

MCKOOL SMITH
A PROFESSIONAL CORPORATION • ATTORNEYS
DALLAS, TEXAS

1 MANATT, PHELPS & PHILLIPS, LLP
RONALD S. KATZ (Bar No. CA 085713)
2 E-mail: rkatz@manatt.com
RYAN S. HILBERT (California Bar No. 210549)
3 E-mail: rhilbert@manatt.com
NOEL S. COHEN (California Bar No. 219645)
4 E-mail: ncohen@manatt.com
1001 Page Mill Road, Building 2
5 Palo Alto, CA 94304-1006
Telephone: (650) 812-1300
6 Facsimile: (650) 213-0260

7 McKOOL SMITH, P.C.
LEWIS T. LECLAIR (Bar No. CA 077136)
8 E-mail: lleclair@mckoolsmith
300 Crescent Court, Suite 1500
9 Dallas, TX 75201
Telephone: (214) 978-4000
10 Facsimile: (214) 978-4044

11 *Attorneys for Plaintiffs*

12 [Counsel for Defendants Appear On Signature Page]

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 HERBERT ANTHONY ADDERLEY,
on behalf of himself and all others
17 similarly situated,
18 Plaintiff

19 vs.

20 NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, a Virginia
21 corporation, and NATIONAL
FOOTBALL LEAGUE PLAYERS
22 INCORPORATED d/b/a PLAYERS
23 INC, a Virginia corporation,
24 Defendants.

CIVIL ACTION NO. C07 0943 WHA
**CLASS COUNSELS' AND
DEFENDANTS' RESPONSE TO
JULY 12, 2010 ORDER**

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2 Counsel for the GLA Class (“Class Counsel”), and defendants National Football League
3 Players Association (“NFLPA”) and National Football League Players Incorporated (collectively
4 “Defendants”) hereby jointly respond to the Court’s July 12, 2010 Order Regarding
5 Undeliverable Claim Forms and would show the Court as follows.

6 **I. INTRODUCTION**

7 Class Counsel’s efforts to provide the Class with notice of the Settlement Agreement
8 satisfy the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure.
9 With the help of its claims administrator—The Garden City Group (the “Claims
10 Administrator”)—Class Counsel has diligently attempted to notify each and every Class Member
11 regarding the Settlement Agreement. Over the course of the last seven months, the Claims
12 Administrator has conducted multiple mailings to the Class and has spent significant time and
13 resources attempting to locate Class Members whose mailings were returned to the Claims
14 Administrator as “undeliverable.” In addition, the Claims Administrator created a website in
15 which it posted all relevant notices and specifically set forth the deadlines by which Class
16 Members needed to respond in order to receive their share of the Settlement Fund. As a result of
17 these efforts, over 87% of the Class has already received its share of the first installment of the
18 Settlement Fund.

19 Furthermore, the Court’s Order regarding distribution of settlement funds anticipated, as
20 is usually the case with large classes, that all class members might not be contacted. The Order
21 provided that the shares of those who failed to respond would be distributed to those who did
22 respond. This Order assures that class members get the full benefit of the settlement.

23 Despite the fact that the requirements of due process have been satisfied, Class Counsel
24 has attempted to determine whether there are any other reasonable steps that could be taken in
25 order to locate class members for whom there is no current address. After discussion with the
26 Claims Administrator, Class Counsel believes that one additional step might be available, were
27 the Court to prefer an additional attempt. Specifically, Class Counsel has contacted counsel for
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1 Defendants to request the social security numbers of those Class Members who have yet to
2 receive their share of the Settlement Fund. Defendants have agreed to provide this information
3 to the Claims Administrator. Class Counsel could provide the Claims Administrator each
4 missing Class Member's social security number to run Lexis-based searches in an attempt to
5 locate a more current address for each such Class Member. Given the efforts undertaken to
6 date, however, Class Counsel is not sure that delaying and potentially diminishing the recovery
7 to other Class Members who have responded is in the overall best interest of the Class.

8 **II. FACTUAL BACKGROUND**

9 1. On November 11, 2008, the Class Members received a jury verdict in the amount
10 of \$28.1 million. The verdict received a significant amount of media attention. *See* Declaration
11 of Lewis T. LeClair ("LeClair Decl.") ¶ 1.

12 2. On June 5, 2009, the parties agreed, subject to court approval, to enter into a
13 Settlement and Release Agreement with Defendants, and on November 23, 2009, the Court
14 granted Class Counsel's Motion for Final Approval of the Settlement Agreement and Proposed
15 Plan of Distribution. *See* Docket No. 670.

16 3. Shortly thereafter, on December 11, 2009, Class Counsel caused the Claims
17 Administrator to mail each Class Member for whom Class Counsel has a known address a Claim
18 Form and Release ("Claim Form"). *See* Declaration of Jennifer M. Keough ("Keough Decl.")
19 ¶ 3. The Claim Form stated that the recipient must return a completed Claim Form to the Claims
20 Administrator on or before February 9, 2010, to share in the settlement amount. *Id.*

21 4. In addition to the mailing, the Claims Administrator published the Notice of Class
22 Action Settlement on a website that was created specifically for this case. *See* Keough Decl. ¶ 4.
23 The website set forth the date by which each Class Member was required to return a completed
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1 Claim Form and the hotline number which Class Members could use to contact the Claims
2 Administer. *Id.*

3 5. The Claims Administrator received 1,571 Claim Forms that were postmarked on
4 or before the February 9, 2010 deadline, and distributed funds to each of the Class Members who
5 submitted a Claim Form by that deadline. Keough Decl. ¶ 5. Four hundred and eighty-eight
6 Class Members did not submit a completed claim form by the deadline. *Id.*

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8 6. Despite the fact that the deadline for submitting a completed Claim Form had
9 passed, Class Counsel authorized the Claims Administrator to send a second notice to each of
10 those Class Members who did not timely submit a Claim Form and for whom Class Counsel had
11 a known address. *See* Keough Decl. ¶ 6. This Claim Form extended the deadline to June 1,
12 2010. *Id.* The Claims Administrator updated its website to reflect the new deadline. *Id.* ¶ 6.

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14 7. Prior to instructing the Claims Administrator to proceed with the second mailing,
15 Class Counsel instructed the Claims Administrator to conduct “advanced address searches” in an
16 attempt to identify the addresses of 261 Class Members whose Claim Forms were returned as
17 “undeliverable” in connection with the initial mailing. *See* Keough Decl. ¶ 7. As part of the
18 “advanced address searches”, the Claims Administrator attempted to locate an updated address
19 for the relevant Class Members by submitting the name, address, phone number and, if available,
20 Social Security number to Choicepoint, a Lexis-based database that aggregates publicly available
21 records, such as utilities and financial records. *Id.* In addition to the “advanced address
22 searches”, the Claims Administrator also used available address information to look up class
23 member phone numbers via reverse directory look-up on the internet and subsequently made
24 attempts to contact these individuals by phone in order to get an updated address. *Id.* The
25 Claims Administrator then conducted a calling campaign to locate updated address information
26 for Class Members whose Claim Forms were returned as “undeliverable”. *Id.*

1 8. The Claims Administrator mailed each Class Member for whom it had a known
2 address a second claim form in March 2010. Keough Decl. ¶ 8. According to the Claims
3 Administrator, 203 of these Claim Forms were returned as “undeliverable” for a second time. *Id.*

4 9. On July 14, following the Court’s most recent Order, Class Counsel met and
5 conferred with counsel for Defendants pursuant to the Court’s July 12, 2010 Order. During the
6 conversation, Class Counsel requested that Defendants provide Class Counsel with the social
7 security number for each Class Member who has yet to receive his share of the Settlement Fund
8 so that the Claims Administrator could run additional searches to locate each Class Member’s
9 current address. Defendants’ counsel agreed to provide the Claims Administrator through Class
10 Counsel with the information for such purpose. LeClair Decl. ¶ 2.

11 **III. ARGUMENT**

12 **A. Class Counsel’s Efforts to Distribute the Settlement Funds Satisfy the**
13 **Requirements of Due Process.**

14 To ensure that class members receive notice of their rights in accordance with due
15 process, the “best notice that is practicable under the circumstances” is required. FED. R. CIV. P.
16 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Best practicable notice
17 requires individual notice “to all class members whose names and addresses may be ascertained
18 through reasonable effort.” *Eisen*, 417 U.S. at 173. “[D]ue process requires reasonable effort to
19 inform affected class members through individual notice, **not receipt of individual notice.**”
20 *Rannis v. Recchia*, No. 09-55859, 2010 U.S. App. LEXIS 10858, at *8 (9th Cir. May 27, 2010)
21 (emphasis added); *see also Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (finding that
22 “best practicable” notice is required, not “actually received” notice); *Wright v. Linkus Enters.,*
23 *Inc.*, 259 F.R.D. 468, 475 (E.D. Cal. 2009) (noting that actual notice to all members of the class
24 is not required). The Ninth Circuit has recognized that, in the majority of class actions, at least
25 some unlocated class members will remain in the class. *Six (6) Mexican Workers v. Arizona*
26 *Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990); *see also* NEWBERG ON CLASS ACTIONS §
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1 10.14 (“In the majority of cases, not all affected class members can be individually identified or
2 located.”).

3 In *Sweet v. General Tire & Rubber Co.*, No. C75-181A, 1982 U.S. Dist. LEXIS 12371, at
4 *18 (N.D. Ohio March 17, 1982), the settlement notice and proof of claim form was sent to the
5 last known address of each class member. When returned notices were received, plaintiffs’
6 counsel took additional steps to assure that the returned notices were forwarded to class
7 members. *Id.* at *18-19. Notwithstanding these efforts, some class members still failed to
8 receive notice. *Id.* at *19. The district court found that Rule 23(e) requires that notice be given
9 in a form and manner that, while not guaranteeing receipt by every class member, does not
10 systematically leave an identifiable group without notice. *Id.* Recognizing that “additional
11 steps” had been taken to attempt to forward notices to class members whose notices had been
12 returned, the district court found that the failure of the mailed notices to reach all class members
13 did not mandate rejection of the settlement. *Id.*

14 Several California district courts have reached similar decisions when a significant
15 number of notices have been returned but “additional steps” have been taken to find the correct
16 addresses of the class members. In *Alberto v. GMRI, Inc.*, No. 07-1895 WBS DAD, 2008 U.S.
17 Dist. LEXIS 91691, at *30-31 (E.D. Cal. Nov. 12, 2008), the district court entered final
18 judgment approving a settlement of a class action in such a situation. Notice packets were
19 initially sent to 18,286 class members, but 5,088 of the packets were returned as undeliverable.
20 *Id.* The settlement administrator performed “skip traces” on the addresses on the returned
21 packets utilizing an internet database and then mailed additional packets to those addresses. *Id.*
22 Even though 1,231, or 7%, of the notice packets were ultimately undeliverable, the district court
23 found that the notice given the class complied in all respects with due process.

24 In *Ybarrondo v. NCO Fin. Sys., Inc.*, No. 05-CV-2057-L(JMA), 2009 U.S. Dist. LEXIS
25 100502, at *10 (S.D. Cal. Oct. 28, 2009), 1,340 notices were sent out to the class. Of those, a
26 total of 298 were returned as undeliverable. *Id.* at *11. A second round of notices were sent out
27 after an address verification process was performed. *Id.* After the second mailing, 215 notices
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1 were returned as undeliverable. *Id.* A total of 104 completed claim forms were received. *Id.*
2 Although 16% of the notices were returned as undeliverable, the district court found that the
3 notice given was the best notice practicable under the circumstances, as it had provided
4 individual notice to all members of the class who could be located through reasonable effort; and
5 the court granted the motion for final approval. *Id.*

6 In another case, *Sandoval v. Tharaldson Employee Management, Inc.*, No. EDCV 08-
7 482-VAP (OPx), 2010 U.S. Dist. LEXIS 69799, *31 (C.D. Cal. June 15, 2010), a total of 190 of
8 988, or 19.23%, of the class notices were undeliverable even though a second notice was sent out
9 after an address trace was performed. The settlement administrator received 244 claim forms.
10 *Id.* Thus, 24% of the class members submitted claims. The district court found that the class
11 members had received the best notice practicable under the circumstances. *Id.* at *32-33.
12 Although 19% of the class notices were returned as undeliverable, the district court granted the
13 motion for final approval of the class action settlement and determined that all class members,
14 except those who had properly opted out, were bound by the dismissal with prejudice. *Id.* at *33.

15 Because individual notices were sent to all class members' last known addresses in this
16 case and because additional efforts were made to ascertain the correct present addresses and to
17 mail a second notice to all class members whose notices were returned, due process has been
18 met. Thus, the 202 class members whose claim forms were returned as undeliverable after two
19 attempts to send notice may be bound by the settlement; their claims may be released under
20 paragraph 32 of the Settlement and Release Agreement (Doc. No. 653-4); and the funds in the
21 Net Settlement Fund allocated to their claims may be declared "unclaimed" and distributed
22 pursuant to the terms of the Proposed Plan of Distribution (Doc. No. 653-2). *See Sandoval*, 2010
23 U.S. Dist. LEXIS 69799, at *33.

24 **B. Class Counsel Could Take One Additional Step to Find the Missing Class**
25 **Members But It would Delay and Potentially Diminish the Recovery to the**
26 **Class.**

27 While Class Counsel has satisfied the requirements of due process, Class Counsel has
28 determined that it could take one additional step to contact those Class Members who have yet to

1 submit a timely Claim Form. Specifically, Class Counsel could ask the Claims Administrator to
2 conduct additional Lexis-based searches using social security information in order to identify the
3 addresses of each Class Member whose Claim Form was returned as “undeliverable”. Class
4 Counsel has requested that Defendants provide Class Counsel with the social security number of
5 each Class Member who has yet to submit a Claim Form, and Defendants have agreed to provide
6 this information to the Claims Administrator if the Court directs Class Counsel to take additional
7 steps to locate the Class Members whose Claim Forms were returned as “undeliverable”.

8 Because due process has been satisfied, Class Counsel is reluctant to take action that
9 would result in further delay and potentially diminish the recovery amount to the Class Members
10 who have responded, at a minimum because the Claims Administrator will incur additional fees
11 and costs that will be paid from the remaining Settlement Fund. Should the Court deem the
12 additional step appropriate, however, Class Counsel is in a position to proceed as directed.

13 **CONCLUSION**

14 For these reasons, Class Counsel respectfully requests that the Court find that the
15 requirements of due process have been satisfied and that the settlement and the distribution of the
16 Settlement Fund should be finalized as proposed. Alternatively, Class Counsel requests that the
17 Court order Class Counsel to (i) perform additional searches for missing addresses using each
18 Class Member’s social security number that will be provided by the Defendants, and (ii) conduct
19 a third mailing of the Claim Form using any additional address information that is obtained,
20 before making the final distribution of the Settlement Fund.
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