

EXHIBIT 2

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

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.	)	Tuesday
	)	October 21, 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.
and
MANATT, PHELPS & PHILLIPS
7 Times Square
New York City, New York 10036

BY: L. PETER PARCER, ESQ.
and
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.

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.

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

Katherine Powell Sullivan, CSR, RPR, CRR
Official Reporter - U.S. District Court
(415) 794-6659

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.

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NATIONAL FOOTBALL LEAGUE PLAYERS)	
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LEAGUE PLAYERS INCORPORATED d/b/a)	
PLAYERS INC,)	
)	San Francisco, California
Defendants.)	Monday
)	October 27, 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.

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Los Angeles, California 90064
BY: CHAD HUMMEL, ESQ.

(Appearances continued on next page)

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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

Katherine Powell Sullivan, CSR, RPR, CRR
Official Reporter - U.S. District Court
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1 Q. And was that changed?

2 A. Yes, it was.

3 Q. Was it changed to non-exclusive? I think you testified to
4 that.

5 A. Yes. We changed "exclusive" to "non-exclusive."

6 Q. Now, this is a form where someone wrote:

7 "I cut the word 'exclusive' since I do some
8 things on my own."

9 Do you see that?

10 A. I do.

11 Q. So when you had the exclusive form did some retired
12 players say:

13 "I'm going to take that out"?

14 A. It did.

15 Q. Did that affect your decision as to whether to change the
16 form?

17 A. Yes, the number of players that objected to signing it
18 because it was exclusive led us to change the language to
19 non-exclusive.

20 Q. Now, I would like, Mr. Allen, to turn to a new subject.

21 Which is you were asked some questions about Trial
22 Exhibit 125, which is the agreement between the Players
23 Association and Players Inc, dated the 9th day of May, 1994. I
24 just want to go through that date.

25 We're going to refer to this as the "1994 agreement,"

1 Mr. Allen?

2 A. All right.

3 Q. Because later there's a 2000 agreement that I want to
4 refer to, also.

5 A. All right.

6 Q. Now, you got asked by counsel:

7 "Is this the agreement that set the division of
8 23 percent to Players Inc, 40 percent to the union and
9 37 percent to the players?"

10 Do you recall?

11 A. Let me look at it, and I'll tell you.

12 Q. Sure. I can direct your attention to the paragraph if
13 that will help you.

14 A. Yes, it is.

15 Q. Okay. And you testified earlier that that was decided
16 ultimately by the Board of Player Representatives, correct?

17 A. Yes.

18 Q. Now, take a look, if you can, on page 5 of this agreement.
19 Actually, go back paragraph 4 on page 4. This comes under the
20 subject of royalties.

21 Do you see that?

22 A. I do.

23 Q. Now, look at page 5. And there's a definition here of the
24 term "gross licensing revenues."

25 A. Yes.

1 Q. Now, these are the revenues that were being divided up,
2 37/23/40; is that correct?

3 A. Yes.

4 Q. Was any of this retired player money?

5 A. No.

6 Q. What money was it?

7 A. Active player money.

8 Q. Now, there's also a reference here, Counsel showed you, on
9 page 7. If you look at the bottom, on page 7C, this is in
10 section 5(c), to setting eligibility requirements. Do you see
11 that?

12 A. Yes.

13 Q. Now, were these the eligibility requirements for the
14 active player money or the retired player money, or both? What
15 were they?

16 A. Active player only.

17 Q. Have anything at all to do with retired players?

18 A. No.

19 Q. Okay.

20 **MR. KESSLER:** Your Honor, I would like to approach
21 the witness, please.

22 **THE COURT:** Go ahead.

23 **BY MR. KESSLER:**

24 Q. I'm going to show you, Mr. Allen, a copy of Exhibit 93.

25 Do you recognize what Trial Exhibit 93 is?

UNITED STATES DISTRICT COURT
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NATIONAL FOOTBALL LEAGUE PLAYERS)	
ASSOCIATION and NATIONAL FOOTBALL)	
LEAGUE PLAYERS INCORPORATED d/b/a)	
PLAYERS INC,)	
)	San Francisco, California
Defendants.)	Tuesday
)	October 28, 2008

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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

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(Appearances continued on next page)

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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.

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Official Reporter - U.S. District Court

Katherine Powell Sullivan, CSR, RPR, CRR
Official Reporter - U.S. District Court
(415) 794-6659

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

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VS.)	NO. C 07-0943 WHA
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NATIONAL FOOTBALL LEAGUE PLAYERS)	
ASSOCIATION AND NATIONAL FOOTBALL)	
LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	WEDNESDAY
)	OCTOBER 29, 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 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,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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NATIONAL FOOTBALL LEAGUE PLAYERS)	
ASSOCIATION AND NATIONAL FOOTBALL)	
LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	THURSDAY
)	OCTOBER 30, 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 **"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.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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NATIONAL FOOTBALL LEAGUE PLAYERS)	
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LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	FRIDAY
)	OCTOBER 31, 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.
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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.

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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?

UNITED STATES DISTRICT COURT
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LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	MONDAY
)	NOVEMBER 3, 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

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

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OFFICIAL REPORTER - U.S. DISTRICT COURT

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 IT'S NOT IN HIS DEPOSITIONS.

2 IT'S NOWHERE UNTIL HE NOW WOULD LIKE TO DO IT FOR THE
3 FIRST TIME TODAY.

4 **MR. HUMMEL:** THAT'S ABSOLUTELY UNTRUE.

5 I'LL WITHDRAW IT, YOUR HONOR.

6 **THE COURT:** ALL RIGHT.

7 **MR. HUMMEL:** I'LL WITHDRAW IT.

8 **BY MR. HUMMEL:**

9 **Q.** MR. ROWLEY, DOES THE METHOD YOU DESCRIBED APPLY TO --
10 COULD THE JURY USE THE METHOD YOU DESCRIBED AND DISCLOSED IN
11 YOUR REPORT TO CALCULATE WHAT THE GROUP WOULD BE OWED BASED ON
12 INDIVIDUAL LICENSEES?

13 **A.** IT COULD, YES.

14 **Q.** HOW?

15 **A.** IN TOOTLING, MY RESPONSE WOULD BE YOU COULD TAKE AS A
16 PERCENTAGE OF THE TOTAL THESE AMOUNTS OF ROYALTIES AND APPLY
17 THAT PERCENTAGE THEN TO THE DAMAGE FIGURES.

18 **Q.** WHAT PERCENTAGE?

19 **A.** WELL, EA WOULD BE, OF THE LICENSEES, ROUGHLY HALF. BUT
20 THAT'S BEFORE YOU WOULD GET TO THE NFL SPONSORSHIP.

21 **Q.** OKAY. SO YOU -- WHAT YOU WOULD DO IS YOU TAKE THE TOTAL
22 PAID BY EA. AND THAT WOULD BE -- IF YOU PUT THAT OVER 215,
23 THAT WOULD BE THE PERCENTAGE YOU WOULD APPLY TO THESE NUMBERS;
24 IS THAT ROUGHLY RIGHT?

25 **MR. KESSLER:** YOUR HONOR, THAT'S LEADING. AND I MOVE

1 TO STRIKE THE LAST TWO ANSWERS OF THE WITNESS. THAT IS NOT
2 DISCLOSED ANYWHERE IN THE REPORT, SOME IDEA OF DOING AN
3 INDIVIDUAL CALCULATION --

4 **THE COURT:** LET ME SAY TO THE WITNESS: DON'T GO ONE
5 PHRASE BEYOND WHAT'S IN YOUR REPORT. I DON'T HAVE IT IN FRONT
6 OF ME, BUT -- SO IF YOU GO BEYOND IT I'M GOING TO STRIKE YOUR
7 ANSWER.

8 BUT YOU CAN ANSWER IT IF IT IS IN THE REPORT.
9 ASK THE QUESTION AGAIN, BUT STOP LEADING THE WITNESS.

10 **MR. HUMMEL:** I WILL, YOUR HONOR.

11 **BY MR. HUMMEL:**

12 **Q.** HOW WOULD THE JURY GO ABOUT CALCULATING DAMAGES BASED ON A
13 FINDING OF SOME, BUT NOT ALL, OF THE LICENSES THAT ARE LISTED
14 ON EXHIBIT 1217?

15 **MR. KESSLER:** OBJECTION, YOUR HONOR. NOT IN THE
16 REPORT. I WOULD LIKE A FOUNDATION QUESTION TO THE WITNESS IS
17 IT --

18 **THE COURT:** IS IT IN YOUR REPORT?

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

21 **BY MR. HUMMEL:**

22 **Q.** DID YOU DO THAT ON YOUR INITIAL REPORT?

23 **A.** I CERTAINLY DESCRIBED THE METHODOLOGY ON TAKING ROYALTIES
24 AND REVENUES AND HOW YOU WALK THROUGH THE PROCESS TO COME UP
25 WITH THE EQUAL SHARE.

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

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.	)	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 Q. SO IF THE TOP NFL PLAYERS -- WITHDRAWN.

2 IF THE TOP RETIRED NFL PLAYERS IN TERMS OF LICENSING
3 VALUE HAVE NEVER SIGNED RETIRED PLAYER GLA'S, WHAT DOES THAT DO
4 TO THE ABILITY OF THE NFLPA OR PLAYERS INC TO EXERCISE ANY KIND
5 OF BARGAINING POWER OR LEVERAGE?

6 A. WELL, IF THEY ATTEMPTED TO EXTRACT ANY -- ANY EXCESS
7 PROFIT, IF YOU WILL, OUT OF THIS RELATIONSHIP, ANYBODY COULD
8 JUST COME IN AND GET THEIR OWN DEAL.

9 I MEAN, THERE'S NOTHING TO PREVENT -- FIRST OF ALL,
10 THE GLA'S THEMSELVES ARE NON-EXCLUSIVE.

11 SECONDLY, MOST OF THE PLAYERS WHO HAVE HIGH LICENSING
12 VALUE HAVEN'T EVEN SIGNED THE GLA.

13 SO THERE'S ABSOLUTELY NOTHING PREVENTING ANY ONE OF
14 US FROM IMMEDIATELY GETTING INTO THE LICENSING BUSINESS FOR TOP
15 RETIRED NFL STARS AND CHARGING A LOWER PRICE THAN THE NFLPI
16 WOULD CHARGE.

17 SO IT'S NOT A MARKET IN WHICH YOU WOULD ARGUE THAT
18 THERE IS NO POTENTIAL FOR COMPETITION TO TAKE AWAY ANY ABILITY
19 OF NFLPI TO EXTRACT ANYTHING FROM THESE LICENSES.

20 Q. IN THE VIDEO GAME INDUSTRY, DID YOU FIND ANY EVIDENCE THAT
21 ANOTHER VIDEO GAME COMPANY CAME IN AND LICENSED RETIRED PLAYERS
22 OUTSIDE OF PLAYERS INC?

23 A. YES. THAT'S THE TAKE TWO EXAMPLE.

24 Q. WOULD YOU EXPLAIN TO THE JURY WHAT THAT WAS?

25 A. OKAY. TAKE TWO IS A COMPETITOR WITH EA. AND AS YOU

1 RECALL, EA HAS THIS LICENSE WITH NFLPI THAT ACTUALLY SAYS FOR
2 THE GAMES THAT ARE LICENSED EA MUST DEAL WITH NFLPI FOR THE
3 PLAYERS WHO ARE IN THOSE GAMES, THOSE PARTICULAR GAMES.

4 WELL, THAT WOULD SEEMINGLY PREVENT ANYBODY FROM
5 GETTING INTO THIS BUSINESS. WELL, OF COURSE, IT DIDN'T. TAKE
6 TWO WENT DIRECTLY TO 240 RETIRED STARS, GOT THEIR LICENSING
7 RIGHT, CREATED A VIDEO GAME THAT WAS INTRODUCED IN JULY OF LAST
8 YEAR, WHERE THERE'S THESE 240 PLAYERS.

9 IF YOU WANT TO PLAY THE GAME, YOU DRAFT PLAYERS, JUST
10 LIKE YOU WOULD IN A NORMAL FOOTBALL LEAGUE, AND THEN YOU PLAY A
11 GAME WHERE YOUR DRAFTED PLAYERS PLAY THE OTHER GUY'S DRAFTED
12 PLAYERS.

13 SO THIS IS SORT OF AN ILLUSTRATION OF THE FACT THAT
14 GETTING -- YOU KNOW, GETTING INTO THIS BUSINESS WITHOUT DEALING
15 WITH NFLPI AND HAVING LICENSING COME FROM SOME OTHER MECHANISM
16 IS PERFECTLY FEASIBLE. THERE IS NO PREVENTION OF THAT.

17 Q. IN THE TAKE TWO GAMES, WERE SOME OF THE RETIRED PLAYERS
18 WHO LICENSED THEIR RIGHTS TO TAKE TWO MEMBERS OF THIS CLASS?

19 A. YES.

20 Q. RETIRED PLAYERS WHO SIGNED GLA'S?

21 A. YES.

22 Q. NOW --

23 A. SOME WERE AND SOME WEREN'T. MOST WEREN'T.

24 Q. PROFESSOR NOLL, IN OPENING STATEMENT MR. PARCHER, COUNSEL
25 FOR PLAINTIFFS, ACTUALLY QUOTED FROM YOUR DEPOSITION. PUT A

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NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

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ANTHONY ADDERLEY, WALTER ROBERTS)	
III,)	
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PLAINTIFFS,)	
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VS.)	NO. C 07-0943 WHA
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NATIONAL FOOTBALL LEAGUE PLAYERS)	
ASSOCIATION AND NATIONAL FOOTBALL)	
LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	WEDNESDAY
)	NOVEMBER 5, 2008

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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 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 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 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 PURPOSES OF
24 DISCUSSION, ASSUME THAT THE DEFENDANTS SOLD THE PLAINTIFFS DOWN
25 THE RIVER. JUST ASSUME IT, BECAUSE I THINK THERE'S A

1 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.

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.	)	THURSDAY
	)	NOVEMBER 6, 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.

(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.

FOR DEFENDANTS: DEWEY & LEBOEUF
1301 AVENUE OF THE AMERICAS
NEW YORK CITY, NEW YORK 10019-6092
BY: JEFFREY L. KESSLER, ESQ.
DAVID G. FEHER, ESQ.
ROY TAUB, 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 PLAYER," THEN IT SAYS "RPGLA."

2 SO YOU PROBABLY WANT TO STRIKE "RETIRED PLAYER."

3 **THE COURT:** YES. THANK YOU.

4 ALL RIGHT. WE'RE UP TO THE FIDUCIARY DUTY POINT, SO
5 WE WILL TAKE A BREAK AT THIS POINT AND COME BACK IN 15 MINUTES.

6 (RECESS WAS TAKEN.)

7 **THE COURT:** PLEASE BE SEATED. LET'S GO BACK TO WORK.
8 ALL RIGHT. WE'RE UP TO PARAGRAPH 32.

9 ANY OBJECTIONS?

10 **MR. KESSLER:** YOUR HONOR, JUST THAT THERE'S A TYPO IN
11 LINE 11, WHICH SAYS:

12 "YOU'VE HEARD SOME TESTIMONY RELATING TO WHETHER THE
13 WORD 'OR' SHOULD BE STRICKEN."

14 **MS. NAYLOR:** "OR THE WORD 'NOT' SHOULD BE ADDED."

15 **THE COURT:** WE WILL SAY "WHETHER OR NOT." OKAY.

16 ANYTHING MORE ON 32?

17 ALL RIGHT. 33.

18 **MR. KESSLER:** IN 33, YOUR HONOR, THIS IS THE FIRST
19 TIME THIS COMES UP. AND I'LL RAISE THE ISSUE NOW. YOUR HONOR
20 KNOWS THAT IT'S OUR POSITION THAT CLASS-WIDE DAMAGES IS NOT THE
21 APPROPRIATE REQUIREMENT IN THE NINTH CIRCUIT.

22 WE'RE ARGUED THAT. WE HAVE CITED CONTROLLING NINTH
23 CIRCUIT AUTHORITY.

24 I THINK THE ISSUE THAT HAS COME UP ABOUT THE FACT
25 THAT THEIR EXPERT PUT IN NO EVIDENCE EVEN HOW TO DIVIDE THE

1 MONEY WITH RESPECT TO DIFFERENT -- DIFFERENT CLASS MEMBERS
2 HAVING DIFFERENT GLA'S IN EFFECT IN DIFFERENT YEARS WHICH
3 REQUIRE INDIVIDUAL CALCULATIONS.

4 SO THERE'S BEEN NO PROOF EVEN IF IT WAS A CLASS-WIDE
5 BASIS, A COMPLETE FAILURE PROOF. WE BELIEVE, YOUR HONOR, THAT
6 IT HAS TO BE SOME TYPE OF INDIVIDUALIZED INJURY SHOWING.

7 AND EVEN IF YOU HAVE A CLEAR -- CASES THAT HAVE
8 ALLOWED CLASS-WIDE THEORIES, WHAT YOU HAVE TO DO IS HAVE
9 EVIDENCE THAT THE CLASS-WIDE THEORY APPLIES TO EACH PARTICULAR
10 CLASS MEMBER IN A PARTICULAR WAY.

11 SO, FOR EXAMPLE, THEY PUT NO EVIDENCE IN THAT THERE
12 WAS A FORMULA, OR WHAT THAT FORMULA WOULD BE FOR THE JURY, AS
13 TO HOW EACH PARTICULAR CLASS MEMBER WAS INJURED.

14 THEY MAY SAY THEIR EXPERT COULD DO IT. THEY TOLD YOU
15 THE EXPERT COULD DO IT IN THE FUTURE. THAT EVIDENCE HAS TO BE
16 PRESENTED INTO THE RECORD.

17 THERE'S BEEN NO EFFORT EVEN TO PUT INTO EVIDENCE A
18 FORMULA THE JURY COULD APPLY TO DO THIS.

19 **THE COURT:** WHAT IS THE DECISION BY THE NINTH CIRCUIT
20 THAT YOU RELY ON?

21 **MR. KESSLER:** THERE ARE TWO, YOUR HONOR. LET ME GET
22 MY BRIEF ON THAT, PLEASE. ONE SECOND.

23 YES, YOUR HONOR. THE FIRST DECISION --

24 **THE COURT:** WHAT PAGE SHOULD I LOOK AT?

25 **MR. KESSLER:** IN MY MOST RECENT MEMORANDUM, PAGE 10,

1 THE TWO NINTH CIRCUIT CASES ARE:

2 KLINE V. COLDWELL BANKER & COMPANY, AND THE SECOND
3 CASE IS ABUAN, A-B-U-A-N V. GENERAL ELECTRIC COMPANY. AND
4 THESE WERE TWO RULE 23 CASES.

5 WHAT HAPPENED IS, IT HAD TO DO WITH: WAS
6 INDIVIDUALIZED INJURY REQUIRED? SO THESE WERE GROUNDS FOR
7 DECERTIFYING THE CLASS, BECAUSE IT WAS AN INDIVIDUAL ISSUE.

8 AND IN BOTH CASES THE NINTH CIRCUIT SAID: REGARDLESS
9 OF RULE 23, ULTIMATELY THE TRIER OF FACT HAS TO DO THIS
10 PLAINTIFF BY PLAINTIFF.

11 AND THIS TRIER OF FACT HAS BEEN PRESENTED WITH NO
12 EVIDENCE TO DO IT PLAINTIFF BY PLAINTIFF.

13 SO WE HAD A RULE 50 MOTION ON THIS. YOUR HONOR
14 RESERVED.

15 BUT IN THE INSTRUCTIONS, WE THINK YOUR HONOR HAS TO
16 INSTRUCT THE JURY THAT THERE HAS TO BE INDIVIDUALIZED PROOF.
17 AND IF THEY HAVEN'T PUT IT THERE, WE SHOULD BE ABLE TO ARGUE
18 THAT TO THE JURY, AT A MINIMUM.

19 **THE COURT:** WHAT DO YOU SAY TO THAT, MR. LECLAIR?

20 **MR. LECLAIR:** YOUR HONOR, THIS IS --

21 **THE COURT:** LET ME ASK MY LAW CLERK.

22 PLEASE GO GET ME 508 F.2D. NOT F.3D, BUT F.2D.

23 ALL RIGHT. GO AHEAD.

24 **MR. LECLAIR:** YOUR HONOR, IT'S ENTIRELY PERMISSIBLE
25 TO PUT ON IN A SITUATION WHERE YOU HAVE A CONTRACT AND THE

1 BREACH IS A UNIFORM BREACH AND THE DAMAGES FLOW, OUR EXPERT HAS
2 CALCULATED YEAR BY YEAR WHAT THE DAMAGES ARE FOR THE MEMBERS OF
3 THE CLASS. THAT'S -- THAT IS ENTIRELY COMPLIANT --

4 **THE COURT:** DID HE TAKE INTO ACCOUNT THE NUMBER OF
5 PEOPLE WHO HAD GLA'S IN EFFECT?

6 **MR. LECLAIR:** YES.

7 **THE COURT:** IN OTHER WORDS, FROM YEAR TO YEAR THE
8 NUMBER CHANGED, HE TOOK THAT INTO ACCOUNT?

9 **MR. LECLAIR:** HE CERTAINLY DID, YOUR HONOR. AND
10 THAT'S WHY IT'S AN APPROPRIATE METHODOLOGY AND PERFECTLY
11 SUITABLE UNDER THE NINTH CIRCUIT STANDARD.

12 THE JURY HAS THE BASIS TO DO EXACTLY WHAT THEY'RE
13 REQUIRED TO DO.

14 **THE COURT:** LET -- I WANT TO BE CLEAR ON SOMETHING.
15 SO HOW MANY -- LET'S JUST TAKE THE 2007 PAYMENT IN SEPTEMBER.
16 HOW MANY -- AS OF SEPTEMBER '07, HOW MANY CLASS MEMBERS WERE
17 THERE? AND HOW MANY ACTIVE PLAYERS WERE THERE?

18 **MR. LECLAIR:** THERE WERE, I BELIEVE YOU SAID, 21 IN
19 '07?

20 **MR. KATZ:** WE HAVE TO GET --

21 **MR. LECLAIR:** HERE WE GO. HERE IT IS, YOUR HONOR.
22 IT'S 22 IN '07, 1208 IN '06, 1438 IN '05, 1426 IN
23 '04, AND 1982 IN '03.

24 **THE COURT:** IS ALL THIS IN EVIDENCE NOW?

25 **MR. LECLAIR:** YES.

1 **THE COURT:** IT'S IN EVIDENCE. NOT JUST THAT THE
2 EXPERT, BUT IT'S ACTUALLY BEFORE THE JURY?

3 **MR. LECLAIR:** IT'S BEFORE THE JURY. MATTER OF FACT,
4 THERE'S ACTUALLY A CHART, YOUR HONOR, THAT SHOWS THE NAME OF
5 EACH CLASS MEMBER AND THE YEAR IN WHICH THEIR GLA'S WERE IN
6 EFFECT.

7 **THE COURT:** DO WE ALSO KNOW WHAT THE NUMBER OF ACTIVE
8 PLAYERS WERE?

9 **MR. LECLAIR:** YES, WE HAVE THAT, AS WELL, YOUR HONOR.

10 **THE COURT:** SO WHY ISN'T THAT ENOUGH THEN?

11 **MR. KESSLER:** YOUR HONOR, THE NUMBER OF ACTIVE
12 PLAYERS IS NOT IN EVIDENCE, NUMBER ONE. NEVER PUT IN EVIDENCE
13 BY PLAINTIFFS.

14 **THE COURT:** MR. LECLAIR JUST TOLD ME IT WAS.

15 **MR. KESSLER:** EXCUSE ME?

16 **THE COURT:** MR. LECLAIR JUST TOLD ME IT WAS.

17 **MR. KESSLER:** I THINK HE MEANT HIS EXPERT DID THAT IN
18 HIS EXPERT REPORT.

19 **MR. LECLAIR:** I DO NOT, YOUR HONOR.

20 WE PUT INTO EVIDENCE THE CHARTS OF THE EQUAL SHARE
21 ROYALTY THAT SHOWS EXACTLY THE NUMBER OF ACTIVE PLAYERS THAT
22 WERE INCLUDED IN THE EQUAL SHARE ROYALTY, YEAR BY YEAR. THAT
23 WAS IN EVIDENCE DURING PAT ALLEN.

24 **THE COURT:** WELL, I'M NOT TALKING ABOUT ILLUSTRATIVE
25 CHARTS.

1 **MR. LECLAIR:** NO, NO.

2 **THE COURT:** IS IT SOMETHING THAT'S GOING TO BE IN THE
3 JURY ROOM --

4 **MR. LECLAIR:** IT IS.

5 **THE COURT:** -- IN TESTIMONY?

6 **MR. HILBERT:** IT'S EXHIBITS 1296, 1298, 1299 AND
7 1300.

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

9 **THE COURT:** WHY THEN -- I MEAN, IF ALL THAT'S TRUE,
10 THEN THE JURY COULD ADD UP HOW MANY THERE WERE RETIRED, HOW
11 MANY THERE WERE ACTIVE, FIGURE OUT THE PER-SHARE BASIS FOR
12 PAYMENT.

13 WHY ISN'T THAT GOOD ENOUGH?

14 **MR. KESSLER:** YOUR HONOR, LOOKING, FOR EXAMPLE, AT
15 12 --

16 **MR. LECLAIR:** PAGE NUMBER?

17 **MR. KESSLER:** -- 96. DO YOU WANT TO SHOW ME WHAT
18 PAGE NUMBER YOU ARE REFERRING TO?

19 **MR. LECLAIR:** SURE.

20 IN FACT, I DISPLAYED IT TO THE JURY, YOUR HONOR.

21 **MR. KESSLER:** WELL, YOUR HONOR, I'LL TELL YOU WHAT --
22 WHAT THE PROBLEM HERE IS.

23 DO WE HAVE THE ABILITY TO DISPLAY?

24 I'LL HAND IT UP TO YOUR HONOR, OKAY? THIS SHOWS THE
25 TOTAL -- THE TOTAL AMOUNT OF DOLLARS PAID EACH YEAR TO HOW MANY

1 PLAYERS. IT DOESN'T EXPLAIN HOW MANY PRACTICE SQUAD PLAYERS
2 THERE ARE. SO YOU HAVE NO WAY OF KNOWING WHAT THE SHARES WERE
3 FOR PRACTICE SQUAD PLAYERS, WHICH IS A THOUSAND DOLLARS,
4 DIFFERENT FROM THE OTHERS.

5 YOU HAVE NO WAY OF KNOWING HOW MANY ARE THE ACTIVE
6 PLAYER SHARES, THE EQUAL SHARES VERSUS THE PRACTICE SQUAD.
7 JUST A FOOTNOTE SAYING THAT THEY WERE PRACTICE SQUAD PLAYERS
8 WHO WERE PAID THAT.

9 AND, MOST IMPORTANTLY, WHAT THEY SHOULD HAVE DONE IS
10 THEIR EXPERT SHOULD HAVE EXPLAINED TO THE JURY WITH EXPERT
11 OPINION SAYING THE WAY IN WHICH YOU SHOULD APPLY THIS
12 METHODOLOGY, IF THEY WERE GOING TO DO THIS, IS THAT YOU TAKE
13 THIS NUMBER, DIVIDE IT BY THIS NUMBER, AND YOU DO THESE
14 CALCULATIONS, AND GIVEN THE JURY SOME BASIS.

15 THE IDEA THAT PLAINTIFFS IN CLOSING ARGUMENT -- THERE
16 IS NO EVIDENCE OF HOW MANY ARE PRACTICE SQUAD PLAYERS. THEY
17 CAN'T EVEN TELL THE JURY HOW TO MAKE THESE DETERMINATIONS.

18 AND SO, ONE, WE HAVE A PROBLEM WITH THAT.

19 **THE COURT:** JUST A SECOND. THE PAGE THAT'S BEEN
20 HANDED TO ME -- LET'S MAKE SURE, MR. LECLAIR. IS THAT WHAT
21 YOU'RE TALKING ABOUT, THE PAGE THAT HAS THE BATES NUMBER ENDING
22 324?

23 **MR. LECLAIR:** YES, YOUR HONOR.

24 **THE COURT:** WHERE DOES THAT TELL US WHAT THE NUMBER
25 OF ACTIVE PLAYERS WERE THAT GOT A -- GOT AN EQUAL SHARE AS

1 OPPOSED TO THE THOUSAND-DOLLAR SHARE?

2 **MR. LECLAIR:** IT'S -- THE NUMBER IS IN THE FOURTH
3 COLUMN, YOUR HONOR.

4 **THE COURT:** LET'S JUST TAKE THE VERY LAST ONE. THIS
5 ONLY GOES UP TO 2002.

6 **MR. LECLAIR:** WELL, WE PUT IT IN THE FOLLOWING YEARS,
7 ALSO. THIS WAS JUST AN EXAMPLE, YOUR HONOR.

8 **THE COURT:** SO THIS SAYS "2,230."

9 WHAT DOES THAT MEAN? WHAT DOES THAT --

10 **MR. LECLAIR:** THAT MEANS THAT'S THE NUMBER OF ACTIVE
11 PLAYERS THAT WERE INCLUDED IN THE EQUAL SHARE CALCULATION, YOUR
12 HONOR.

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

14 **THE COURT:** THEN, IT SAYS -- OKAY. SO THAT WOULD BE
15 ACTIVE PLAYERS BUT NOT -- WHAT DOES THAT FOOTNOTE MEAN:
16 "AMOUNT OF CHECK FOR NONPRACTICE SQUAD PLAYERS ONLY"?

17 WHAT DOES THAT MEAN?

18 **MR. LECLAIR:** THAT MEANS THAT IT DOESN'T INCLUDE THE
19 THOUSAND-DOLLAR CHECKS FOR THE PRACTICE SQUAD PLAYERS.

20 **MR. KESSLER:** YOUR HONOR, HERE'S THE PROBLEM. OF
21 COURSE, THERE'S BEEN NO EVIDENCE AS TO WHAT THIS CHART MEANS,
22 SO WE GET LAWYERS' ARGUMENT. THE CHART WAS IN EVIDENCE BECAUSE
23 THEY PUT THE WHOLE DOCUMENT IN EVIDENCE.

24 BUT WHAT IT SAYS HERE IS: "THE TOTAL PAID INCLUDES
25 150 TO 200 PRACTICE SQUAD PLAYERS A YEAR."

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)	
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VS.)	NO. C 07-0943 WHA
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NATIONAL FOOTBALL LEAGUE PLAYERS)	
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LEAGUE PLAYERS INCORPORATED D/B/A)	
PLAYERS INC,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	FRIDAY
)	NOVEMBER 7, 2008

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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 BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE THE
2 FOLLOWING: FIRST, THAT MONIES WERE GENERATED BY DEFENDANTS'
3 LICENSING OF RIGHTS TO WHICH MONEY THE RPGLA CLASS WAS
4 ENTITLED.

5 LET REREPEAT THAT. NUMBER ONE, THAT MONIES WERE
6 GENERATED BY DEFENDANTS' LICENSING OF RIGHTS TO WHICH MONEY THE
7 RPGLA CLASS WAS ENTITLED.

8 AND, NUMBER TWO, THAT AT LEAST SOME OF ANY SUCH MONEY
9 WAS NOT PAID TO THE RPGLA CLASS PURSUANT TO THE RPGLA.

10 NOW, THIS CASE INVOLVES MANY CONTRACTS, SOME OF WHICH
11 WERE LICENSE AGREEMENTS. WITH RESPECT TO THE LICENSE
12 AGREEMENTS, I WANT TO EXPLAIN THREE DIFFERENT LEVELS THAT I
13 WILL IDENTIFY FOR YOU.

14 ONE IS THE RPGLA BETWEEN AN INDIVIDUAL PLAYER AND
15 DEFENDANTS, LIKE THE ONE MR. ADDERLEY SIGNED.

16 A SECOND ARE THE SO-CALLED "AD HOC" AGREEMENTS. THESE
17 WERE LICENSES BETWEEN INDIVIDUAL PLAYERS AND A THIRD PARTY LIKE
18 EA AND DEFENDANTS. UNDER THESE AGREEMENTS CERTAIN RETIRED
19 PLAYERS RECEIVED MONEY, 7 MILLION OF WHICH WENT TO CLASS
20 MEMBERS. NO ONE IN THIS CASE IS SUING TO RECOVER ANY OF THAT
21 MONEY. THAT IS, NO ONE CONTENDS THAT ANY OF THE AD HOC LICENSE
22 REVENUE SHOULD BE REDISTRIBUTED TO ALL CLASS MEMBERS UNDER THE
23 RPGLA OR THAT THE AD HOC AGREEMENTS TRIGGERED ANY RIGHTS UNDER
24 THE RPGLA.

25 RATHER, THE CLASS OF RETIRED PLAYERS IS CONTENDING

1 THAT THEY SHOULD HAVE RECEIVED SOME OF THE THIRD-PARTY
2 LICENSING REVENUE CLAIMED BY DEFENDANTS TO HAVE BEEN FOR ACTIVE
3 PLAYERS ONLY.

4 THAT LEADS TO THE THIRD LEVEL OF LICENSES. THE THIRD
5 LEVEL ARE THE THIRD-PARTY LICENSES. THESE ARE THE LICENSES
6 BETWEEN DEFENDANTS AND THIRD-PARTY MAKERS OR VENDORS OF PLAYER
7 CARDS, VIDEO GAMES AND OTHER FOOTBALL PRODUCTS.

8 THE INDIVIDUAL PLAYERS WERE NOT PARTIES TO THESE
9 THIRD-PARTY LICENSES, FOR THESE AGREEMENTS WERE BETWEEN
10 DEFENDANTS AND VARIOUS THIRD PARTIES, LIKE ELECTRONIC ARTS.

11 I WILL REFER TO THESE AS "THIRD-PARTY LICENSES."
12 THERE ARE ABOUT 95 OF THEM IN EVIDENCE. A BASIC QUESTION YOU
13 WILL NEED TO CONSIDER IS THE EXTENT TO WHICH, IF AT ALL,
14 REVENUES FLOWING OUT OF THE THIRD LEVEL OF LICENSES WERE
15 REQUIRED TO HAVE BEEN PAID TO CLASS MEMBERS UNDER THE RPGLA.

16 THIS IS THE REVENUE THAT WENT INTO THE GLR OR GROSS
17 LICENSING REVENUE POOL, WHICH DEFENDANTS CLAIM WAS ACTIVE
18 PLAYER MONEY, BUT WHICH PLAINTIFF ASSERTS SHOULD HAVE BEEN
19 SHARED WITH CLASS MEMBERS PURSUANT TO THE RPGLA.

20 YOUR RESOLUTION OF THIS QUESTION WILL INVOLVE YOUR
21 INTERPRETATION OF THE RELEVANT AGREEMENTS.

22 IN THIS CONNECTION, THE RPGLA STATED THAT, QUOTE,
23 "THE MONIES GENERATED BY SUCH LICENSING OF RETIRED PLAYER GROUP
24 RIGHTS WILL BE DIVIDED BETWEEN THE PLAYER AND AN ESCROW ACCOUNT
25 FOR ALL ELIGIBLE NFLPA MEMBERS WHO HAVE SIGNED A GROUP

1 LICENSING AUTHORIZATION FORM," CLOSED QUOTE.

2 YOU HAVE HEARD EVIDENCE THAT LITTLE OR NO MONEY WAS
3 EVER PAID TO ANY RETIRED PLAYER PURSUANT TO AN RPGLA, AND THAT
4 NO SUCH ESCROW ACCOUNT WAS EVER ESTABLISHED. TO THIS
5 DEFENDANTS RESPOND THAT LITTLE OR NO MONEY WAS EVER GENERATED
6 OR DUE WITHIN THE MEANING OF THE RPGLA AND, THEREFORE, THERE
7 WAS NOTHING OR VERY LITTLE TO PUT INTO ESCROW.

8 BY CONTRAST, PLAINTIFF CONTENDS THAT LARGE SUMS OF
9 MONIES WERE, IN FACT, GENERATED BY THIRD-PARTY LICENSES AND PUT
10 INTO THE GLR, BUT WERE NOT SHARED WITH RETIRED PLAYERS UNDER
11 THE RPGLA AND INSTEAD WERE SPLIT ONLY BETWEEN ACTIVE PLAYERS
12 AND DEFENDANTS.

13 AGAIN, THE PLAINTIFF CLASS SEEKS TO SHARE IN THE
14 GROUP LICENSING REVENUES THAT DEFENDANTS CLAIM WAS DUE ONLY TO
15 ACTIVE PLAYERS.

16 WHETHER ANY SUCH MONEY WAS DUE TO THE CLASS UNDER THE
17 RPGLA DEPENDS ON THE COVERAGE OF THE RPGLA, AS WELL AS POSSIBLY
18 THE COVERAGE OF THE THIRD-PARTY LICENSES, QUESTIONS OF COVERAGE
19 FOR THE JURY.

20 PLAINTIFF HAS THE BURDEN TO PROVE LIABILITY ON THE
21 CLAIM, AND IT MUST DO SO BY A PREPONDERANCE OF THE EVIDENCE.

22 SO I WILL NOW GIVE YOU THE RULES THAT YOU MUST FOLLOW
23 IN INTERPRETING THE VARIOUS CONTRACTS AT ISSUE.

24 INTERPRETATION OF A CONTRACT IS A DETERMINATION OF
25 THE REASONABLE AND MUTUAL EXPECTATIONS OF THE PARTIES TO A

1 CONTRACT, TAKING INTO ACCOUNT THE WORDS AND PHRASES USED AND
2 THE CIRCUMSTANCES SURROUNDING THE FORMATION OF THE CONTRACT.

3 YOU SHOULD START WITH THE WORDS ACTUALLY USED. THE
4 EXPRESS WRITTEN LANGUAGE OF A CONTRACT IS THE PRIMARY REFERENCE
5 YOU SHOULD CONSULT WHEN INTERPRETING THE MEANING OF THE
6 CONTRACT.

7 THAT IS BECAUSE THE WHOLE POINT OF YOUR WRITTEN
8 CONTRACT IS TO REDUCE THE AGREEMENT TO WRITING. AND THE ONLY
9 WAY TO DO SO IS THROUGH WORDS AND PHRASES. WORDS AND PHRASES
10 USED BY THE PARTIES IN A CONTRACT SHOULD BE GIVEN THEIR USUAL
11 AND ORDINARY MEANING UNLESS IT IS PROVEN THAT THEY HAD A
12 SPECIAL MEANING ACCEPTED BY THOSE IN THE BUSINESS INVOLVED,
13 HERE PROFESSIONAL FOOTBALL, OR WERE DEFINED IN THE CONTRACT
14 ITSELF TO MEAN SOMETHING SPECIAL.

15 SOMETIMES, HOWEVER, WORDS AND PHRASES AS USED IN A
16 CONTRACT ARE SUBJECT TO TWO OR MORE POSSIBLE MEANINGS. THIS IS
17 CALLED "AMBIGUITY."

18 TO RESOLVE SUCH AMBIGUITIES THE LAW HAS DEVELOPED
19 FURTHER GUIDELINES FOR CONTRACT INTERPRETATION THAT I WILL NOW
20 DISCUSS.

21 IN DETERMINING THE REASONABLE AND MUTUAL EXPECTATIONS
22 OF THE PARTIES TO THE CONTRACT IT, YOU SHOULD ALSO CONSIDER THE
23 RELEVANT FACTS AND CIRCUMSTANCES KNOWN TO THE PARTIES AT THE
24 TIME OF MAKING THE AGREEMENT AND EVALUATE HOW THOSE SURROUNDING
25 CIRCUMSTANCES INFORMED THE MUTUAL AND REASONABLE EXPECTATIONS