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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

CIVIL ACTION NO. C07 0943 WHA

21 BERNARD PAUL PARRISH, HERBERT
 22 ANTHONY ADDERLEY, and WALTER
 23 ROBERTS, III on behalf of themselves and
 24 all others similarly situated,

Plaintiffs

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' RENEWED MOTION FOR
 JUDGMENT AS A MATTER OF LAW**

vs.

Date: January 8, 2009
 Time: 8:00 a.m.
 Judge: Honorable William H. Alsup

25 NATIONAL FOOTBALL LEAGUE
 26 PLAYERS ASSOCIATION, a Virginia
 27 corporation, and NATIONAL FOOTBALL
 28 LEAGUE PLAYERS INCORPORATED
 d/b/a PLAYERS INC, a Virginia
 corporation,

Defendants.

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1 **I. INTRODUCTION**

2 The Ninth Circuit sets a very high standard for overturning a jury verdict. Judgment as a
3 matter of law (“JMOL”) under Rule 50 is appropriate only if the evidence, construed in the light
4 most favorable to the nonmoving party, permits only one reasonable conclusion, and that
5 conclusion is contrary to the jury’s verdict.

6 Defendants’ speculation on what the jury must have done comes nowhere close to meeting
7 this standard. Plaintiffs therefore respectfully request that the Court deny Defendants’ renewed
8 motion for judgment as a matter of law (“Motion”).

9 **II. LEGAL STANDARD**

10 Jury verdicts are entitled to great deference. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d
11 772, 775 (9th Cir. 1990). They can be overturned only if the evidence, construed in the light most
12 favorable to the prevailing party, permits only *one* reasonable conclusion, and that conclusion is
13 contrary to the jury’s verdict. In this trial, there was substantial evidence, described herein, that
14 Defendants breached the GLAs, acted as an “agent” for the retired class of GLA signatories
15 (thereby owing them fiduciary duties), and breached those fiduciary duties in a number of ways.
16 The trial record is also replete with evidence, aside from testimony by Philip Rowley, from which
17 a jury could very reasonably assess and render an award of damages for those breaches. *Pavao v.*
18 *Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *Marques v. Bank of Am.*, 59 F. Supp. 2d 1005, 1009
19 (N.D. Cal. 1999) (quoting *Omega Env’tl, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir.
20 1997)). Defendants’ Motion must be denied if – construing the evidence in the light most
21 favorable to Plaintiffs – there is substantial evidence for any reasonable interpretation that
22 supports the jury’s verdict. *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th
23 Cir. 1993); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir. 1984).
24 “Substantial evidence,” in turn, simply means relevant evidence that a reasonable person might
25 accept as adequate to support the conclusions reached. *Landes Const. Co., Inc. v. Royal Bank of*
26 *Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 770
27 (9th Cir. 1987).

1 Furthermore, Defendants have waived their right to challenge what they allege is an
2 inconsistent jury verdict by failing to raise this objection before the jury was discharged. When
3 counsel for a party is invited to consider discharging the jury, counsel's answer risks waiver of
4 objections to any later alleged inconsistencies. *The Home Indemnity Co. v. Lane Powell Moss &*
5 *Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995) (waiver of inconsistent verdict argument because party
6 failed to object to the alleged inconsistency before the jury's dismissal). Here, as in *The Home*
7 *Indemnity*, the Court gave Defendants' counsel the opportunity to object to the jury's verdict
8 before the jury was dismissed.¹ Defendants' agreement to discharge the jury before raising their
9 inconsistency argument now constitutes a waiver. *See Los Angeles Nut House v. Holiday*
10 *Hardware Corp.*, 825 F.2d 1351, 1354-55 (9th Cir. 1987) (waiver where party fails to object
11 immediately and move for re-submission of the inconsistency before jury dismissed).

12 Moreover, the proper remedy for an inconsistent verdict is a new trial, not a reversal of the
13 jury's verdict, and Defendants have sought only a reversal of the verdict in their Motion. When a
14 party claims a verdict is inconsistent, the court must attempt to reconcile any alleged
15 inconsistencies, and if it cannot, then it must grant a new trial. *Gallick v. Baltimore & Ohio R.R.*
16 *Co.*, 372 U.S. 108, 119-20 (1963) (court must try to harmonize inconsistent verdicts); *Tanno v.*
17 *S.S. President Madison Ves.*, 830 F.2d 991, 992 (9th Cir. 1987) (new trial required if inconsistent
18 findings are irreconcilable); *Toner v. Lederle Labs.*, 828 F.2d 510, 512-13 (9th Cir. 1987) (court
19 must exhaust efforts to read the verdict coherently before remanding for a new trial). Of course,
20 for the reasons detailed herein, the verdict is completely coherent, is not inconsistent, and no new
21 trial is warranted.

22 **III. DEFENDANTS HAVE NOT MET AND CANNOT MEET THE EXTREMELY**
23 **HIGH STANDARD REQUIRED TO OVERTURN THE JURY'S VERDICT ON**
24 **COMPENSATORY DAMAGES**

25 Defendants fail to meet the standard for overturning the jury's verdict on compensatory
26 damages. Defendants do not offer an alternative conclusion to the jury's verdict, other than to
27 state that the one legitimately reached is incorrect.

28 ¹ *See* Declaration of Ryan S. Hilbert ("Hilbert Decl."), Exh. A (Trial Transcript ("Trial Tr.") 2898:5-2898:7) (Court: "Any reason, though, why the jury cannot be discharged?" Defendants: "No, your Honor.").

1 Even then, Defendants are wrong. Defendants’ argument in favor of JMOL rests solely
2 on two premises: (1) that the only damages evidence available to the jury was testimony related to
3 calculation of equal shares of the gross licensing revenue (“GLR”) pool; and (2) that the jury
4 rejected this claim. Motion at 5. Even though Plaintiffs need to negate only one of these
5 premises to defeat Defendants’ Motion, each is false.

6 **A. Defendants’ Argument that the Jury Rejected Plaintiffs’ GLR Pool Claim Is**
7 **Purely Speculative.**

8 The crux of Defendants’ argument that “the jury rejected Plaintiffs’ GLR pool damages
9 evidence and theory” is that the jury found that Defendants breached the GLA, but did not award
10 any corresponding damages. Motion at 5. Defendants, however, ignore the obvious and cogent
11 reason why the jury awarded zero damages for breach of contract after finding a breach of
12 contract: **the jury was simply following the Court’s instructions not to double-count**
13 **damages.**² Given the jurors’ view of Defendants’ reprehensible conduct, it is hardly surprising
14 that they chose to award the damages for breach of fiduciary duty (so that they could also award
15 punitive damages) covering both the breach of contract and breach of fiduciary duty.

16 Under Paragraph 53 of the jury instructions, the jury was expressly cautioned about
17 awarding Plaintiffs damages for each of their breach of contract and breach of fiduciary duty
18 claims: “Plaintiff has made claims against defendants for breach of contract and breach of
19 fiduciary duty. If you decided that plaintiff has proved more than one of these causes of action,
20 the same damages that resulted from multiple claims can be awarded only once.” Based on this
21 instruction, it is perfectly reasonable that the jury found that Plaintiffs were entitled to damages
22 for breach of contract and breach of fiduciary duty, but chose only to award damages for one of
23 these claims, as instructed.

24
25
26 ² Furthermore, the Court’s instruction regarding breach of contract did not require the jury
27 to state a specific amount of damages in order to find a breach: “On the breach-of-contract claim,
28 Plaintiff has the burden of establishing by a preponderance of the evidence: (1) that moneys were
generated by defendants’ licensing of rights to which money the RPGLA class was entitled; and
(2) that at least some of any such money was not paid to the RPGLA class pursuant to the
RPGLA.” Final Charge to the Jury No. 16, Docket No. 546 (filed November 6, 2008).

1 Nowhere on the Special Verdict Form does it say that the jury must award damages for
2 each of Plaintiffs' claims if liability is established for both; choosing to put a damages number in
3 one blank over the other is entirely consistent with the Court's instructions. Indeed, it was
4 Defendants who urged the Court to adopt this instruction.³

5 **B. Defendants Misstate and Fail to Acknowledge the Broad Scope and Nature of**
6 **Plaintiffs' Damages Evidence.**

7 Defendants incorrectly state that "[t]he only damages evidence that Plaintiffs presented at
8 trial was predicated upon the jury finding that GLA Class members were entitled to equal shares
9 of the . . . gross licensing revenue ('GLR') pool." Motion at 4. This is not the first time
10 Defendants have made this argument. During the charging conference on November 6, 2008,
11 Defendants expressly asked that the jury be instructed that "the only damage evidence that's been
12 presented to the jury is a claim to equal shares of the GLR pool." Trial Tr. 2589:18-23. The
13 Court rejected Defendants' request by refusing to include such language in the final instructions.

14
15 _____
16 ³ There are many possible explanations for why the jury awarded damages for breach of
17 fiduciary duty as opposed to breach of contract. For example, it would have been plausible for
18 the jury to decide not to award damages pursuant to breach of contract in light of Paragraph
19 4(A)(v) of the 2000 Agreement between the NFLPA and PLAYERS INC. Hilbert Decl. Exh. B
20 (Trial Exh. 95). Paragraph 4(A)(v) states: "Gross Licensing revenues shall exclude any revenues
21 derived from the following: (v) amounts received by retired players pursuant to Group Licensing
22 Assignments or Group Licensing Rights." *Id.* The jury could have reasonably concluded that this
23 Agreement eliminated licensing revenue that should have been paid under the appropriate
24 construction of the GLA, but since the conduct was also a breach of fiduciary duty, damages
25 more properly were awarded in response to the fiduciary question.

26 As another example, the jury could have found breach of fiduciary duty from the
27 Defendants' determination not to render the retired players eligible for sharing in the equal share
28 royalty, particularly given the conflicts inherent in that decision by Defendants. Trial Tr. 748:4-
11. Such a finding is perfectly consistent with a breach of the contract, but since the dollars were
not treated as owed under the RPGLA because the retired players were later, without their
knowledge or consent, rendered ineligible for payment, the damages more properly were awarded
for breach of fiduciary duty.

Plaintiffs do not, of course, concede that the verdict would be inconsistent or improper in
any way, even if the jury were not required to follow the jury charge on double-counting of
damages (which, of course, they were). In addition to the above scenarios that are consistent with
a finding of a breach of contract yielding zero damages and a breach of fiduciary duty yielding
damages, Plaintiffs do not concede that a finding of no breach of contract at all (contrary to the
verdict) would preclude breach of fiduciary duty damages. The jury could have found (but did
not find) that the retired players were not included in the contracts but that the Defendants had a
fiduciary duty to include them in the contracts. The damage number and methodology would be
the same under either of those scenarios and the jury verdict should be upheld for that reason.

1 See Final Charge to the Jury No. 47, Docket No. 546 (filed November 6, 2008) (failing to include
2 Defendants' proposed language).

3 To say that Plaintiffs have not offered any evidence separate and apart from the "GLR
4 pool" is to penalize Plaintiffs simply for following the same methodology Defendants used. As
5 Plaintiffs explained to the Court when it rejected Defendants' narrow characterization of
6 Plaintiffs' claim, the only reason Plaintiffs used the term "GLR pool" was that that was a term
7 used by Defendants: "[Plaintiffs] completely disagree with [Defendants' proposed] instruction
8 because what [Plaintiffs] claim is the revenue. They put it [the gross licensing revenue] in the
9 GLR pool, which is why [Plaintiffs] [] used the methodology that [they] did. But [Plaintiffs']
10 claim is to the revenue from the license agreements. And to start instructing the jury that
11 [Plaintiffs] have to be a part of the GLR pool is confusing and misleading to the jury, because
12 what [Plaintiffs are] claiming is the revenue." Trial Tr. 2590:18-25; *see generally* Trial Tr.
13 2590:18-2591:8.

14 Defendants also fail to acknowledge that the jury had ample evidence to make an
15 appropriate determination of damages wholly apart from the actual calculation testified to by
16 Philip Rowley. The jury had at its disposal all of the evidence required to make its own
17 calculation, including: (1) all of the GLAs signed by the GLA Class (Exh. 1164-4); (2) a
18 summary list of each member of the GLA Class and the years in which each member had a GLA
19 in effect (Exh. 2057); (3) a chart of Total Royalty Payments by Year by Licensee during the
20 period FY 2003-2007 (Exh. 1217); (4) a chart of Royalty Payments showing the detail of actual
21 payments made by licensees during the period FY 2003-2007 (Exh. 1218); (5) documents
22 showing the NFLPA's own report of the amount of the equal share royalty for pertinent years,
23 including the total dollars paid out to active players, the amount of each annual check for the
24 equal share royalty, and the number of active players who received payments from the GLR pool
25 (Exhs. 1296, 1298 and 1299); and (6) copies of all of the pertinent license agreements (Exh.
26 1221). *See* Hilbert Decl. Exhs. V (2057), C (1217), D (1218), S (1296), T (1298), U (1299), and
27
28

1 E (1221).⁴ The jury also had at its disposal testimony about how the NFLPA handled the revenue
2 from such licenses. Trial Tr. 1412:23-25; 1427:18-1434:6; 1838:14-21. From these materials
3 and testimony, the jury was free to determine any damage amount it deemed appropriate so long
4 as that amount was supported by the evidence (as is the case here).

5 The possible range of damages is quite broad, and would certainly include the modest
6 \$7.1 million that the jury did award. Indeed, the Court considered this very point during the
7 charging conference and rejected Defendants’ same contention that the evidence was insufficient:

8 I’m going to deny this motion, because it looks to me like there’s sufficient
9 evidence from which the jury could figure out for each payment into the fund how
10 many active players participated in it. And we know how many class members
11 there were by year. It’s true that there is some loosey-goosey room on the practice
12 squad people. But if you look at the actual dollars that could be – it’s going to be
13 150 to 200 per year. And at a thousand dollars a pop, that’s only 200,000, at most,
14 out of 13, \$14 million. It’s going to be so *de minimus* that this is close enough.
15 So that motion is denied. There is – there is a methodology before the jury
16 whereby they could crank the numbers and come up with – all right.

17 Trial Tr. 2559:20-2560:8.

18 For the same reason, Defendants’ argument that the damage amount represents an award
19 of the “ad hoc” payments in evidence is nothing more than raw speculation and legally improper.
20 Although the jury could have based its damages award on other reasonable permutations of the
21 evidence, we “need not – and indeed cannot – reconstruct the precise mathematical formula that
22 the jury adopted. Nor need we explore every possible quantitative analysis or compute the basis
23 of each penny and dollar in the award.” *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr.,*
24 *Inc.*, 957 A.2d 890, 904 (D.C. 2008) (quoting *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225,
25 1239 (D.C. App. 1984)) (“Our inquiry ends once we are satisfied that the award is within a
26 reasonable range and that the jury did not engage in speculation or other improper activity.”).
27 The jury’s “award will be upheld as long as it is a ‘just and reasonable estimate based on relevant
28 data,’ even if it is not proven with mathematical precision.” *Id.* (citing *Affordable Elegance*
Travel, Inc. v. Worldspan, L.P., 774 A.2d 320, 329 (D.C. 2001)). Defendants’ attempt to “play
Monday morning quarterback” and supplant the jury’s evaluation of the complex and conflicting

⁴ Trial Exhibit 1164-4, which is all of the GLAs signed by the GLA Class, is fairly voluminous and thus is not included with the Hilbert Declaration.

1 evidence with their own is improper. *Los Angeles Memorial Coliseum Comm'n v. National*
2 *Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986).

3 **C. The Jury Had Sufficient Information To Determine That Plaintiffs Were**
4 **Entitled To \$7.1 Million In Damages For Breach Of Fiduciary Duty.**

5 Courts give substantial deference to the jury's finding of the appropriate amount of
6 damages. *Del Monte Dunes v. City of Monterrey*, 95 F.3d 1422, 1435 (9th Cir. 1995) (jury's
7 damages figure must be affirmed "unless the amount is grossly excessive or monstrous, clearly
8 not supported by the evidence, or based solely on speculation or guesswork."). Where, as here, a
9 jury verdict is challenged for insufficiency of the evidence on damages, such verdict will be
10 upheld if it is supported by "such relevant evidence as reasonable minds might accept as being
11 adequate to support the conclusion reached. A court will not disturb a damage award unless it is
12 clearly unsupported by the evidence." *LuMetta*, 824 F.2d at 770 (stating while the "evidence
13 could not establish an exact monetary value to the agreement, it substantially supports the jury's
14 finding of a formula by which such value could be ascertained."); *see also Del Monte Dunes*, 95
15 F.3d at 1435; *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992) (it is within the jury's
16 province to determine credibility of witnesses in awarding damages). Here, there is no question
17 the jury had sufficient information to determine that Plaintiffs were entitled to a modest \$7.1
18 million in damages for their breach of fiduciary duty claim.

19 During trial, Philip Rowley carefully explained the methodology he used in calculating the
20 various damages numbers in his report. Trial Tr. 1838:22-1850:2. Among the principles on
21 which Mr. Rowley relied was that any proceeds owed to the GLA Class be divided on an equal
22 share basis by the GLA Class members. Trial Tr. 1838:14-20. This is the same principle used by
23 Defendants for active players (Trial Tr. 939:22-940:9; 1412:23-25), and was confirmed by one of
24 Defendants' own witnesses, Dan Goich. Trial Tr. 2000:9-2001:14 ("That's the way I understood
25 it. If you part of the group that earned the monies, you would share equally.").⁵

26
27
28 ⁵ Mr. Goich was in a position to know this because of the many meetings he attended where
Defendants' officers explained the GLA program. Trial Tr. 1988:5-8; 1989:24-1990:6.

1 Also during trial, Defendants' expert, Dr. Roger Noll, testified that every single license
2 agreement in this case was evidence of significant demand for a group that includes six or more
3 active or retired players. Trial Tr. 2332:9-17 ("Q: You admit that, every single license in this
4 case is economic evidence that there is significant demand for groups of six or more active or
5 retired players. A: Yes."). In light of this wide-ranging demand, the jury could have determined
6 that Plaintiffs were entitled to any number attributed to a specific licensee, or to any part of the
7 income attributable to a licensee, or to part or all of the income attributable to any combination of
8 licensees. Trial Tr. 1847:11-20; 1857:9-1859:1. The equal share principle explained by
9 Mr. Rowley provides that the GLA Class receive its proportionate share of any such number.⁶

10 Plaintiffs introduced into evidence a chart prepared by Mr. Rowley showing each royalty
11 payment made by a licensee during the relevant time period (Trial Exh. 1218) and a chart
12 showing the annual payments made by each licensee during this period (Trial Exh. 1217). Hilbert
13 Decl. Exhs. C (Trial Exh. 1217) and D (Trial Exh. 1218); *see also* Trial Tr. 1842:12-1844:6
14 (explaining the charts). In addition, Plaintiffs introduced into evidence 95 license agreements
15 between Players Inc and its licensees. Trial Tr. 1690:4-1691:3; Hilbert Decl. Exh. E (Trial Exh.
16 1221) (listing the 95 license agreements that were entered into evidence).

17 Mr. Rowley explained to the jury how it could use these documents and his methodology
18 to calculate what the GLA Class would be owed based on individual licenses. Trial Tr. 1857:9-
19 1859:1 (explaining how the amount of Plaintiffs' damages could be determined on a licensee-by-
20 licensee basis). Such an independent look could generate on an equal share basis any number
21 within the dollar amount of those licenses divided by the number of players sharing equally
22 (which the jury also had before it as admissible evidence).

23 Nor was the jury constrained by any particular application of the "equal share" formula in
24 determining the uniform share to be awarded equally to retired players. Defendants themselves
25 brought to the jury's attention the role of practice squad players who received a lesser uniform

26 ⁶ Adding the number of GLA class members (approximately 2062) to the number of active
27 players (approximately 2300) yields a total number of players to share in the pool, which is then
28 divided into the appropriate licensing revenues. The retired players' share is a percentage of the
whole pie based on the number of eligible active players and the number of GLA retired players.

1 payment of \$1000. Trial Tr. 1923:9-12. Thus, the jury was free to determine an appropriate
2 damage award to the RPGLA Class on an equal share basis among the retired players based on
3 the evidence. The number awarded by the jury is less than the total amount calculated by
4 Mr. Rowley for all licensee revenue for all years and is well within the range of reason based on
5 the evidence. The jury could have reduced the sharing percentage paid equally to retired players,
6 the licensees from whom revenue was shared, or the particular revenue that was required to be
7 shared. All that matters is that the number fall within the reasonable range based on the evidence
8 admitted of licensing revenue paid and the amounts paid to active players. There is no debate that
9 the number awarded by the jury here, a modest \$7.1 million, was entirely reasonable and results
10 in a payment per retired GLA Class member that is significantly less on a per year basis than the
11 equal share payment made to active players.

12 Defendants make the baseless argument that the jury could choose from only eight
13 numbers for damages: \$29 million (\$32 million with interest); \$49 million (\$54 million with
14 interest); \$61 million (\$68 million with interest); or \$73 million (\$81 million with interest).
15 Motion at 6. This argument is without merit for at least three reasons.

16 First, as noted above, Mr. Rowley explained to the jury how to determine appropriate
17 damages amounts separate and apart from the eight numbers suggested in his damages report.
18 Trial Tr. 1857:9-1859:1. More specifically, Mr. Rowley explained to the jury how it could use
19 documents in evidence and his methodology to calculate what the GLA Class would be owed
20 based on individual licenses. *Id.* (explaining how the amount of Plaintiffs' damages could be
21 determined on a licensee-by-licensee basis).

22 Second, although Defendants insist that Mr. Rowley was presenting the jury with
23 "damages evidence" (*see, e.g.,* Motion at 6), in fact Defendants won a motion *in limine*
24 precluding Mr. Rowley from presenting anything but possible numerical alternatives which the
25 jury could accept or replace with a number of its own. *See* Order Adopting Summary of Rulings
26 on Motions *In Limine* Subject to Stated Modifications, Docket No. 494 (filed October 21, 2008)
27 ("Mr. Philip Y. Rowley, shall be permitted to testify as to his *arithmetic calculation* of different
28 damages amounts based upon various assumptions provided to him as to liability.") (emphasis

1 added); Transcript of October 15, 2008 Pre-Trial Hearing 39:21-23 (opposing counsel stating no
2 objection to Mr. Rowley “[a]s long as Your Honor, he offers no opinion because he has no basis,
3 that this is an appropriate measure of damages for this finding.”). That is precisely what Mr.
4 Rowley did, and the jury, as it had a right to do, chose a number of its own.

5 Third, “the jury is not bound to accept the bottom line provided by any particular damages
6 expert.” *In re First Alliance Mort. Co.*, 471 F.3d 977, 1002 (9th Cir. 2006); *see Creative*
7 *Computing v. Getloaded.com, LLC*, 386 F.3d 930, 936 (9th Cir. 2004) (jury need not “blindly”
8 adopt an expert’s conclusions; validity of verdict depends on whether substantial evidence
9 supports it, not whether the verdict matches expert testimony). As one of an essentially infinite
10 number of examples supported by the evidence, the jury could have determined that Defendants
11 breached their contractual and fiduciary duties to Plaintiffs only with respect to Electronic Arts
12 (“EA”) and calculated damages accordingly. Because EA was such a significant percentage of
13 the total licensing revenue, the EA Agreement would support the full damage amount on any
14 number of reasonable calculations that the jury could have made. *See Del Monte Dunes*, 95 F.3d
15 at 1435.

16 **D. Defendants’ Attempt To Misapply The Court’s Prior Comments About The**
17 **Evidence Is Unavailing.**

18 As further support for their argument that the verdict awarding damages must be set aside,
19 Defendants quote extensively from the trial transcript to suggest that the Court has somehow
20 prophesied the granting of Defendants’ Motion. Motion at 8-9. Defendants’ argument in this
21 regard is misleading and wrong, but Plaintiffs are confident that the Court will best understand
22 the limited nature of its own prior remarks.

23 Before closing arguments, the Court expressed two concerns about Plaintiffs’ case. The
24 first was that the jury would find no breach of contract (which would suggest the parties did not
25 reasonably expect that active and retired players would share revenues under the contract), but
26 would find a breach of fiduciary duty (which could have the effect of validating the very contract
27 provision at issue). Trial Tr. 2464:4-2466:9. This concern was never realized, however, because,
28 by finding for Plaintiffs on breach of contract, the jury concluded “(1) that moneys were

1 generated by defendants' licensing of rights to which money the RPGLA class was entitled; and
2 (2) that at least some of any such money was not paid to the RPGLA class pursuant to the GLA.”
3 Final Charge to the Jury No. 16, Docket No. 546 (filed November 6, 2008).

4 The Court's second concern was that Plaintiffs had not offered a damages methodology
5 that would exist separate and apart from Plaintiffs' breach of contract claim. Trial 2463:1-21. As
6 above, this concern never materialized because the jury returned verdicts of both breach of
7 contract and breach of fiduciary duty in Plaintiffs' favor. *See, e.g.*, Trial Tr. 2463:17-19. In fact,
8 the Court made clear that its concern was the potential of a negative jury finding for Plaintiffs on
9 contract interpretation that would make a jury finding of damage on fiduciary duty more difficult
10 to comprehend. But, the jury found for Plaintiffs on the contract interpretation and damages are
11 fully supported by the evidence. As explained in Section C immediately above, the jury had
12 ample evidence before it from which it could have arrived at the damage numbers at which it did
13 arrive. As instructed, the jury did not double-count (see Section III.A above).

14 **E. Defendants' Recycled Argument That Plaintiffs Failed To Prove**
15 **Individualized Damages Fails For The Same Reasons It Failed In Previous**
16 **Motions.**

17 Defendants rehash their argument that Plaintiffs must prove individual damages. The
18 Court already has rejected this argument several times, including in connection with the granting
19 of class certification, the denial of summary judgment, and the adoption of the jury instructions.
20 As already explained, the damages were properly presented and calculated on a class-wide basis
21 with an equal share or uniform methodology – the same methodology used by Defendants
22 themselves when distributing money to active players. Trial Tr. 939:22-940:9; 1412:23-25.

23 Even assuming that Plaintiffs had to prove individualized damages, they already
24 accomplished this task by virtue of setting forth an “equal share” theory of recovery. Under this
25 theory, each member of the GLA class was to share equally in the proceeds he should have but
26 did not receive as a result of signing the GLA. Trial Tr. 1838:14-20. Put another way, each
27 individual GLA class member was damaged in the same way as every other individual GLA class
28 member. This alone moots Defendants' argument.

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

19 *Brown v. Pro Football*, 146 F.R.D. 1, 3 (D.D.C. 1992) is illustrative. In *Brown*, the NFL
20 defendants sought to de-certify a class action brought by the NFLPA on behalf of its professional
21 football player members. Like Defendants here, the NFL alleged that "[t]he injury and damage
22 determinations will require separate proof as to each class member; thus, common issues no
23 longer predominate over individual issues as required by Fed. R. Civ. Pro. 23." *Id.* at 3. The
24 NFL defendants sought to support this allegation by "examining several members of the class and
25 highlighting the differences among them." *Id.* Nonetheless, the court noted that there existed
26 numerous common issues of fact, including that "[e]ach member of the plaintiff class signed a
27 similar contract to play on similarly-developed and -operated Development Squads for the same
28 weekly salary." *Id.* at 7. With respect to damages, the court also noted that there was a "common

1 method of proof of damages.” *Id.* The court stated: “Although individual circumstances
2 necessarily exist among the members of the plaintiff class, a reasonable approximation of
3 damages is achievable through a common formula. Thus, the factual basis of the damages is
4 common to all members.” *Id.*

5 As with the players in *Brown*, a reasonable approximation of the damages suffered by
6 Plaintiffs in this case was achievable through a common formula. The jury’s damage award was
7 based on acts by Defendants that affected the GLA Class as whole, and are to be shared among
8 the GLA Class members equally. Moreover, as explained above, Plaintiffs’ damages are
9 “demonstrated by a mathematical computation based on a formula common to an identified
10 class.” Newberg § 10.03 at 479. Mr. Rowley testified that Plaintiffs sought damages to the GLA
11 Class as a whole based on an equal share basis – a reasonable class-wide formula. Trial Tr.
12 1838:14-20; *see also* Trial Tr. 2000:9-2001:14 (Defendants’ witness confirming that equal share
13 was consistent with the parties’ expectations). Significantly, Mr. Rowley’s methodology – *i.e.*,
14 distribution to each retired player on an equal share basis – is the same methodology Defendants
15 themselves use for active players. Trial Tr. 939:22-940:9; 1412:23-25. Such class-wide
16 calculations are and were appropriate.

17 None of the cases Defendants cite support the proposition of individualized damages. In
18 *Abuan v. General Electric Co.*, 3 F.3d 329, 334 (9th Cir. 1993), the court considered whether
19 each member of a class of workers who claimed to be exposed to toxic chemicals was actually
20 exposed to such materials. There was no discussion of individualized damages aside from a
21 vague reference in *dicta*. Similarly, in *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 n.8
22 (9th Cir. 1974), the court re-considered the district court’s decision to certify a class of residential
23 home sellers. The court determined that the case could not be maintained as a class action on the
24 ground that, among other things, the individualized nature of each Plaintiff’s claim made the class
25 action unmanageable. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 n.8. Here, the class
26 was properly certified.⁷

27 ⁷ Defendants’ other cases are similarly inapposite. *Hilao v. Estate of Marcos*, 103 F.3d 767,
28 788 (9th Cir. 1996) is a case involving torture victims whose causation and damages will
necessarily be distinct due to the nature of their injury. Moreover, *In re Hotel Telephone*

1 **IV. THE JURY’S DETERMINATION ON PUNITIVE DAMAGES SHOULD STAND**

2 **A. Plaintiffs Offered Clear and Convincing Evidence That Defendants’ Actions**
3 **Warranted Punitive Damages.**

4 Defendants cannot meet the standard for overturning the jury’s punitive damages award.
5 Defendants cannot establish that no reasonable jury could interpret the evidence against them, and
6 failing that, the motion must be denied. As above, this is not the first time Defendants have
7 sought to re-introduce an argument that has already been rejected. During both the November 5
8 hearing on their Rule 50 motion and the November 6 charging conference, Defendants implored
9 the Court not to instruct the jury on punitive damages. Trial Tr. 2481:14-2483:2; 2483:25-
10 2484:14; 2593:19-24. The Court, having heard over two weeks of evidence by that time, thought
11 that the matter was ripe for the jury and thus rejected Defendants’ request. Trial Tr. 2486:1-
12 2489:1; 2593:19-24. Indeed, as the Court observed during the hearing on Plaintiffs’ Rule 50
13 motion:

14 Here are some of the points that work in the plaintiffs’ favor. You’ve got a
15 contract that calls for an escrow and no escrow was ever set up. You’ve got a
16 contract they tried for 14 years to get people to sign up, and not one penny was
17 ever distributed under this contract. So what was the – why was that? And why
18 was it so hard? It’s true that you have some verbal testimony saying: “Yes, we
19 tried to interest the licensees in the group licensing class members” but it’s not
20 strong evidence. It’s verbal. And there is in writing a letter saying: “Don’t use
21 their names and images. You must scramble.” It would have been nice if that
22 same letter had said: “And, by the way, we stand ready to give you a group license
23 on these people, or at least on a large number of them.” But the defense person – I
24 have forgotten her name – who wrote that letter, didn’t do that. Instead, she said:
25 “Don’t use them.” Now, I understand the explanation. But if the – if the
26 defendants were so keen on trying to market these rights, that would have been a
27 very natural opportunity to say: “And, by the way, we have 20,000 – I mean 2,053
28 signed up. We will license these to you for \$10,000.” Okay? For some
reasonable sum over and above. Something to indicate in writing that there was a
genuine, sincere effort to market. No, that did not occur.

* * *

23 Instead, [LaShun Lawson of Players Inc] just says: “No. Scramble.” Then, you
24 have the problem with owing the favor and trying to help EA out and saving them
25 money. One could infer that the defendants wanted to monopolize – that’s too
26 strong a word – wanted to keep someone else out, like [Take Two] . . . keep take
two out of the market so that they would not emerge [as] an alternative source for
football players. And that this was a preemptive move, a defensive move, to bottle

27 *Charges*, 500 F.2d 86 (9th Cir. 1974) is a case in which the court denied certification in a far-
28 reaching antitrust suit, where, unlike here, common questions did not predominate over individual
questions.

1 up the players and – it’s not exclusive, but, nonetheless, make the players think
2 that they were doing something so that they would not get any interest in Take
3 Two. What I’m doing is reciting for the record a theory that the plaintiffs have in
4 words, more or less, articulated, which would supply evil motive, supply greed,
5 trying to trick the retired players.

6 Trial Tr. 2486:1-2488:6.

7 The facts below (as indicated by the Court above) demonstrate that Plaintiffs have met
8 their burden by proving with clear and convincing evidence that Defendants acted with evil
9 motive and that their conduct was outrageous, grossly fraudulent or reckless. *See United Mine
10 Workers of Am. v. Moore*, 717 A. 2d 332, 341 (D.C. 1998).

11 **1. Even Though Defendants Actively Solicited Plaintiffs To Sign GLAs,
12 Defendants Never Intended To Honor Their Terms.**

13 Defendants called a number of witnesses to testify how they actively solicited retired
14 players to sign GLAs. *E.g.*, Trial Tr. 498:19-24. These witnesses (all former executives of
15 Defendants except Trace Armstrong, who is a candidate to replace former NFLPA Executive
16 Director, Gene Upshaw) testified that they were trying to “help” retired players in requesting that
17 all retired players turn over their licensing rights and allow Defendants to act as their
18 representatives by going out and marketing these rights. Motion at 14 n. 9. But on cross-
19 examination, these witnesses had no choice but to admit the obvious: Even though Defendants
20 actively and aggressively solicited signed GLAs from their retired player members for years –
21 thereby offering such players hope and implying that such signed GLAs had value – Defendants
22 never marketed these players as a group. Trial Tr. 609:11-19; 947:7-18; 1242:13-15; 1244:1-5;
23 1249:11-14; 1263:3-5; 2108:14-20 Defendants also wanted the ability to be, as they put it, a
24 “one-stop shop” for third parties who wanted to license the rights of active or retired players.
25 Hilbert Decl. Exh. F (Trial Exh. 29). The GLAs allowed them to publicly proclaim that they
26 represented more than 3500 retired players.⁸ *See, e.g.*, Hilbert Decl. Exh. G (Trial Exh. 5).

27 After implementing the GLA program, Defendants then worked behind the retired
28 players’ backs to ensure that Defendants would never have to compensate retired players under

⁸ Defendants altered this language within days of the filing of this lawsuit to state that Defendants represented “many memorable” retired players. Hilbert Decl. Exh. G (Trial Exh. 5).

1 those agreements. For example, Defendants drafted “eligibility” standards that specifically
2 excluded retired players, even though they have conceded that such standards could have
3 included retired players if Defendants wished. *Id.* Hilbert Decl. Exh. H (Trial Exh. 96); Trial Tr.
4 545:9-12 (stating that there was nothing that could have prevented Defendants from defining
5 eligibility in a manner to include retired players). In 2000, Defendants also executed a contract
6 between themselves that excluded from the definition of “gross licensing revenue” amounts
7 received by retired players pursuant to Group Licensing Assignments or Group Licensing Rights.
8 Hilbert Decl. Exh. B (Trial Exh. 95). To make matters worse, even though Defendants knew that
9 they did not intend to pay retired players under the GLA, they continued to offer retired players
10 hope by stating in an issue of Touchback magazine – the newsletter for retired players – that the
11 players’ continued participation in the GLA program was “essential.” Hilbert Decl. Exh. I (Trial
12 Exh. 2046).

13 Finally, the GLA unambiguously defines retired player group licensing programs as
14 “programs in which a licensee utilizes a total of six (6) or more present or former player NFL
15 player images in conjunction with or on products that are sold at retail or used as promotional or
16 premium items.” Hilbert Decl. Exh. J (emphasis added) (Trial Exh. 110); *see also* Trial Tr.
17 541:15-24. Despite this clear language, Mr. Allen testified that a retired player would get paid
18 under the GLA only “in the event that a third party like EA agreed to license the entire stable of
19 retired players who had signed up under the GLA.” Trial Tr. 759:23-760:3. Of course, this is not
20 what the agreement says or contemplates nor was this rationale ever shared with the retired
21 players.⁹

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23
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25
26 ⁹ The GLA also mandated the creation of an escrow account for monies collected under the
27 GLA. Mr. Allen testified that it was never created, which is an express breach of the GLA. Trial
28 Tr. 746:5-7.

1 **2. Defendants Did Nothing To Market Retired Players' Images, And**
2 **When A Third Party Expressed An Interest In Retired Players,**
3 **Defendants Maliciously Went Behind Their Backs To Attempt To Cut**
4 **Retired Players Out.**

5 Once they obtained the signed GLAs, and contrary to their obligations under the GLA,¹⁰
6 Defendants intentionally did absolutely nothing. Even the former head of the union admitted as
7 much. When asked “do you make efforts to sell that [retired players images] prior to them
8 making requests,” Mr. Upshaw nonchalantly responded “not really.” Trial Tr. 609:11-19. Mr.
9 Upshaw also infamously referred publicly to retired players as “dog food.” Hilbert Decl. Exh. K (RFA No. 19). When retired players complained about their lack of support from their fiduciary,
10 Mr. Upshaw fired back by insinuating that he wanted nothing to do with retired players
11 Defendants contracted to represent: “the bottom line is I don’t work for them . . . they don’t hire
12 me, and they can’t fire me. They can complain about me all day long. They can have their
13 opinion. But the active players have the vote. That’s who pays my salary.” Trial Tr. 1529:8-14.

14 Of course, Defendants attempted at trial (and in their Motion) to argue that they did in fact
15 use their “best efforts” to market retired players. Trial Tr. 928:12-15. But, in addition to
16 Mr. Upshaw’s own testimony, the overwhelming evidence established that they did not. For
17 instance, Mr. Allen’s wife, former Players Inc executive Pat Allen, testified that a list of retired
18 players who had signed GLAs was available to all third party licensees (or potential licensees).
19 Trial Tr. 2108:14-20. Yet, Players Inc’s VP of Players Marketing, who worked directly under
20 Ms. Allen, testified that he was not aware of such a list. Trial Tr. 2409:23-25. And EA’s Joel
21 Linzner testified that Defendants’ largest licensee, EA, never was provided with a list of retired
22 players who had signed GLAs. Trial Tr. 1243:13-15; 1244:1-5.

23 If that were not bad enough, Defendants went one step further: They affirmatively
24 discouraged third-party licensees from licensing retired players so licensing revenue would not
25 have to be shared with retired players. For example, in response to EA’s request to utilize retired

26 _____
27 ¹⁰ Mr. Allen testified that players had a right to believe that Defendants would aggressively
28 market them. Trial Tr. 492:24-493:6. Mr. Linzner testified that Defendants were “an agent or
middleman between the retired players and [EA] to license the rights of those retired players.”
Trial Tr. 1246:4-9.

1 players in the Madden video games, LaShun Lawson, a former assistant vice president at Players
2 Inc, instructed EA to “scramble” their images. Hilbert Decl. Exh. L (Trial Exh. 1320).
3 Defendants argue that they gave the scrambling instruction to protect retired players because the
4 right to utilize their images was not in the EA Agreement. Trial Tr. 915:20-25. This
5 rationalization contradicts on its face Defendants’ oft-repeated mantra that the images of the class
6 members were “worthless.”

7 Other evidence has re-affirmed the original LaShun Lawson letter mentioning that EA
8 should scramble the rights of retired players. Specifically, in an email chain about use of retired
9 players images in the Madden games between EA and Ms. Lawson, EA wrote “I know that
10 Players Inc. does not want us to include any retired players ‘in the game’” Put simply, rather
11 than offering the retired players to EA pursuant to EA’s request (let alone marketing them to EA),
12 Defendants refused EA’s request to use retired players. Such conduct is outrageous, malicious
13 and committed in reckless disregard of Plaintiffs’ rights.

14 Finally, there was evidence that Defendants put the interests of third-party licensees
15 before those to whom they owed a duty. In one instance, Players Inc was involved in negotiations
16 between EA and certain retired players, such as Mr. Adderley, who were members of the Pro
17 Football Hall of Fame. In an email between former NFLPA executive Clay Walker and Joe
18 Nahra, Players Inc’s in-house counsel, Mr. Walker bragged about selling out the retired players in
19 proclaiming that EA owed him a “huge favor” because he “was able to forge this deal with the
20 HOF that provides them with \$400K per year (which is significantly below market rate).” Hilbert
21 Decl. Exh. M (Trial Exh. 521).

22 Defendants in their motion have simply failed to make the adjustment to losing at trial. At
23 trial, Defendants were free to argue their interpretation of the evidence and to try to convince the
24 jury to believe their story, however lacking in credibility it might be. Now that the jury has
25 spoken, however, Defendants are not free to argue the evidence in the light most favorable to
26 them. To obtain JMOL, Defendants must establish that no reasonable jury could have concluded
27 that they acted with the requisite intent, as the jury so clearly found. The evidence, however, was
28 strongly to the contrary, and it is clear from the examples above that a reasonable jury could have

1 concluded, as it did, that there was clear and convincing evidence that Defendants' conduct was
2 outrageous and that they acted with evil motive toward Plaintiffs.

3 **B. The Punitive Damages Award Is Well Within Constitutional Limits.**

4 Defendants argue that the \$21 million punitive damages award must be dramatically
5 reduced to a one-to-one ratio with the compensatory damages award because, under the Supreme
6 Court's holding in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2002), an
7 award of three times compensatory damages "stretches the constitutional limit." Motion at 18-19.
8 This is absolutely false. In fact, none of the cases that Defendants cite, let alone *State Farm*,
9 articulate a rule that only a one-to-one ratio between compensatory and punitive damages is
10 appropriate. In fact, as set forth below, all of Defendants' authorities actually support denial of
11 Defendants' request that the jury's punitive damages award be reduced.

12 In *State Farm*, the Supreme Court did not, as Defendants argue, even suggest that a one-
13 to-one ratio was required. To the contrary, the Supreme Court expressly declined "to impose a
14 bright line ratio which a punitive damages award cannot exceed." *Id.* at 425. Rather, the Court
15 held that "fee awards exceeding single digit ratios between punitive and compensatory damages,
16 to a significant degree, will satisfy due process." In reaching this conclusion, the Court surveyed
17 its prior decisions, including its decision in *Pacific Mutual Life Insurance Co. v. Haslip*,¹¹ which
18 allowed punitive damages four times greater than compensatory damages, and observed, "single-
19 digit multipliers are more likely to comport with due process, while still achieving the state's
20 goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or in this
21 case, of 145 to 1." *Id.* at 410. The Supreme Court further noted that although ratios that are
22 "double, treble or quadruple . . . are not binding, they are instructive." *Id.* at 425; *see also TXO*
23 *Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (upholding a \$10 million punitive
24 damage award despite the fact that it was over 526 times as large as the actual damage award of
25 \$19,000).

26
27 ¹¹ In *Haslip*, the Supreme Court further noted that "an award of more than four times the
28 amount of compensatory damages might be close to the line of constitutional impropriety."
Haslip, 499 U.S. 1, 23-24 (1991).

1 Nor do the other cases Defendants cite support their position. In *Mendez v. Gonzalez*, 540
2 F.3d 1109 (9th Cir. 2008) , the Ninth Circuit reduced the punitive damages award because the
3 ratio was 250,000:1. In *Daka Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003) , the D.C. Court of
4 Appeals reduced an award with a 26:1 ratio because it significantly exceeded the single digit ratio
5 (*i.e.*, greater than 9:1).¹² And in a post-*State Farm* Ninth Circuit case that Defendants neglected
6 to cite, the Ninth Circuit upheld a 7:1 ratio and noted that “this is, of course, a single-digit ratio,
7 far below the ratios at issue in *BMW, Cooper Industries and State Farm*. We are aware of no
8 Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and
9 compensatory damages, and we decline to extend the law in this case.” *Zhang v. Am. Gem*
10 *Seafood, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (emphasis added); *see also S. Union Co. v.*
11 *Irvin*, 2008 U.S. App. LEXIS 23403, *5-6 (9th Cir. Nov. 7, 2008) (upholding a 3:1 ratio of
12 punitive to compensatory damages).

13 Here, the jury’s punitive damages award of \$21 million dollars is well within the single-
14 digit range that the Supreme Court found to be instructive in evaluating whether a punitive
15 damages award satisfied due process. In fact, since *State Farm*, a number of courts throughout
16 the country have upheld punitive damages awards with ratios that were far greater than the 3:1
17 ratio in the case at bar. *See, e.g. Kemp v. AT&T*, 393 F.3d 1354 (11th Cir. 2004) (2,173:1 ratio
18 affirmed in RICO class action); *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003) (110:1 ratio upheld
19 in discrimination action); *Mathias v. Accor Econ. Lodging*, 347 F.3d 672 (7th Cir. 2003)
20 (affirming 37:1 ratio); *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003) (upholding 4:1 ratio in
21 employment discrimination lawsuit).

22 Even in those cases where punitive damages have been reduced to comply with
23 constitutional limits, they have been reduced to a greater ratio than Plaintiffs were awarded here.
24 *See, e.g., Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 833 (8th Cir. 2004) (reducing
25

26 ¹² Defendants also cite *Rwanda v. Johnson*, 409 F.3d 368, 376 (D.C. Cir. 2005) for the
27 proposition that punitive damages should be reduced to a 1:1 ratio if compensatory damages are
28 reduced. But, although the *Rwanda* court remanded the action for reconsideration of the punitive
damages award after the compensatory damages were reduced, it did so “without suggesting that
[the punitive award] is necessarily inappropriate.” *Id.* at 22.

1 punitive award to 4:1 in medical malpractice action); *Eden Elec., Ltd v. Amana Co.*, 370 F.3d
2 824, 829 (8th Cir. 2004) (reducing punitive award to a ratio of 4.76:1).

3 Because the jury’s punitive damages award is well within the ratio contemplated by the
4 Supreme Court and other authoritative courts, it should not be disturbed.

5 **V. THE JURY’S DETERMINATION ON FIDUCIARY DUTY SHOULD BE UPHELD**

6 **A. Defendants’ Recycled Arguments On Fiduciary Duty Liability Fail For The**
7 **Same Reasons That They Failed In Defendants’ Motion For Summary**
8 **Judgment And Previous Motion Under Rule 50.**

9 Both parties presented abundant evidence concerning the existence of a fiduciary
10 relationship. Under D.C. law, agency is a broad concept. It is determined based upon the
11 agreement, the circumstances surrounding the agreement, and the parties’ relationship. *See* Final
12 Charge to the Jury No. 37, Docket No. 546 (filed November 6, 2008) (“In evaluating whether
13 defendants undertook to be an agent with fiduciary duties, you must consider not only the actual
14 words used in the agreement, but all of the circumstances surrounding the licensed rights at issue
15 and the parties’ relationship.”).

16 The law of agency takes into account the factual context between the parties. *See, e.g.*,
17 *C&E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 264 (D.D.C. 2007) (“[I]n determining
18 whether an agency relationship exists, courts examine both ‘the terms of [the] contract . . . and . . .
19 the actual course of dealings between the parties.’”) (quoting *Judah*, 744 A.2d at 1040).¹³ The
20 Restatement (Third) of Agency § 1.01, accepted as authoritative by the D.C. courts,¹⁴
21 acknowledges: “Agency encompasses a wide and diverse range of relationships and
22 circumstances. . . . Authors, performers, and athletes often retain specialized agents to represent
23 their interests in dealing with third parties. Some industries make frequent use of nonemployee

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

¹⁴ The District of Columbia follows the Restatement of Agency. *C & E Servs., Inc. v.*
Ashland, 498 F. Supp. 2d 242, 264 n.12 (D.D.C. 2007).

1 agents to communicate with customers and enter into contracts that bind the customer and a
2 vendor.” In determining whether an agency relationship exists, and in evaluating the factors that
3 support a finding of agency, the jury is entitled to look at the course of dealing between the
4 parties. *See Judah*, 744 A.2d at 1040 (“In deciding [whether there is an agency relationship],
5 courts will look to . . . the actual course of dealings between the parties.”). D.C. courts have
6 emphasized the importance of looking at the course of dealing in evaluating a potential agency
7 relationship. *See C&E Servs.*, 498 F. Supp. 2d at 264 (D.D.C. 2007).

8 Control is one factor to be considered (*see* Trial Transcript 2811) (Jury instructions);
9 however, the type and level of control is dependent upon the type of relationship.¹⁵ For example,
10 although agency covers the employer/employee relationship, and, *in that context*, control is often
11 a key distinction between an employee and an independent contractor¹⁶ (*see Safeway Stores, Inc.*
12 *v. Kelly*, 448 A.2d 856, 860 (D.C. 1982)), other contexts suggest that control may be quite
13 attenuated and still permit a finding of agency. *See Green v. H & R Block, Inc.*, 735 A.2d 1039,
14 1051 (Md. 1999) (“In sum, the control a principal exercises over its agent is not defined rigidly to
15 mean control over the minutia of the agent’s actions, such as the agent’s physical conduct, as is
16 required for a master-servant relationship. The level of control may be very attenuated with
17 respect to the details. However, the principal must have ultimate responsibility to control the end
18 result of his or her agent’s actions; such control may be exercised by prescribing the agents’
19 obligations or duties before or after the agent acts, or both.”) (cited in Restatement (Third) of
20 Agency § 1.01(f)). Agency also covers the broker/investor relationship, where a determination of
21 agency is *more* likely if the investor does not control the day-to-day activities of the broker, and

22 ¹⁵ Ironically, despite claiming that “day-to-day” control is a *sine qua non* of a fiduciary
23 relationship, the NFLPA recently initiated a lawsuit against the NFL and the NFL Management
24 Council in which it alleged breach of fiduciary duty without even referencing the same type of
25 onerous “control” requirement Defendants insist on here. *See National Football League Players*
Association v. National Football League and National Football League Management Council,
Case No. 08CV6254 RHK/JJG (D. Minn. December 4, 2008), attached as Exhibit N to the Hilbert
Declaration (StarCaps Complaint).

26 ¹⁶ Employer/employee is the exclusive category on which Defendants wish – erroneously –
27 to rely. *See* Motion at 19, 21 (citing only employment cases: *Giles v. Shell Oil Corp.*, 487 A.2d
28 610,611 (D.C. 1985); *Ames v. Yellow Cab of D.C., Inc.*, 2006 WL 2711546 (D.D.C. 2006);
LeGrand v Ins. Co. of North Am., 241 A.2d 734 (D.C. 1968); *Environmental Research Int’l, Inc.*
v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 812 n. 7 (D.C. 1976).

1 instead, the broker retains control over those activities. *See Merrill Lynch v. Cheng*, 901 F.2d
2 1124, 1128 (D.C. Cir. 1990) (“A broker is an agent who owes his principal a duty to act only as
3 authorized.”); *Lieb v. Merrill Lynch*, 461 F. Supp. 951, 954 (E.D. Mich. 1978) (considering
4 whether the broker had “usurped actual control over a technically non-discretionary account” in
5 determining the extent of duties owed to the investor); *Robles v. Consol. Graphics, Inc.*, 965
6 S.W.2d 552, 557 (Tex. App. 1997) (“Clearly, Robles was hired by both CCI and Gulf Printing on
7 a commission basis to make or negotiate bargains or contracts on their behalf in matters of trade
8 and commerce. Accordingly, Robles was acting as an agent and broker for both Gulf Printing
9 and CCI.”).

10 In the context of a parent and a subsidiary, a court has recognized that agency may be
11 found if “the parent exercises its control in a manner more direct than by voting a majority of the
12 stock in the subsidiary or making appointments to the subsidiary’s Board of Directors.” *See*
13 *TransAmerica Leasing, Inc. v. Venezuela*, 200 F.3d 843, 849-850 (D.C. Cir. 2000). Importantly,
14 D.C. cases emphasize that the *right* to control, rather than its actual exercise, is the proper focus
15 when determining agency. *See Judah*, 744 A.2d at 1040. Defendants have not cited and cannot
16 cite a case in which a member of a large class must specifically control the day-to-day activities
17 of his agent. Such a minute level of control by thousands of individuals is an absurd concept.

18 As noted immediately below, the jury instructions offered many different factual
19 scenarios, any one of which may amount to a fiduciary relationship in the context of the GLA
20 relationship. Based upon its consideration of such factors, the jury properly found an agency
21 relationship.

22 **1. There Was Sufficient Evidence To Show That The Parties Reasonably**
23 **Expected That Defendants Were Plaintiffs’ Marketing Agents.**

24 The evidence indicated a reasonable expectation of the parties both that the Defendants
25 would act as their marketing agents and that the Class would share in marketing proceeds. This
26 same evidence supports the jury’s conclusion that Defendants in fact were the marketing agents
27 of the GLA Class members. For example, Players Inc sent solicitation letters to retired players to
28 sign a GLA “on a regular basis.” Trial Tr. 498:19-24; Hilbert Decl. Exhs. O (Trial Exh. 23) and I

1 (Trial Exh. 2046). The players were told that their participation in group licensing was
2 “essential.” *Id.*, Exh. I (Exh. 2046). A letter from Doug Allen implored the retired players to
3 “[j]oin the thousands of retired NFL players who have provided their name and image rights to
4 the NFLPA and Players Inc. You may get the opportunity to receive royalty payments or
5 appearance fees.” Hilbert Decl. Exh. O (Trial Exh. 23). Mr. Allen testified that players had a
6 right to believe that Players Inc. would market them:

7 Q. So anybody who was retired, that was asked to sign a GLA and signed a GLA,
8 would have a right to believe that what Players Inc was going to do for them is
9 take the helmets off the players and market them as personalities as well as
10 professional athletes, correct?

11 A. Yes.

12 Trial Tr. 492:24-493:6.

13 Q. So any retired player who was being asked to sign a group licensing
14 authorization by the union would have a right to believe from this [website] that
15 Players Inc had been aggressive on behalf of retired players to expand their
16 marketing opportunities, right?

17 A. That’s correct.

18 Trial Tr. 493:17-22.

19 Players Inc also gave the impression to the rest of the world that it was responsible for
20 marketing the retired players. Its website stated that it represented “over 3,000 retired players”.
21 Hilbert Decl. Exh. G (Trial Exh. 5). Similarly, it touted itself in its marketing materials as the
22 “one-stop licensing and market shop for NFL players”.¹⁷ Hilbert Decl. Exh. F (Trial Exh. 29).
23 Even Players Inc’s own licensees – including Mr. Linzner of Electronic Arts, Defendants’ biggest
24 licensee – were led to believe that Players Inc acted as an agent for the retired players:

25 Q. Is it true that you understood that, in effect, the NFLPI, Players Inc was acting
26 as a sort of agent for retired players in dealing with you?

27 A. Yeah, they were an agent or middleman to- between the retired players and us
28 to license the right of those retired players.

¹⁷ Defendants even testified at trial that they used their “best efforts” to market the retired player group rights and were “aggressive in . . . efforts to expand [retired] player marketing opportunities.” Trial Tr. 928:12-15; Trial Tr. 1620:25-1621:4. In further support of the fulfillment of their fiduciary obligations, they offered evidence of their marketing materials. Trial Tr. 810:55-812:3.

1 Trial Tr. 1246:4-9.

2 Not surprisingly, in part because of Defendants' efforts, the GLA class members testified
3 that they reasonably believed that Players Inc had a duty to market them and to generate revenue
4 for them.

5 Q. Did you have a mindset about what the union was going to do on your behalf
6 under this agreement?

7 A. I assumed they're acting as an agent for active and retired players, and they
8 were going to try to get deals for us, and we would get paid.

8 Trial Tr. 980:23-981:2.

9 Q. All right. So you signed [the GLA], right? And you're giving them what?

10 A. The right to act as my agent. I'm giving them my image as a professional
11 football players.

12 Q. And did you think they were going to do anything with that right?

13 A. I assumed so. Why would they ask me to sign something?

14 Q. All right. And what did you expect them to do?

15 A. I expected them to market retired and active players in the group licensing
16 agreements.

16 Q. As your what?

17 A. As my representative, my agent, whatever you want to call them.

18 Trial Tr. 990:8-20.

19 Q. And tell me what you expected to happen after you signed this agreement, Mr.
20 McNeil. Did you think you were going to do something, or did you think Union
21 was going to do something?

22 A. I felt that the Union was going to market the rights to six or more players to a
23 third party and that there would be revenue or income generated, and I would get
24 an opportunity to earn some monies.

24 Trial Tr. 364:2-9.

25 Q. What did you expect from the union, if anything?

26 A. Well, my-- my belief was that these particular documents, the GLA would
27 probably be collected by the union, and then the union would take those and
28 market it through -- through a third party.

28 Trial Tr. 1087:11-15.

1 The GLA Class members also testified that they had a reasonable expectation of sharing
2 in the money generated from such group licensing:

3 Q. And if the union was able to sell a group license of six or more present or active
4 players . . . did you think you were entitled to share in the money?

5 A. Yes.

6 Q. And what led you to believe that?

7 A. Because [the GLA] says it's a collective-- it's a group licensing agreement
8 Trial Tr. 1087:16-23.

9 Q. And why did you sign [the GLA]?

10 A. Because I thought I would still have a shot at licensing monies if it came to
11 fruition.

12 Trial Tr. 990:21-23. Of course, this is not surprising because the GLA states as much: "the
13 moneys generated by such licensing of retired player group rights will be divided between the
14 player and an escrow account for all eligible NFLPA members who have signed a group licensing
15 authorization form." Hilbert Decl. Exh. J (Trial Exh. 110). Indeed, Defendants' own expert, Dr.
16 Roger Noll, testified that retired players could expect payment from video games like EA's
17 popular Madden franchise:

18 Q. So if such a game existed that had historical teams, retired players who signed a
19 GLA's could expect significant revenues from such a game, correct?

20 A. Might expect, yes.

21 Trial Tr. 2211:15-18.

22 Based on evidence such as this, a jury could conclude that the parties' reasonable
23 expectations were that the Defendants would promote and market the retired players as their
24 agents and that the retired players would share in the proceeds. The same evidence supports the
25 conclusion that the Defendants, in fact, undertook to be their marketing agent and to affirmatively
26 promote the retired player rights. *See Los Angeles Land Co.*, 6 F.3d at 1425 (JMOL must be
27 denied if, construing the evidence in the light most favorable to the non-moving party, there is
28 substantial evidence for any reasonable interpretation that supports the jury's verdict).

1 **2. There Was Sufficient Evidence Of The Right To Control And/Or The**
2 **Right To Discharge On Behalf Of Plaintiffs.**

3 The GLA evidences the ability to control¹⁸ and to discharge. For example, Defendants
4 concede that the GLA allows any assignee to opt out of any particular program which he believes
5 conflicts with another program in which he is participating. Motion at 22; *see also* Hilbert Decl.
6 Exh. J (Trial Exh. 110) (“If the undersigned player’s inclusion in a particular NFLPA program
7 will conflict with an individual exclusive endorsement agreement and the players provides the
8 NFLPA with timely notice of that conflict, the NFLPA aggress to exclude that player from that
9 particular program”).

10 Similarly, the GLA limited the scope of representation to that of group licensing of “6 or
11 more” players. Hilbert Decl. Exh. J (Trial Exh. 110) (“The undersigned player retains the right to
12 grant the use of his image to another entity for use in a group of five (5) or less present or former
13 players”). Defendants themselves displayed several examples to the jury of class members
14 who had sought to limit the scope of their particular GLA. For example, one GLA Class member
15 testified that he thought he could opt out of any licensing program involving products associated
16 with alcohol. Trial Tr. 1094:21-1095:14.

17 Furthermore, Plaintiffs’ witnesses testified they had the right to some control over
18 Defendants regarding the GLA. For example, Mr. Adderley testified:

19 Q. Did you have control over the NFLPA with respect to this agreement?

20 A. Yes.

21 Q. And what control did you have, sir?

22 A. Well, if there was a conflict of interest and they wanted to use me in a
23 promotion, for example, if I was doing something for Nike and they wanted me to
24 do something for Reebok, I could say: “Wait, this is a conflict of interest.” Or, if
they asked me to come in and do something with alcohol or tobacco, I could say:
“No, I don’t want any part of it.”

25 Trial Tr. 1508:17-1509:3. Messrs. Beach and Laird also testified along these lines. *See* Trial Tr.
26 1094:24-1095:14 (Beach) and 989:2-17 (Laird).

27 ¹⁸ Although Defendants inaptly focus on this point as applied solely to an
28 employer/employee relationship, it is, according to the law, to be construed in accordance with
the circumstances.

1 Plaintiffs' understanding of their control over Defendants was also corroborated by
2 Defendants' actions. In 2005, Defendants revised the GLA. Unlike the prior version that was
3 signed by the GLA Class members, the new GLA stated that it could not be "revoked or
4 terminated by the undersigned player" prior to the expiration date. Hilbert Decl. Exh. P (Trial
5 Exh. 506). The fact that Defendants needed to include new language precluding revocation
6 indicates that such a right existed beforehand.

7 When viewed as a whole, there is no question there was sufficient evidence of the right of
8 control in the record to support the jury's verdict.

9 **3. There Was Sufficient Evidence Of The Parties' Financial**
10 **Arrangement To Support The Jury's Verdict On Fiduciary Duty.**

11 Another important factor in determining the existence of a fiduciary relationship is "the
12 financial arrangement between [Plaintiffs] and [Defendants]." Final Charge to the Jury No. 39,
13 Docket No. 546 (filed November 6, 2008). One purpose of this factor is to determine whether the
14 GLA was a mere license that excused Defendants from any remaining obligation to the Class
15 upon the payment of a sum certain, or a license that obligated Defendants to attempt to generate
16 income for the Class such that they would get paid for having licensed their rights to Defendants.

17 The evidence was clear in this regard. It is undisputed that the GLA Class members were
18 not paid merely for signing the GLA. Trial Tr. 431:14-18; 1057:11-13. It is also undisputed that
19 the GLA Class members had to rely on Defendants' ability and effort to sell their images to third
20 parties, who were not even permitted under their license agreements to talk with retired players.
21 *See, e.g.*, Hilbert Decl. Exhs. Q (Trial Exh. 65) and R (Trial Exh. 66).

22 Any one of these factors in the context of the GLA is sufficient to support the jury's
23 finding of a fiduciary relationship.

24 **B. There Was Sufficient Evidence for the Jury to Conclude that Defendants**
25 **Breached Their Fiduciary Duties to Plaintiffs.**

26 Defendants argue that "there was also insufficient evidence to support the jury's breach of
27 fiduciary duty verdict." Motion at 26. The reasons Defendants cite in support of this argument
28 are the same reasons they cite in connection with their arguments on compensatory damages and

1 punitive damages. More specifically, Defendants claim that there is insufficient evidence to show
2 breach of fiduciary duty based on the jury's purported rejection of Plaintiffs' claim for equal
3 shares of the GLR pool. Motion at 26. Defendants' argument on this issue lacks merit for the
4 same reasons explained in Sections I and II above. For this reason, and the reasons given above,
5 there is no question that there was sufficient evidence to show that Defendants breached their
6 fiduciary duties to Plaintiffs. The jury's verdict on this issue should be upheld.

7 **VI. CONCLUSION**

8 Defendants try mightily to undermine an entirely proper verdict in which the jurors'
9 dutifully followed the Court's instruction (proposed by Defendants) not to double-count damages
10 applying both to breach of contract and breach of fiduciary duty. But following this instruction
11 did not lead to an inconsistent verdict, nor to a verdict that generated an unconstitutional ratio of
12 punitive damages, nor to a verdict that supports any of Defendants' other recycled arguments.
13 Therefore, Plaintiffs respectfully request that Defendants' Motion be denied.

14 Dated: December 18, 2008

Respectfully submitted,

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