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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

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

Defendants.

CIVIL ACTION NO. C07 0943 WHA

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF
SETTLEMENT AND OF PROPOSED
PLAN OF DISTRIBUTION**

Date: Thursday, November 19, 2009

Time: 2:00 p.m.

Judge: Honorable William H. Alsup

Place: Courtroom 9, 19th Floor

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 19, 2009 at 2:00 p.m. in the above-entitled Court, Plaintiff Herbert Adderley, on behalf of himself and the certified Class (the "GLA Class"), by undersigned counsel ("Class Counsel"), will and hereby does respectfully move the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for an order which: (1) approves the Settlement as fair, reasonable, and adequate and in the best interest of the Class; (2) approves the Plan of Distribution as fair and reasonable; (3) orders the consummation of the settlement subject to its terms; and (4) grants such other and further relief to which the Court believes Class Representatives are entitled.

This Motion is based on the attached Memorandum of Points and Authorities; the Declarations of Ronald Katz, Jennifer M. Keough, and Herbert Anthony Adderley; the Settlement Agreement and Plan of Distribution; all other pleadings and matters of record; and on such additional evidence or argument as may be presented at the hearing.

Dated: October 15, 2009

MANATT, PHELPS & PHILLIPS, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Herbert Adderley (“Plaintiff”), by undersigned counsel (“Class Counsel”), respectfully submits this memorandum in support of his motion for an order finally approving the settlement of this class action with Defendants National Football League Players Association (“NFLPA”) and National Football League Players Incorporated d/b/a Players Inc (“Players Inc”) (collectively, “Defendants”). Plaintiff also seeks an order finally approving his proposed plan of distribution. Defendants join in the relief that Plaintiff and the Class request in this Motion, but do not stipulate to, and do not necessarily agree with, the statements made in this memorandum.

As the Court is aware, this case involved more than two years of hard-fought litigation against very formidable opponents. Following a multi-week trial on the merits, the jury returned a verdict on November 10, 2008 in favor of the Class and against Defendants. Plaintiff and his counsel have since built upon this excellent result by entering into a settlement with Defendants, under which Defendants have agreed to pay \$26,250,000 in cash (the “Settlement Agreement”).

The Settlement Agreement, which was executed on June 5, 2009 and preliminarily approved by this Court on August 18, 2009, was achieved through extensive arms-length negotiations by experienced counsel representing sophisticated clients and was based on the parties’ comprehensive knowledge of the relative strengths of their respective positions. Had Plaintiff and his counsel not settled, they risked obtaining a recovery substantially smaller than the settlement, or no recovery at all, as a result of Defendants’ subsequent appeal. Defendants have strongly denied Plaintiffs’ allegations, denied that they engaged in wrong-doing, and denied that they have any liability whatsoever, and, represented by able counsel, have expended substantial resources defending the case.

In light of Defendants’ vigorous defense, the settlement – which is 93% of the jury’s \$28.1 million verdict – amounts to a significant recovery for the Class, without the risk of a reversal or reduction on appeal. Already the Court has preliminarily approved the settlement agreement and found it sufficiently within the range of reasonableness. Plaintiff now seeks final

1 approval of the Settlement Agreement and of his proposed plan of distribution, among other
2 things.

3 **II. ALL REQUIREMENTS OF THE PRELIMINARY APPROVAL ORDER HAVE**
4 **BEEN SATISFIED**

5 On August 18, 2009, the Court issued an Order (the “Order”) preliminarily approving the
6 Settlement Agreement between Plaintiff and Defendants. The Order also:

7 (2) Required Class Counsel to distribute copies of the Notice of Proposed Settlement
8 and Settlement Hearing (the “Notice”) to all Class Members within twenty (20) days of
9 the Order;

10 (3) Required Defendants’ Counsel to publish in a noticeable position on the front page
11 of their website a link to the Notice within twenty (20) days of the Order; and

12 (4) Required Class Counsel and Defendants’ Counsel to serve and file prior to the
13 November 19, 2009 “fairness hearing” sworn statements attesting to compliance with the
14 provisions of items (2) and (3) above.

15 All requirements of the Preliminary Approval Order have been satisfied. As directed,
16 Class Counsel caused the Claims Administrator, Garden City, to distribute copies of the Notice
17 by first class mail to Class Members. Declaration of Ronald S. Katz (“Katz Decl.”) ¶ 2;
18 Declaration of Jennifer M. Keough (“Keough Decl.”) ¶ 4. The Notice stated that any objections
19 to the Settlement, including to the Plan of Distribution, must be received by October 29, 2009.
20 Katz Decl., Exh. 1. The Notice also stated that any objections to Plaintiffs’ Counsels’ fee request
21 must also be received by October 29, 2009. *Id.* Class Counsel will file a sworn statement
22 attesting to their compliance of this requirement prior to the November 19, 2009 fairness hearing.

23 Class Counsel also caused Garden City to establish and maintain a 24-hour toll-free
24 telephone helpline where Class Members could obtain information about the settlement. Katz
25 Decl. ¶ 3; Keough Decl. ¶ 5. Once a caller connects to the helpline, he or she hears an Interactive
26 Voice Recording (“IVR”). Keough Decl. ¶ 5. The IVR also allows a caller to leave a message
27 and request a call back to be returned by a live operator. *Id.* GCG promptly called each person
28 from whom a return call was requested. *Id.*

1 In addition, Class Counsel caused Garden City to establish and maintain an official
 2 website at www.retiredplayerclassaction.com for the purpose of providing the Notice to Class
 3 Members via the Internet, to provide further information about the settlement, and to answer
 4 those questions most frequently asked by the retired players. Katz Decl. ¶ 3; Keough Decl. ¶ 6.

5 Regarding those obligations of Defendants, Class Counsel is aware that Defendants have
 6 published in a noticeable position on the front page of their website a link to the Notice. Katz
 7 Decl. ¶ 4, Exh. 3. Similarly, on October 13, 2009, Defendants filed a notice of compliance with
 8 the Class Action Fairness Act. Notice of Compliance with Requirements of the Class Action
 9 Fairness Act of 2005, 28 U.S.C. § 1715 (Docket No. 647).

10 **III. BACKGROUND OF LITIGATION**

11 **A. Procedural Posture**

12 On April 29, 2008, the Court ruled that this lawsuit may proceed as a class action and that
 13 Herbert Adderley was an adequate class representative. *See* Order Granting in Part and Denying
 14 in Part Plaintiffs' Motion for Class Certification (Docket No. 275). The Court slightly modified
 15 this ruling on June 9, 2008, and defined the Class as:

16 All retired NFL players who executed a group licensing authorization form (GLA)
 17 with the NFLPA that was in effect at any time between February 14, 2003 and
 18 February 14, 2007 and which contains the following language: "[T]he moneys
 19 generated by such licensing of retired player group rights will be divided between
 the player and an escrow account for all eligible NFLPA members who have
 signed a group licensing authorization form."

20 Stipulation and Order Revising Class Definition and Notice (Docket No. 289).

21 After extensive discovery and litigation, including the extensive utilization of experts and
 22 one-sided settlement discussions initiated by Class Counsel, the parties proceeded to a three-week
 23 jury trial in this Court. On November 10, 2008, the jury returned a verdict against Defendants
 24 that, among other things, awarded the Class \$7.1 million in actual damages and another \$21
 25 million in punitive damages, both arising from Defendants' breach of their fiduciary duties. On
 26 January 28, 2009, final judgment was entered by the Court in the amount of \$28.1 million. *See*
 27 Amended Judgment (Docket No. 611). On February 3, 2009, Defendants filed an appeal with the
 28 United States Court of Appeals for the Ninth Circuit. Notice of Appeal (Docket No. 612). On

1 appeal, Defendants likely would have contested fundamental issues, including class certification
 2 and choice of law, as well as various evidentiary issues. Significantly, Defendants also intended
 3 to contest the verdict and resultant judgment, and several other potentially dispositive issues.

4 Pursuant to the Settlement Agreement, the parties filed a joint stipulation to request that
 5 the Ninth Circuit dismiss the Defendants' appeal without prejudice to reinstatement on June 15,
 6 2009, pending this Court's consideration of the parties' request for approval of the settlement.
 7 The Ninth Circuit granted that request on June 29, 2009, and returned jurisdiction over this case
 8 to this Court.

9 **B. Allegations of the Class and Defendants' Response**

10 Plaintiff Herbert Adderley, individually and as class representative, contends Defendants
 11 breached certain contractual and fiduciary obligations owed to Adderley and the Class in
 12 connection with a Group Licensing Authorization ("GLA") form. Under the GLA, Defendants
 13 were granted the right to use a player's name, signature, facsimile, voice, picture, photograph,
 14 likeness and/or biographical information for "group licensing programs." The GLA defines a
 15 "group licensing program" as any program or license "in which a licensee utilizes a total of six
 16 (6) or more present or former NFL player images in conjunction with or on products that are sold
 17 at retail or used as promotional or premium items." Defendants promoted the concept of a
 18 "group licensing program" for retired players for over a decade.

19 After soliciting and acquiring GLAs from thousands of retired players, Defendants entered
 20 into profitable group licensing agreements with several third parties, including Electronic Arts,
 21 Inc. and the Topps Company, Inc. These agreements generated tens of millions of dollars each
 22 year in guaranteed minimum royalties for Defendants. Adderley alleged that Defendants failed to
 23 pay Adderley and the Class their share of the licensing revenue generated from such agreements,
 24 and that Defendants instead kept those monies for themselves. In the alternative, Adderley
 25 alleged that Defendants should have negotiated vigorously for inclusion of retired players in
 26 licensing programs, but failed to do so in breach of their obligations as agents of the Class
 27 Members. Adderley further claimed that Defendants negotiated for below-market rates for retired
 28 player licenses.

1 Defendants have denied all of Adderley's allegations and deny that they engaged in any
2 wrongdoing, or that have any liability, whatsoever. Eventually Defendants agreed to pay \$26.25
3 million to settle all claims and put an end to this litigation.

4 **C. Litigation and Trial**

5 The jury verdict and resultant judgment was achieved after nearly two years of vigorous
6 and hard-fought litigation. Katz Decl. ¶ 5. During this time, Class Counsel spent thousands of
7 hours – which equate to millions of dollars – of attorney and paralegal time analyzing hundreds of
8 thousands of pages of documents; taking and defending multiple depositions across the country;
9 drafting numerous briefs and motion papers, most of which were drafted in response to motions
10 filed by Defendants; battling over class certification and pleading amendments, including a
11 motion for summary judgment and motions to decertify the class; participating in numerous court
12 hearings; consulting repeatedly with damage and sports economics experts; and conducting a
13 three-week jury trial. *Id.*

14 Based on their extensive knowledge of and familiarity with this case, the potential risk
15 (however remote) that the judgment could be overturned on appeal, and on the fact that the
16 settlement amount is only \$1.85 million less than the amount of the jury verdict, Class Counsel
17 and Class representative Herbert Adderley believe that the Settlement Agreement is fair,
18 reasonable, and adequate and in the best interests of the Class. Katz Decl. ¶ 8; Declaration of
19 Herbert Anthony Adderley (“Adderley Decl.”) ¶ 5.

20 **IV. SUMMARY OF SETTLEMENT TERMS AND ALLOCATION PLAN**

21 Subject to Court approval, Defendants have agreed to pay \$26,250,000 (Twenty-Six
22 Million Two Hundred Fifty Thousand Dollars) to resolve this matter. Katz Decl., Exh. 4. This
23 amount is to be paid in two installments. *Id.* The first installment of \$13,125,000 (Thirteen
24 Million One Hundred Twenty-Five Thousand Dollars), constituting one-half of the settlement
25 amount, was put into an escrow account on July 13, 2009. *Id.* Subject to the Court's approval of
26 the Settlement Agreement, and provided there are no appeals of the Court's ruling, Defendants
27 have agreed to pay the second installment of \$13,125,000 (Thirteen Million One Hundred
28 Twenty-Five Thousand Dollars), constituting the other half of the settlement amount, into an

1 escrow account by no later than June 5, 2010. *Id.*

2 The Settlement Agreement further provides that attorney's fees, costs, any incentive fee,
3 and expenses may be paid out of the Settlement Fund (as that term is defined in the Settlement
4 Agreement) after Court approval. Katz Decl., Exh. 4. On October 2, 2009, Class Counsel filed
5 their renewed application for attorneys' fees, expenses and an incentive payment for Herbert
6 Adderley. Class Counsels' Renewed Application for Preliminary and Final Determination of
7 Costs, Fees, Expenses, and an Incentive Payment for Class Representative, Herbert Adderley
8 (Docket No. 642). In that Application, Class Counsel respectfully requested an award of 30% of
9 the settlement amount minus expenses. *Id.* at 3. Plaintiffs' Counsel further request that they be
10 awarded their fees, and that the sole class representative, Herbert Adderley, be awarded an
11 incentive fee in the amount of \$60,000 for his substantial and substantive participation on behalf
12 of the entire GLA Class. *Id.*; see also Adderley Decl., Exh. A. This amount is approximately
13 .2% of the \$26,250,000 settlement amount. The remainder of the settlement amount would then
14 be distributed between the Class Members in accordance with the Plan of Distribution, as
15 approved or amended by the Court. Katz Decl., Exh. 2.

16 In exchange for Defendants' agreement to pay the Class \$26,250,000, each Class Member
17 must agree to release Defendants from any claims, demands and causes of action that were the
18 subject of the certified claims or that were alleged in the Class Action. Katz Decl., Exh. 4. As
19 the Court is aware, expressly excluded from the releases are "[a]ny claims by class members,
20 individually or as a class, against Electronic Arts or any other licensee of defendants concerning
21 misuse of their images or identities, including scrambling" *Id.*

22 **V. THE SETTLEMENT AGREEMENT IS FAIR**

23 As protection for absent Class Members, Rule 23(e) requires that a class action only be
24 settled with the approval of the Court. See *Officers for Justice v. Civil Serv. Comm'n of San*
25 *Francisco*, 688 F.2d 615, 623-24 (9th Cir. 1982). It is well established that "voluntary
26 conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice*,
27 688 F.2d at 625. Indeed, "unless [a] settlement is clearly inadequate, its acceptance and approval
28 are preferable to lengthy and expensive litigation with uncertain results." *National Rural*

1 *Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004); 4 A Conte & H.
 2 Newberg, *Newberg on Class Actions* § 11:50 at 155 (4th ed. 2002). This is especially true of
 3 class actions.

4 **A. The Settlement Agreement is Presumed Fair.**

5 A presumption of fairness arises where: (1) counsel is experienced in similar litigation;
 6 (2) the settlement was reached through arm's length negotiations; (3) investigation and discovery
 7 are sufficient to allow counsel and the court to act intelligently. *In re Heritage Bond*
 8 *Litigation*, 2005 WL 1594403, 2 (C.D. Cal.); *Linney v. Alaska Cellular P'ship*, 1997 WL 450064,
 9 at *5 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the
 10 fact that the settlement agreement was reached in arm's length negotiations, after relevant
 11 discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234
 12 (9th Cir. 1998). Here, the parties' Settlement Agreement is presumed fair. The settlement was
 13 reached by experienced, fully-informed counsel after many years of litigation and a jury trial. *See*
 14 *Katz Decl.* ¶ 7. It also took months of continuous arm's length negotiations between experienced
 15 counsel and sophisticated parties to reach terms on which both parties could agree. *Id.*

16 **B. The Settlement Agreement Also is Fair, Adequate and Reasonable Under the**
 17 **Multi-Factor Balancing Test Employed by the Courts.**

18 It is the responsibility of this Court to determine whether the settlement is "fundamentally
 19 fair, adequate, and reasonable." *Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1998). In
 20 doing so, the Court should consider a number of factors, including: (1) the risk, expense,
 21 complexity, and likely duration of further litigation; (2) the risk of maintaining class action status
 22 through trial; (3) the amount offered in settlement; (4) the extent of discovery completed and the
 23 stage of the proceedings; (5) the experience and views of counsel; and (6) the reaction of the
 24 Class Members to the proposed settlement. *Officers for Justice*, 688 F.2d at 625; *In re Critical*
 25 *Path Inc.*, 2002 WL 32627559, at *5 (N.D. Cal. June 18, 2002).

26 The Court can give varying weight to these or other factors, depending on the
 27 circumstances of the particular case. *Officers for Justice*, 688 F.2d at 625; *National Rural*
 28 *Telecomm. Coop.*, 221 F.R.D. at 526 (C.D. Cal. 2004) (*citing*, 5 *Moore's Federal Practice* §

23.85[2][a] (Matthew Bender 3d ed.)). Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval. *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

It is also worth noting that “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.” *Officers for Justice*, 688 F.2d at 625. The Court should not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wastefulness and expensive litigation that induce consensual settlements.” *Id.*

Ultimately, review is limited to the extent necessary “to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.* (“Ultimately, the district court’s determination is nothing more than ‘an amalgam of delicate balancing, gross approximations and rough justice.’”) (*quoting City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974)). As demonstrated below, an analysis of each of the factors set forth above strongly supports a finding that the settlement is fair, reasonable and adequate, and is in the best interest of the GLA Class.

1. The Risk, Complexity, and Expense of Further Litigation, Including the Maintenance of Class Status, Demonstrate that the Settlement is Proper.

Acceptance and approval of a settlement is preferable to lengthy and expensive litigation with uncertain results. *National Rural Telecomm. Coop.*, 221 F.R.D. at 526 (citing 4 A Conte & H. Newberg, *Newberg on Class Action*, § 11:50 at 155 (4th ed. 2002)). “The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, ‘It has been held proper to take the bird in hand instead of a prospective flock in the bush.’” *National Rural Telecomm. Coop.*, 221 F.R.D. at 526 (citations omitted). The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators. *Id.*

Here, there is no question that Defendants intended to pursue this matter through the

1 appellate process and beyond. Defendants' counsel made numerous statements to this effect in
 2 the days and months following the jury verdict against Defendants.¹ Nor is there any question
 3 that Plaintiffs risked losing some or all of their judgment on appeal. Defendants previously
 4 indicated that they intended to contest the judgment on appeal, as well as a wide range of
 5 fundamental issues, including choice of law and class certification. A negative result on the class
 6 certification issue could have resulted in Plaintiffs' inability to maintain their class status.

7 Because Plaintiffs will receive most of their awarded damages through the Settlement
 8 Agreement, there is little benefit to them of further costly and unpredictable litigation. At the
 9 same time, there is a risk that Plaintiffs could have their award reversed and receive nothing.
 10 Settlement is clearly the preferred alternative.

11 **2. The Amount of the Settlement Also Demonstrates that the Settlement** 12 **is Proper.**

13 In assessing the consideration obtained by the class members in a class action settlement,
 14 "it is the complete package taken as a whole, rather than the individual component parts, that
 15 must be examined for overall fairness." *National Rural Telecomm. Coop.*, 221 F.R.D. at 527
 16 (quoting *Officers for Justice*, 688 F.2d at 628). In determining whether the amount of a proposed
 17 settlement is fair, it has been suggested that the district court compare the settlement amount to
 18 the parties' estimates of the maximum amount of damages recoverable in a successful litigation.
 19 *Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, *4 (N.D. Cal.) (citing, *In re Mego Fin.*
 20 *Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)). Even a cash settlement amounting to only a
 21 fraction of the potential recovery – which is not the case here; Defendants' offer represents 93%
 22 of the value of Plaintiffs' judgment – does not per se render the settlement inadequate or unfair.
 23 *Id.* (approving settlement of 25% to 35% of the amount plaintiffs hoped to prove at trial).

24 In the context of settlement, class plaintiffs typically accept some fraction of their

25 ¹ Soon after the jury returned a verdict in favor of the retired players and against Defendants, counsel for
 26 Defendants told the press that the verdict was "unjust" and that Defendants were "confident it would be overturned."
 27 Katz Decl., Exh. 5. Over two months later, in January 2009, counsel for Defendants re-affirmed his position. When
 28 asked whether Defendants would drop their appeal, Defendants' Counsel stated "I don't think the union was wrong in
 that lawsuit." *Id.*, Exh. 6. Moreover, when told by a reporter that "[t]he judge felt the [NFLPA] was wrong," counsel
 for Defendants stated that he did not "think there was any evidence to support that." *Id.* Defendants' counsel even
 stated that he would not advise Defendants "just to give up on that lawsuit." *Id.*

1 damages in exchange for avoidance of the risks and costs of trial. *See, e.g., Jaffe v. Morgan*
 2 *Stanley*, 2008 WL 346417, at *9 (N.D. Cal. Feb. 7, 2008) (“The settlement amount could
 3 undoubtedly be greater [than 40% of predicted damages], but it is not obviously deficient, and a
 4 sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that
 5 come with litigating a case to trial.”); *see also Kakani v. Oracle Corp.*, 2007 WL 2221073, at *3
 6 (N.D. Cal. Aug. 2, 2007) (granting preliminary approval to settlement for 12.3% of maximum
 7 claims). Here, Defendants’ agreement to pay \$26.25 million in settlement represents only a slight
 8 decrease from the \$28.1 million awarded by the jury. At the same time, Plaintiffs avoid the
 9 uncertainties, risks, and costs that come with further litigation. This is a strong and credible result
 10 for the GLA Class. Indeed, the Court can approve the Settlement Agreement based on this factor
 11 alone. *See Torrissi*, 8 F.3d at 1376 (one factor alone may prove determinative in finding sufficient
 12 grounds for court approval).

13 3. The Stage of the Proceedings, the Experience and Views of Counsel, 14 and the Reaction of the Class Members to the Proposed Settlement, Warrant Approval.

15 In approving class settlements, courts generally defer to the judgment of experienced
 16 counsel who have conducted arms-length negotiations. *In re Omnivision Tech., Inc.*, 559 F. Supp.
 17 2d 1036, 1043 (N.D. Cal. 2007); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979).
 18 Indeed, “[g]reat weight is accorded to the recommendation of counsel, who are most closely
 19 acquainted with the facts of the underlying litigation.” *National Rural Telecomm. Coop.*, 221
 20 F.R.D. at 528. The reason for this is that the “parties represented by competent counsel are better
 21 positioned than courts to produce a settlement that fairly reflects each party’s expected outcome
 22 in the litigation.” *Id.* For this same reason, “the trial judge, absent fraud, collusion, or the like,
 23 should be hesitant to substitute its own judgment for that of counsel.” *Id.*

24 In this case, the settlement reflects the result of extensive, arms-length negotiation
 25 between experienced counsel representing sophisticated clients. Katz Decl. ¶ 7. Because of the
 26 preparation, investigation and evaluation by a myriad of counsel in this matter on behalf of both
 27 Defendants and the Class, and the fact that the evidence and arguments have been thoroughly
 28 tested before a jury and in a subsequent motions for judgment as a matter of law, the parties are in

1 an excellent position to make a realistic assessment of their strengths and weaknesses.

2 The reactions of the class members to a proposed settlement also is a proper consideration
3 for the Court. *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1043; *National Rural*
4 *Telecomm. Coop.*, 221 F.R.D. at 528 (quoting 5 *Moore's Federal Practice* § 23.85[2][d]). The
5 absence of a large number of objections to a proposed class action settlement raises a strong
6 presumption that the terms of a proposed class action settlement are favorable to the class
7 members. *National Rural Telecomm. Coop.*, 221 F.R.D. at 529.

8 Here, an overwhelming number of the retired players who have contacted Class Counsel
9 about the settlement have indicated their approval.² *Id.* Katz Decl. ¶ 9.

10 **4. The Settlement Agreement is Not the Result of Fraud or Collusion.**

11 Collusive settlement “usually come as a cash award to counsel, a broad release of claims,
12 and a cosmetic non-cash recovery for the absent shareholders.” *In re Zoran Corp. Derivative*
13 *Litigation*, 2008 WL 941897, 2 (N.D. Cal. 2008). There is absolutely no hint of any such
14 collusion here. First, the settlement releases only the claims of members of the certified Class,
15 and only relates to those claims that were the subject of the certified claims or that were alleged in
16 the Class Action. Second, Class Counsel acknowledges that any fee and expenses award is based
17 on the amount of the common settlement fund and will be granted at the discretion of the Court.
18 Third, as seen above, because the settlement is based on recovery of 93% of the GLA Class’s
19 judgment, the settlement confers substantial benefit upon absent Class Members.

20 **VI. THE PLAN OF DISTRIBUTION IS FAIR AND REASONABLE**

21 Approval of a plan of allocation of settlement proceeds in a class action is governed by the
22 same standards of review applicable to approval of the settlement as a whole: the plan must be
23 fair, reasonable and adequate. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th
24 Cir. 1992); *In re Heritage Bond Litig.*, 2005 WL 1594403, *11; *see also In re Oracle Securities*
25 *Litigation*, 1994 WL 502054 *1 (N.D. Cal. 1994). An allocation formula need only have a

26
27 ² On October 14, 2009, the Court issued an Order suggesting that some Class Members may have filed
28 comments, positive and negative, in connection with the Settlement Agreement. Notice Re Objections (Docket No. 650). Class Counsel is currently in the process of obtaining and reviewing these comments. Class Counsel reserves their right to more fully respond to these comments at the appropriate time.

1 reasonable, rational basis, particularly if recommended by experienced and competent counsel. *In*
 2 *re Heritage Bond Litig.*, 2005 WL 1594403, *11 (citations omitted). Generally, a plan of
 3 allocation that reimburses class members based on the extent of their injuries is “reasonable.” *Id.*;
 4 *In re Oracle Securities Litig.*, 1994 WL 502054 *1. However, it also is reasonable to “allocate
 5 more of the settlement to class members with stronger claims on the merits.” *In re Heritage Bond*
 6 *Litig.*, 2005 WL 1594403, *11.

7 The proposed Plan of Distribution is fair, reasonable and adequate. The Plan was drafted
 8 by Class Counsel with the input of their economic consulting experts, and has been sent by the
 9 Claims Administrator, Garden City, to Class Members via first class mail. As explained in the
 10 Plan, Class Members are to be compensated consistent with the way the active players were
 11 compensated during the same years at issue in this lawsuit. The Plan states:

12 It is the judgment and contention of Class Counsel that the Class Members’
 13 alleged damages stem from being denied participation in the royalties shared with
 14 active NFL players. Thus, in the judgment of Class Counsel, division of the
 15 payout would be most equitable if it mirrors the way in which Class Counsel
 16 understands based upon the evidence in this case that the active players received
 17 payments from the Gross Licensing Revenue pool for the years 2004 through 2007
 18 that are included in the Class Period. It is Class Counsel’s understanding based on
 19 the evidence, that the eligible active players received approximately twenty
 20 percent (20%) of the total licensing revenue during the class period in 2004,
 21 twenty four percent (24%) of the total licensing revenue during the class period in
 22 the second year (2005); twenty five percent (25%) of the total licensing revenue
 23 was paid in the third year (2006); and thirty one percent (31%) of the total
 24 licensing revenue was paid in the fourth year (2007). Class Counsel further
 25 understands, based on the evidence, that each year the amounts were divided
 26 equally among the eligible active NFL players for that year.

27 Katz Decl., Exh. 2.

28 The Plan also seeks to allocate more of the settlement to those Class Members who had
 GLAs in effect for more than one year or several years on the ground that such Class Members
 arguably suffered greater harm as a result of Defendants’ failure to market or license their rights.
 For example, a retired player who had a GLA in effect only for 2003 arguably lost out only on the
 licensing and marketing opportunities that would have been available for that single year, while a
 retired player who had a GLA in effect 2003 through 2006 lost out on licensing and marketing
 opportunities for each of those four years.

This formula is reasonable and rational, and intends to allocate more of the settlement to

1 class members with stronger claims on the merits. Class Counsel is of the opinion that this is the
 2 fairest division of Net Settlement proceeds.

3 **VII. CONCLUSION**

4 Based on the foregoing, the Class Representative and Class Counsel respectfully request
 5 that the Court, after conducting the Fairness Hearing, enter an order which: (1) approves the
 6 Settlement as fair, reasonable, and adequate and in the best interest of the Class; (2) approves the
 7 Plan of Distribution as fair and reasonable; (3) orders the consummation of the settlement subject
 8 to its terms; and (4) grants such other and further relief to which the Court believes Class
 9 Representatives are entitled.

10 Dated: October 15, 2009

Respectfully submitted,

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