union did it.

17 All I my knew this was an agreement that the Players
18 Association had sent me. I didn't know how it had come --
19 another organization other than -- I didn't know about that
20 they had organized them through the Players Inc. I didn't
21 know, for example, that EA had engaged into a contract with
22 somebody other than this.

23 But if that's the way that the players' union chose
24 to market themselves as a profit-making entity instead of a
25 nonprofit-making entity, that was left up to them. I trusted

1 fiduciary duty to -- in connection with the -- the image rights
2 of the retired players?

3 It may be more specific than that at the end of the
4 day, but that's -- those are the two issues.

5 Now, I want to circle back to how I started here. I
6 don't want you to get confused. The lawyers don't want you to
7 get confused. They've asked me to make this clear to you, that
8 this scrambling by EA, Electronic Arts, in the Madden game, is
9 not alleged to be a violation of anybody's rights in this case.

10 Rather, the alleged violation flows out of this
11 agreement, the group licensing agreement, if there was a
12 violation. And that's for you to determine.

13 All right. I just wanted to -- I hope that helps
14 some.

15 Mr. Parcher?

16 **MR. PARCHER:** I don't know whether Your Honor wants
17 me to say it out loud.

18 **THE COURT:** What, you have an objection to what I
19 said?

20 **MR. PARCHER:** Well, I think there's a little
21 confusion and more to it on the fiduciary point. Our fiduciary
22 point is that if for any reason the EA agreement didn't
23 include -- didn't include the group, the class, that the union
24 breached its fiduciary obligation by not turning it over.

25 **THE COURT:** I meant to include that argument in

1 Players Inc about your understanding of what that agreement
2 meant?

3 **A.** No, I didn't.

4 **Q.** Did you rely on any representations by anyone from the
5 NFLPA or Players Inc about what the agreement meant before you
6 signed it?

7 **A.** No, I didn't.

8 **MR. LECLAIR:** Objection, form, Your Honor.
9 Ambiguous.

10 **THE COURT:** I'm sorry. What's the ambiguity?

11 **MR. LECLAIR:** Whether he's talking about what's in
12 the agreement or something apart from the agreement. I can't
13 tell from the question, Your Honor.

14 **THE COURT:** No. As I see the question it's a fine
15 question. Overruled.

16 Next question.

17 **BY MR. MEYER:**

18 **Q.** Sir, when you were in the courtroom did you see that your
19 counsel put up a letter from Doug Allen from 2003; do you
20 recall that?

21 **A.** Yes, I saw he done it, but I didn't pay too much attention
22 to it.

23 **Q.** And you didn't receive a copy of that letter prior to
24 signing the GLA, right?

25 **A.** No, I didn't.

1 account.

2 Q. Okay. And I think -- you have no control over the
3 defendants' licensing operations, right?

4 MR. LECLAIR: Objection, form, Your Honor. I think
5 that calls for a legal conclusion.

6 THE WITNESS: No, I don't have any control to my
7 knowledge. I don't have any control.

8 THE COURT: Overruled. In light of what both sides
9 have asked here, that's a fair question.

10 Go ahead.

11 THE WITNESS: No, I don't have control.

12 BY MR. MEYER:

13 Q. And do you have any knowledge of NFLPA or Players Inc's
14 licensing activities?

15 A. Let me make sure I understand the question.

16 Q. Let me withdraw it and be more specific.

17 Do you know what NFLPA or Players Inc did in order
18 to try to market your rights? Let me say "retired player group
19 licensing rights." Do you have any idea?

20 A. Here's what I assume.

21 Q. Sir, with all due respect, I'm not asking about
22 assumptions. I'm asking about factual knowledge.

23 A. It's the only way I can answer you.

24 Q. You can say you don't know if you don't know. I don't
25 want to argue with you.

1 All right. That's all I'm going to say on that
 2 subject. All right.

3 We will see you tomorrow.

4 **MR. LECLAIR:** Your Honor, would you give us the time?

5 **THE COURT:** What?

6 **MR. LECLAIR:** I want to track the time daily.

7 **THE COURT:** So far I've got -- I can't add it up.

8 **MR. LECLAIR:** Okay.

9 **THE COURT:** You've gotten, looks like, an hour and 17
 10 minutes for the plaintiff and 42 for the defense.

11 **MR. LECLAIR:** Thank you, Your Honor.

12 (Thereupon, this trial was continued until Wednesday,
 13 October 22, 2008 at 7:30 o'clock a.m.)

14 - - - -

15

16 **CERTIFICATE OF REPORTER**

17 I certify that the foregoing is a correct transcript
 18 from the record of proceedings in the above-entitled matter.

19

20 DATE: Tuesday, October 21, 2008

21

22 s/b Katherine Powell Sullivan

23 Katherine Powell Sullivan, CSR #5812, RPR, CRR
 24 U.S. Court Reporter

24

25

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

BERNARD PAUL PARRISH, HERBERT)
ANTHONY ADDERLEY, WALTER ROBERTS)
III,)
)
Plaintiffs,)

VS.)

No. C 07-0943 WHA)

NATIONAL FOOTBALL LEAGUE PLAYERS)
ASSOCIATION and NATIONAL FOOTBALL)
LEAGUE PLAYERS INCORPORATED d/b/a)
PLAYERS INC,)
)
Defendants.)

San Francisco, California)

Wednesday)
October 22, 2008)

TRANSCRIPT OF PROCEEDINGS

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BY: **BRUCE S. MEYER, ESQ.**

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BY: **R. JAMES SLAUGHTER, ESQ.**

Reported By:

Katherine Powell Sullivan, CSR # 5812
Official Reporter - U.S. District Court

1 **THE COURT:** But the --

2 **MR. KESSLER:** Your Honor --

3 **MR. PARCHER:** Excuse me, please. I would like to
4 respond to that.

5 **THE COURT:** Go ahead, Mr. Parcher. What do you say
6 to that?

7 **MR. PARCHER:** Well, I'm respectfully disagreeing.
8 Perhaps it's my fault because I'm making it look left when it's
9 center right.

10 There are two prongs to this case. One is breach of
11 contract, and the other is breach of fiduciary obligation.

12 **THE COURT:** Only as it relates to the GLA.

13 **MR. PARCHER:** Right. I'm saying there is a duty. It
14 began -- it began with the constitution in the union. It goes
15 through several other documents that I'm about to introduce
16 that clearly demonstrate that these men who spoke for this
17 union had a duty to do the right thing by these guys.

18 **THE COURT:** All right. I'm going to instruct the
19 jury.

20 I'm going to let you pursue this line of questioning,
21 but before this case ever started we had a lot of motions. And
22 the Court has already ruled that this case you've got to decide
23 is two issues, and they both are related to the GLA.

24 This case is not about a broad-ranging duty of
25 fairness by the union to its members. That would be a

1 different kind of a lawsuit.

2 This case is about the GLA that the class members
3 signed. And that's what hooks them all together, is this GLA.

4 The Court has previously said there are two issues
5 for you to decide: The meaning of the GLA and whether it was
6 violated by the defendants, and secondly, whether or not the
7 defendants violated any fiduciary duty as it relates to the
8 GLA.

9 **MR. PARCHER:** Okay.

10 **THE COURT:** Not as it might have related to the union
11 constitution.

12 **MR. PARCHER:** I accept that entirely.

13 **THE COURT:** All right. Well, then, I'm going to let
14 you pursue this line of questions based on the union
15 constitution.

16 **MR. PARCHER:** Right, right.

17 **THE COURT:** But at some point you've got to connect
18 it to the GLA.

19 **MR. PARCHER:** Right. Well, I'm just --

20 **THE COURT:** Fine.

21 **MR. PARCHER:** I've just begun.

22 **THE COURT:** All right. You're talking about duties
23 and so forth.

24 **MR. PARCHER:** I am talking about duties.

25 **MR. KESSLER:** Your Honor, again, just to add an

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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III,)
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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

Monday

October 27, 2008

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Reported By: *Katherine Powell Sullivan, CSR # 5812*
Official Reporter - U.S. District Court

1 A. Uhm, yes. This was the document that was referred to.

2 Q. Okay. And this document, Attachment A, NFL Players
3 Association Group Licensing Assignment, is this the GLA that
4 was signed by active players or retired players?

5 A. This is the GLA that was signed by active players.

6 Q. Okay. So would retired players sign this after they left
7 the NFL?

8 A. No.

9 Q. Okay. Let me -- by the way, if you look at the second
10 line here it says there is an exclusive right. Do you see that
11 in the second line?

12 A. Yes, I do.

13 Q. Was the active player GLA exclusive?

14 A. Yes.

15 Q. Now, did you use the same or a different form for retired
16 player licensing?

17 A. It was a different form.

18 Q. With respect to active player -- well, let me ask you a
19 question now -- I'll withdraw it -- about retired player
20 licensing.

21 Was retired player licensing money ever used to fund
22 the operations of the union the way the active player money was
23 used?

24 A. No, it never was.

25 Q. Okay. So do you have an understanding of why the union

1 started retired player licensing?

2 **A.** Yes.

3 **Q.** Why did the union start retired player licensing?

4 **A.** For a number of reasons. One was to -- to try to create,
5 based on the active player model, opportunities for retired
6 players to be involved in group licensing and to be involved in
7 endorsements or making appearances or participating in events
8 or being on television programs, so that there would be -- we
9 could try to provide the opportunity for retired players to
10 earn some money.

11 And we could also give them exposure to the
12 marketplace and try to develop the kind of program for them
13 that we had developed for active players.

14 **Q.** Now, was Mr. Upshaw a retired player?

15 **A.** Yes.

16 **Q.** Hall of Fame player?

17 **A.** He was a little more famous than I was.

18 **Q.** Was Mr. Upshaw involved in the decision to start retired
19 player licensing?

20 **A.** Very much involved.

21 **Q.** Now, other than attachment A, do you recall there was
22 another way that active players could sign up for GLA rights?

23 **A.** Yes.

24 **MR. KESSLER:** Your Honor, if I may I approach.
25

1 **MR. DOUG ALLEN:** I'm not invited, Your Honor. I
2 think the party is Thursday.

3 **MR. KESSLER:** Thursday.

4 **MR. DOUG ALLEN:** I'm not positive about that. I'm --
5 my schedule is so tight, I can't go.

6 **THE COURT:** She can go to the party. And if we don't
7 get her testimony, we'll bring her back next week.

8 But that goofs up the Rule 50 because at the end of
9 the case we haven't heard all the plaintiffs' case yet.

10 **MR. KESSLER:** We understand, Your Honor.

11 **THE COURT:** Anything more today?

12 **MR. HUMMEL:** No, Your Honor.

13 **THE COURT:** See you at 7:30.

14 **MR. HUMMEL:** Thank you very much, Your Honor.

15 (Thereupon, this trial was continued until Tuesday,
16 October 28, 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: Monday, October 27, 2008

22 s/b Katherine Powell Sullivan
23 _____

24 Katherine Powell Sullivan, CSR #5812, RPR, CRR
25 U.S. Court Reporter

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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LEAGUE PLAYERS INCORPORATED d/b/a)
PLAYERS INC,)

Defendants.)

San Francisco, California

Tuesday

October 28, 2008

TRANSCRIPT OF PROCEEDINGS

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Reported By: *Katherine Powell Sullivan, CSR # 5812*
Official Reporter - U.S. District Court

1 **MR. KESSLER:** Sorry. I apologize. Trying to go too
2 quickly.

3 **BY MR. KESSLER:**

4 **Q.** The EA license agreements, there is a minimum royalty
5 payment in 2006-2007, that period of time, of \$25 million per
6 year, correct?

7 **A.** Yes.

8 **Q.** Was that agreed to for active player rights, retired
9 player rights or both?

10 **A.** Just active player rights.

11 **Q.** Did you discuss with EA whether they would be willing to
12 pay any additional money for all the retired player rights?

13 **A.** Yes.

14 **Q.** Were they willing to do that?

15 **A.** Absolutely not.

16 **Q.** Mr. Parcher suggested you could give away the rights of
17 the retired players for free to EA just by saying:

18 "Don't pay me anymore. Include them in the 25."

19 Mr. Allen, if you gave away retired player rights for
20 free to a licensee, would you have any money to give to the
21 retired players?

22 **A.** No.

23 **Q.** Mr. Allen, if you gave away the retired player rights to
24 EA for free, would any licensee in the future ever pay for
25 something you gave away for free?

1 **A.** No.

2 **Q.** Thank you, Mr. Allen. I have no further questions.

3 **MR. PARCHER:** At the risk of an historic first, I
4 have no questions of this witness.

5 **THE COURT:** Thank you. Just one second.

6 Before the witness is excused, I want to make sure I
7 didn't goof up on a document. I said 1056 was received in
8 evidence, but Dawn is asking whether or not it was supposed to
9 be a different number.

10 **MR. KESSLER:** Your Honor, I don't know which one of
11 us goofed up, so I'll take responsibility. But it was 2056.
12 2056.

13 **THE COURT:** 2056?

14 **MR. KESSLER:** Yes, not 1056. That's the compilation.

15 **THE COURT:** 2056. All right. I allowed in 1056, so
16 that's out. Back to not being admitted. And 2056 is the one
17 that's received.

18 **MR. KESSLER:** Thank you, Your Honor.

19 **THE COURT:** All right. May the witness be excused
20 and discharged, not subject to recall?

21 **MR. PARCHER:** Yes, sir.

22 **MR. KESSLER:** Yes, Your Honor.

23 **THE COURT:** All right. You're free to go. You are
24 not subject to recall.

25 Thank you, Mr. Allen.

- 1 **A.** Active or retired players, present or former.
- 2 **Q.** So did you have an understanding when you signed this
3 agreement about what would trigger an obligation for the union
4 to pay?
- 5 **A.** If they struck some type of deal for active or former
6 players to license us, then we would get paid.
- 7 **Q.** Did you draft this document?
- 8 **A.** No, sir.
- 9 **Q.** Did you negotiate it?
- 10 **A.** No, sir.
- 11 **Q.** Did anyone from the union ever instruct you or advise you
12 you better hire a lawyer?
- 13 **A.** No, sir.
- 14 **Q.** When you signed this document, did you send it back in?
- 15 **A.** Yes, sir.
- 16 **Q.** Did you retain any control at all?
- 17 **A.** No. Well, what does "control" mean?
- 18 **Q.** Do you have an understanding of the word "control"?
- 19 **A.** In what context?
- 20 **Q.** Well, when you sent this letter back in, did you retain
21 any control over what the union could or couldn't do?
- 22 **A.** Oh, no.
- 23 **Q.** Did you have a mind-set about what the union was going to
24 do on your behalf under this agreement?
- 25 **A.** I assumed they're acting as an agent for active and

1 **A.** Of course not.

2 **Q.** And do people still recognize you as a retired player?

3 **A.** Uhm, I believe so. Yesterday I came into the courtroom,
4 and a gentleman asked me where was my Super Bowl ring. That
5 was just yesterday.

6 I'm still recognized by people who are interested in
7 the game.

8 **Q.** So you believe that your image as a retired player has
9 value?

10 **A.** Of course.

11 **Q.** And you talked about on Exhibit 40 -- I think you pointed
12 us to the second paragraph.

13 **A.** Yes, the second paragraph in the -- the second paragraph
14 is a group licensing program. And it defines the fact that six
15 or more present or former NFL players are part of this here --
16 this agreement.

17 **Q.** What does that mean to you, that language?

18 **A.** That language means the group -- that if there's any six
19 or more present or -- present or former players' images in
20 conjunction with -- or the products that are sold at retail or
21 used as promotion and premium items, that I was part of that
22 group.

23 **Q.** Did you negotiate this contract with the union?

24 **A.** No.

25 **Q.** Those aren't your words?

1 A. No. No, it's not my words.

2 Q. What -- what did you understand that you were giving to
3 the union of value in exchange for this agreement?

4 A. Uhm, my image. My image as a professional football player
5 was what they were requesting. And that's what I was
6 providing.

7 Q. And what was the significance of this back to you, if any,
8 that this was a group agreement?

9 A. Well, the fact that it was -- what was significant to me
10 was that it meant that any group of six or more individual
11 football players would -- I would benefit. And I was delighted
12 to participate in this particular agreement.

13 Q. Did anyone ever tell you there was a different definition
14 of "group licensing," other than what is up here, the "six or
15 more present or former NFL players"?

16 A. No, no.

17 Q. Did you believe that active players were a part of this
18 agreement?

19 A. Of course. It says "six or more present."

20 "Present" means active to me. Present.

21 Q. Did anyone ever tell you that active players were not a
22 part of the definition of "group licensing" under paragraph 2?

23 A. No.

24 Q. Did you believe you were automatically entitled to receive
25 money just because you signed this contract?

1 fourth paragraph:

2 "If the undersigned players' inclusion in a
3 particular NFL player program will conflict with an
4 individual's exclusive endorsement agreements and the players
5 provides the NFLPA with a timely notice of that conflict," if
6 there was something that conflicts with it, if they were -- I
7 had given my image, and they were probably -- if they used my
8 image for something in reference to alcohol or something that I
9 didn't -- that would be in conflict with my personal, then I
10 would have the opportunity to say that I wouldn't want to
11 participate.

12 **Q.** Did you believe you had the right to revoke this GLA, as
13 well?

14 **A.** That's correct.

15 **Q.** Did you ever complain to the union that they hadn't sent
16 you a check or any reports or accounting on the GLAs?

17 **A.** No.

18 **Q.** Why not?

19 **A.** Uhm, as I -- as I said earlier, I -- when I left football,
20 I left football. I was fortunate and blessed. I was glad to
21 receive the GLAs. And as I received the GLAs, I sent it back.
22 But I didn't -- I didn't have a lot of contact with the -- with
23 the league or to that nature. So I was about doing other
24 things.

25 **Q.** Did anything under the GLA that you're aware of obligate

1 minutes in here, so I will need your tables. But you can leave
2 everything else.

3 **MR. KESSLER:** Okay. Thank you.

4 **MR. KATZ:** Thank you.

5 (Thereupon, this trial was continued until Wednesday,
6 October 29, 2008 at 7:30 o'clock a.m.)

7

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10 **CERTIFICATE OF REPORTER**

11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled matter.

13 DATE: Tuesday, October 28, 2008.

14

15 s/b Katherine Powell Sullivan

16

17

18

19 Katherine Powell Sullivan, CSR #5812, RPR, CRR
20 U.S. Court Reporter

21

22

23

24

25

APPEARANCES CONTINUED:

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REPORTED BY: ***KATHERINE POWELL SULLIVAN, CSR #5812***
OFFICIAL REPORTER - U.S. DISTRICT COURT

1 TRANSCRIPT, 113.

2 MR. KESSLER: LINES 3 TO 7, YOUR HONOR.

3 MS. NAYLOR: NO OBJECTION.

4 THE COURT: GO AHEAD.

5 MR. KESSLER: OKAY.

6 "QUESTION: MR. BEACH, DO YOU BELIEVE YOU
7 HAVE ANY CONTROL OVER DEFENDANTS' LICENSING
8 OPERATIONS?

9 "ANSWER: OH, NO. I DON'T HAVE ANY CONTROL
10 ABOUT THAT."

11 THE WITNESS: THAT'S CORRECT. THAT'S WHAT I SAID.

12 BY MR. KESSLER:

13 Q. I'M SORRY. I MISUNDERSTOOD YOU. THAT'S CORRECT TESTIMONY
14 THAT YOU DON'T HAVE CONTROL?

15 A. THAT'S CORRECT TESTIMONY. BUT WHAT IT DOESN'T DEAL WITH
16 IS I THOUGHT YOU WERE TALKING ABOUT OPERATIONS OF THE -- OF
17 THE -- THE UNION'S EVERYDAY OPERATION: FAX MACHINES, SENDING
18 OUT NOTICES.

19 THAT'S WHY I RESPONDED TO IT THAT WAY. THAT'S WHAT I
20 THOUGHT YOU WERE TALKING ABOUT. I DIDN'T KNOW YOU WAS TALKING
21 ABOUT THE ASPECT OF THE GLA IN TERMS OF HAVING ANY KIND OF
22 IMPACT. I DEFINITELY WOULD HAVE IMPACT ON THE GLA.

23 Q. WELL, SIR, YOU TESTIFIED ON YOUR COUNSEL'S EXAMINATION YOU
24 THOUGHT THERE WERE TWO THINGS YOU HAD -- YOU HAD THE RIGHT TO
25 DO, I BELIEVE. ONE THING YOU SAID IS YOU COULD REVOKE THE GLA,

1 NFLPA WITH A TIMELY NOTICE OF THAT CONFLICT, THE NFLPA AGREES
2 TO EXCLUDE THE PLAYER FROM THAT PARTICULAR PROGRAM."

3 Q. OKAY.

4 A. SO THAT MEANS THAT IF YOU'RE GOING TO -- IF THERE IS
5 SOMETHING THAT I HAD A CONFLICT WITH, I COULD -- I WAS GOING TO
6 BE EXCLUDED FROM IT. AGAIN, I'M CONFUSED.

7 Q. I DON'T WANT TO CONFUSE YOU, SIR. I'LL ASK YOU ABOUT THAT
8 PARAGRAPH.

9 MR. KESSLER: LEAVE THAT PARAGRAPH UP, LAUREN,
10 BECAUSE I WANT TO ASK ABOUT IT.

11 (DOCUMENT DISPLAYED.)

12 BY MR. KESSLER:

13 Q. IT SAYS -- BUT I WANT FIRST WANT TO ASK YOU: THIS
14 PARAGRAPH DOESN'T GIVE YOU THE RIGHT TO REVOKE THE WHOLE
15 AGREEMENT, RIGHT? IT SAYS YOU COULD BE EXCLUDED FROM A
16 PARTICULAR PROGRAM, RIGHT?

17 A. THAT'S CORRECT.

18 Q. OKAY. SO I JUST WANT TO BE CLEAR FOR THE JURY. YOU DON'T
19 THINK THERE'S ANYTHING THAT GIVES YOU THE RIGHT TO REVOKE THE
20 WHOLE AUTHORIZATION?

21 A. NO, NO, NOT THE WHOLE --

22 Q. OKAY. OKAY. NOW, LET'S FOCUS ON THIS.

23 IT SAYS:

24 "IF THE UNDERSIGNED PLAYER'S INCLUSION IN A
25 PARTICULAR NFLPA PROGRAM WILL CONFLICT WITH AN INDIVIDUAL

1 NONE.

2 **A.** I VIEWED THE --

3 **Q.** SIR, I'M NOT ASKING YOU --

4 **THE COURT:** HE'S ENTITLED TO GET A DIRECT ANSWER --

5 **THE WITNESS:** I AM SORRY, SIR.

6 **THE COURT:** -- TO THE QUESTION OF WHETHER OR NOT YOU
7 HAD ANY INDIVIDUAL ENDORSEMENT AGREEMENTS.

8 **THE WITNESS:** NO, I HAD NO INDIVIDUAL ENDORSEMENT
9 AGREEMENT.

10 **BY MR. KESSLER:**

11 **Q.** RIGHT. SO YOU DIDN'T HAVE THEM EXCLUSIVE OR
12 NON-EXCLUSIVE. YOU DIDN'T HAVE ANY, RIGHT?

13 **A.** I DON'T KNOW.

14 **Q.** NO, YOU KNOW WHAT AGREEMENTS YOU HAD INDIVIDUALLY.

15 **A.** RIGHT. I KNOW THAT.

16 **Q.** AND YOU HAD NONE.

17 **A.** I HAD NONE.

18 **Q.** THANK YOU. THAT WAS MY QUESTION, SIR.

19 NOW, FINALLY, SIR, I JUST WANT TO UNDERSTAND YOUR
20 POSITION WITH RESPECT TO EA, OKAY?

21 YOU KNOW IN THE EA GAME, AS WE DISCUSSED, THEY DON'T
22 USE YOUR NAME, AND THEY DON'T USE YOUR PICTURE, AND THEY DON'T
23 USE YOUR NUMBER SINCE 2003, CORRECT? YOU KNOW THAT?

24 **A.** YES.

25 **Q.** OKAY. IS IT YOUR BELIEF THAT THE NFLPA SHOULD HAVE GIVEN

1 AWAY YOUR NAME FOR FREE TO EA?

2 **A.** NO.

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

4 I HAVE NO FURTHER QUESTIONS.

5 **THE COURT:** ALL RIGHT. WILL YOU FINISH THE REDIRECT
6 RIGHT NOW?

7 **MS. NAYLOR:** YOUR HONOR, WE HAVE NO REDIRECT.

8 **THE COURT:** THANK YOU.

9 **MS. NAYLOR:** YOU'RE WELCOME.

10 **THE COURT:** THEN, MAY THE WITNESS BE EXCUSED AND
11 DISCHARGED, NOT SUBJECT TO RECALL?

12 **MS. NAYLOR:** YES.

13 **MR. KESSLER:** NO, YOUR HONOR, NOT SUBJECT TO RECALL.

14 **THE COURT:** ALL RIGHT. MR. BEACH, YOU'RE FREE TO GO.
15 THANK YOU FOR COMING.

16 **THE WITNESS:** THANK YOU.

17 **THE COURT:** OKAY. CAN WE GET STARTED ON OUR NEXT
18 WITNESS BEFORE WE TAKE A BREAK? WE'RE GOING TO TAKE A BREAK IN
19 ABOUT 15 MINUTES.

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

21 **THE COURT:** ALL RIGHT. SO CAN WE ALL GO ANOTHER 15
22 MINUTES?

23 (JURY RESPONDED AFFIRMATIVELY.)

24 **THE COURT:** EXCELLENT. WE WILL START WITH OUR NEXT
25 WITNESS.

1 SMALL EXCEPTION, WE NEVER REALLY HAD ANY ISSUES WITH THEM. AND
2 THEY WERE ABLE TO LICENSE US ENOUGH OF THE RETIRED PLAYERS THAT
3 WE NEEDED TO DO THE FEATURES THAT WE HAD IN OUR GAMES.

4 Q. IS IT TRUE THAT YOU UNDERSTOOD THAT, IN EFFECT, THE NFL
5 PI, PLAYERS INC, WAS ACTING AS A SORT OF AGENT FOR RETIRED
6 PLAYERS IN DEALING WITH YOU?

7 A. YEAH, THEY WERE AN AGENT OR MIDDLEMAN TO -- BETWEEN THE
8 RETIRED PLAYERS AND US TO LICENSE THE RIGHTS OF THOSE RETIRED
9 PLAYERS.

10 Q. IS IT TRUE THAT YOU UNDERSTOOD THAT THEY ACTED AS A SORT
11 OF AGENT TO GET MERCHANDISING OR LICENSING DEALS FOR RETIRED
12 PLAYERS?

13 A. WELL, AT LEAST WITH RESPECT TO US THEY DID. I DON'T KNOW
14 ABOUT OTHER ENTITIES.

15 Q. WITH RESPECT TO YOU THAT'S HOW YOU UNDERSTOOD IT?

16 A. THEY HAD A PROVISION IN THEIR AGREEMENT THAT IF WE WANTED
17 THE RIGHTS TO RETIRED PLAYERS OR UPCOMING PLAYERS, FOR THAT
18 MATTER, WE WOULD WORK THROUGH THEM TO DO THAT.

19 Q. IS IT TRUE, SIR, THAT IN YOUR VIEW, IN FACT, THE NFLPA AND
20 PLAYERS INC NEVER EVEN TRIED TO GET EA TO ADD MORE RETIRED
21 PLAYERS IN A GAME?

22 A. NO.

23 Q. THAT'S NOT TRUE?

24 A. NO.

25 Q. IS IT TRUE, THOUGH, THAT EA SELECTS WHICH PLAYERS IT

1 YOU MADE A PUBLIC COMMENT NOW THAT I'M SURE YOUR HONOR DID NOT
2 INTEND TO EXPRESS ANY VIEW AS TO HOW THIS CASE SHOULD BE
3 DECIDED.

4 **THE COURT:** THAT IS TRUE. THAT IS UP TO THE JURY.

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

6 **THE COURT:** I'VE SAID THAT MANY TIMES, AND I STAND BY
7 THAT. THE JURY IS GOING -- I'M GOING TO GIVE THEM PROPER
8 INSTRUCTIONS OF LAW. BUT WHAT THEY DECIDE IS THEIR BUSINESS.

9 **MR. KESSLER:** THANK YOU.

10 **THE COURT:** ALL RIGHT. SEE YOU TOMORROW.

11 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL THURSDAY,
12 OCTOBER 30, 2008 AT 7:30 O'CLOCK A.M.)

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CERTIFICATE OF REPORTER

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DATE: THURSDAY, OCTOBER 30, 2008.

S/B KATHERINE POWELL SULLIVAN

KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

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

THURSDAY

OCTOBER 30, 2008

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED ON NEXT PAGE)

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REPORTED BY:

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

1 THEMSELVES AND EA OVER THE RETIRED PLAYERS. AND IT DOES RELATE
2 TO THE GLA, BECAUSE THE CHOICE THEY HAD WAS:

3 "DO WE GIVE EA OUR GLA GROUP? OR DO WE INSTEAD
4 GO OFF AND PICK OFF THE MOST VALUABLE RETIRED PLAYERS?"

5 OUR THEORY OF THE CASE IS THEY SHOULD HAVE LICENSED
6 OUR GROUP. AND THEY DIDN'T DO IT, AND THAT'S WHY WE THINK IT'S
7 A BREACH OF FIDUCIARY DUTY.

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

9 LET'S HEAR FROM MR. KESSLER.

10 **MR. KESSLER:** YOUR HONOR, THIS IS SO FAR AFIELD FROM
11 ANYTHING HAVING TO DO WITH THE GLA.

12 **THE COURT:** NO, WAIT A MINUTE. BUT YOU YOURSELF -- I
13 HEARD YOU ASK ALL THESE QUESTIONS OF MR. ALLEN. YOU HAVE LEFT
14 THE IMPRESSION WITH THE JURY THAT YOUR DEFENDANTS ARE OUT THERE
15 LOOKING OUT FOR THE INTERESTS OF THE RETIRED PLAYERS, AND
16 7 MILLION, 30 MILLION, ALL THESE AD HOC DEALS.

17 AND HERE'S ONE INSTANCE WHERE IT CAN BE ARGUED, CAN
18 BE ARGUED, THAT YOU DID NOT HAVE THE BEST INTERESTS OF THE
19 RETIRED PLAYERS, YOU SOLD THEM OUT CHEAP IN ORDER TO KEEP
20 SOMEBODY OUT OF THE MARKET.

21 **MR. KESSLER:** YOUR HONOR, LET ME EXPLAIN TO YOU THE
22 ACTUAL EVIDENCE AND FACTS ABOUT THE HALL OF FAME DEAL, BECAUSE
23 YOU DIDN'T GET AN ACCURATE PICTURE, I'M AFRAID.

24 THE HALL OF FAME LICENSE WAS BETWEEN THE HALL OF FAME
25 ITSELF, AN INSTITUTION, AND EA. IT WAS NOT A PLAYERS INC--EA

1 **"QUESTION:** OKAY. AND WOULD YOUR -- WHAT
2 YOUR TESTIMONY IS, IF YOU HAD AN INDIVIDUAL
3 AGREEMENT THAT CONFLICTED WITH SOMETHING THEY
4 DID, YOU COULD ASK NOT TO BE INCLUDED IN WHAT
5 THEY WERE DOING, RIGHT?

6 **"ANSWER:** YES.

7 **"QUESTION:** BUT YOU NEVER HAD ANY SUCH
8 AGREEMENT, INDIVIDUAL AGREEMENT, CORRECT?

9 **"ANSWER:** CORRECT.

10 "SO APART FROM THAT, DID YOU HAVE ANY ABILITY TO
11 CONTROL PLAYERS INC USE OF YOUR GLA RIGHTS?

12 **"ANSWER:** NO."

13 AND YOU STAND BY THAT TESTIMONY, SIR, DO YOU NOT?

14 **A.** CORRECT.

15 **Q.** OKAY. NOW, MR. ADDERLEY, LET ME SHOW YOU A COPY OF AN
16 EXHIBIT THAT'S IN EVIDENCE, TRIAL EXHIBIT 2056. THE
17 COMPILATION.

18 DO I HAVE THAT HERE? I'M SORRY.

19 **MR. KESSLER:** MAY I APPROACH, YOUR HONOR?

20 **THE COURT:** GO AHEAD.

21 **BY MR. KESSLER:**

22 **Q.** MR. ADDERLEY --

23 **MR. KATZ:** CAN YOU GIVE US A MOMENT? WE DON'T SEEM
24 TO HAVE IT.

25 (DOCUMENT DISPLAYED.)

1 ELSE.

2 **MR. KESSLER:** OKAY. JUST HAVE TWO MORE SUBJECTS.

3 FORGIVE ME, MR. ADDERLEY, MAKING A MESS.

4 **BY MR. KESSLER:**

5 **Q.** MR. ADDERLEY, AT ONE POINT DID YOU ENTER INTO AN AD HOC
6 LICENSE AGREEMENT WITH THE HALL OF FAME?

7 **A.** YES.

8 **Q.** AND THAT WAS A LICENSE TO CREATE A MADDEN HALL OF FAME
9 GAME; IS THAT CORRECT?

10 **A.** I BELIEVE SO.

11 **Q.** AND YOU WERE SOLICITED DIRECTLY BY THE HALL OF FAME FOR
12 THAT; IS THAT CORRECT?

13 **A.** YES.

14 **Q.** OKAY. AND YOU ENTERED INTO A LICENSE WITH THE HALL OF
15 FAME, AND YOU AGREED UPON HOW MUCH MONEY YOU WOULD BE PAID FOR
16 YOUR IMAGE AND NAME, CORRECT?

17 **A.** REPEAT THAT.

18 **Q.** YOU AGREED WITH THE HALL OF FAME HOW MUCH THEY WOULD PAY
19 YOU TO PUT YOU IN THAT GAME?

20 **A.** YES.

21 **Q.** AND YOU WERE SATISFIED WITH HOW MUCH THEY WERE GOING TO
22 PAY YOU TO PUT YOU IN THAT GAME, CORRECT?

23 **A.** NO.

24 **Q.** BUT YOU AGREED TO IT?

25 **A.** I CAN'T TURN DOWN MONEY.

1 Q. OKAY. THAT'S FAIR ENOUGH. OKAY. AND DO YOU RECALL HOW
2 MUCH YOU WERE PAID?

3 A. IT WAS \$8,000. AND IT WAS SEPARATED \$2,000 PER YEAR. SO
4 THEY STILL OWE ME \$2,000. IT'S A 4-YEAR DEAL. AND THEY GAVE
5 US \$2,000 EACH YEAR.

6 Q. OKAY. NOW, FOR THAT -- THAT WAS AN AD HOC AGREEMENT WITH
7 THE HALL OF FAME, CORRECT?

8 A. AS FAR AS I KNOW, YES.

9 Q. RIGHT. IN OTHER WORDS, PLAYERS INC DIDN'T NEGOTIATE THAT
10 \$2,000 WITH YOU, DID THEY? THAT WAS DIRECTLY THE HALL OF FAME?

11 A. YES.

12 Q. AND, IN FACT, THE HALL OF FAME TOLD YOU IN A LETTER THEY
13 SENT YOU THAT THIS WAS GOING TO BE A DEAL NOT JUST TO HELP
14 INDIVIDUAL PLAYERS, BUT THERE WAS GOING TO BE MONEY GIVEN TO
15 THE WHOLE HALL OF FAME IN THAT DEAL. YOU KNEW THAT, RIGHT?

16 MR. KATZ: OBJECT, YOUR HONOR.

17 THE WITNESS: THEY DIDN'T SAY THAT TO ME.

18 MR. KATZ: OBJECT, YOUR HONOR. IF HE WANTS TO SHOW
19 HIM THE BEST EVIDENCE OF THIS LETTER, LET HIM SHOW IT TO HIM.
20 I THINK IT'S PROBABLY SOMETHING HE HAS TO DISCLOSE.

21 THE COURT: WELL, THE -- YOU DON'T HAVE TO ALWAYS USE
22 THE BEST EVIDENCE, QUOTE THE BEST EVIDENCE.

23 YOU CAN BRING IN EVIDENCE IN OTHER WAYS. AND THAT'S
24 WHAT MR. KESSLER IS TRYING TO DO HERE.

25 THE OBJECTION IS OVERRULED.

1 ALL AFTERNOON SO BE SURE YOU CLEAR AWAY THE COUNSEL TABLE.

2 MR. HUMMEL: THANK YOU, YOUR HONOR.

3 MR. KESSLER: THANK YOU, YOUR HONOR.

4 MR. PARCHER: THANK YOU, YOUR HONOR.

5 MR. KATZ: THANK YOU, YOUR HONOR.

6 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL FRIDAY,
7 OCTOBER 21, 2008 AT 7:30 O'CLOCK A.M.)

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CERTIFICATE OF REPORTER

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DATE: TUESDAY, OCTOBER 28, 2008.

S/B KATHERINE POWELL SULLIVAN

KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

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,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	FRIDAY
)	OCTOBER 31, 2008

TRANSCRIPT OF PROCEEDINGS

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REPORTED BY:

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

1 Q. WAS IT AN AD HOC PROGRAM FOR THE HALL OF FAME?

2 A. I BELIEVE IT WAS AN AD HOC PROGRAM FOR THE HALL OF FAME,
3 YES.

4 MR. KESSLER: YOUR HONOR, AT THIS TIME I WOULD LIKE
5 TO READ IN JOINT STIPULATED FACT NO. 13, IF I MAY.

6 THE COURT: READ IT SLOWLY, AND THEN I WILL ASK
7 COUNSEL IF IT'S STIPULATED TO.

8 MR. KESSLER: "NO. 13: PLAINTIFFS DO NOT SEEK TO
9 RECOVER IN THIS CASE ANY MONIES PAID TO SOME GLA CLASS MEMBERS
10 UNDER SEPARATE SO-CALLED 'AD HOC LICENSE AGREEMENTS.'"

11 THE COURT: STIPULATED TO?

12 MR. LECLAIR: STIPULATED, YOUR HONOR.

13 THE COURT: THANK YOU. ALL RIGHT. THAT'S NOW PROVEN
14 IN THE CASE. YOU MUST TAKE THAT AS GIVEN.

15 ALL RIGHT. THANK YOU. GO AHEAD.

16 BY MR. KESSLER:

17 Q. NOW, MR. NAHRA, LET'S TAKE A LOOK AT TRIAL EXHIBIT 56,
18 WHICH IS IN EVIDENCE. AND LET'S GO TO THE FIRST PARAGRAPH,
19 PLEASE.

20 (DOCUMENT DISPLAYED.)

21 "THIS AGREEMENT IS MADE AND ENTERED INTO THIS
22 25TH DAY OF APRIL, 2006, BY AND AMONG ELECTRONIC ARTS INC.,
23 EA."

24 AND THEN, IT'S -- IT'S ANOTHER EA ENTITY, EACV. IS
25 THAT ALSO ANOTHER ELECTRONIC ARTS ENTITY?

1 ACQUIRED THE RIGHTS TO ANY HALL OF FAME PLAYERS WHO THE HALL OF
2 FAME DID NOT ALREADY HAVE THE RIGHTS TO?

3 **A.** I BELIEVE THAT EITHER ONE OF THEM COULD ACQUIRE RIGHTS TO
4 PEOPLE -- ARE YOU TALKING ABOUT NEW INDUCTEES?

5 **Q.** LET ME ASK THIS WAY. LET ME SHOW YOU A COPY OF TRIAL
6 EXHIBIT 2320. IT'S IN FRONT OF YOU.

7 BEFORE WE GET TO THAT, WE NOW FOUND MR. ADDERLEY'S
8 TESTIMONY. AND I'LL READ TO YOU FROM TRANSCRIPT 1584. AND MY
9 QUESTION TO MR. ADDERLEY WAS IN THE CONTEXT OF THIS HALL OF
10 FAME AGREEMENT WAS:

11 "QUESTION: RIGHT. IN OTHER WORDS, PLAYERS
12 INC DIDN'T NEGOTIATE THAT 2,000 WITH YOU, DID
13 THEY? THAT WAS DIRECTLY THE HALL OF FAME?

14 "ANSWER: YES."

15 **MR. LECLAIR:** YOUR HONOR, FOR OPTIMAL COMPLETENESS,
16 CAN I READ 1596, LINE 13 THROUGH 16?

17 **MR. KESSLER:** YOUR HONOR, THAT'S -- I DON'T KNOW WHAT
18 IT SAYS, BUT IT'S FOR COMPLETENESS, IT'S LIKE 12 PAGES LATER IN
19 THE TRANSCRIPT. SO I DON'T THINK IT COULD BE FOR COMPLETENESS.

20 **THE COURT:** YOU CAN DO THAT LATER ON.

21 **MR. LECLAIR:** FINE.

22 **THE COURT:** SO WHAT IS YOUR QUESTION?

23 **BY MR. KESSLER:**

24 **Q.** MY QUESTION IS: DO YOU KNOW, MR. NAHRA, WHETHER
25 MR. ADDERLEY WAS CORRECT THAT IT WAS THE HALL OF FAME WHO WAS

1 CONTACTING THE PLAYERS TO NEGOTIATE HOW MUCH THEY WOULD BE PAID
2 FOR THE HALL OF FAME AGREEMENT AND NOT PLAYERS INC? DO YOU
3 KNOW?

4 A. YES, THAT'S MY UNDERSTANDING.

5 Q. WHO WAS IT, SIR?

6 A. IT WAS THE HALL OF FAME.

7 Q. OKAY. AND TO THE EXTENT THE 400,000 WAS NEGOTIATED
8 BETWEEN THE HALL OF FAME AND EA, AND TO THE EXTENT THAT
9 MR. WALKER WAS INVOLVED IN THE 400,000 NEGOTIATION, WHO DID
10 THAT MONEY GO TO?

11 DID IT GO TO THE PLAYERS, OR WAS THAT THE AMOUNT THAT
12 WENT TO THE HALL OF FAME? WHICH WAS IT?

13 A. IT'S THE AMOUNT THAT EA AGREED TO PAY TO THE HALL OF FAME.

14 Q. AND WAS THE HALL OF FAME FREE TO PAY WHATEVER THEY WANTED
15 TO TO THE PLAYERS?

16 A. AS FAR AS I KNOW.

17 Q. NOW, TAKE A LOOK AT TRIAL EXHIBIT 2320. ARE YOU FAMILIAR
18 WITH THIS AS TO WHAT THIS WAS?

19 A. I'M FAMILIAR WITH IT.

20 Q. OKAY. TELL THE JURY WHAT THIS WAS, AND THEN -- WHAT THIS
21 WAS. THANK YOU.

22 A. THIS IS A LETTER FROM THE HALL OF FAME. I'M ACTUALLY NOT
23 SURE WHO MRS. HUNT IS. BUT IT'S A LETTER FROM THE HALL OF FAME
24 SORT OF ANNOUNCING THE DEAL THAT THE PRO FOOTBALL HALL OF FAME
25 WANTS TO ENTER INTO WITH EA FOR THE MADDEN NFL VIDEO GAME.

1 A. I'M CERTAIN THEY DO.

2 Q. YES? IF TOPPS TRADING CARDS WANTED TO LICENSE A LINE OF
3 RETIRED PLAYER TRADING CARDS, SEPARATE AND APART FROM THE
4 PRODUCTS THAT THEY LICENSED FROM YOU, COULD THEY DO THAT
5 PRODUCT ON THEIR OWN?

6 A. YES.

7 Q. FINALLY, MR. NAHRA, OUT OF THE CLASS MEMBERS IN THIS CASE,
8 DO YOU KNOW WHETHER MORE THAN 17 OF THOSE MEMBERS WERE IN THE
9 EA HALL OF FAME AGREEMENT GAME?

10 A. I'M SORRY. CAN YOU REPEAT THAT QUESTION?

11 Q. DO YOU KNOW THE NUMBER OF CLASS MEMBERS IN THIS CASE WHO
12 SIGNED HALL OF FAME AGREEMENTS WHERE THERE WAS MORE THAN 17?

13 A. UHM, NO. THAT SOUNDS LIKE A PRETTY REASONABLE NUMBER.

14 Q. DO YOU KNOW IT WOULD BE A VERY SMALL NUMBER?

15 A. YEAH.

16 MR. KESSLER: THANK YOU. I HAVE NO FURTHER
17 QUESTIONS, YOUR HONOR.

18 THE COURT: ALL RIGHT. I THINK THIS LAST POINT IS
19 ONE THAT DESERVES TO BE -- OUGHT TO BE A CLEAR-CUT THING.

20 MR. LECLAIR, I WANT A STIPULATION. HOW MANY CLASS
21 MEMBERS WERE IN THE HALL OF FAME DEAL?

22 MR. LECLAIR: I BELIEVE IT'S 17, YOUR HONOR. BUT
23 WE'LL MAKE SURE THAT'S RIGHT AND STIPULATE TO IT.

24 THE COURT: IS THAT YOUR UNDERSTANDING?

25 MR. KESSLER: OUR UNDERSTANDING IS 17 CLASS MEMBERS

1 HAD AN AGREEMENT IN EFFECT WHILE THEY WERE IN THE HALL OF
2 FAME -- WHILE THEY WERE IN THE HALL OF FAME AGREEMENT.

3 THE REASON I SAY THAT, YOUR HONOR, IS SOME CLASS
4 MEMBERS HAD AN AGREEMENT IN EFFECT FOR ONE YEAR OF THE PERIOD,
5 BUT NOT ANOTHER. SO THOSE CLASS MEMBERS WHO HAD A GLA IN
6 EFFECT DURING THE HALL OF FAME GAME WAS 17. THAT'S IT.

7 THE COURT: MR. KESSLER, I'M TRYING TO MAKE THIS
8 SIMPLE FOR THE JURY.

9 MR. KESSLER: 17.

10 (LAUGHTER)

11 THE COURT: 17 IS THE ANSWER.

12 MR. KESSLER: YES.

13 THE COURT: THANK YOU. GO AHEAD.

14 REDIRECT EXAMINATION

15 BY MR. LECLAIR:

16 Q. MR. NAHRA, I JUST HAVE A FEW QUESTIONS FOR YOU.

17 MR. KESSLER ASKED YOU ABOUT THIS INTERFERENCE CLAUSE.
18 WHY DID YOU PUT THAT INTERFERENCE CLAUSE IN ALL OF YOUR LICENSE
19 AGREEMENTS?

20 A. UHM, I'M NOT SURE I KNOW ALL THE REASONS, BUT THE REASON
21 THAT COMES UP MOST OFTEN IS THAT AS THE LICENSORS, AS THE
22 COMPANY THAT IS GRANTING RIGHTS TO SOMEONE ELSE TO USE IN THEIR
23 PRODUCT, WE ALWAYS WANT TO BE AWARE OF WHAT PLAYERS IT IS THEY
24 PLAN ON PUTTING INTO THAT PRODUCT.

25 AND SO THROUGH THE NONINTERFERENCE CLAUSE, IF THERE'S

1 ANALYSIS?

2 A. I'VE NOTED THEY HAVE SOLD BILLIONS OF DOLLARS WORTH OF --

3 (SIMULTANEOUS SPEAKING, NOT REPORTABLE.)

4 Q. THAT'S NOT MY --

5 A. WELL, THAT'S --

6 Q. MY QUESTION IS: DID YOU DO ANY TYPE OF ECONOMIC STUDY?

7 YOU KNOW WHAT AN ECONOMIC STUDY IS, SIR?

8 A. YES.

9 Q. YOU'RE FAMILIAR WITH REGRESSION ANALYSIS, RIGHT?

10 A. THAT'S NOT THE ONLY --

11 Q. OKAY.

12 A. -- KIND OF ANALYSIS.

13 Q. OKAY. THERE ARE A LOT OF ECONOMIC STUDIES.

14 A. RIGHT.

15 Q. HAVE YOU DONE ANY ANALYSIS OF THE ECONOMIC DATA IN THIS

16 CASE TO COME TO A CONCLUSION ABOUT ANY KIND OF RELATIONSHIP IN

17 A DATA SENSE BETWEEN SALES OF EA GAMES AND RETIRED PLAYERS, ANY

18 KIND OF DATA ANALYSIS?

19 A. YOU MEAN, LIKE SPECIFIC QUANTITATIVE --

20 (SIMULTANEOUS SPEAKING, NOT REPORTABLE.)

21 Q. YES, NO QUANTITATIVE --

22 A. QUALITATIVE ANALYSIS.

23 Q. OKAY. BUT YOU'VE DONE NO QUANTITATIVE ANALYSIS?

24 A. RIGHT. QUALITATIVE ANALYSIS.

25 Q. BUT YOU'VE DONE NO QUANTITATIVE ANALYSIS? YOU HAVE DONE NO

1 ANALYSIS INVOLVING NUMBERS. THAT'S QUANTITATIVE, RIGHT?

2 A. RIGHT.

3 Q. SO NO NUMBER ANALYSIS. LET'S TRY TO MAKE IT SIMPLE.

4 NOW, SIR, IT'S ALSO TRUE, IS IT NOT, THAT YOU AGREE
5 THAT ALL THE RETIRED PLAYERS WHO ARE IN THIS CLASS WOULD NOT
6 CONTRIBUTE EQUALLY TO THE VALUE OF A LICENSING BUSINESS OR ANY
7 TYPE OF SPORTS BUSINESS. THEY WOULD ALL HAVE DIFFERENT VALUES,
8 RIGHT?

9 A. I MEAN, YEAH. INDIVIDUAL PLAYERS WOULD HAVE DIFFERENT
10 VALUES. IT'S INTERESTING IN THE EA GAME THAT IF THEY HAVE ALL
11 THE PLAYERS ON THE TEAM, THEN IN A SENSE IT'S -- IF YOU WANT TO
12 PLAY THE GAME YOU HAVE GOT TO HAVE A TACKLE AND A GUARD AND A
13 CENTER, AND SO FORTH.

14 SO IN THAT SENSE THEY'RE ALL CONTRIBUTING THE SAME
15 VALUE. NOW, IN EA THEY HAVE THE HALL OF FAME THAT ARE
16 HIGHLIGHTED, AND SO FORTH. AND THEN, THEY'VE GOT THE
17 JOURNEYMEN PLAYERS WHO AREN'T HIGHLIGHTED.

18 Q. OKAY.

19 A. BUT --

20 Q. SIR, YOU UNDERSTAND, DO YOU NOT, THAT IF YOU HAVE STAR
21 QUARTERBACKS, FOR EXAMPLE, THEIR ECONOMIC LICENSING RIGHTS ARE
22 GOING TO BE WORTH A LOT MORE THAN A JOURNEYMAN PLAYER WHO
23 BARELY PLAYED?

24 YES OR NO?

25 A. THEY SELL --

1 **MR. KESSLER:** WHAT I WOULD ASK YOUR HONOR, IF
2 POSSIBLE, AS I SAID WE THINK 90 MINUTES IS ADEQUATE. BUT IF
3 YOU COULD LET US KNOW BY TUESDAY MORNING, BECAUSE OBVIOUSLY
4 WE'RE GOING TO BE PREPARING OUR CLOSING EVEN AS WE'RE STILL
5 DOING THE CASE. AND SO IF WE HAVE SOME GUIDANCE AS TO THE TIME
6 IT WILL HELP US FOCUS THAT.

7 **THE COURT:** I KNOW YOU DO. AND I KNOW YOU NEED IT.
8 BUT IT'S TOO SOON.

9 **MR. KESSLER:** I UNDERSTAND.

10 **THE COURT:** IT'S TOO SOON TO SETTLE ON A TIME LIMIT.

11 **MR. PARCHER:** AND IF I GET THE TIME I'LL START OFF
12 THE SUBMISSION BY SAYING "GLA, GLA." I'LL SAY IT TWICE

13 **THE COURT:** OKAY. HEARING NOTHING MORE WE'RE GOING
14 TO ADJOURN. AND SEE YOU AT 7:30 ON MONDAY MORNING.

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

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

17 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL MONDAY, NOVEMBER 3,
18 2008 AT 7:30 O'CLOCK A.M.)

19 **CERTIFICATE OF REPORTER**

20 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
21 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

22 DATE: FRIDAY, OCTOBER 31, 2008

23 S/B KATHERINE POWELL SULLIVAN

24 _____
25 KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

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,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	MONDAY
)	NOVEMBER 3, 2008

TRANSCRIPT OF PROCEEDINGS

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1 RETIRED PLAYERS IN THAT GIVEN YEAR TO COME UP WITH WHAT THE
2 RETIRED PLAYERS ARE OWED FOR THE GIVEN YEAR.

3 Q. SO YOU'VE NOW DESCRIBED THE CALCULATION THAT YOU MADE, THE
4 METHODOLOGY. CAN YOU NOW TELL THE LADIES AND GENTLEMEN OF THE
5 JURY WHAT THE RESULTS OF YOUR METHOD --- OF THE APPLICATION OF
6 YOUR METHOD WERE?

7 A. YES.

8 Q. WHAT WERE YOUR CONCLUSIONS ABOUT WHAT AMOUNT WOULD BE DUE
9 TO THE CLASS?

10 A. WELL, COUNSEL, THERE WERE -- THERE'S A VARIETY OF MODELS
11 AND DATA POINTS.

12 Q. WHY DON'T YOU ASSUME FIRST THAT THE JURY FINDS THAT THE 63
13 TO 69 PERCENT ALLOCATION THAT THE NFLPA AND PI TOOK WAS
14 APPROPRIATE.

15 A. ALL RIGHT. SO WE'LL SET IT UP.

16 Q. WHY DON'T YOU EXPLAIN WHAT THE COLUMNS ARE YOU ARE SETTING
17 UP?

18 A. WHAT I'LL DO IS I'LL GIVE YOU A -- ASSUMING THE PERCENTAGE
19 FOR THE DEDUCTION THAT NFLPA/PI IS MAKING, I WILL GIVE YOU WHAT
20 AMOUNT WOULD BE OWED, AND THEN WHAT THAT AMOUNT WOULD BE,
21 ASSUMING THAT INTEREST SHOULD BE AWARDED.

22 Q. OKAY. SO ASSUME FIRST THAT THERE'S NO CHANGE IN THE
23 DEDUCTION BY THE NFLPA/PI, THAT THE JURY FINDS THAT THAT'S
24 FAIR.

25 A. OKAY. SO IF ON AVERAGE THE 63 TO 69 PERCENT IS ASSUMED TO

1 BE REASONABLE, THE AMOUNT OWED WOULD BE ROUGHLY \$29 MILLION.
2 WITH INTEREST, THAT WOULD BE 32 MILLION.

3 Q. JUST TO BE CLEAR -- WE'RE TRYING TO SAVE SOME TIME -- BUT
4 YOU APPLIED THE METHODOLOGY THAT YOU DESCRIBED ON THE PRIOR
5 PAGE TO ARRIVE AT THOSE NUMBERS, RIGHT?

6 A. YES.

7 Q. NOW, DID YOU MAKE ANY OTHER ASSUMPTIONS ABOUT OTHER
8 DIFFERENT PERCENTAGES RETAINED BY THE NFLPA AND PI?

9 A. YES.

10 Q. AND WHAT WERE THOSE BASED ON?

11 A. I WAS PROVIDED BY DR. RASCHER THREE OTHER POTENTIAL DATA
12 POINTS FOR MORE APPROPRIATE OR REASONABLE ADJUSTMENTS.

13 Q. OKAY. WHY DON'T YOU TELL THE JURY WHAT THOSE WERE.

14 A. THERE WERE THREE. ONE WAS A 40 PERCENT. ONE WAS A
15 25 PERCENT. AND THE LAST IS THAT THE NFLPA/PI SHOULD HAVE ONLY
16 TAKEN OUT A 10 PERCENT DEDUCTION.

17 Q. ALL RIGHT. AND WHAT WERE YOUR CALCULATIONS BASED ON THOSE
18 DIFFERENT ASSUMPTIONS ABOUT HOW MUCH WAS RETAINED BY THE UNION
19 AND PLAYERS, INC?

20 A. THE CORRESPONDING NUMBERS WOULD BE FOR THE 40 PERCENT,
21 49 MILLION BEFORE INTEREST, 54 MILLION WITH INTEREST.

22 FOR THE 25 PERCENT, IT WAS 61 MILLION, AND THEN
23 APPROXIMATELY 68 WITH INTEREST.

24 AND THEN, FOR THE 10 PERCENT, IT WAS 73 MILLION, AND
25 THEN 82 IF YOU INCLUDE THE INTEREST.

1 Q. OKAY. MR. ROWLEY, THE JURY HAS HEARD A LOT ABOUT AN
2 \$8 MILLION REALLOCATION THAT PLAYERS INC AND NFLPA DECIDED TO
3 TAKE IN 2006. DO YOU RECALL THAT?

4 A. AND 2007, YES.

5 Q. AND 2007, OKAY.

6 HOW DOES THAT REALLOCATION FACTOR INTO THOSE NUMBERS
7 YOU CALCULATED? CAN YOU DESCRIBE THAT BRIEFLY?

8 A. YES. OBVIOUSLY, THERE WOULD BE NO ADJUSTMENT FOR THE
9 \$8 MILLION HERE IF YOU ASSUME THAT THE 63 TO 69 WAS APPROPRIATE
10 BECAUSE ESSENTIALLY YOU'RE GETTING TO THE 69 PERCENT BECAUSE
11 THE \$8 MILLION WAS TAKEN OUT.

12 I WOULD ASSUME THAT THE \$8 MILLION IS BEING ADDED
13 BACK IN WHEN YOU'RE LOOKING AT THE 40 TO 25 AND THE 10.

14 Q. OKAY. NOW, THESE NUMBERS, CAN THEY REPRESENT A NUMBER
15 THAT THE JURY MIGHT FIND REASONABLE AS AN AWARD FOR PURPOSES OF
16 BREACH OF FIDUCIARY DUTY, DAMAGES, AND IF SO, HOW?

17 **MR. KESSLER:** YOUR HONOR, I HAVE AN OBJECTION TO THIS
18 BASED ON OUR IN LIMINE MOTION. THIS WITNESS IS HAS DONE
19 ANYTHING IN TERMS OF TALKING ABOUT WHAT WOULD BE APPROPRIATE
20 FOR WHAT SPECIFIC EVENT, YOUR HONOR, I BELIEVE.

21 THAT WAS THE ISSUE AS TO WHETHER HE JUST DID
22 CALCULATIONS OR WHETHER HE'S ACTUALLY DONE ANY TYPE OF ANALYSIS
23 LIMITED TO SPECIFIC EVENTS.

24 **THE COURT:** SPECIFIC WHAT?

25 **MR. KESSLER:** HE JUST ASKED THIS WITNESS TO GIVE AN

1 OPINION AS TO WHETHER DAMAGES WOULD BE APPROPRIATE FOR THE
2 BREACH OF FIDUCIARY DUTY CLAIM, IN PARTICULAR. I DON'T BELIEVE
3 THERE'S ANYTHING IN HIS EXPERT REPORT THAT WOULD SUPPORT SUCH
4 AN OPINION.

5 **THE COURT:** ALL RIGHT. WHERE IS THIS IN THE REPORT?

6 **MR. HUMMEL:** CAN YOU POINT TO HIS HONOR WHERE YOU'VE
7 ADDRESSED FIDUCIARY DUTY DAMAGES IN YOUR REPORT?

8 **MR. KESSLER:** YOUR HONOR, MY ARGUMENT IS NOT THAT IT
9 WASN'T MENTIONED IN THE REPORT.

10 **MR. HUMMEL:** IT IS DISCLOSED.

11 **MR. KESSLER:** MY ARGUMENT IS THAT THERE IS NO DAUBERT
12 BASIS.

13 YOUR HONOR WILL RECALL WE ARGUED THIS PRIOR TO TRIAL,
14 AND YOUR HONOR SAID HE COULD TESTIFY WITH RESPECT TO THE
15 CALCULATIONS --

16 **MR. HUMMEL:** THIS IS A SPEAKING OBJECTION, YOUR
17 HONOR.

18 **MR. KESSLER:** -- BUT NOT WITH RESPECT TO CAUSATION OR
19 OPINIONS THAT SOME DAMAGE MEASURE WAS APPROPRIATE, BUT SIMPLY
20 THE CALCULATIONS. I BELIEVE THAT'S HOW YOUR HONOR RULED.

21 **THE COURT:** THAT'S CORRECT, ISN'T IT?

22 **MR. HUMMEL:** IT'S PARTIALLY CORRECT.

23 **THE COURT:** WHAT'S THE INCORRECT PART?

24 **MR. HUMMEL:** THE INCORRECT PART IS, IS THERE ANY
25 DIFFERENCE IN YOUR CALCULATIONS BASED ON WHETHER THE JURY FINDS

1 A BREACH OF CONTRACT AND/OR BREACH OF FIDUCIARY DUTY. THAT IS
2 IN HIS REPORT.

3 **MR. KESSLER:** WHETHER HIS CALCULATIONS ARE DIFFERENT,
4 I DON'T HAVE AN OBJECTION TO. HE ASKED HIM A QUESTION WHETHER
5 HE HAD AN OPINION AS TO WHAT WAS AN APPROPRIATE MEASURE OF
6 DAMAGES. THAT YOUR HONOR HAS RULED OUT.

7 **THE COURT:** WELL, I THINK THIS IS NOT A HARD PROBLEM.
8 LET ME EXPLAIN.

9 THIS WITNESS IS NOT HERE TO TELL YOU WHETHER THERE
10 WAS A BREACH OF FIDUCIARY DUTY. AND HE'S NOT HERE TO TELL YOU
11 WHETHER THERE WAS ANY BREACH OF ANY CONTRACT. HE HAS ALREADY
12 BASICALLY TOLD YOU THAT.

13 HE'S HERE TO CRUNCH NUMBERS AND TO RUN THROUGH SOME
14 OF THE ALTERNATIVE ASSUMPTIONS AND DO THE MATH, AND THEN SHOW
15 YOU HOW HE DID THE MATH SO THAT IT WILL HELP YOU IN THAT KIND
16 OF ANALYSIS.

17 SO I'M GOING TO OVERRULE THE OBJECTION AND ALLOW THE
18 QUESTION. BUT BE MINDFUL THAT THIS JURY [SIC] IS NOT QUALIFIED
19 TO TELL YOU WHETHER THERE WAS ANY BREACH OF FIDUCIARY DUTY.
20 THAT'S FOR YOU TO DECIDE, ANYWAY, NOT FOR THE EXPERT WITNESS TO
21 COME IN HERE TO TELL YOU ABOUT IT.

22 BUT HE IS QUALIFIED TO CRUNCH THE NUMBERS AND TO TELL
23 YOU A METHODOLOGY BY WHICH IF YOU DECIDED THERE WAS A BREACH OF
24 FIDUCIARY DUTY, ONE WAY IN WHICH YOU COULD GO ABOUT MAKING THAT
25 CALCULATION.

1 I THINK THAT'S A FAIR STATEMENT OF THE PROBLEM. SO
2 I'M GOING TO LEAVE IT AT THAT.

3 GO AHEAD WITH YOUR ANSWER.

4 **THE WITNESS:** NO, I DID NOT -- I DID NOT HAVE
5 DIFFERENT CALCULATIONS. THEY ARE THE SAME.

6 **BY MR. HUMMEL:**

7 **Q.** WHY IS THAT?

8 **A.** I WASN'T REALLY ASKED TO BREAK OUT THE TWO. AND IN
9 LAYPERSON'S TERMS IT'S THE AMOUNT OF MONEY THAT WAS OWED AND
10 THE AMOUNT THAT THEY SHOULD HAVE ENSURED WAS PAID. SO IT'S THE
11 SAME CALCULATION.

12 **Q.** OKAY. I THINK, MR. ROWLEY -- WELL, ONE MORE QUESTION.

13 YOU CAN TAKE A SEAT, ACTUALLY.

14 LET ME ASK YOU A QUESTION ABOUT THIS FIRST CHART.
15 IT'S STUCK TO MR. PARCHER'S CHART.

16 DOES YOUR DAMAGE ANALYSIS, IF THE JURY WERE TO FIND
17 BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, REQUIRE THAT
18 MONIES -- OR DOES IT CONTEMPLATE THAT MONIES COME OUT OF THE
19 POCKETS OF ACTIVE PLAYERS?

20 **A.** NO.

21 **Q.** WHY IS THAT?

22 **A.** FIRST OF ALL, MY UNDERSTANDING IS THE SUIT IS AGAINST
23 NFLPA/PI. AND IF YOU LOOK TO THE DEDUCTIONS THAT ARE MADE,
24 THERE SHOULD BE MONIES AVAILABLE FROM NFLPA/PI TO PAY THIS.

25 **Q.** ALL RIGHT. ONE FINAL QUESTION FOR YOU, SIR.

1 **MR. HUMMEL:** FAIR ENOUGH.

2 YOUR HONOR, THAT'S ENOUGH. NO FURTHER QUESTIONS.

3 **THE COURT:** THANK YOU. THANK YOU, MR. HUMMEL.

4 ALL RIGHT. THERE WE GO.

5 CROSS EXAMINATION.

6 **CROSS EXAMINATION**

7 **BY MR. KESSLER:**

8 **Q.** JUST TAKE ME A MINUTE TO GET SET UP.

9 **A.** NO PROBLEM, MR. KESSLER. TAKE YOUR TIME.

10 **Q.** GOOD MORNING, MR. ROWLEY.

11 **A.** GOOD MORNING.

12 **MR. KESSLER:** GOOD MORNING, LADIES AND GENTLEMEN OF

13 THE JURY.

14 **BY MR. KESSLER:**

15 **Q.** MR. ROWLEY, LET'S FIRST IDENTIFY FOR THE JURY WHAT YOU DID
16 NOT DO, IF WE CAN, OKAY.

17 FIRST OF ALL, MR. ROWLEY, YOU DID NOT CALCULATE ANY
18 DAMAGES IN THIS CASE RESULTING FROM ANY AD HOC LICENSE
19 AGREEMENTS, CORRECT?

20 **A.** THAT'S CORRECT.

21 **Q.** OKAY. AND SO, FOR EXAMPLE, THE JURY HAS HEARD ABOUT A
22 HALL OF FAME AGREEMENT INVOLVING EA AND AD HOC LICENSE. YOU
23 DIDN'T CALCULATE ANY DAMAGES REGARDING THAT, CORRECT?

24 **MR. HUMMEL:** OBJECT, YOUR HONOR. I THINK WHAT MR. --
25 THE POINT OF MR. KESSLER'S ARGUMENT IS IN HIS OBJECTIONS WAS HE

1 DIDN'T CALCULATE DAMAGES AT ALL. HE PROVIDE A METHODOLOGY AND
2 ANALYSIS. IF MR. KESSLER WANTS TO ASK ABOUT DAMAGES, I'M HAPPY
3 TO DO THAT ON REDIRECT, BUT IT'S A WORD OF CAUTION.

4 **THE COURT:** WELL, BE AWARE THAT HE MAY OPEN THE DOOR.
5 ON REDIRECT HE IS NOT LIMITED TO WHAT'S IN THE REPORT. HE CAN
6 GO BEYOND WHAT'S IN THE REPORT, IF YOU OPEN THE DOOR.

7 **MR. KESSLER:** OKAY. I'LL ASK THIS QUESTION.

8 **BY MR. KESSLER:**

9 **Q.** SO, IN OTHER WORDS -- I JUST WANT TO UNDERSTAND WHAT
10 COUNSEL SAID. YOU DIDN'T CALCULATE ANY DAMAGES MEASUREMENTS AT
11 ALL IN THIS CASE; IS THAT CORRECT?

12 **A.** WHAT I WAS ASKED TO DO WAS TO GO THROUGH AND REVIEW THE
13 ENTIRE POOL AND THE PROCESS AND WHAT WOULD HAVE BEEN PAID TO
14 THE RETIRED PLAYERS IF THEY HAD PARTICIPATED.

15 **Q.** I'M GOING TO YOU ASK, MR. ROWLEY -- AND I THINK THE COURT
16 WILL DIRECT YOU -- IF YOU CAN ANSWER "YES" OR "NO," PLEASE TRY
17 TO ANSWER "YES" OR "NO."

18 I'M GOING TO ASK THE QUESTION AGAIN.

19 YOU DID NOT CALCULATE ANY DAMAGES MEASURE IN THIS
20 CASE; IS THAT CORRECT?

21 **MR. HUMMEL:** I OBJECT, YOUR HONOR. THAT'S A TOTALLY
22 UNFAIR QUESTION, GIVEN THE COURT'S RULING ON THE MOTION IN
23 LIMINE. I STAYED FAR CLEAR OF THAT.

24 IT'S INCORRECT. HE KNOWS IT. AND HE'S ASKING A
25 QUESTION BASED ON THE MOTION IN LIMINE. THAT'S COMPLETELY

1 UNFAIR.

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

3 **MR. KESSLER:** YOUR HONOR, I FIRST ASKED HIM WHAT HE
4 DID. HE TOLD ME -- HE ARGUED, WELL, HE HASN'T CALCULATED
5 DAMAGES. I JUST WANT TO ESTABLISH FOR THE JURY THAT IN
6 EVIDENCE HE HASN'T CALCULATED DAMAGES. IT'S EITHER ONE OR THE
7 OTHER.

8 **THE COURT:** ALL RIGHT. I'M GOING TO ALLOW THE
9 QUESTION. BUT ON REDIRECT YOU NEED SOME LEEWAY TO MEET THIS
10 CONTENTION.

11 ALL RIGHT. GO AHEAD.

12 **BY MR. KESSLER:**

13 **Q.** SO YOU HAVE NOT CALCULATED ANY DAMAGES MEASURE IN THIS
14 CASE, CORRECT?

15 **A.** COUNSEL, I WAS ADVISED --

16 **Q.** CAN YOU SAY "YES" OR "NO"?

17 **THE COURT:** WAIT. YOU SAID "DAMAGES MEASURE." IS
18 THAT YOUR QUESTION?

19 **BY MR. KESSLER:**

20 **Q.** HAVE YOU CALCULATED ANY DAMAGES IN THIS CASE?

21 **A.** I HAVE NOT CALCULATED DAMAGES.

22 **Q.** CORRECT. NOW, YOU'VE TESTIFIED IN OTHER CASES IN WHICH
23 YOU HAVE CALCULATED DAMAGES, CORRECT?

24 **MR. HUMMEL:** I OBJECT, YOUR HONOR. AGAIN, THIS IS
25 BASED ON THE MOTION IN LIMINE. IT'S AN UNFAIR LINE. I'LL

1 CLEAN IT UP, BUT I WANT TO BE VERY CLEAR ON WHAT WE'RE DOING.

2 **THE COURT:** OVERRULED. OVERRULED.

3 GO AHEAD.

4 **THE WITNESS:** I HAVE BEEN ASKED IN OTHER MATTERS TO
5 OPINE ON DAMAGES.

6 **BY MR. KESSLER:**

7 **Q.** IN FACT, TYPICALLY, WHEN YOU COME IN AS A DAMAGES EXPERT
8 YOU DO A STUDY OF WHAT'S CALLED THE "BUT-FOR WORLD," CORRECT?

9 YOU KNOW WHAT THE "BUT-FOR WORLD" IS IN DAMAGES?

10 **A.** GENERALLY SPEAKING, YES.

11 **Q.** YES. AND THE BUT-FOR WORLD IS YOU TRY IN -- AS A DAMAGES
12 EXPERT IN THE CASE, IF THERE'S A BREACH OF CONTRACT ALLEGED OR
13 A BREACH OF FIDUCIARY DUTY ALLEGED, TO DETERMINE WHAT WOULD THE
14 WORLD LOOK LIKE IF THOSE BREACHES DIDN'T OCCUR. THAT'S WHAT
15 YOU WOULD DO IN A BUT-FOR DAMAGES ANALYSIS, CORRECT?

16 **A.** YOU CERTAINLY COULD.

17 **Q.** AND YOU WERE NOT ASKED TO DO THAT IN THIS CASE, CORRECT?

18 **A.** WELL, I WOULD DISAGREE WITH THAT.

19 **Q.** OKAY. WELL, LET'S GO WITH WHAT YOU WERE ASKED TO DO. LET
20 ME GO BACK. BEFORE I GET THERE, I WANT TO GO TO MY OTHER
21 QUESTIONS.

22 YOU DIDN'T CALCULATE ANY MEASURE OF DAMAGES
23 SEPARATELY FOR ANY AD HOC AGREEMENT LIKE THE HALL OF FAME
24 AGREEMENT, CORRECT?

25 **A.** THAT'S CORRECT.

1 **BY MR. KESSLER:**

2 **Q.** SO YOU WOULD AGREE, SIR, THAT IF THIS JURY FINDS THAT
3 THERE'S NO CONTRACTUAL ENTITLEMENT OF THE PLAINTIFF CLASS TO
4 THE REVENUES IN THE GLR POOL, OR NO OTHER LEGAL ENTITLEMENT TO
5 AN EQUAL SHARE OF THE REVENUES IN THE GLR POOL, YOUR MEASURE,
6 OKAY, WOULD NOT BE APPLICABLE, CORRECT?

7 **A.** I WAS ASKED TO ASSUME LIABILITY, SO, YES, THAT WOULD BE
8 CORRECT.

9 **Q.** NO, BUT YOU WEREN'T ASKED TO ASSUME JUST LIABILITY, IN
10 GENERAL. YOU WERE ASKED TO ASSUME A SPECIFIC LIABILITY IN
11 WHICH THE JURY WOULD FIND NOT JUST SOME CONTRACTUAL BREACH OR
12 NOT JUST SOME BREACH OF DUTY, BUT A SPECIFIC ENTITLEMENT TO AN
13 EQUAL SHARE OF THE GLR POOL; ISN'T THAT CORRECT?

14 **A.** NO, I THINK THAT OVERSTATES WHAT I WAS ASKED TO ASSUME IN
15 LIABILITY, SIR.

16 **Q.** LET ME ASK YOU A QUESTION, THEN.

17 LET'S SAY THIS JURY WERE TO FIND, OKAY, THAT JUST
18 SPECIFIC -- THAT -- THAT THERE WAS A BREACH BECAUSE PLAYERS INC
19 SHOULD HAVE DONE MORE TO MARKET RETIRED PLAYERS, CORRECT?
20 ASSUME THAT WITH ME, ALL RIGHT?

21 **A.** OKAY.

22 **Q.** BUT THEY DON'T FIND THAT THAT HAS ANYTHING TO DO WITH AN
23 ENTITLEMENT TO ANY SHARE OF THE GLR POOL. ARE YOU WITH ME ON
24 THOSE ASSUMPTIONS?

25 **A.** YES.

1 Q. IN THAT CASE, YOU'RE NOT OFFERING ANY MEASURE OF DAMAGES,
2 CORRECT?

3 A. I THINK THAT'S CORRECT.

4 Q. YES. IN OTHER WORDS, YOU'RE ONLY OFFERING THE MEASURE OF
5 DAMAGES IF THE JURY FINDS THAT THE GLR POOL IS SOMETHING THAT
6 THESE PLAINTIFFS HAVE AN ENTITLEMENT TO, CORRECT?

7 A. COUNSEL, THAT'S DIFFERENT THAN WHAT YOU ASKED.

8 Q. OKAY.

9 A. YOU --

10 Q. YES OR NO? YOU WANT TO SAY NO? SAY NO.

11 A. NO.

12 MR. KESSLER: IF I MAY, YOUR HONOR, I WANT TO WORK
13 WITH THE CHARTS. I'M GOING TO WORK WITH ONE OF THE SHEETS.

14 BY MR. KESSLER:

15 Q. NOW, MR. ROWLEY, I'M GOING TO TURN IT THIS WAY SO THAT YOU
16 CAN SEE IT AND THE JURY CAN SEE IT.

17 THE COURT: CAN EVERYONE ON THE JURY SEE THAT CHART
18 OKAY?

19 BY MR. KESSLER:

20 Q. NOW, MR. ROWLEY, YOU -- ALL OF YOUR CALCULATIONS ARE BASED
21 ON THE PLAINTIFFS RECEIVING AN EQUAL SHARE OF THIS GLR POOL,
22 CORRECT?

23 A. CORRECT. CORRECT.

24 Q. OKAY. AND THIS GLR POOL, OKAY, CONTAINS ONLY -- THIS
25 CONTAINS ONLY ACTIVE PLAYER MONEY, CORRECT?

1 YOU KNOW, SIR, OKAY, THAT NFL LICENSING PROGRAMS FOR THE 2004
2 SEASON ARE ALL ALREADY IN PLACE BY DECEMBER OF 2004, WHEN THE
3 SEASON IS ENDING? DO YOU KNOW THAT ONE WAY OR THE OTHER?

4 A. NO, I DON'T. I DON'T KNOW THAT.

5 Q. OKAY.

6 A. AND THERE CERTAINLY CAN BE SALES WHEN WE SEE ROYALTY
7 PAYMENTS BY LICENSEES THROUGHOUT THE YEAR.

8 Q. RIGHT. BUT IF YOU HAVE -- IF YOU PUBLISH TRADING CARDS,
9 RIGHT, FOR THE NFL, RIGHT, IF THE TRADING CARDS ARE ALREADY
10 MANUFACTURED AND BEING DISTRIBUTED BY DECEMBER OF 2004, THERE'S
11 NEVER BEEN A CASE, HAS THERE, IN HISTORY WHEN A TRADING CARD
12 COMPANY FOR THE NFL HAS SAID:

13 "OH, IN JANUARY LET'S ADD IN SOMEBODY ELSE FOR
14 THE LAST SEASON."

15 HAS THAT EVER HAPPENED, SIR, IN HISTORY?

16 A. I'M NOT AN EXPERT ON TRADING CARDS.

17 Q. YOU DON'T KNOW. THAT'S NEVER HAPPENED, HAS IT?

18 A. I DON'T KNOW.

19 Q. LET ME ASK YOU THIS: LET'S SAY THE JURY WERE TO FIND THAT
20 THERE WAS NO BREACH OF CONTRACT, OKAY, AND THERE WAS A BREACH
21 OF FIDUCIARY DUTY FOR NOT MARKETING, NOT SUFFICIENTLY MARKETING
22 THE RETIRED PLAYERS WHO SIGNED THE GLA'S, OKAY? HAVE YOU DONE
23 ANY ANALYSIS OF SPECIFICALLY HOW MUCH THE RETIRED PLAYERS WOULD
24 HAVE EARNED FOR THEIR RIGHTS IF THEY HAD BEEN MORE AGGRESSIVELY
25 MARKETED, JUST ON THAT CLAIM SEPARATELY?

1 A. NO.

2 Q. NO. IN FACT, YOU OFFERED THE SAME MEASURE CALCULATIONS OF
3 DAMAGES NO MATTER WHAT THE JURY FINDS. WHETHER IT'S -- WHETHER
4 IT'S RELATED TO MARKETING, WHETHER IT'S RELATED TO BREACH OF
5 FIDUCIARY DUTY, WHETHER IT'S RELATED TO CONTRACT, ALL YOUR
6 CALCULATIONS ARE THE SAME. IT DOESN'T DISTINGUISH BETWEEN
7 THEM, DO THEY?

8 A. THEY WOULD HAVE BEEN ENTITLED TO THAT ONE POOL AT A
9 MINIMUM.

10 Q. RIGHT. IN OTHER WORDS, YOUR WHOLE PREMISE FOR EVERY ONE
11 OF YOUR CALCULATIONS IS THAT THE JURY WILL FIND THAT THE
12 RETIRED PLAYERS BY SIGNING A RETIRED PLAYER GLA WERE ENTITLED
13 TO AN EQUAL SHARE OF THE GLR POOL? ALL YOUR CALCULATIONS ARE
14 PREMISED ON THAT, RIGHT?

15 A. YES.

16 Q. AND IF THE JURY DOESN'T FIND THAT THEN, YOUR CALCULATIONS
17 WOULD NOT APPLY, RIGHT?

18 A. DOESN'T FIND WHAT, COUNSEL?

19 Q. DOESN'T FIND THAT THE RETIRED PLAYERS ARE ENTITLED TO AN
20 EQUAL SHARE OF THE GLR POOL. IF THE JURY REJECTS THAT, THEY
21 CANNOT USE YOUR CALCULATIONS, CORRECT?

22 A. IF THEY REJECT IT THEY'RE NOT ENTITLED TO GROUP LICENSING
23 PROGRAM. THOSE ARE THE REVENUES THAT I'VE LOOKED AT AND
24 PROVIDED THE CALCULATIONS.

25 Q. RIGHT. NOW, SIR, YOU ALSO HAVEN'T EXAMINED THAT, LET'S

1 Q. SUCH A SIMPLE QUESTION.

2 A. -- WHAT --

3 Q. IT'S SUCH A SIMPLE QUESTION. REALLY, I WILL ASK YOU VERY
4 NICELY, OKAY, AND BE VERY CLEAR.

5 IF THE JURY FINDS, THE JURY FINDS --

6 A. YES.

7 Q. -- THAT RETIRED PLAYERS ARE NOT ENTITLED TO ANY LICENSING
8 REVENUES THAT WERE GENERATED SOLELY BY ACTIVE PLAYER LICENSING,
9 OKAY? IF THE JURY FINDS THAT, AND THEY ALSO FIND THAT THE GLR
10 POOL WAS ONLY ACTIVE PLAYER LICENSING MONEY, IN THOSE TWO
11 ASSUMPTIONS DO YOU AGREE WITH ME THAT YOUR CALCULATIONS,
12 THEREFORE, SHOW NO DAMAGES, IF THAT'S WHAT THEY FIND?

13 A. LIABILITY WOULD NOT HAVE BEEN ESTABLISHED, WHICH WAS ONE
14 OF MY ASSUMPTIONS.

15 Q. RIGHT. YOUR ASSUMPTION IS THE ONLY LIABILITY THAT WOULD
16 BE FOUND HERE WOULD BE ONE IN WHICH THE JURY CONCLUDED THAT
17 RETIRED PLAYERS WERE ENTITLED TO ACTIVE PLAYER LICENSING MONEY.

18 THAT'S YOUR ASSUMPTION OF YOUR TESTIMONY, CORRECT?

19 A. NO. THEY ARE ENTITLED TO GROUP LICENSING REVENUES.

20 Q. BUT YOU'RE ASSUMING -- I DON'T WANT TO CONFUSE THE JURY.

21 YOU'RE ASSUMING THE JURY WOULD FIND THAT GROUP
22 LICENSING REVENUES TO WHICH THE RETIRED PLAYERS WOULD RECEIVE
23 MONEY INCLUDED ACTIVE PLAYER LICENSING. THAT IS WHAT YOU'RE
24 ASSUMING, RIGHT?

25 A. IT COULD, YES.

1 Q. AND IF THEY REJECT THAT ASSUMPTION THEN THEY SHOULD FIND
2 NO DAMAGES UNDER YOUR MODEL, CORRECT? YES OR NO?

3 IF THEY REJECT THAT ASSUMPTION? PLEASE. I KNOW IT'S
4 A YES OR NO.

5 A. I HAVEN'T SEGREGATED OUT, BECAUSE I COULDN'T, RETIRED
6 VERSUS ACTIVE PLAYER REVENUES. SO IF THAT WAS THEN ANOTHER
7 ASSUMPTION OR NUANCE, YOU WOULD HAVE TO GO BACK AND LOOK AT THE
8 NUMBERS.

9 AT THIS POINT WE COULDN'T SIMPLY APPLY WHAT I'VE
10 DONE, BECAUSE IT'S ALL GROUP LICENSING REVENUES.

11 Q. YOU'VE GIVEN THE JURY NO BASIS TO CALCULATE ANY DAMAGES IF
12 THEY FIND THAT RETIRED PLAYERS ARE NOT ENTITLED TO ACTIVE
13 PLAYER LICENSING MONEY AND ALL THE MONEY IN THE GLR POOL IS
14 ACTIVE PLAYER LICENSING MONEY, CORRECT?

15 A. IF THOSE TWO ASSUMPTIONS ARE TRUE, THEN, YES.

16 MR. KESSLER: YOUR HONOR, I MAY BE FINISHED. JUST
17 LOOKING THROUGH MY NOTES.

18 I THINK I'M GOING TO QUIT WHILE I'M AHEAD. THANK
19 YOU, YOUR HONOR.

20 THE COURT: ALL RIGHT.

21 ANY REDIRECT?

22 MR. HUMMEL: YES, YOUR HONOR.

23 REDIRECT EXAMINATION

24 BY MR. HUMMEL:

25 Q. ALL RIGHT, MR. ROWLEY. LET'S TRY TO SEPARATE BACK OUT

1 **MR. KATZ:** OBJECT. LEADING.

2 **THE COURT:** IT'S PRELIMINARY. OVERRULED.

3 PLEASE ANSWER.

4 **THE WITNESS:** YES, IT WAS. IT WAS DISCUSSED --

5 **THE COURT:** BEFORE YOU SAY -- NEXT QUESTION. THAT

6 WAS THE PRELIMINARY QUESTION. WHAT'S THE NEXT QUESTION?

7 **BY MR. GREENSPAN:**

8 **Q.** WHO DISCUSSED THE RETIRED PLAYER GLA?

9 **A.** I HEARD THE GLA FROM DOUG, FROM GENE AND FROM FRANK.

10 **Q.** WHO IS DOUG?

11 **A.** DOUG ALLEN WAS THE SECOND-IN-CHARGE FOR MANY -- I DON'T

12 KNOW, 25 YEARS TO GENE. GENE UPSHAW WAS THE EXECUTIVE

13 DIRECTOR. I WOULD SAY DOUG ALLEN WAS THE ASSISTANT EXECUTIVE

14 DIRECTOR. AND THEN, THERE WAS FRANK, THE HEAD OF THE RETIRED

15 PLAYERS PART OF THE DEAL.

16 **Q.** ON HOW MANY DIFFERENT OCCASIONS, AS BEST YOU CAN RECALL,

17 WAS THE RETIRED PLAYER GLA DISCUSSED AT THESE CONVENTIONS?

18 **A.** EVERY CONVENTION THAT I CAN REMEMBER SINCE I THINK WE

19 STARTED THE GLA -- I WAS PRIVY TO INFORMATION PRIOR TO THE GLA

20 THAT THEY WERE FORMING SOMETHING LIKE THE GLA, GROUP LICENSING,

21 TO TRY TO HELP RETIRED PLAYERS.

22 AND THEN, EVERY YEAR WE SIGNED IT, AND IT CAME

23 THROUGH THE MAIL. THERE WAS THE TOUCHBACK, WHICH IS A

24 NEWSLETTER THAT COMES TO US AS UNION-PAYING MEMBERS.

25 I REMEMBER READING ABOUT THAT. I REMEMBER THE

1 POWERPOINT PRESENTATIONS, DISCUSSING IT WITH FRANK
2 INDIVIDUALLY, AND WITH THE GROUP, DISCUSSING IT WITH THE GUYS
3 AT THE CONVENTION, LISTENING TO DOUG TIME AND TIME AND TIME
4 AGAIN.

5 GENE, NOT SO OFTEN. BUT, GENE, YES, ALSO DISCUSSED
6 THE GLA WITH ALL OF US AT THE CONVENTION.

7 **Q.** MR. GOICH, DO YOU RECALL WHAT INFORMATION ABOUT THE
8 RETIRED PLAYER GLA WAS PROVIDED?

9 **A.** THE -- IT WENT THROUGH THIS.

10 **Q.** IT WENT THROUGH THE FORM?

11 **A.** YEAH.

12 **Q.** DID --

13 **A.** I'M NOT SO SURE IT -- I THINK IT WAS PART OF THE
14 POWERPOINT PRESENTATION.

15 **Q.** WAS THE SUCCESS OR LACK OF SUCCESS OF THE RETIRED PLAYER
16 GLA EVER DISCUSSED?

17 **A.** YEAH.

18 **Q.** AND WHAT WAS TOLD TO YOU?

19 **A.** THE MARKETABILITY OF RETIRED PLAYERS, FRANKLY, FROM THE
20 LICENSEES' PERSPECTIVE WASN'T THERE.

21 I ALWAYS FELT IT WAS -- AGAIN, I'LL SAY IT -- A HOPE,
22 A WING AND A PRAYER. I SAID, "IT'S NOT GOING TO WORK" WHEN
23 FRANK AND I WOULD TALK ONE-ON-ONE.

24 I SAID, "WHAT YOU'RE TRYING TO DO IS LICENSE A DEAD
25 HORSE."

1 **MR. LECLAIR:** YOUR HONOR?

2 **THE WITNESS:** TO RETIRED PLAYERS.

3 **MR. LECLAIR:** I OBJECT, BECAUSE I DON'T KNOW THE TIME
4 FRAME. IF WE'RE TALKING ABOUT '94, WHICH IS WAY, WAY, WAY
5 BACK, OR IF WE'RE TALKING ABOUT DURING THE RELEVANT TIME OF THE
6 CLASS PERIOD, WHEN THE WITNESS, I DON'T THINK, WAS EVEN ON THE
7 BOARD.

8 SO I THINK I OBJECT TO IT FOR LACK OF FOUNDATION.

9 **THE COURT:** IN YOUR ANSWER PLEASE TELL US WHAT TIME
10 PERIOD YOU'RE TALKING ABOUT.

11 **BY MR. KESSLER:**

12 **Q.** I'M ASKING THE ENTIRE TIME PERIOD YOU WERE ON THE BOARD,
13 SO GO FROM '91 UP THROUGH 2003.

14 **A.** RIGHT.

15 **Q.** OKAY?

16 **A.** YES.

17 **Q.** WHERE DID RETIRED PLAYER LICENSING MONEY GO?

18 **A.** TO RETIRED PLAYERS.

19 **Q.** OKAY. WELL, WAS ANY OF THE RETIRED PLAYER LICENSING GIVEN
20 TO RUN THE UNION?

21 **A.** NO.

22 **Q.** WHY NOT?

23 **A.** WELL, ACTIVE PLAYERS FELT LIKE THAT IT WAS THEIR
24 RESPONSIBILITY TO FUND THE UNION WITH THE PORTION FROM THE
25 PROCEEDS. AND WE FELT LIKE ANYTHING THAT A RETIRED PLAYER

1 EARNED IN THIS AREA SHOULD BE THEIRS.

2 Q. NOW, WAS ONE OF THE DEPARTMENTS IN THE UNION THE RETIRED
3 PLAYERS DEPARTMENT?

4 A. YES.

5 Q. AND WAS THAT A DEPARTMENT TO HELP RETIRED PLAYERS?

6 A. YES, IT WAS.

7 Q. NOW, WHOSE LICENSING MONEY, WHEN YOU WERE THERE, WAS USED
8 TO FUND THE -- THE RETIRED PLAYER DEPARTMENT, ACTIVE PLAYER
9 MONEY OR RETIRED PLAYER MONEY?

10 A. ACTIVE PLAYER MONEY.

11 SO ALL THE STAFF AND ALL OF THE ACTIVITIES OF THE
12 RETIRED PLAYERS DEPARTMENT WAS FUNDED BY THE NFLPA. THE FUNDS
13 FROM THOSE CAME FROM -- FOR THOSE ACTIVITIES CAME FROM ACTIVE
14 PLAYERS.

15 Q. NOW, WE DISCUSSED THE 40 PERCENT THAT WAS GIVEN OF THE GLR
16 POOL TO THE UNION. WHY WAS 23 PERCENT GIVEN TO PLAYERS INC?
17 WHAT WAS THAT FOR?

18 A. WELL, WE CONSTRUCTED PLAYERS INC TO OPERATE ON A LEAN
19 BUDGET. AND BASED ON THE VALUATION WE GOT FROM DUFF & PHELPS
20 AND BASED ON THE ADVICE OF COUNSEL, IS WE HAD TO HAVE ENOUGH
21 FOR PLAYERS INC TO FUND NORMAL OPERATIONS TO HAVE STAFF, TO BE
22 ABLE TO FLY PLACES, GO OUT AND MEET PEOPLE AND DO DEALS.

23 AND THIS WAS THE AMOUNT, BASED ON THE VALUATION WE
24 HAD, THAT WAS -- AND THERE'S SOME TAX IMPLICATIONS WITH THAT,
25 AS WELL, AGAIN. BUT THAT IS BASED OFF OF COUNSEL.

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

TUESDAY

NOVEMBER 4, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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

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

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

BY: L. PETER PARCHER, ESQ.

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

BY: CHAD HUMMEL, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

APPEARANCES CONTINUED:

ALSO FOR PLAINTIFFS: MCKOOL SMITH
300 CRESCENT COURT
SUITE 1500
DALLAS, TEXAS 75201
BY: LEWIS T. LECLAIR, ESQ.
JILL ADLER NAYLOR, ESQ.
ANTHONY GARZA, ESQ.
BRETT CHARHON, ESQ.

FOR DEFENDANTS: DEWEY & LEBOEUF
1301 AVENUE OF THE AMERICAS
NEW YORK CITY, NEW YORK 10019-6092
BY: JEFFREY L. KESSLER, ESQ.
DAVID GREENSPAN, ESQ.
DAVID G. FEHER, ESQ.
ROY TAUB, ESQ.
MOLLY DONOVAN, ESQ.
JASON CLARK, ESQ.

WEIL, GOTSHAL & MANGES LLP
767 FIFTH AVENUE
NEW YORK, NEW YORK 10153-0119
BY: BRUCE S. MEYER, ESQ.

REPORTED BY: *KATHERINE POWELL SULLIVAN, CSR # 5812*
OFFICIAL REPORTER, U.S. DISTRICT COURT

1 WE TALKED MANY TIMES ABOUT LEADERSHIP, LEVERAGE,
2 RESOURCES. TO BE SUCCESSFUL AS A UNION, YOU HAVE TO HAVE ALL
3 THREE. RESOURCES AND LEVERAGE OFTENTIMES COME FROM FUNDS.

4 IF YOU LOOK AT A UNION YOU'RE FIGHTING THE COLLECTIVE
5 RESOURCES OF 32 CLUBS THAT ARE VALUED AT OVER A BILLION
6 DOLLARS. SO THAT MONEY VERY MUCH BENEFITED RETIRED PLAYERS.

7 **Q.** SO IN YOUR VIEW, IT WAS NECESSARY TO RETAIN EVERY BIT OF
8 IT SO YOU HAD MAXIMUM LEVERAGE?

9 **A.** YES.

10 **Q.** ARE YOU AWARE, SIR, THAT DURING THE CLASS PERIOD MILLIONS
11 OF DOLLARS OF DUES WERE REBATED TO ACTIVE PLAYERS?

12 **A.** YES.

13 **Q.** SO, IN OTHER WORDS, YOU WERE GIVING BACK THE DUES TO THE
14 ACTIVE PLAYERS DURING THAT SAME TIME PERIOD, RIGHT?

15 **A.** YES, WE DID REBATE DUES.

16 **Q.** WHILE YOU WERE RETAINING THE LICENSING MONEY, YOU WERE
17 REBATING THE DUES, CORRECT?

18 **A.** YES.

19 **Q.** ALL RIGHT, SIR.

20 DID ANYBODY SUGGEST AT ANY TIME -- LET'S FOCUS ON THE
21 PERIOD 2001 THROUGH 2003, WHILE THIS RETIRED PLAYER GLA AT
22 ISSUE WAS IN EFFECT.

23 DID ANYBODY SUGGEST THAT THERE MIGHT BE A POSSIBILITY
24 OF A CONFLICT OF INTEREST FOR THE UNION AND THE BOARD
25 CONCERNING THE INTERESTS OF ACTIVE PLAYERS ON THE ONE HAND, AND

1 RETIRED PLAYERS ON THE OTHER HAND?

2 **A.** NO. WE ALWAYS FELT LIKE THEY WERE RELIANT. WE KNEW THAT
3 YOU'RE ALWAYS ONE PLAY AWAY FROM BEING A RETIRED PLAYER. AND
4 THAT'S WHY THE MANTRA OF OUR UNION IS "PAST, PRESENT AND
5 FUTURE."

6 AND THAT'S WHY IN EVERY COLLECTIVE BARGAINING
7 AGREEMENT EVERY OPPORTUNITY WE HAD TO ADVANCE BENEFITS FOR OUR
8 RETIRED PLAYERS WE DID THAT.

9 AS AN EXAMPLE, LAST YEAR, IF YOU WATCHED ANY NFL
10 FOOTBALL, EVERY PLAYER YOU SAW ON THE FIELD LAST YEAR GAVE
11 ABOUT \$84,000 OUT OF HIS POCKET FOR BENEFITS FOR RETIRED
12 PLAYERS. THAT'S HOW PASSIONATELY WE FEEL ABOUT IT IN THE
13 ORGANIZATION.

14 **Q.** SIR, DID YOU CONSIDER -- DID ANYBODY SUGGEST THAT THERE
15 WAS ANY POTENTIAL CONFLICT OF INTEREST WHEN YOU SET THE
16 ELIGIBILITY CRITERIA EVERY YEAR, RELATED TO THE RETIRED PLAYER
17 GLA?

18 **A.** NO.

19 **Q.** ALL RIGHT, SIR.

20 IS IT CORRECT THAT NOBODY SUGGESTED AT THE MEETING,
21 2001 THROUGH 2003, THAT THERE SHOULD BE ANY SHARING UNDER THE
22 RETIRED PLAYER GLA AT ISSUE IN THIS CASE?

23 **A.** I'M NOT SURE I UNDERSTAND YOUR QUESTION.

24 **Q.** IN OTHER WORDS, NOBODY BROUGHT UP, GENE UPSHAW, DOUG
25 ALLEN, NOBODY BROUGHT UP THE QUESTION TO THE BOARD AND SAID:

1 SUMMARIZED HIM.

2 AND THEN, THIS IS WITH PAT ALLEN. AND THEN, 906 UP
3 TO PAT ALLEN FOR PLAINTIFF. AND THEN, WITH PAT ALLEN FORWARD:
4 28, 3, 4 AND 60. THAT'S WHAT I HAVE.

5 MR. KESSLER: OKAY. THANK YOU, YOUR HONOR. IF WE
6 HAVE ANY QUESTIONS AFTER FURTHER REVIEWING I'LL LET YOUR HONOR
7 KNOW TOMORROW. THANK YOU.

8 THE COURT: ALL RIGHT.

9 MR. KESSLER: THAT'S IT.

10 THE COURT: ANYTHING MORE? GREAT. I HAVE A CRIMINAL
11 CALENDAR AT 2 O'CLOCK, SO I'LL NEED THE COURTROOM. THANK YOU.

12 MR. KATZ: THANK YOU.

13 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL WEDNESDAY,
14 NOVEMBER 5, 2008, AT 7:30 O'CLOCK A.M.)

15 - - - -

16

17 CERTIFICATE OF REPORTER

18 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
19 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

20 DATE: TUESDAY, NOVEMBER 4, 2008

21

22

S/B KATHERINE POWELL SULLIVAN

23

KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

24

25

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1 LICENSES THAT WERE SIGNED BY PLAYERS INC.

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

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

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

10 **A.** JUST THE NFL.

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

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

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

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

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

23 **A.** YES.

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

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

3 **Q.** WHY NOT?

4 **A.** MOREOVER --

5 **Q.** WHY NOT?

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

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

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

1 WOULDND'T STAND FOR IT.

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

5 DO YOU REMEMBER THOSE QUESTIONS?

6 **A.** I DO.

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

9 **A.** YES.

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

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

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

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

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

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

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

FURTHER RECROSS EXAMINATION

1
2 **BY MR. HUMMEL:**

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

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

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

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

FURTHER REDIRECT EXAMINATION

14
15 **BY MR. KESSLER:**

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

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

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

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

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

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

1 **THE COURT:** BUT THINK ABOUT IT FOR A SECOND. IF YOU
2 WIN ON THE MEANING OF THE CONTRACT, LET'S SAY, AND IF THAT'S
3 NOT SET ASIDE UNDER RULE 50 OR THE NINTH CIRCUIT, LET'S JUST
4 SAY IF YOU WIN ON THE CONTRACT THEORY ALONE, SINCE YOUR CLASS
5 GETS TO SHARE EQUALLY IN THE GROSS LICENSING REVENUE, ALL
6 RIGHT? THAT'S ONE SCENARIO.

7 THEN, THE FIDUCIARY DUTY CLAIM ADDS NO ADDITIONAL
8 DAMAGES.

9 ON THE OTHER HAND, IF YOU LOSE ON THAT, LET'S SAY THE
10 JURY DISAGREES WITH YOUR MEANING OF THE CONTRACT. AND LET'S
11 SAY THE JURY SAYS THERE'S NO WAY THIS EVER MEANT THEY WERE
12 GOING TO SHARE IN THE GROSS LICENSING REVENUE.

13 BUT THEN, LET'S SAY THE JURY AGREES THAT THE NFLPA
14 HELD THEMSELVES OUT AS A REPRESENTATIVE AND AN AGENT AND
15 UNDERTOOK A FIDUCIARY DUTY TO MARKET THESE PEOPLE, THESE CLASS
16 MEMBERS.

17 NOW, WE GET TO THAT JUNCTURE IN THE DECISION TREE BY
18 ONLY -- ON THE ASSUMPTION THAT THE CONTRACT DOES NOT REQUIRE
19 PARTICIPATION IN THE GROSS LICENSING REVENUE.

20 SO IS THERE THEN A DAMAGE THEORY THAT CAN GET YOU TO
21 THAT OUTCOME?

22 MR. KESSLER SAID, NO, THERE'S NOT.

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

24 **THE COURT:** SO WHAT IS THE MEASURE OF DAMAGES?

25 **MR. LECLAIR:** THE MEASURE OF DAMAGES IS THE SAME

1 REVENUE FROM THE SAME LICENSES, BECAUSE OUR THEORY IS THEY
2 SHOULD HAVE INCLUDED US. WE SHOULD HAVE BEEN PUT TOGETHER WITH
3 THE -- BECAUSE THEY WERE ACTING AS OUR AGENT.

4 **THE COURT:** EVEN THOUGH THE CONTRACT DID NOT
5 REQUIRE -- EVEN THOUGH THE JURY SAYS: LOOK, THE CONTRACT DOES
6 NOT REQUIRE -- THE THING THAT EVERYBODY SIGNED DOES NOT REQUIRE
7 THAT, AND THEN, NONETHELESS, YOU'RE SAYING THAT THE AGENCY
8 WOULD HAVE --

9 **MR. LECLAIR:** ACTUALLY, I AM SAYING THAT.

10 **THE COURT:** TAKE THE HOLLYWOOD EXAMPLE. TAKE THE
11 HOLLYWOOD EXAMPLE. LET'S SAY AN AGENT HAS A CONTRACT WITH A
12 FAMOUS HOLLYWOOD STAR, AND IT SAYS FLAT OUT:

13 "YOU DO NOT HAVE TO TRY TO GET ME INTO MOVIE X,
14 Y, Z. YOU'VE GOT TO TRY TO GET ME IN SOME OTHER MOVIE, BUT NOT
15 MOVIE X, Y, Z."

16 TURNS OUT X, Y, Z IS THE BIGGEST MOVIE OF ALL TIME.
17 CAN THAT STAR COME ALONG AND SAY:

18 "YEAH, BUT THEY OWED ME A FIDUCIARY DUTY, DESPITE
19 THE WORDING OF THE CONTRACT, TO TRY TO GET ME INTO X, Y, Z."

20 IT JUST SEEMS TO ME THAT'S TOPSY-TURVY.

21 AND WHY EVER HAVE A CONTRACT IF YOU CAN DISREGARD THE
22 WORDING OF IT?

23 **MR. LECLAIR:** YOUR HONOR, I THINK RESPECTFULLY THAT'S
24 NOT -- THAT ANALOGY ISN'T THE SAME AS OUR SITUATION.

25 BECAUSE THIS IS NOT A CONTRACT THAT SAYS WE'RE GOING

1 TO FAVOR THE ACTIVE -- THIS WOULD BE DIFFERENT. IF THE
2 CONTRACT SAID:

3 "BY THE WAY, WE'RE GOING TO FAVOR THE ACTIVE
4 PLAYERS; WE'RE GOING TO DO EVERYTHING WE CAN TO AVOID PUTTING
5 YOU IN A GROUP LICENSE; WE'RE GOING TO DO WHAT WE CAN TO KEEP
6 FROM PAYING YOU; WE'RE GOING TO DO OUR BEST TO MAKE SURE IF
7 YOU'RE A STAR PLAYER YOU GET YOUR MONEY; AND IF YOU'RE A
8 JOURNEYMAN, WE THINK YOU'RE WORTHLESS, AND YOU'RE NEVER GOING
9 TO GET ANYTHING," IF THEY HAD SAID ALL THAT IN THE CONTRACT WE
10 WOULDN'T BE HERE.

11 BUT THAT'S NOT WHAT THEY SAID. THEY SAID IN THE
12 CONTRACT -- THE CONTRACT CLAIM IS THAT THE LANGUAGE REQUIRES
13 THAT THEY PAY US BY VIRTUE OF THAT FOR EVERY LICENSE.

14 THE FIDUCIARY CLAIM IS:

15 "YOU SHOULD HAVE PUT US IN BY VIRTUE OF BEING
16 OUR AGENT."

17 AND IF YOU HAVE A CONTRACT --

18 **THE COURT:** EVEN THOUGH THE CONTRACT DID NOT REQUIRE
19 IT?

20 **MR. LECLAIR:** "EVEN THOUGH THE CONTRACT DID NOT
21 REQUIRE YOU TO DO IT, YOU SHOULD HAVE AS OUR FIDUCIARY. AND IF
22 YOU WEREN'T GOING TO DO THAT, YOU SHOULD HAVE DISCLOSED YOUR
23 CONFLICT OF INTEREST AND TOLD US WE DIDN'T HAVE TO."

24 **THE COURT:** BUT THE CONTRACT INTERPRETATION IS
25 SUPPOSED TO BE -- AS THE DRAFT INSTRUCTIONS SAY, IT IS SUPPOSED

1 TO CARRY OUT THE REASONABLE EXPECTATIONS -- REASONABLE
2 EXPECTATIONS OF THE PARTIES BASED ON THE LANGUAGE AND THE
3 SURROUNDING CIRCUMSTANCES.

4 SO IF THE REASONABLE EXPECTATIONS OF THE PARTIES WAS
5 IN NO WAY THAT THE RETIRED PLAYERS WERE GOING TO SHARE WITH THE
6 ACTIVE MONEY, HOW CAN YOU THEN SAY THAT THE CONTRACT AND THE
7 CIRCUMSTANCES IMPOSED A FIDUCIARY DUTY TO DO THE OPPOSITE,
8 I.E., TO GET THEM INTO THE SHARE AND SHARE ALIKE WITH THE
9 ACTIVE MONEY?

10 **MR. LECLAIR:** I DO UNDERSTAND YOUR HONOR'S QUESTION.
11 NOW I COMPLETELY UNDERSTAND WHAT YOU ARE SAYING. THERE IS A
12 GOOD ANSWER. LET ME GIVE IT TO YOU.

13 **THE COURT:** ALL RIGHT. WHAT IS IT?

14 **MR. LECLAIR:** WHAT WE'RE SAYING UNDER THE CONTRACT --
15 THEY HAVE THIS ARGUMENT UNDER THE CONTRACT, AND THEY HAVE BEAT
16 US AND BEAT US AND BEAT US WITH IT SAYING, EVERY WITNESS ON THE
17 STAND:

18 "IS THIS ALL ACTIVE PLAYER MONEY? IS THIS ALL
19 ACTIVE? IS THIS ALL ACTIVE PLAYER MONEY? IS IT ALL ACTIVE
20 PLAYER MONEY?"

21 OKAY? ASSUME THEY CONVINCED THE JURY THAT'S TRUE,
22 BECAUSE THEY DECIDED -- THEY THEMSELVES DID THE LICENSES --
23 EXPRESSLY TO SAY:

24 "CONTRARY TO WHAT WE SAY, ASSUME THE LICENSES DON'T
25 INCLUDE THE ACTIVE -- DON'T INCLUDE THE RETIRED PLAYERS."

1 WHAT WE'RE SAYING IS:

2 "OKAY. WE ACCEPT THAT YOU DIDN'T DO THAT. YOU
3 DIDN'T INCLUDE US IN THE LICENSES, SO WE DON'T HAVE A
4 CONTRACTUAL CLAIM."

5 BUT THE FIDUCIARY CLAIM IS TOTALLY DIFFERENT. WHAT
6 WE'RE SAYING IS:

7 "NOT THAT YOU DID INCLUDE US, BUT THAT YOU
8 SHOULD HAVE. AND IF YOU WEREN'T GOING TO INCLUDE US, YOU
9 SHOULD HAVE TOLD US YOU HAD A CONFLICT OF INTEREST."

10 SO IT'S NOT INCONSISTENT AT ALL.

11 **THE COURT:** WELL, IF THE CONTRACT DIDN'T REQUIRE IT
12 IN THE FIRST PLACE, THEN WHY SHOULD -- IN OTHER WORDS, LET'S
13 SAY THAT THE CONTRACT HAD BEEN MORE CLEAR, FOR THE SAKE OF
14 ARGUMENT, AND IT SAID FLAT OUT:

15 "THIS MEANS YOU WILL NOT PARTICIPATE IN THE" ...

16 SO YOU'RE SAYING THAT THEY SHOULD HAVE MADE MORE
17 CLEAR THAT THEY WEREN'T GOING TO PARTICIPATE. BUT I COME BACK
18 TO THE RULE OF CONTRACT INTERPRETATION IS: WHAT WERE THE
19 REASONABLE EXPECTATIONS OF THE PARTIES?

20 AND IF IT WAS THE REASONABLE EXPECTATION OF THE
21 PARTIES TO BEGIN WITH THAT THERE WOULD BE NO PARTICIPATION IN
22 THE GROSS LICENSING REVENUE, THEN THEY HAVE BEEN TOLD. THEY
23 HAVE BEEN TOLD, BECAUSE THAT'S THE REASONABLE EXPECT -- THAT'S
24 THE MEANING OF THE CONTRACT.

25 **MR. LECLAIR:** YOUR HONOR, IF THEY'VE BEEN TOLD

1 THEY'RE NOT IN THE CONTRACT, BUT WHAT THEY DON'T KNOW IS THE
2 REASON THEY'RE NOT IN THE CONTRACT, WHICH IS WHY THEIR AGENT
3 HAS STABBED THEM IN THE BACK. THAT'S THE FIDUCIARY CLAIM IS
4 THEIR AGENT, INSTEAD OF SAYING TO THEM -- WHAT DID THEY SAY?
5 WHAT THEY SAID WAS:

6 "OH, THERE'S NOT MUCH INTEREST. YOU'RE KIND OF
7 WORTHLESS. NOBODY WANTS YOU."

8 AND WHAT WE ARE SAYING TO THE JURY IS THE EVIDENCE IS
9 TO THE CONTRARY. IT'S NOT THAT THEY DIDN'T WANT US. IT'S
10 THAT THE FACT OF THE MATTER IS THEY DIDN'T WANT TO INCLUDE US
11 IN THE LICENSES.

12 PEOPLE WANTED -- THERE'S ABUNDANT EVIDENCE THAT THESE
13 LICENSEES WANTED TO USE RETIRED PLAYERS. TONS OF EVIDENCE OF
14 THAT, INCLUDING SOME THEY HAVE PUT IN.

15 THE POINT IS: HOW DID THEY STRUCTURE THE LICENSE?
16 AND IF THEY CONTRACTUALLY SAY:

17 "OKAY. WE'RE GOOD LAWYERS. WE WROTE THE PAPERS.
18 AND WE WROTE 'ACTIVE' OVER HERE AND 'RETIRED' OVER HERE, SO YOU
19 DON'T GET ANY OF THIS MONEY," AND THEY CONVINCED THE JURY THAT
20 THEY'RE RIGHT ABOUT THAT, WE LOSE ON CONTRACT.

21 BUT THAT HAS NOTHING TO DO WITH THEIR FIDUCIARY DUTY
22 TO EITHER KEEP US TOGETHER OR TO TELL US WE HAVE A CONFLICT OF
23 INTEREST.

24 AND WHEN THEY DON'T DO THAT, THEY HAVE BREACHED THEIR
25 FIDUCIARY DUTY, AND THEY HAVE BLOCKED US FROM DEALING WITH THE

1 VERY PEOPLE --

2 **THE COURT:** LET'S PURSUE THAT, THOUGH.

3 IF THAT'S -- IF THE BREACH IS THAT THEY FAILED TO
4 DISCLOSE A CONFLICT OF INTEREST, THEN THE DAMAGES THAT WOULD
5 FLOW FROM THAT WOULD BE IF MR. ADDERLEY HAD KNOWN AND OTHER
6 CLASS MEMBERS HAD KNOWN THAT THERE WAS A CONFLICT OF INTEREST,
7 THEN CONCEIVABLY THEY COULD HAVE GONE OUT AND HIRED
8 MR. HOLLYWOOD TO BE THEIR GROUP LICENSING AGENT, AND MAY TRY TO
9 MAKE THEIR OWN DEALS.

10 AND ONCE AGAIN WE COME BACK TO THE QUESTION OF: HAD
11 MR. HOLLYWOOD GONE OUT TO DO THAT, WHAT WOULD BE THE PLAUSIBLE
12 RANGE OF POTENTIAL ROYALTIES THAT SUCH A GROUP LICENSE WOULD
13 HAVE COMMANDED IN THE MARKET?

14 THERE'S NO EVIDENCE ON THIS POINT.

15 **MR. LECLAIR:** YOUR HONOR, IF THE EVIDENCE IS THAT
16 THEY COULD HAVE DONE A GROUP LICENSE, WHICH THERE IS EVIDENCE,
17 THEY COULD HAVE DONE A GROUP LICENSE, IT DOESN'T EVEN MATTER
18 WHETHER IT'S THE SAME MONEY OR ONE DOLLAR MORE, OR IT DOESN'T
19 MAKE ANY DIFFERENCE. BECAUSE THE POINT IS: EVERYBODY GOT
20 THEIR AD HOC MONEY.

21 AND IF -- ALL THEY HAD TO DO -- LET'S TAKE THE EA
22 LICENSE AS AN EXAMPLE. LET'S BE VERY SPECIFIC. LET'S TAKE THE
23 EA LICENSE AS AN EXAMPLE.

24 WHAT IF INSTEAD OF THE WAY THEY STRUCTURED THE
25 LICENSE AGREEMENT THEY HAD SIMPLY SAID -- YOU KNOW, THIS IS

1 WHAT WE ARGUE. BUT LET'S ASSUME IT'S REJECTED THAT WE'RE
2 ACTUALLY IN THE LANGUAGE. LET'S ASSUME THAT THE LANGUAGE ABOUT
3 MENTIONING RETIRED PLAYERS ISN'T EVEN THERE.

4 IF THEY HAD, IN FACT, HAD A CONTRACT THAT HAD BOTH --
5 IF WE SAY:

6 "WHAT YOU SHOULD HAVE DONE IS JUST -- YOU ENDED
7 UP -- USING THESE RETIRED PLAYERS."

8 THERE'S NO QUESTION THEY USED THEM. EA USED THEM.
9 LOTS OF OTHER LICENSEES USED THEM.

10 IF THEY HAD WRITTEN A LICENSE AGREEMENT THAT SAYS:

11 "YOU HAVE ALL THE ACTIVE PLAYERS TO CHOOSE FROM,
12 AND YOU HAVE THIS GROUP OF RETIRED PLAYERS TO CHOOSE FROM," IF
13 THEY HAD DONE THAT, WHICH WE SAY WAS WHAT THEIR FIDUCIARY DUTY
14 REQUIRED THEM TO DO, WE WOULD HAVE SHARED IN THE MONEY. WE'D
15 HAVE SHARED IN THE GROUP MONEY. AND THAT'S WHY WE'RE ENTITLED
16 TO THE DAMAGES FROM THAT.

17 AND THE BREACH IS THAT THEY DIDN'T DO THAT, AND THEY
18 DIDN'T DO THE CONFLICT OF INTEREST.

19 **THE COURT:** YOU HAVE GONE OFF AND NOT ACCEPTED MY
20 HYPOTHETICAL. YOU SAID --

21 **MR. LECLAIR:** I TRIED TO, YOUR HONOR. I APOLOGIZE.

22 **THE COURT:** YOU SAID THAT THE PROBLEM WAS CONFLICT OF
23 INTEREST. THAT THEN SAYS: OKAY. WHAT WOULD THEY HAVE DONE IN
24 THE ALTERNATIVE?

25 THE ALTERNATIVE WOULD HAVE BEEN MR. HOLLYWOOD.

1 MR. HOLLYWOOD COULD HAVE THEN GONE TO EA IN
2 CONNECTION WITH THE MADDEN GAME AND SAID:

3 "I'VE GOT THIS ENTIRE GROUP OF 2,053 RETIRED
4 PLAYERS, INCLUDING MR. ADDERLEY, HALL OF FAME. WOULD YOU
5 LICENSEES" -- AND THEN, AT LEAST THOSE YOU COULD USE THEIR REAL
6 NAMES IN THE MADDEN GAME.

7 AND, FRANKLY, I THINK JUST USING PLAUSIBILITY,
8 THERE'S SOME PLAUSIBILITY TO THE IDEA THAT EA WOULD HAVE SAID:

9 "OKAY, WE'LL GIVE YOU \$10,000 FOR THAT, OR MAYBE
10 EVEN -- MAYBE EVEN A HUNDRED THOUSAND DOLLARS FOR THAT."

11 I DON'T KNOW WHAT THE NUMBER WOULD BE. BUT IT
12 WOULD -- CONTRARY TO MR. NOLL, I THINK EA, IF CONFRONTED WITH
13 THAT, MIGHT HAVE PAID SOME MONEY FOR THOSE PARTICULAR GROUP
14 RIGHTS.

15 **MR. LECLAIR:** OKAY.

16 **THE COURT:** BUT NO WAY THAT -- THE JURY COULD
17 DECIDE -- BUT IT IS HARD TO BELIEVE THAT EA WOULD HAVE PAID THE
18 SAME FOR THE -- FOR THE ACTIVE PLAYERS AS THEY WOULD FOR THE
19 RETIRED PLAYERS.

20 SO THE IDEA THAT YOU -- SO WE'RE FOLLOWING THE
21 MR. HOLLYWOOD SCENARIO NOW, BECAUSE MR. HOLLYWOOD DOESN'T HAVE
22 ANY ACTIVE PLAYERS TO MARKET.

23 ANYWAY, YOU -- YOU COME BACK AT EACH JUNCTURE TO SAY,
24 BASICALLY THIS, THAT THE BREACH OF FIDUCIARY DUTY HAS TO BE
25 THAT THE DEFENDANTS SHOULD HAVE THROWN IN THE RETIRED FOR

1 FREE, AND THEN SHARED THE \$25 MILLION ON A PLAYER-BY-PLAYER
2 BASIS, WHICH I THINK -- AND WE ONLY GET TO THIS SCENARIO IF
3 YOU'RE ASSUMING FOR THE SAKE OF ARGUMENT THAT THE CONTRACT DOES
4 NOT -- DID NOT REQUIRE SHARING IN THE GROSS LICENSING REVENUE
5 TO BEGIN WITH.

6 SO I THINK THERE'S A POSSIBLE CIRCULARITY HERE
7 THAT -- JUST A MINUTE.

8 ALL RIGHT. I'M GOING TO DENY THE MOTION. I'M GOING
9 TO LET THE JURY DECIDE THIS, WITHOUT PREJUDICE TO RENEWING THE
10 MOTION AT THE END.

11 JUST A WORD OF CAUTION, THOUGH. I'VE SEEN THIS
12 HAPPEN. WHEN PLAINTIFFS GO TO THE JURY WITH MULTIPLE THEORIES,
13 AND THEY WIN ON ONE THAT IS FATALY DEFECTIVE, THEY WIND UP
14 WITH NOTHING.

15 WHEREAS, IF THEY HAD -- IF DISCRETION HAD BEEN THE
16 BETTER PART OF VALOR, AND THEY HAD RECOGNIZED FATAL PROBLEMS
17 WITH THEIR THEORY AND GONE WITH ONE THAT HAD A SHOT, THEY MIGHT
18 HAVE WON SOMETHING.

19 I'M DENYING THIS MOTION, AND I'M GOING TO LET THE
20 JURY HAVE THE FIRST SHOT AT IT. BUT I WANT YOU TO KNOW IF THE
21 SCENARIO TURNS OUT AS I SAY, AND YOU WIND UP WITH A BIG ZERO
22 HERE --

23 **MR. PARCHER:** COULD YOU BE MORE SPECIFIC? SCENARIOS
24 YOU SAY IS --

25 **THE COURT:** I'M TELLING YOU ALL OF YOUR THEORIES ARE

1 TENUOUS. ALL OF THEM. BUT I'M NOT SAYING I'M GOING TO TAKE
2 THEM AWAY. I'M SAYING THESE ARE VERY SUBSTANTIAL RULE 50
3 MOTIONS THAT HAVE BEEN MADE.

4 AND I'M GOING -- BECAUSE THERE IS A REASONABLE
5 POSSIBILITY THE JURY WILL REJECT ALL OF THE ARGUMENTS, THEN
6 THAT WILL END THE CASE.

7 BUT I AM NOT -- I WANT YOU TO BE AWARE THAT IF YOU
8 PREVAIL -- I AM NOT SAYING YOU WILL GET IT TAKEN AWAY. I'M
9 JUST TRYING TO SAYING I'VE TRIED TO EXPRESS WHAT MY CONCERNS
10 ARE ABOUT YOUR THEORY, AND YOU NOW KNOW MOST OF THEM.

11 BUT IF YOU CHOOSE TO GO TO THE JURY ON A THEORY THAT
12 ULTIMATELY GETS TAKEN AWAY, AND THAT'S THE ONLY ONE YOU WON ON
13 BEFORE THE JURY, YOU SHOULD BE AWARE -- I'M TELLING YOU RIGHT
14 NOW -- YOU'RE AT RISK ON ALL YOUR THEORIES.

15 **MR. PARCHER:** I APPRECIATE WHAT YOUR HONOR SAID VERY
16 MUCH, BECAUSE IT'S INSTRUCTIVE AS TO HOW TO SUM UP.

17 BUT I NEED TO RAISE YOUR HONOR'S CONSCIOUSNESS TO ONE
18 THING THAT I DON'T THINK YOUR HONOR HAS FOCUSED ON, WHICH MAY
19 NOT HAVE BEEN APPEARING ON ANYTHING --

20 **THE COURT:** I'M DENYING THE MOTION. GO AHEAD.

21 **MR. PARCHER:** I UNDERSTAND. I UNDERSTAND. BUT IT'S
22 A RACE FOR YOUR MIND, AS WELLS AS FOR THE JURORS' MIND HERE.

23 THERE IS A REALITY HERE. ASSUME FOR THE PURPOSE\$ OF
24 DISCUSSION, ASSUME THAT THE DEFENDANTS SOLD THE PLAINTIFFS DOWN
25 THE RIVER. JUST ASSUME IT, BECAUSE I THINK THERE'S A

1 LIKELIHOOD THAT THE JURY IS GOING TO BELIEVE THAT.

2 ASSUME FURTHER --

3 **THE COURT:** WELL, THE EXPERT, MR. NOLL, CAME CLOSE TO
4 SAYING THAT AT THE END.

5 **MR. PARCHER:** YES, HE DID.

6 **THE COURT:** HE SAID THAT THERE WAS EVIDENCE THAT
7 DEFENDANTS HAD "SOLD OUT," WAS THE PHRASE HE USED. "SOLD OUT."

8 **MR. PARCHER:** I HEARD IT. I ACTUALLY WROTE IT DOWN
9 ON MY --

10 **THE COURT:** YEAH.

11 **MR. PARCHER:** OKAY. ASSUME FURTHER THAT THE
12 DEFENDANTS FOUND THEMSELVES IN A DILEMMA WHEN THEY STARTED.
13 WHEN THEY STARTED, THEY DESPERATELY WANTED AS MANY PLAYERS AS
14 POSSIBLE, PAST, PRESENT, EVEN TRYING TO LAY THE GROUNDWORK FOR
15 THE FUTURE, SO THEY COULD BE THE ONLY GAME IN TOWN, SO THAT THE
16 BOSSES OF THE TRACE ARMSTRONGS OF THIS WORLD WOULDN'T BE IN
17 THERE COMPETING, OR SUCCESSFULLY COMPETING, BECAUSE THEY
18 PRACTICALLY GOT A MONOPOLY AS A RESULT OF WHAT OUR GUYS GAVE
19 THEM ALONG WITH THE ACTIVES.

20 AND THEN, THEY FOUND THEMSELVES IN THE A QUAGMIRE.
21 AND THE QUAGMIRE WAS THEY NEEDED TO PLEASE -- "THEY" IS ALLEN
22 AND MR. UPSHAW, THE LATE MR. UPSHAW -- THEY NEEDED TO PLEASE
23 THEIR CONSTITUENCY, WHICH, AFTER ALL, AT THE END OF THE DAY ARE
24 ACTIVE PLAYERS. OUR PLAYERS ARE DOG FOOD. THEY NEEDED TO
25 PLEASE THEIR CONSTITUENCY BECAUSE THEY VOTE.

1 AND ONE OF THE VOTES THEY COULD CAST IS TO CAST
2 MR. UPSHAW AND MR. ALLEN OUT OF OFFICE, AND PERHAPS GET
3 SOMEBODY ELSE IN THERE.

4 AND SO, THEREFORE, THEY WANTED AS MUCH MONEY AS
5 POSSIBLE TO GO INTO THE ACTIVE TILL.

6 BY THE SAME TOKEN, THEY DID NOT WANT THE RETIRED TO
7 BOLT AND SIGN UP MR. ARMSTRONG'S BOSSES, BECAUSE IF THEY SIGNED
8 UP MR. ARMSTRONG -- IF THE RETIRED WERE SIGNED UP BY
9 MR. ARMSTRONG'S BOSSES THERE'S A VERY STRONG LIKELIHOOD THAT
10 THE JOE MONTANAS AND THE JOE NAMATHS OF THE WORLD, WHO ACTUALLY
11 BECAME JOE NAMATHS AND JOE MONTANAS BECAUSE SOME OF THESE
12 FELLOWS BLOCKED FOR THEM, AND SOME OF THESE FELLOWS TACKLED FOR
13 THEM, AND SOME OF THESE FELLOWS CAUGHT PASSES FOR THEM, THAT
14 WHEN THEY'RE PLAYING POKER OR DRINKING BEER, OR GOING TO
15 CHURCH, OR WHATEVER THEY DO WHEN THEY GET TOGETHER, THEY MIGHT
16 HAVE SAID:

17 "DO YOU LIKE YOUR AGENT? YOU LIKE YOUR" -- YOU
18 CALLED HIM "MR. HOLLYWOOD."

19 IT'S ACTUALLY SOME GUYS IN PINSTRIPE SUITS AND
20 ATTRACTIVE TIES WITH DIMPLES IN THEM, YOU KNOW, THAT SOME OF
21 THESE MEN AND WOMEN ACTUALLY LIKE. THEY ARE NOT ALL
22 STEREOTYPICALLY WHAT MAKES SAMMY RUN.

23 IN FACT, MR. ARMSTRONG WAS ONE OF THEM, AS YOUR HONOR
24 SAW. QUITE AN ATTRACTIVE YOUNG MAN.

25 AND SUPPOSE THE RETIRED SAID:

1 "SURE. WE WERE BEING SOLD DOWN THE RIVER BY --
2 BY THE SO-CALLED 'UNION AGENT.'"

3 **THE COURT:** ALL RIGHT. SO LET'S -- I SEE WHERE
4 YOU'RE GOING. THAT'S WHERE MR. LECLAIR WAS GOING.

5 SO LET'S SAY THAT MR. ARMSTRONG'S COMPANY SIGNED UP
6 THE ENTIRE CLASS.

7 **MR. PARCHER:** RIGHT.

8 **THE COURT:** HOW MUCH OF A ROYALTY COULD THAT CLASS
9 COMMAND IN THE MARKETPLACE?

10 **MR. PARCHER:** I THINK THAT'S THE WRONG QUESTION.

11 **THE COURT:** WHAT IS THE --

12 **MR. PARCHER:** THE QUESTION IS -- FIRST OF ALL, THE
13 FIDUCIARY CLAIM CARRIES WITH IT NOT ONLY COMPENSATORY DAMAGES,
14 WHICH IS OSTENSIBLY EQUAL TO THE CONTRACTUAL DAMAGES, ASSUMING
15 OUR VIEW OF THE CONTRACT PREVAILS, BUT ALSO CARRIES WITH IT
16 PUNITIVE DAMAGES.

17 AND WHAT -- AND WHAT IS IT WORTH, WHAT IS IT WORTH IF
18 YOU FIND OUT THAT YOUR AGENT, THE PERSON THAT YOU -- THE
19 COMPANY THAT YOU TRUSTED, THE ONES THAT YOU THOUGHT WERE GOING
20 TO HELP YOU, THE ONES THAT YOU HELPED TO BUILD INTO THE
21 POWERHOUSE THEY ARE, WERE NOT ONLY SELLING YOU DOWN THE RIVER
22 BUT WERE WRITING YOU THINGS LIKE "GROUP LICENSING IS
23 ESSENTIAL," LONG AFTER, SIX, SEVEN, EIGHT, NINE, TEN YEARS
24 AFTER THEY REALIZED THAT THERE WAS NOBODY -- YOU KNOW, THAT
25 NOBODY WAS SIGNING UP. WHAT IS IT WORTH? WHAT IS IT WORTH

1 HERE WHEN YOU FINALLY FIND -- WHEN YOU FINALLY FIND OUT THAT
2 YOU WERE STABBED IN THE BACK?

3 AND THE REASON YOU WERE STABBED IN THE BACK AND THEY
4 KEPT LURING YOU BACK IN WAS THEY DIDN'T WANT YOU TO GO
5 ELSEWHERE, BECAUSE IF YOU WENT THAT MIGHT START THE RUN ON THE
6 BANK AND UNRAVEL THE WHOLE CABOODLE.

7 NOW, I'M SAYING THAT TO YOUR HONOR WITHOUT ANY --
8 WITHOUT ANY NECESSARILY INSERTION INTO ANY CHARGE, OR PERHAPS
9 THERE IS AN INSERTION, BUT TO RAISE YOUR HONOR'S CONSCIOUSNESS
10 HERE AS TO WHAT PROBABLY WAS GOING ON.

11 BECAUSE, OTHERWISE --

12 **THE COURT:** WHY IS THAT ANY DIFFERENT FROM WHAT
13 MR. LECLAIR SAID?

14 WHAT I'M SUGGESTING TO YOU IS IF YOU -- IF YOU PURSUE
15 THAT THEORY, AND THEN MR. HOLLYWOOD HAS GOT TO BE BROUGHT INTO
16 THE PICTURE BECAUSE YOU HAVE TO ASK THE QUESTION:

17 "ALL RIGHT. IF THIS GROUP HAD BEEN REPRESENTED
18 BY AN INDEPENDENT AGENT WITH NO BREACH OF CONTRACT -- I MEAN,
19 NO BREACH OF FIDUCIARY DUTY, WHAT WOULD THEY HAVE NEGOTIATED ON
20 BEHALF OF THIS GROUP?"

21 **MR. PARCHER:** AND IF THE GROUP HAD BEEN REPRESENTED
22 BY AN INDEPENDENT AGENT WHO, AS A RESULT OF THE REPRESENTATION
23 OF THAT GROUP WAS ABLE TO PERSUADE AD HOC PLAYERS TO COME OVER,
24 STAR RETIRED AD HOC PLAYERS TO COME OVER, EVENTUALLY TO GET THE
25 UNION -- TRACE ARMSTRONG AND THE LOVEABLE MR. GOICH TO REALIZE

1 WHAT THE CON GAME WAS AND SAY:

2 "WE'RE ALL GOING OVER THERE, AND WE'RE GOING TO
3 THEN BE A LICENSOR FOR BOTH ACTIVES AND GROUPS," WHAT WOULD
4 THAT HAVE BEEN WORTH?

5 I MEAN, YOUR HONOR IS CUTTING IT OFF AT ITS ANKLE.

6 **THE COURT:** I'M NOT CUTTING OFF. I'M ASKING YOU,
7 WHAT EVIDENCE -- YOU ARE THE PLAINTIFF.

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

9 **THE COURT:** IT'S YOUR BURDEN OF PROOF. WHAT EVIDENCE
10 DID YOU PUT IN ON WHAT THAT INDEPENDENT AGENT WHO HAD NOTHING
11 TO DO WITH THE LEAGUE, NOTHING TO DO WITH THE DEFENDANTS, WHAT
12 THEY WOULD HAVE BEEN ABLE TO NEGOTIATE IN THE MARKETPLACE?

13 I DIDN'T HEAR ANY EVIDENCE ON THAT.

14 **MR. PARCHER:** DEPENDS ON WHO THEY REPRESENTED AND WHO
15 THEY COULD PUT IN.

16 **THE COURT:** THE EXACT GROUP THAT WE HAVE HERE, THE
17 ENTIRE CLASS. THAT'S THE TEST.

18 **MR. PARCHER:** WHAT IF IT WAS THE ENTIRE CLASS PLUS
19 THE AD HOCS? WHAT IF IT WAS THE ENTIRE CLASS PLUS THE AD HOCS
20 AND THE ACTIVES?

21 **THE COURT:** WE DIDN'T EVEN GET EVIDENCE ON THAT
22 SCENARIO. LOOK, I'M DENYING THE MOTION FOR NOW. I THINK MY
23 CONSCIOUSNESS HAS BEEN RAISED ALREADY. BUT YOU'VE RAISED IT
24 AGAIN.

25 **MR. PARCHER:** RIGHT. AND YOU'VE RAISED MINE.

1 STARTING AT 7:30.

2 THANK YOU.

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

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

5 (THEREUPON, THIS TRIAL WAS CONTINUED UNTIL THURSDAY,
6 NOVEMBER 6, 2008, AT 7:30 O'CLOCK A.M.)

7 - - - -

8

9

10

11

12

13

14

15

CERTIFICATE OF REPORTER

16

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT

17

FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

18

19

DATE: WEDNESDAY, NOVEMBER 5, 2008

20

S/B KATHERINE POWELL SULLIVAN

21

22

KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
U.S. COURT REPORTER

23

24

25

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REPORTED BY: *KATHERINE POWELL SULLIVAN, CSR # 5812*
OFFICIAL REPORTER - U.S. DISTRICT COURT

1 WE HAVE NO IDEA WHETHER IT'S 150 OR WHETHER IT'S 200,
2 OR WHAT THE NUMBER IS.

3 THE AMOUNT OF THE CHECK IS -- IN OTHER WORDS, THE
4 AMOUNT OF CHECK FOR NONPRACTICE SQUAD PLAYERS ONLY, THERE'S NO
5 EXPLANATION. WE DON'T KNOW. WE JUST KNOW THE TOTAL INCLUDES
6 THE PRACTICE SQUAD. WE DON'T KNOW HOW THAT FITS INTO THIS
7 AMOUNT OF CHECK.

8 AND THERE WAS NO QUESTIONS ASKED OF MR. ALLEN TO
9 EXPLAIN THIS CHART. THERE'S NOTHING THERE. THIS IS WHAT THEIR
10 EXPERT SHOULD HAVE DONE.

11 **MR. LECLAIR:** THIS IS WHAT HE --

12 **MR. KESSLER:** SO EVEN IF YOUR HONOR GIVES A PROPER
13 INSTRUCTION AND TELLS THE JURY TO MAKE THESE CALCULATIONS I
14 DON'T KNOW HOW THE JURY COULD DO IT WITHOUT SPECULATION.

15 **MR. LECLAIR:** YOUR HONOR, THAT'S WHAT OUR EXPERT DID.
16 HE DID DO THIS CALCULATION. AND THEY HAD EVERY OPPORTUNITY TO
17 CROSS-EXAMINE HIM IF THEY WANTED TO BRING THINGS OUT TO THE
18 JURY.

19 **MR. KESSLER:** THAT WASN'T MY --

20 **THE COURT:** I'M GOING TO DENY THIS MOTION, BECAUSE IT
21 LOOKS TO ME LIKE THERE'S SUFFICIENT EVIDENCE FROM WHICH THE
22 JURY COULD FIGURE OUT FOR EACH PAYMENT INTO THE FUND HOW MANY
23 ACTIVE PLAYERS PARTICIPATED IN IT. AND WE KNOW HOW MANY CLASS
24 MEMBERS THERE WERE BY YEAR.

25 IT'S TRUE THAT THERE IS SOME LOOSEY-GOOSEY ROOM ON

1 THE PRACTICE SQUAD PEOPLE. BUT IF YOU LOOK AT THE ACTUAL
2 DOLLARS THAT COULD BE -- IT'S GOING TO BE 150 TO 200 PER YEAR.

3 AND AT A THOUSAND DOLLARS A POP, THAT'S ONLY 200,000,
4 AT MOST, OUT OF 13, \$14 MILLION. IT'S GOING TO BE SO DE
5 MINIMUS THAT THIS IS CLOSE ENOUGH.

6 SO THAT MOTION IS DENIED. THERE IS -- THERE IS A
7 METHODOLOGY BEFORE THE JURY WHEREBY THEY COULD CRANK THE
8 NUMBERS AND COME UP WITH -- ALL RIGHT.

9 **MR. KESSLER:** YOUR HONOR, THEN, I WOULD AT LEAST
10 REQUEST THAT THE JURY BE INSTRUCTED THEY HAVE TO MAKE THOSE
11 CALCULATIONS.

12 RIGHT NOW, YOUR HONOR'S INSTRUCTIONS SIMPLY SAY ALL
13 THEY HAVE TO FIND -- IT STARTS IN 33, BUT WE WOULD ASK FOR AN
14 INSTRUCTION ON THIS LATER. THEY HAVE TO DETERMINE: HAVE
15 PLAINTIFFS PROVEN, THROUGH A FORMULA OR OTHERWISE, WHAT THE
16 INDIVIDUAL INJURIES ARE SO THAT THE JURY WILL TRY TO MAKE THOSE
17 CALCULATIONS?

18 RIGHT NOW YOU'VE ONLY TOLD THEM IT'S CLASS WIDE. WE
19 THINK THAT'S INAPPROPRIATE.

20 **THE COURT:** AT THIS POINT, I'M GOING TO LEAVE IT AS
21 IT IS, AS AN INTRODUCTORY STATEMENT. WHEN WE GET TO THE MORE
22 DETAILED ONES YOU CAN RENEW THAT POINT.

23 ALL RIGHT. ALL OBJECTIONS TO 33 ARE OVERRULED.

24 ANY MORE FROM YOU, MR. LECLAIR?

25 HEARING NONE, NUMBER 34.

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,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	FRIDAY
)	NOVEMBER 7, 2008

TRANSCRIPT OF PROCEEDINGS

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REPORTED BY: *KATHERINE POWELL SULLIVAN, CSR # 5812*
OFFICIAL REPORTER - U.S. DISTRICT COURT

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 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 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 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 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 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 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 KATHERINE POWELL SULLIVAN, CSR #5812, RPR, CRR
25 U.S. COURT REPORTER

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,)	
)	San Francisco, California
Defendants.)	Monday
)	November 10, 2008

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Reported By:

Katherine Powell Sullivan, CSR # 5812
Official Reporter - U.S. District Court

1 Just to go over some of the -- I wouldn't call them
2 highlights, I would call them lowlights -- but the eligibility
3 criteria, the fact that these men were supposed to share with
4 the eligible NFLPA members who could only have been active
5 players; the fact that that was -- that they were defined out
6 of existence in an agreement between the NFLPA and PI that was
7 negotiated behind the back of these men, they had nothing --
8 Mr. Adderley had nothing, no knowledge of this agreement
9 whatsoever; the Hall of Fame agreement, where their rights were
10 sold for below market; the scrambling; and, most of all, I
11 think, the demeaning.

12 You know, of course, we're going to have
13 disagreements in our society. We have disagreements within our
14 families, within our friends. That's not a problem.

15 The problem is we must learn how to disagree with one
16 another in a civil manner. I respectfully disagree with your
17 opinion. Here's my view. Here's your view.

18 We just had a presidential election. Sometimes the
19 presidential candidates were civil to one another. Sometimes
20 they're not so civil to one another. But that is the goal.

21 And referring to someone as worthless, referring to
22 someone as dog food, is not a way of disagreeing with someone.
23 It's a way of demeaning people. And in this case they're
24 demeaning their own union members. I think it's a very serious
25 matter.

1 So what I would like to do, because of the time
2 limits that we have, is just take one example and show you how
3 this conduct -- I'm not going to use the words from the -- from
4 the instruction. I'm going to use more colloquial words. This
5 conduct was rotten to the core.

6 Let me demonstrate that to you. We start out at the
7 middle and the core is, basically, demeaning people. You are
8 worthless --

9 **MR. KESSLER:** Your Honor, doesn't this exceed -- I
10 object -- what Your Honor said was the purpose of this
11 particular argument now?

12 **THE COURT:** No. The evidence was limited to
13 financial condition. But in determining the amount, Counsel is
14 entitled to argue broader than just the financial condition,
15 and to get into those types of factors such that I gave in the
16 original instructions, evil motives, actual malice, et cetera,
17 and conduct that was outrageous, grossly fraudulent or reckless
18 toward the safety, that can be argued, as well as the state of
19 mind of the defendant and the nature of the wrong that was
20 committed.

21 So this is -- this is okay to get into in the
22 argument part.

23 Go ahead, Mr. Katz.

24 **MR. KATZ:** Thank you, Your Honor.

25 So we start out with the demeaning. You are

1 worthless. You are dog food.

2 Then the next level is that we see that that is
3 simply not true. Again, this is all about scrambling. There
4 are other examples I could give, but I'm just going to use the
5 scrambling.

6 We see evidence that that's simply not true. How do
7 we know that it's not true? Because EA -- there is demand from
8 EA. There's 143 vintage teams. There are -- they are teams
9 that are people's favorites. They want to play those games.
10 They want to be Joe Montana on the '89 49ers. They want to be
11 Herb Adderley on the '66 Packers.

12 So you can see with your own eyes. I don't have to
13 tell you that my clients are worthwhile. EA is saying that
14 they're worthwhile because they have 143 games in this
15 multi-million, hundreds of million dollars games. There are
16 actually many more vintage teams than there are current teams.

17 So that's the second level. And then the third level
18 is the misconduct. What do you do if you are the defendants
19 and you have this belief, for whatever reason, that they're
20 worthless and dog food, but now the real world is telling you
21 something else, there is demand?

22 So what do they do? They scrambled. LaShun Lawson
23 wrote a letter to EA and said: Scramble. We can't pay these
24 people. We can't have these people out there.

25 And, of course, scrambling doesn't really do any good

1 because if you want to be the '66 Greenbay Packers, it can only
2 be Herb Adderley there. If you want to be the '89 49ers, it
3 can only be Joe Montana.

4 This distinction that Dr. Noll made that it's the
5 teams and not the players, teams are made up of players.

6 Okay. So we've got the wrongdoing now. We've got
7 the scramble. And then they've got a final problem. Final
8 problem is that they have to meet we the people. They have to
9 meet you in a court of law.

10 And what did they do when they met you? They
11 basically insulted your intelligence. They insulted your
12 intelligence with their excuse.

13 And their excuse was -- Mr. Kessler said this just
14 last Friday, and he said it many times -- We did this, we did
15 the scrambling to protect their rights. You heard it so many
16 times.

17 Now, why does this insult your intelligence? Insults
18 your intelligence because it goes right to the core. I said I
19 will show you it's rotten to the core.

20 Let's go back to the core. They're worthless.
21 They're dog food.

22 Why do you need to protect the rights of people who
23 are worthless? There's no -- there's nothing to protect. What
24 are they saving them for? They've had this program for 16
25 years. They've never paid a penny. So what are they

1 protecting them for, another 16 years of not being paid a
2 penny?

3 It's just an untruth. It's not true that they're
4 protecting their rights. They are protecting their own right
5 to a stream of \$81 million a year. And they're having trouble.
6 They're scrimping by. You heard Mr. Berthelsen tell you.

7 So that, I think, is an example of what's happened
8 here, a graphic example that you've seen with your own eyes.

9 There's a lot of distractions, ad hoc agreements,
10 this, that, and the other thing. Accusations that these men
11 didn't complain.

12 They trusted their union. I mean, what did these men
13 do, really? They signed an agreement; they trusted their
14 union; and they didn't get paid. And, yet, they were put on
15 trial, all of them.

16 Mr. Laird, Mr. Beach, Mr. McNeil, they were all put
17 on trial. Why? How dare you, you didn't complain.

18 These men did nothing except to trust their union.
19 And a union is something you should be able to trust.

20 And that's what you have to tell this union. You
21 better be trustworthy the next time because it's going to cost
22 you some money.

23 **THE COURT:** Mr. Katz, you've used about 11 of your 15
24 minutes. If you want to save anything for rebuttal, keep that
25 in mind.

1 **MR. KATZ:** Thank you, Your Honor.

2 How much money? The wealth of the defendants is
3 \$219,655,553. You can see that on the page that I talked
4 about.

5 And what we believe is an appropriate number here,
6 that will cause the plaintiffs -- the defendants to think about
7 what they've done and hopefully to change their behavior, is
8 10 percent of their net worth. So approximately \$211 million,
9 we think, is appropriate.

10 My clients don't want to break the union. They don't
11 want to hurt the active players. But they want to send a
12 message. And they need you to send that message.

13 Unions have to be trustworthy. And this is how you
14 do that. This is how we the people does that.

15 Thank you.

16 **THE COURT:** Thank you, Mr. Katz. Could you move
17 the --

18 **MR. KATZ:** Sorry.

19 **THE COURT:** Move the easel, unless you're going to
20 use it.

21 **MR. KESSLER:** I'm not going to use the easel, Your
22 Honor.

23 **THE COURT:** All right. Mr. Kessler.

24 CLOSING ARGUMENT

25 **MR. KESSLER:** Good afternoon, ladies and gentlemen of

1 here. And if there's anyone who wants to talk to the lawyers,
2 fine.

3 As far as the press is concerned, you can talk to the
4 jury. It's okay. You're discharged now. And you can talk to
5 the lawyers. No more gag rule, or whatever it's called. Both
6 sides are free to talk to the press and issue press releases,
7 do whatever you would like to do, because there's no issue of
8 jury contamination anymore.

9 So with that, I'm going to say good-bye for now. I'm
10 sure I'll see you back here on motion practice.

11 All right. Done.

12 (All counsel simultaneously thank the Court.)

13 **MR. ADDERLEY:** Thank you, sir.

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17 **CERTIFICATE OF REPORTER**

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.

20

21 DATE: Monday, November 10, 2008

22

23

s/b Katherine Powell Sullivan

24

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

25