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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

(UNLIMITED JURISDICTION)

ALEX POPOV,	)	Case Number 400545
	)	
Plaintiff,	)	**DEFENDANT PATRICK**
	)	**HAYASHI'S TRIAL BRIEF**
	)	
PATRICK HAYASHI, and Does 1-25,	)	
	)	

Defendants.)
)
)
)
)
)
) Action filed: October 24, 2001
) Trial Date: October 15, 2002
)

INTRODUCTION

Plaintiff ALEX POPOV ("Popov"), a baseball fan who briefly got his glove on Barry Bonds' record-setting 73rd homerun ball has brought this lawsuit against Patrick Hayashi, the fan who found the ball on the ground and asserted unequivocal dominion and control of the ball by holding it up for all to see.

On September 12, 2002, the Court dismissed Popov's causes of action for assault and battery on Patrick Hayashi's motion for summary adjudication. The Court found no triable issue as to whether Patrick Hayashi "committed or attempted to commit any act resulting in a harmful or offensive contact with" Popov's person.

Remaining for trial are Popov's causes of action for conversion, trespass to chattel, specific recovery of property and constructive trust. In its September 12, 2002 Order, the Court found that triable issues of fact exist only "regarding **whether Plaintiff exercised unequivocal dominion and control over the baseball**." (Emphasis added.)

FACTUAL BACKGROUND

On October 7, 2001, the San Francisco Giants played their final game of the 2001 baseball season at Pacific Bell Park. Going into the game, Giants left fielder Barry Bonds had already hit 72 homeruns during the regular season, eclipsing by two the single season record of 70 set by Mark McGwire in 1998. McGwire's 70th homerun ball later sold at auction for some $3,050,000.

Alex Popov attended the October 7, 2001 game intent upon catching a record-setting Barry Bonds homerun ball. To this end, Popov traded his ticket for a reserved seat in the stands for much less expensive standing-room-only ticket in the arcade walkway above and behind right field, where Bonds had hit many of his homeruns. Popov also brought a baseball glove with him for the occasion. Once in the arcade walkway area, Popov positioned himself in the area where his prior research had indicated Bonds was most likely to hit a homerun ball.

During the first inning, Barry Bonds hit his 73rd home run into the arcade walkway. The home run ball initially hit Popov's glove, but as is evident in the videotape taken by Josh Keppel of Channel 11, the ball was in the upper part of the webbing of Popov's glove, and in the 6/10 of second before the ball it disappeared from view, the ball was not secure in Popov's glove.

Patrick Hayashi's expert, retired Major League umpire Jim Evans, concluded from a careful study of the Keppel videotape that what appears in the videotape is not a "catch" according to both the official rules of Major League Baseball and the common law of the stands. Popov simply did not have firm and secure possession of the ball. Almost the entire round circumference of ball is clearly visible; the ball is in the upper part of the webbing; Popov's fingers are not closed over the ball; parts of the ball appear loose in webbing; and the glove is turning awkwardly.

At his deposition in this case, Popov's lawyer showed Jim Evans a chronological sequence of stills which covered the time the home run ball hit Popov's glove, to the time the ball and glove disappeared from view. Each frame in the sequence represents just 1/30 of a second. After carefully examining each of the frames in chronological order, Jim Evans concluded that Popov had even less control of the home run ball in the final frames than he did in the earlier frames. So in just 6/10 of a second, Popov was losing his already tenuous contact with the ball.

Another of Patrick Hayashi's experts, Dr. Janet Jhoun, has testified that in a split second after the home run ball struck Popov's glove, Popov began falling backwards and downwards. Whether Popov fell from the momentum of the ball hitting his glove, the surge of the crowd going after the home run ball, or some combination of the two, is inconclusive.

Still another of Patrick Hayashi's experts, Ted Kobayashi, has testified that there was insufficient perception and response time for the crowd to have attacked Popov for the home run ball. There simply was not enough time from the time the home run ball struck Popov's glove, to the time Popov started falling to the arcade walkway, for the crowd to have perceived that Popov had the ball, and then to have reacted by attacking him for the ball.

The Keppel videotape fully supports the opinions of Dr. Janet Jhoun and Ted Kobayashi. In real time, in slow motion, and in stills, the videotape does not show anyone knocking Popov down.

In addition, according to Ted Kobayashi, if Popov rotated as he fell to the arcade walkway, as Popov testified, Popov's head would have hit the ground at about 14 to 15 miles an hour, and Popov's chest and shoulder area would have hit between 9 and 12 miles an hour. Furthermore, according to Dr. Janet Jhoun, Popov's reported injuries were consistent with impacting with the surface of the arcade walkway.

Hayashi Found the Ball Untouched on the Ground

Patrick Hayashi also attended the October 7 game hoping to get a Barry Bonds homerun ball. He saw Barry Bonds make contact, and the ball go high in the air toward the arcade walkway. Hayashi positioned himself along with many other people around him and he went up for the ball along with a number of fans around him. Hayashi's momentum, and the momentum of the crowd, as they reached up and moved toward the Barry Bonds' 73rd home run baseball at the same time, caused a pile up with Hayashi at the bottom, face down.

Immediately after Hayashi hit the ground, he looked up and spotted what would eventually be authenticated as the Barry Bonds home run ball on the ground within his reach. The baseball lay motionless on the ground by itself, and was not in anyone's possession. No one was holding onto the baseball, it was not in anyone's glove, and it was not in anyone's clothes. Hayashi immediately reached over for the baseball, and placed it in his glove.

Hayashi then waited on the ground for the pile of people to dissipate, and eventually made it to his feet. After some initial confusion and doubt, Hayashi realized the ball he was holding must be the home run ball, and he held it up in the air. The crowd cheered Hayashi, acknowledging that he came up with the Barry Bonds ball. Even Popov admitted in his deposition that he told Hayashi, "You've got it! Yeah! Dude!" when Hayashi held up the ball. (Popov Depo 185:14-21.)

Paul Padilla, Major League Baseball's Manager of Security, then showed Hayashi his identification and asked to see the baseball. Hayashi showed the ball to him, and Padilla indicated it was the home run ball. Hayashi was escorted to a security office at Pacific Bell Park by Padilla and Lee Jett, another Major League Baseball security agent and a 20-year veteran of the Los Angeles Police Department.

In the security room, several people gave Hayashi their business cards including Jorge Costa, Senior Vice President of Ballpark Operations, Pacific Bell Park; Paul Padilla; and Lt. Jack Ballentine, P.L.E.S. Administrator, Film and Video Coordinator, San Francisco Police Department.

Hayashi watched the officials in the security room examine the baseball and verify that it was Barry Bonds' 73rd home run base ball. One of the Major League Baseball security people asked Hayashi some questions about what happened on the arcade walkway. Someone in the security room said there was someone outside claiming the ball was his. Nevertheless, the officials in the

security room put the home run ball in a transparent plastic case, and told Hayashi that it was his ball.

Witnesses Saw a "Sucker" Ball, Not the Barry Bonds Ball in Popov's Glove

Popov later claimed that he had "caught" the ball and held it securely in his glove next to his body for up to a minute, but his claim is refuted by independent witness Jim Callahan. Callahan was in the right field arcade walkway with his 11-year old son when he saw Barry Bonds hit his 73rd homerun on October 7, 2001. Callahan dove to the floor at the same time as Popov and was next to him, able to see inside the glove on Popov's left hand, as well as Popov's right hand. He immediately saw that Popov did not have the Barry Bonds homerun ball, but instead had a different ball with felt tip pen writing on it in his glove. Callahan's account in part is as follows:

> As the ball was on its downward trajectory, I could tell the ball was out of my reach to capture it on the fly, so I dove low hoping that the ball would fall to the floor in my vicinity. . . .
>
> When I landed on the ground, my head was directly above Alex Popov's head. I know the person was Alex Popov ("POPOV") because I later saw him on television. POPOV was lying on his side somewhat face down, and immediately after I landed on the floor, I saw POPOV's glove on his left hand on the cement near his head. ***I could see POPOV's whole glove and a ball in it that I immediately knew that this ball was not the 73rd home run ball because it had large letters on it that looked like it came from a thick, black felt pen***. I couldn't see what the letters spelled because they were wrapped around the ball, but I thought I saw a "C" or an "O."
>
> I know that POPOV did not have possession of the 73rd home run ball when he hit the floor because we both hit the floor at approximately the same time, and immediately I was able to see the inside of his glove on his left hand, and ***I could also see his right hand, and he did not have the 73rd home run ball in either hand***. Instead, he held another ball in his glove with letters marked on it as if done by a thick marking pen.
>
> From the time I saw the 73rd home run ball about to land in the crowd, to the time POPOV and I hit the ground with my head over his, was a very short time, no more than one or two seconds.

(Callahan MSJ Dec. ¶¶ 6-9, emphasis added.)

Russ Reynolds, a witness who signed a declaration for Popov that Popov submitted in support of both his motion for a preliminary injunction and his motion for summary judgment, testified at his recent deposition that he fell to arcade walkway along with everyone else, and ended up on top of somebody else who was on top of Popov, with his head about 3 feet from Popov's glove. He thought he had been watching the glove the whole time, and was therefore confused when Popov eventually opened the glove, and there was only a ball with the word "sucker" written on it in black ink.

A Witness Saw Popov Bobble the Home Run Ball

Scott Siciliano, a recently discovered witness who captured Barry Bonds' 69th home run ball, saw Popov bobble the 73rd home run ball, and saw a loose ball.

Major League Baseball

Major League Baseball Security Manager Paul Padilla and witness Jonah Fluxgold also got a good look at the ball in Popov's glove. They saw that it had the word or words, "sucker" or "71 suckers" written on it. (Padilla Depo. 32:22-33:9; Fluxgold Depo. 9:13-17.) Thus, the only ball Popov had in his glove right after hitting the surface of the arcade walkway was the "sucker" ball, and not Barry Bonds' 73rd homerun ball.

During his May 23, 2002 deposition, Major League Baseball's Manager of Security Operations, Paul Padilla, testified at great length about Major League Baseball's Collectibles and Memorabilia Authentication Program. (Padilla Depo., 52:25, 53:1-6.) Padilla stated that, during the Barry Bonds homerun chase, he met with Joe Grippo, licensing manager for Major League Baseball, in order to implement the program. (Padilla Depo., 53:15-17, 55:10-22.) The purpose of the program was to verify the actual homerun ball in the event Bonds broke the single-season record. (Padilla Depo., 55:10-19.)

In accordance with the league's program, Padilla personally marked the baseballs to be used for Barry Bonds' at-bats – using a stamp and water-resistant ink to stamp each ball with a number. (Padilla Depo., 36:3-25, 37:1-14.) In addition, Padilla also used a specially-supplied pen to mark each ball with an invisible ink that could be read only with an ultraviolet light. (Padilla Depo., 56:3-22.) Padilla testified that he specifically marked the ball that would become the 73rd homerun ball by applying the invisible ink in the form of five dots in the area of the seams. (Padilla Depo., 56:23-25, 57:1-23.) An Arthur Andersen representative was present to witness Padilla's marking of these special baseballs. (Padilla Depo., 55:2-9.)

After Bonds' 67th homerun, Padilla's superior, Kevin Hallinan, instructed Padilla to attend all remaining Giants games because Bonds was three homeruns away from tying Mark McGwire's single season record. (Padilla Depo., 19:8-25, 20:1-9.) Hallinan further informed Padilla that the purpose of his attending these games was two-fold: to manage the crowd and to authenticate the record-setting baseball. (Padilla Depo., 21:8-20, 21:5-12.) Padilla testified that Hallinan serves as Major League Baseball's Senior Vice President of Security Operations and Facilities Management, and that his role is to protect the integrity of the game. (Padilla Depo., 19:21-25, 20:1-9.)

Padilla stated that, as the person in charge of the authentication process (Padilla Depo., 110:11-22), his job was to retrieve the person with the ball and "explain to that person what the authentication would do for **his** ball." (Padilla Depo., 13:15-22, 87:6-13 [**emphasis** added].) If the person who had the ball in his hand wanted it authenticated, Padilla would then assist in that process. (Padilla Depo., 13:15-22, 87:6-13.)

In addition to Padilla, Major League Baseball also employed four resident security agents to assist in retrieving and authenticating the Bonds homerun ball. (Padilla Depo., 13:23-25, 14:1-11, 16:6-24, 17:1-20, 39:12-24, 42:24-25, 43:1-24.) Three of these security agents are retired police

officers. (Padilla Depo., 16:6-18, 17:4-14, 42:24-25, 43:1-24.) The fourth, Lee Jett, has been a police officer with the Los Angeles Police Department since 1982 and, in October, 2001, served as resident security agent for the Los Angeles Dodgers. (Jett Depo., 5:19-25, 6:7-16.)

All four security agents traveled with and worked under the supervision of Padilla during the time the authentication efforts were being carried out. (Padilla Depo., 111:19-22; Jett Depo., 12:25, 13:1-11.) In this regard, Padilla gave them explicit instructions on the process and protocol for retrieving the ball. (Jett Depo., 13:12-23, 41:22-25, 42:1-2.) Specifically, Padilla told them that their "primary responsibility" was "[t]o recover the person who catches the ball, who has the ball." (Padilla Depo., 112:16-20.) Lee Jett confirmed this point, testifying that his duties were to "watch the ball, monitor as close as we could and whoever ends up with the ball, get to that person and let them know what our purpose was to authenticate the ball and that we wanted to take that person to a secured area so that the authentication process can be completed." (Jett Depo., 41:22-25, 42:1-2)

Before the Giants games, Padilla reviewed information indicating those areas of the park where Bonds was likely to hit a homerun. (Padilla Depo., 110:4-22.) Padilla and the four resident agents would then strategically post themselves in these areas of the outfield. (Padilla Depo., 17:22-25, 18:1-25,19:1-4, 110:7-22.) The Giants also supplied additional security guards on the arcade walkway (Padilla Depo., 40:3-6), while the Arthur Andersen representative was posted at home plate. (Padilla Depo., 17:5-7.)

On the day of the October 7 game, Padilla personally brought to Pac Bell Park the balls which he had marked for use during Bonds' at-bats. (Padilla Depo., 38:10-16.) Before each Bonds at-bat, Linda Pentell ("Pentell"), Major League Baseball's Manager of Facility Operations, handed these pre-marked balls to the ball boy. (Padilla Depo., 51:16-25, 52:1-9.) The other balls – used for every batter except Bonds – were supplied by the Giants themselves. (Padilla Depo., 38:17-20.)

Before the game began, Padilla had a discussion with Pentell, as well as Jorge Costa ("Costa"), Vice President of Stadium Operations, about the plan for taking the spectator with the ball to the security room of the ballpark. (Padilla Depo., 50:24-25, 51:1-15.) In addition, Joe Grippo contacted Arthur Andersen to make sure its representative was present at the game. (Padilla Depo., 53:11-14.)

When Padilla saw the homerun ball leave Bonds' bat, he began moving toward the arcade walkway where it appeared headed. (Padilla Depo., 27:15-19.) When the ball landed, he was about 50 feet away. (Padilla Depo., 28:6-9.) He saw a "scramble" and a "pile-up" and he immediately began moving in that direction, so that he could "retrieve the person with the ball." (Padilla Depo., 29:1-24, 30:5-11.) Padilla arrived at the scene about a minute later. (Padilla Depo., 29:25, 30:1-4.)

Lee Jett was also standing on the arcade walkway when Bonds hit his homerun. (Jett Depo., 14:19-21.) He testified that he saw Bonds hit the ball and followed it until it reached the walkway. (Jett Depo., 14:22-25, 15:1-9.) At this point, Jett was about 20 to 30 feet away from the ball. (Jett Depo., 15:10-12.) Jett arrived at the pile-up 27 seconds after Barry Bonds' hit the home run. (Jett Depo., 16:3-12; See October 7, 2001 videotape.) Once there, Jett made his way to the bottom of the pile-up by going through people and moving them aside. (Jett Depo., 16:13-17.)

When Padilla first noticed Popov, he was lying on the ground, face down, with a glove in his hand. (Padilla Depo., 31:21-25, 32:1-1-10.) Padilla noticed a baseball in Popov's glove; however, it was not the ball which Bonds had just struck, but a different one, on which someone had written the word "sucker." (Padilla Depo., 32:22-25, 33:1-9.)

Shortly after seeing the sucker ball, Padilla noticed Hayashi standing across from him, holding a ball which appeared to contain both the number and the marking which Padilla had put on the Bonds homerun ball. (Padilla Depo., 35:4-15.) He immediately grabbed Hayashi's hand, in order to make sure that the ball was safe and secure. (Padilla Depo., 38:21-25, 39:1-4.)

Accompanied by Lee Jett, Padilla escorted Hayashi to a room which was set up to authenticate the ball. (Padilla Depo., 39:5-11.)

Present in the security room, along with Padilla and Hayashi, were Kevin Hallinan, Jorge Costa, and an Arthur Andersen representative. (Padilla Depo., 57:24-25, 58:1-5.) Once in the room, Padilla placed the ball inside a black bag, which contained an ultraviolet light. (Padilla Depo., 59:3-13.) The light was turned on and both Padilla and the Arthur Anderson representative looked at the ball, took notes, and verified that it was, in fact, the authentic homerun ball. (Padilla Depo., 58:22-25, 59:1-12.) The ball was then removed from the black bag, and the Arthur Andersen representative permanently glued a holographic sticker onto it, to indicate that it was the actual record-setting baseball. (Padilla Depo., 14:21-25, 15:1-20, 59:3-25, 60:1-7.)

Finally, after verifying the ball's authenticity, Costa asked Hayashi if he wanted a plastic container to hold the ball. (Padilla Depo., 61:15-25, 62:1-11.) When Hayashi indicated that he did, Costa placed the ball in a container and gave it to Hayashi. (Padilla Depo., 61:15-25, 62:1-11.)

When Padilla later returned to the arcade walkway, he learned about Popov's claim to have caught the homerun ball. (Padilla Depo., 64:20-25, 65:1-11.) In response, Padilla escorted Popov back toward the security room, where he placed a phone call to Thomas Belfiore, the Director of Security Operations for Major League Baseball. (Padilla Depo.,65:2-25, 66:20-25, 67:1-25, 68:1-24.) After speaking with Belfiore, Padilla came back and advised Popov that he could not be of any help to him. (Padilla Depo., 65:16-26, 66:20-25, 67:1-25, 68:1-24, 72:13-25, 73:1-20.)

Padilla testified that, based on his experience in his present position, as well as his former employment at Yankee Stadium, it is his understanding that a spectator at a Major League Baseball game is entitled to keep a ball hit into the stands when that ball is in his possession. (Padilla Depo., 24:9-20, 25:1-12.) Thus, when Padilla escorted Hayashi to the security room, he assumed that the

73rd homerun ball belonged to Hayashi (Padilla Depo., 52:10-17), since it was in his hand. (Padilla Depo., 87:21-25, 88:1-3.) Padilla also testified that nothing happened after he took Hayashi to the security room to change his assumption that the ball belonged to Hayashi. (Padilla Depo., 52:20-24.)

In addition, during his deposition in this case, Jorge Costa acknowledged that he was accurately quoted in the October 10, 2001 San Jose Mercury, when he stated:

> [t]he ball was there, and [Hayashi] got it . . . When the other guy [Popov] showed up [at the Giants' office] and wanted to talk about all this stuff, I said: "I don't even know why this guy's here. Once Major League Baseball identifies the individual with possession of the ball, that's the end of it." (Costa Depo., 33:1-25, 34:1-2.)

Costa also testified that the newspaper accurately quoted him as stating, "[o]nce [Hayashi] was brought to the room and they authenticated the baseball, it was over. It's one of those circumstances where everyone wanted the ball. The ball was in transit, and from where it lands to where it ends up, that's the way it goes." (Costa Depo., 34:3-25, 35:1-23.) Because Costa serves as Senior Vice President of Ballpark Operations, the Giants have specifically authorized him to comment, and give quotes, pertaining to the ballpark and the operations of that ballpark. (Costa Depo., 80:5-11.)

During his May 23, 2002 deposition, Padilla also testified about Major League Baseball's crowd management policies, and about the ways in which those policies were implemented at the October 7 game. Padilla stated that he has served as Manager of Security Operations for Major League Baseball since January 2001. (Padilla Depo., 3:25, 4:1-4.) In this capacity, he described his duties as "oversee[ing] crowd management throughout all major league ball parks, work[ing] together with stadium operations people throughout Major League Baseball, and implementing Major League Baseball procedures, policies." (Padilla Depo., 4:7-15.) Before serving in his current capacity, Padilla had worked, between 1998 and December, 2000, as director of security for Burns International, at Yankee Stadium. (Padilla Depo., 11:11-20.) While at Burns, Padilla oversaw 350 security personnel and was responsible for securing fans, players, and the Yankee Stadium facility.

(Padilla Depo., 11:21-25, 12:1-3.) Padilla testified that crowd management was an important part of his duties, and that Yankee Stadium had a written policy of ejection for fans engaged in fighting, cursing, throwing items at other fans or onto the field, or otherwise disrupting the game. (Padilla Depo., 12:4-25.)

Padilla stated that one of his specific job duties is to make sure that teams comply with the written Crowd Management Initiative, which Major League Baseball implemented and sent out to teams before the start of the 2001 season. (Padilla Depo., 81:13-23, 82:7-21, 83:14-23.) Formulated by Kevin Hallinan and Linda Pentell (Padilla Depo., 81:13-25, 82:1-6), this ten-page initiative calls for ejection from the stadium for any fan engaged in cursing, drunken behavior, or fighting. (Padilla Depo., 98:2-9.) However, Padilla is aware of no Major League Baseball policy which prevents a fan from keeping a homerun baseball if he is too rough or aggressive in obtaining possession of it. (Padilla Depo., 22:5-18.) Nor is he aware of any specific rules regarding fan behavior in pursuit of a homerun ball. (Padilla Depo., 23:12-24.) And he is not aware of any rule which states that a fan may not keep a homerun ball if he assaults or batters another person in obtaining it. (Padilla Depo., 22:19-25, 23:1-11.)

Throughout the 2001 season, Padilla worked with Jorge Costa to control spectator conduct at Pac Bell Park. (Padilla Depo., 51:12-14, 80:25, 81:1-4; Costa Depo., 7:23-25, 8:1-3.) Before the October 7 game, Padilla and Costa discussed security on the arcade walkway. (Padilla Depo., 77:16-25, 78:1-15.) Specifically, Padilla was concerned that, if Bonds were to hit a homerun into the arcade walkway, there would be a scramble to obtain the ball. (Padilla Depo., 78:21-24.) Therefore, he and Costa decided to freeze the walkways during Bonds' at-bats, so that spectators would be unable to return to their seats until the at-bat was over. (Padilla Depo., 77:16-25, 78:1-15.) In this

way, Padilla and his fellow security agents would have a better chance at getting to the ball. (Padilla Depo., 78:16-24.)

As a result of their discussions, Costa did, in fact, arrange to freeze the arcade walkway, to increase manpower, and to restrict walkway access to only those people with seats or standing-room-only tickets. (Padilla Depo., 79:23-25, 80:1-10.) After Bonds' first inning homerun, Padilla saw people piled on top of Popov, but saw no conduct which he believed warranted ejection from the stadium. (Padilla Depo., 98:10-18.) Padilla testified that he defined fighting as "people manhandling each other, fighting, pushing, punching each other," and that he did not believe that piling on top of each other constituted fighting. (Padilla Depo., 98:10-18, 19-21.) Padilla further stated that he did not feel the crowd in the arcade walkway was out of control during the October 7 game. (Padilla Depo., 99:21-24.)

Jett also testified that, while there was a lot of physical contact between fans in the arcade walkway, he believed that it was inadvertent, and a result of multiple people trying to chase after the same ball. (Jett Depo., 51:13-18, 52:1-8.) Besides his 20 years of law enforcement experience, Jett has received training in classes dealing specifically with crowd control and management, disorderly conduct, and riot situations. (Jett Depo., 11:17-25, 12:1-2.) Jett later testified that, in his view, the Giants and the league deployed sufficient security on the day of Bonds' homerun. (Jett Depo., 58:9-12.) When asked if he felt that there were too many people on the arcade walkway, Jett answered, "Not really," noting that there were uniformed San Francisco police monitoring everyone that came in, letting only a certain number of people with tickets in, and, at one point, cutting access to the walkway. (Jett Depo., 58:13-19.) Jett stated that at no point after Bonds' homerun did he have any concern about his own physical safety, nor did he fear that Popov or anyone else would get hurt. (Jett Depo., 47:16-25, 48:1-5.)

Jett further testified that, during the early 1990s, he served about one year as a detective in an assault and battery detail called "CAPS" (Crimes Against Persons). (Jett Depo., 11:2-16.) When later asked to define the term "assault," Jett answered that it required some type of specific intent or targeting of the victim. (Jett Depo., 51:8-12.) He testified:

> If there's physical contact between two people who are going for a ball, I wouldn't consider that as an assault . . . An assault, in my mind as a law enforcement officer, is someone that is attempting to strike someone with the intent to do bodily harm. (Jett Depo., 51:5-18.)

In this regard, Jett stated that he did not see any spectator conduct at the ball game that in his mind warranted arrest. (Jett Depo., 30:1-4.) He also testified that, during the pile-up following Bonds' homerun, he did not see any conduct which constituted grounds for ejection. (Jett Depo., 50:1-5.) Jett further commented that the pile-up in the arcade walkway was the kind of behavior "expected considering everything involved." (Jett Depo., 50:1-10.) As Jett explained, "Everybody there had the same intent, and that was getting that ball. So . . . it was just for that very reason because honestly it was – the potential value of the ball was great; so everybody was motivated to get that ball so everyone went for it." (Jett Depo., 47:11-15.)

Finally, Jett also testified that he saw neither Hayashi nor anyone else commit any crimes on the arcade walkway, including robbery, assault, or battery. (Jett Depo., 26:23-25, 27:1-22.) For this reason, he did not report any crimes, even when he ran into San Francisco Police Lieutenant Ballentine after the Bonds homerun. (Jett Depo., 26:4-22.)

LEGAL ISSUES

I. THE SCRAMBLE FOR THE BALL WAS A COMPETITION THUS, UNDER THE CALIFORNIA SUPREME COURT'S *YOUST V. LONGO* DECISION, POPOV'S ACTION FOR THE BALL IS NON-JUSTICIABLE.

As a matter of law and public policy, all of Popov's causes of action should be denied because the dispute giving rise to this action arose out of a competition (in this case for a baseball),

and courts have consistently found such disputes to be non-justiciable (See, e.g., *Youst v. Longo* (1987) 43 Cal.3d 64, 78; *Crouch v. National Association for Stock Car Racing, Inc.* (1988) 845 F.2d 397, 400; *Georgia High School Association v. Waddell* (1981) 248 Ga. 542; *Shapiro v. Queens County Jockey Club* (1945) 53 N.Y.S.2d 135.) This non-interventionist approach arises from strong policy considerations, for:

> If [tort claims] were recognized in the context of a sporting competition, virtually no such event would take place without a tort claim from some losing competitor seeking to recover his supposed *economic* loss; a player's every move would be highly scrutinized for possible use in the courtroom. Placing this type of additional pressure on competitors could seriously harm competitive sports.

(*Youst v. Longo*, *supra*, 43 Cal.3d at p. 78, *emphasis* in original.) The *Youst* court declared a blanket public policy rule against suits based on economic loss arising out of sporting events. (*Id.*, at p. 79.) As the Court cautioned, "We should not sanction moving the arena for sporting competitions from the stadium, boxing ring, or horseracing track into the courtroom." (*Ibid.*)

Likewise, courts have adopted this same policy of restraint when asked to adjudicate disputes arising from non-sports competitions, such as spelling bees (*McDonald v. Scripps Newspaper* (1989) 210 Cal.App.3d 100), raffle drawings (*Endres v. Buffalo Automobile Dealers Association, Inc.* (1961) 217 N.Y.S.2d 460), puzzle contests (*Furgiele v. Disabled American Veterans Service Foundation* (D.C.N.Y. 1952) 116 F.Supp. 375, affd. (2d Cir. 1952) 207 F.2d 957), and a historical painting competition (*Trego v. Pennsylvania Academy of Fine Arts* (Pa. 1886) 3 A. 819).

In *McDonald*, *supra*, 210 Cal.App.3d 100, the runner-up in a county-wide spelling bee sued the competition's sponsor, alleging that the contest's winner would never have been allowed into the county finals, but for a violation of spelling bee rules by contest officials. The California appeals court denounced this claim as "trivial" and chided the plaintiff for making a lawsuit out of an incident that was nothing more than "a bad break caused by the vicissitudes of life." (*Id.*, at p. 105.)

The Court declined to get involved in the dispute, holding that the discretionary ruling of spelling bee officials did not present a justiciable controversy. (*Id.*, at p. 106.)

The courts have drawn no distinction between losses suffered by participants and those suffered by spectators. (See, e.g., *Shapiro v. Queens County Jockey Club*, *supra*, 53 N.Y.S.2d 135; *Bourgeois v. Fairground Corporation* (La. 1985) 480 So.2d 408; *White v. Turfway Park Racing Association* (E.D.Ky. 1989) 718 F.Supp. 615, affd. (6th Cir. 1990) 909 F.2d 241.[1]) In *Shapiro*, for instance, the plaintiff sued to collect his winning bet in a horse race, claiming that the official's erroneous false start call had deprived his horse of a victory. The Court found the case to be non-justiciable, concluding that a court of law has no business substituting its judgment for that of the racing officials:

> In more than one sense, such officials are truly judges of the facts . . . Surely their immediate reactions and decisions of the questions which arose during the conduct of the sport should receive greater credence and consideration than possibly the remote, subsequent, matter-of-fact observation by a court in litigation subsequently instigated by a disgruntled loser of a wager.

(*Id.*, at pp. 138-139.)

There is little doubt that plaintiff Popov, defendant Hayashi and scores of others competed for Barry Bonds' record homerun ball. American Heritage Dictionary (2d college ed. 1985) p. 301, defines *compete* as: "To strive or contend with another or others, as for profit or a prize." As in a football game, horse race, or spelling bee, the participants in the homerun ball competition had to vie and contend with others, in their effort to capture the prize.

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[1]The Sixth Circuit's decision in *White* was overruled on other grounds in *Eyerman v. Mary Kay Cosmetics, Inc.* (6th Cir. 1992) 967 F.2d 213, 217, fn. 4.

In this competition for Barry Bonds' record homerun ball, many fans went to considerable lengths to try to win this contest. Popov himself also made special efforts to try to win this competition — researching where Barry Bonds hit his homeruns, bringing his glove to the game, and trading in his reserved seat for admission into the standing-room-only right field arcade walkway.

Having voluntarily entered this contest, he cannot now complain about its result. Just as a baseball player cannot appeal the decision of an umpire (*White v. Turfway Park Racing Association*, *supra*, 718 F.Supp. at p. 621), and a losing bettor cannot sue over the outcome of a horse race (*Shapiro v. Queens Jockey Club*, *supra*, 53 N.Y.S.2d at p. 139), Popov must "consent to be bound" by the rules of the game and by the results which those rules produce. (*Ibid.*)

According to Major League Baseball's Manager of Security Operations Paul Padilla, in this case, the rules of the game were simply to abide by the rules governing fan conduct as set forth in Major League Baseball's Crowd Management Initiative. (Padilla Depo., 81:13-23, 82:7-21.) This ten-page initiative calls for ejection of fans who engage in cursing, drunken behavior or fighting. (Padilla Depo., 98:2-9.)

Despite its extensive experience with balls hit into the stands, Major League Baseball has chosen not to adopt any specific rules regarding fan conduct in pursuit of a homerun ball. In addition, the league has also chosen not to enact any rules stating that a fan must return the ball if he is too rough or aggressive in obtaining it. (Padilla Depo., 22:5-25, 23:1-24.) Given the frequency with which balls fly into the stands during baseball games, the league's silence on this issue signifies a direct policy decision that fans **can** be aggressive in pursuit of homerun balls, so long as they don't engage in conduct that warrants ejection from the ballpark.

Finally, in addition to their rule-enforcing function, the security officials in this case had the duty of carrying out the authentication process which Major League Baseball instituted for the

Bonds homerun ball. This excruciatingly detailed, well-staffed and undoubtedly expensive process was plainly designed to verify beyond any doubt that the person who recovered the ball had the actual Bonds homerun ball. In so doing, it also implicitly recognized Hayashi as the winner of the contest.

By returning the ball to Hayashi after they had authenticated it, the ball's former owners – Major League Baseball – acknowledged that the baseball now belonged to Hayashi. They reiterated this point later in the day, after Popov sought to enlist their assistance in obtaining the ball. At that time, Padilla contacted Major League Baseball's Director of Security Operations, Thomas Belfiore, who "reassured [Padilla's] feeling" that the league could not be of assistance to Popov. (Padilla Depo., 62:1-25, 66:20-25, 67:1-25, 68:1-24.) In the words of Giants' Vice President of Stadium Operations, Jorge Costa, "Once Major League Baseball identifies the individual with possession of the ball, that's the end of it." (Costa Depo., 33:1-25, 34:1-2.)

In short, Major League Baseball specifically deployed security agents who enforced the rules of the contest for Barry Bonds' 73rd homerun. Accordingly, Popov's claims for conversion, trespass to chattels, specific recovery of property, and constructive trust do not present a justiciable controversy.

Given our increasingly litigious society, disputes over valuable and historically important baseballs will likely become even more frequent in the future, posing an ever-increasing drain on our already overburdened judiciary. Rather than encouraging a new wave of such litigation, this court should send a clear message to would-be litigants: a court of law will not play referee in such contests.

No one forced Popov to participate in the contest to capture the Barry Bonds homerun ball. He did so voluntarily and with full knowledge that there could be but one winner. As with many

losing competitors, Popov is unhappy that the results did not turn out to his liking. Nonetheless, his only injury in this case is that he lost a contest and, as a result, failed to come away with a valuable prize. However, as one California appellate court has wisely pointed out:

> Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

(*McDonald v. Scripps Newspaper*, *supra*, 210 Cal.App.3d at p. 105, quoting *Evans v. Evans* (1790) Consistory Court of London.)

Simply put, this case is governed by the principle that courts of law do not provide relief to one whose sole misfortune is that he lost a contest. Our courtrooms have far more important things to worry about than disputes over which person gained possession of a homerun baseball. As a matter of law and public policy, lawsuits of this nature should not be allowed.

II. POPOV'S CONVERSION, TRESPASS TO CHATTELS AND SPECIFIC RECOVERY OF PROPERTY CLAIMS FAIL BECAUSE HAYASHI, NOT POPOV, HAD UNEQUIVOCAL DOMINION AND CONTROL OF THE BALL.

Popov's conversion claim (First Cause of Action), fails because Popov cannot establish the first essential element of conversion, namely, "plaintiff's ownership or right to *possession* of the property." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1065, emphasis added.) Conversion differs from trespass to chattel only by degree; whereas conversion involves a substantial interference with the plaintiff's right to possession, trespass to chattel consists of some lesser intermeddling with, or use of, the plaintiff's personal property. (*Thrifty-Tel v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567.)

Popov and Hayashi agree that the "plaintiff's right to possess the property when the suit was filed" is an essential element of Popov's Third Cause of Action, which was entitled "Injunctive Relief" on the Complaint, but which Popov admits is for specific recovery of property. See Popov's

Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Popov's MSJ MPA"), p. 8, fn. 4. Thus, if Popov cannot establish his "ownership or right to possession of" Barry Bonds' 73rd homerun ball, his claims for conversion, trespass to chattels and for specific recovery of the ball, all fail.

A. MERE CONTACT OF THE BALL WITH ONE'S GLOVE IS NOT SUFFICIENT TO ESTABLISH UNEQUIVOCAL DOMINION AND CONTROL OF THE BALL.

Popov's core argument is that he "caught" Barry Bonds' 73rd homerun ball and therefore immediately became the owner of the ball. According to Popov, "Once the BASEBALL entered POPOV's glove, the fate of the BASEBALL was sealed." Popov's MSJ MPA, p. 10. This sweeping claim fails because the law distinguishes between acts amounting to ownership, which requires unequivocal dominion and control of an object, and lesser acts which do not give rise to ownership, such as momentary contact with an object. The former establishes legal title, but the latter does not. The terms "caught" and "catch" are ambiguous and if used casually or indiscriminately, may refer to someone who briefly touches the ball, as opposed to one who exercises unequivocal dominion and control over it as further discussed below.

In denying Popov's motion for summary judgment, Judge James McBride rejected Popov's simplistic analysis, and adopted verbatim Hayashi's legal test of unequivocal dominion and control in ruling that the sole triable issue of fact in this case is "whether Plaintiff exercised unequivocal dominion and control over the baseball." The trial court should uphold this framing of the legal issue because it correctly states the legal standard that should guide this trial.

It has long been settled that ownership of personal property vests in the person who first reduces that good to his possession. (*Eads v. Brazelton* (1861) 22 Ark. 499; *Haslem v. Lockwood* (1871) 37 Conn. 500; *In re Seizure of $82,000 More or Less* (W.D. Mo. 2000) 119 F.Supp.

1013,1019.) This "first occupancy" rule traces its roots to English common law, and perhaps as far back as Greek and Roman times. (See *Brown v. Eckes* (1916) 160 N.Y.S. 489, 491; *Pierson v. Post* (N.Y. 1805) 3 Cai. R. 175, 1805 WL 781.) As stated by Blackstone, the rule provides that, "Whatever movables are found, – upon the surface of the earth, or in the sea, and unclaimed by the owner, – they belong to the first occupant or fortunate finder." (*Herman v. Katz* (Tenn. 1897) 47 S.W. 86, 87, quoting 2 Blackstone's Commentaries, Ch. 26, p. 400.)

While the rule of first occupancy has existed, with "practically no change . . . since the days of Plato" (*Brown v. Eckes*, *supra*, 160 N.Y.S. at p. 491), this relatively straightforward principle begs the more difficult question: at what point does a person acquire possession over a chattel? (Rose, *Possession as the Origin of Property* (1985) 52 U.Chi.L.Rev. 73, 75.) In early American jurisprudence, efforts to address this question often arose in cases dealing with ownership of wild animals. The most famous of these cases involved a dispute between two fox hunters, in which the plaintiff pursued the animal with hounds, but the defendant killed it and took it away. (*Pierson v. Post*, *supra*, 3 Cai. R. 175, 1805 WL 781.)

In *Pierson*, the New York Supreme Court held that the fox belonged to the defendant because, "[P]ursuit alone vests no property or right in the huntsman; . . . **even pursuit, accompanied with wounding, is equally ineffectual** for that purpose **unless the animal be actually taken.**" (*Ibid.*, emphasis added.) To gain legal title, a party must achieve, rather than mere wounding of the animal, "mortal wounding . . . since, thereby, the pursuer manifests an **unequivocal intention of appropriating** the animal to his individual use**,** has deprived him of his natural liberty, and brought him within his **certain control**." (*Ibid.,* emphasis added.)

In the nearly 200 years since *Pierson*, numerous other courts have had occasion to consider similar questions arising from hunting and fishing disputes. (See, e.g., *Dapson v. Daly* (1926) 257

Mass. 195 [" huntsman acquires no title to a wild animal by pursuit alone, even though there is wounding . . ."]; *Ferguson v. Miller* (N.Y. 1823) 1 Cow. 243, 1823 WL 1844 [no possession established by finding bee tree, carving initials in it, and obtaining consent from landowner to cut it down]; *Liesner v. Wanie* (Wis. 1914) 145 N.W. 374 [plaintiff obtained possession by mortally wounding it; *State v. Shaw* (1902) 67 Ohio St. 157 [owner of net acquired a property interest in fish by maintaining control in a way which showed "that he [did] not intend to abandon them again to the world at large"].)

However, the principles which developed out of these cases are by no means limited to wild animal jurisprudence. To the contrary, courts have drawn on analogies to wild animals in cases involving such "fugitive" resources as oil (*Jones v. Forest Oil Co.* (Pa. 1900) 44 A. 1074), gas (*Westmoreland & Cambria Natural Gas Co. v. De Witt* (Pa. 1889) 18 A. 724, 725), and groundwater (*Adams v. Grigsby* (La. 1963) 152 So.2d 619, 622).[2]

From these early cases emerges a definition of possession which requires a clear act, by which the person not only exerts physical dominion and control over the animal, but notifies the world that the property in question belongs to him. (Rose, *Possession as the Origin of Property*, *supra*, 52 U.Chi.L.Rev. at p. 77.) This latter requirement also entails a concept of intent, since the notice which the owner provides to the world is, in effect, "a *declaration* of [his] intent to appropriate." (*Ibid.*, *emphasis* in original.) Thus:

> To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search.

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[2] Courts have also applied the rule of first occupancy to disputes involving abandoned manure (*Haslem v. Lockwood*, *supra*, 37 Conn. 500), riparian rights (*Ramelli v. Irish* (1892) 96 Cal. 214, 217), and "treasure trove" – that is, "money or coin found hidden or secreted in the earth or other private place, the owner being unknown." (*Danielson v. Roberts* (1904) 44 Or. 108, 114.)

(*State v. Strutt* (1967) 4 Conn. Cir. Ct. 501, 506, quoting Holmes, The Common Law, pp. 216-217.)

Taken together, these requirements of unequivocal dominion, control and intent amount to a form of communication, "with the audience composed of all others who might be interested in claiming the object in question." (Rose, *Possession as the Origin of Property*, *supra*, 52 U.Chi.L.Rev. at pp. 78-79.) The key, then, to establishing legal possession is to communicate that possession through "a clear act," which all the world understands and respects as an act demonstrating ownership. (*Id.*, at p. 77.)

In *Eads v. Brazelton* (1861) 22 Ark. 499, the court, amplified the necessary elements of legal possession, stating, "Possession in the civil law 'implies three things; a just cause of possessing as master, the intention to possess in this quality, and detention . . . . **Without detention the intention is useless, and does not make the possession**.'" (emphasis added.)[3] In *Eads*, the plaintiff placed a buoy on top of a sunken wreck, intending but failing to return the next day to recover the wreck's lead cargo. Several months later, defendant found the wreck and began raising the lead. The Court held that the sunken treasure belonged to the defendant, as plaintiff had "never attained to the possession of the wreck." In other words, plaintiff had not established ownership because he had failed to assert unequivocal dominion and control of the wreck.

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[3] Given Popov's failure to detain or control the ball, it is noteworthy that in his summary judgment briefs, Popov completely ignored the leading cases such as *Eads v. Brazelton* and *Pierson v. Post*. Instead, Popov's main authority appears to be the obscure case of *Indian River Recovery Co. v. The China* (D.Del.1986) 645 F.Supp. 141, which Popov quotes for the proposition that the "law . . . does not require one who discovers abandoned property actually to have it in hand." Popov's MSJ MPA, p. 10. Popov's reliance on *Indian River*, however, is misplaced because: (1) it is a case that does not involve conversion, but rather issues of admiralty law (*Id.* at ppj. 143-144), which are inappposite; (2) the disputed ball here was not abandoned property (see *infra*, Section III.B.);(3) the situation in *Indian River* was materially different from this case in that it involved the disposition of an object – a 19th Century shipwreck at the bottom of Delaware Bay – too big and remote for any individual "actually to have it it hand." (*Id.* at pp. 142-144); and (4) the *Indian River*

The Barry Bonds home run ball is similar to the fox in *Pierson v. Post*. The ball was a movable object "free to the first occupant or fortunate finder." (*Herman v. Katz* (Tenn. 1897) 47 S.W. 86, 87.) Like Post in *Pierson v. Post*, Popov's pursuit of the ball was not sufficient to establish ownership because he failed to bring the ball "within his **certain control**." (*Pierson v. Post, supra,* 3 Cai.R. 175, emphasis added.) Like Brazelton in *Eads v. Brazelton*, Popov located the ball, but failed "to secure it, or to otherwise convince the world that it was his." (*Eads v. Brazelton, supra,* 22 Ark. 499.) As stated in *Eads*, "[w]**ithout detention the intention is useless, and does not make the possession**.'" (*Eads v. Brazelton, supra*, 22 Ark. 499, emphasis added.)

Popov may have attempted and intended to obtain possession of the Barry Bonds baseball, but it was Hayashi who held up the ball firmly in his grasp for all to see, thereby establishing his unequivocal and intentional dominion and control of the ball. Hayashi was the first to communicate ownership in a way that those around him understood and respected. The law of property "gives preference to those who convince the world that they have caught the fish and hold it fast." (Rose, *Possession as the Origin of Property* (1985) 52 U.Chi.L.Rev. 73, 88.)

That one does not own a ball until one exercises unequivocal dominion and control over it is intuitively understood by fans, baseball personnel, and baseball historians as the unwritten rule that governs who owns balls hit into the stands. For example, long-time baseball fan Jim Callahan states,

> From my many years of attending many professional baseball games and my personal experience from catching or fielding balls which are hit into the stands, I know that the protocol for balls hit into the stands at professional baseball games - whether it is a batting practice ball, a foul ball, or a home run ball - is that if you catch a ball and get it firmly under your control, it's yours, but if you drop it and there is a scramble for the ball, the ball belongs to anyone who then gets the ball firmly under his or her control.

(Callahan Dec. ¶ 6.)

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court did not award legal title of the shipwreck to any person or entity (*Id.* at p. 145).

Another baseball fan, Paul Castro, explained that, "In my experience, often the first fan who comes into contact with a ball hit into the stands is not able to hang onto the ball, and it is considered a loose ball and free to the fan who is able to capture it." (Castro MSJ Dec. ¶ 6.)

Jim Evans, in his 28 years as a major league baseball umpire, has seen literally thousands of balls hit into the stands. He states,

> In my 28 years of umpiring Major League Baseball, I would estimate approximately 30 to 40 balls entering the stands each game. The vast majority of these balls are not finally secured by the person who initially touches it. In other words, it is not the fan that first has contact with the ball who is entitled to keep it—rather, the fan who is entitled to keep the ball is the fan who finally ends up with the ball and who is able to show everyone that he has it.

(Evans MSJ Dec. ¶ 10.)

Without regard to its implications to the national past time, and based on the unabashed legal conclusions of three law professors who seem to think that what actually happens at the ball park is totally irrelevant to the issue, Popov asks the Court to adopt a radical and extremist definition of the term "catch" that would fundamentally alter what has been happening in ballparks throughout America for over 70 years.

For example, the following exchange took place at the deposition of Paul Finkelman, one of plaintiff's law professor/experts, who incidentally does not even have a law degree, and who rarely attends any Major League Baseball games:

Q Is your definition of "catch" dependent on what you've seen happen to baseballs hit out of the field of play at major league baseball games?
A I don't think so.

Contrary to Paul Finkelman, the law cannot be applied in the abstract. It must be applied to real life situations in specific context. For instance, in a dispute over a whale, one court noted that, "Every judge who has dealt with this subject has felt the importance of upholding all reasonable

usages of the fisherman. " (*Swift v. Gifford* (D.Mass. 1872) 23 F.Cas. 558.) In another whale case, the court upheld as law a custom which had "been recognized and acquiesced in for many years." (*Ghen v. Rich* (D.Mass. 1881) 8 F. 159.)

In his 28 years of umpiring Major League Baseball, Jim Evans saw approximately 30 to 40 balls enter the stands each game. The vast majority of those balls were not finally secured by the person who initially touched them, and Jim saw literally thousands of scrambles by fans for souvenir baseballs.

Jim Evans is firmly of the opinion that after 30 years of experience in professional baseball, and being around "thousands and thousands and thousands of situations," fans apply much the same rules in defining a catch in the stands as the umpires do on the field.

In describing the common law of the stands, Jim Evans gave the classic example of his umpiring experience at Yankee stadium:

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Q. What of the scrambles or home run balls suggest to you that fans have been following the Major League Baseball rules?

A. They basically enforce this by consent. They basically enforce the same rules that are used for on the field of play. I can give you several examples if you would like.

Q. Yes.

A. We have had several situations like in Yankee Stadium, where there is a three-tiered stadium, where a fan would reach over the railing in the upper deck and the ball is in his glove. There is no question like this. The ball is in the glove. He gets bumped by someone also striving to get the ball. They are leaning over the railing, the third deck, and it knocks the ball from his glove and it goes down to the next level. And somebody either finally gets firm and secure possession and has the ball, that ball belongs to that person. That's the way it's always been and that's always the

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way it will always be unless they come up with some far

out new definition of a catch. But that person who ended up with the ball on the second tier now has that ball.

I have never in 30 years seen anybody run the ball back up to the person who had the ball securely in their hand. There is videotape on these kind of things that the MLB used to run on Bloopers and things, showing the fans all ridiculing and kidding the guy for dropping the ball.

I have even seen it drop from the third deck down to the second, and the guy on the second deck end up dropping it and losing possession, and it end up in the possession of somebody on the grandstand level, field playing level. And that person who ended up with the ball at that third level was the person who was the rightful owner determined by the fans.

Jim Evans observes: "If you start using some legal, tricky legal definition of a catch and no catch, you are going to run into many, many enforceability issues in the stands. May be good for lawyers. You are going to need a night court judge in every section of the ballpark."

The Court should consider the disastrous impact of accepting plaintiff's unsupported, flawed rule that would confer ownership of Barry Bonds' 73rd home run ball on plaintiff based on the insecure, momentary contact of the home run ball with plaintiff's glove for 6/10 of a second that was captured on the Keppel videotape. Such a rule might be good for Popov, but it certainly would not be good for baseball.

B. NUMEROUS WITNESSES REFUTE POPOV'S CLAIM THAT HE HAD UNEQUIVOCAL DOMINION AND CONTROL OF THE BALL AFTER IT TOUCHED HIS GLOVE.

It is not disputed that Patrick Hayashi had unequivocal dominion and control of the ball when he held it up in his hand and was immediately whisked off by Major League Baseball officials to have the ball authenticated. However, plaintiff Popov claims that he had unequivocal dominion and control of the ball prior to Hayashi, and therefore, the ball is his and not Hayashi's.

Witness evidence establishes that Popov never had unequivocal dominion and control of the ball, thus, his claims for conversion and specific recovery of property must fail. Popov relies mainly on witnesses who say that he "caught" the ball. But the term "caught" is ambiguous and confusing when trying to establish whether Popov exercised unequivocal dominion and control of the ball. For example, some of Popov's own witnesses who say he "caught" the ball go on to clarify that when they used the word "caught" they merely meant that they saw the ball "go into Popov's glove." They cannot attest to facts establishing that Popov had unequivocal dominion and control of the ball, and in fact, they were expecting and looking to see if the ball had come loose. If they had recovered such a loose ball, they would have considered it theirs. The expectation that the ball might come loose indicates that Popov did not have unequivocal dominion and control of the ball. In contrast, once Hayashi demonstrated his unequivocal dominion and control of the ball by holding it up firmly in his hand, the crowd and Major League Baseball officials acknowledged him as the owner of the ball and no one dived to the ground for a loose ball.

1. <u>JIM CALLAHAN</u>:

Jim Callahan was in the right field arcade walkway with his 11-year old son when he saw Barry Bonds hit his 73rd homerun on October 7, 2001. Unlike most of Popov's witnesses, he hit the floor at the same time as Popov and was close enough to see inside the glove on Popov's left hand, as well as Popov's right hand. He immediately saw that Popov did not have the Barry Bonds homerun ball, but instead had a *different* ball in his glove. Callahan's account in part is as follows:

> As the ball was on its downward trajectory, I could tell the ball was out of my reach to capture it on the fly, so I dove low hoping that the ball would fall to the floor in my vicinity. . . .
>
> When I landed on the ground, my head was directly above Alex Popov's head. I know the person was Alex Popov ("POPOV") because I later saw him on television. POPOV was lying on his side somewhat face down, and immediately after I landed on the floor, I saw POPOV's glove on his left hand on the cement near his head. ***I***

> ***could see POPOV's whole glove and a ball in it that I immediately knew that this ball was not the 73rd home run ball because it had large letters on it that looked like it came from a thick, black felt pen***. I couldn't see what the letters spelled because they were wrapped around the ball, but I thought I saw a "C" or an "O."[4]
>
> I know that POPOV did not have possession of the 73rd home run ball when he hit the floor because we both hit the floor at approximately the same time, and immediately I was able to see the inside of his glove on his left hand, and ***I could also see his right hand, and he did not have the 73rd home run ball in either hand***. Instead, he held another ball in his glove with letters marked on it as if done by a thick marking pen.
>
> From the time I saw the 73rd home run ball about to land in the crowd, to the time POPOV and I hit the ground with my head over his, was a very short time, no more than one or two seconds.

(Callahan MSJ Dec. ¶¶ 6-9, emphasis added.)

2. <u>RUSS REYNOLDS</u>:

Again, Russ Reynolds, a witness who signed a declaration for Popov that Popov submitted in support of both his motion for a preliminary injunction and his motion for summary judgment, testified at his recent deposition that he fell to arcade walkway along with everyone else, and ended up on top of somebody else who was on top of Popov, with his head about 3 feet from Popov's glove. He thought he had been watching the glove the whole time, and was therefore confused when Popov eventually opened the glove, and there was only a ball with the word "sucker" written on it in black ink.

3. <u>PATRICK HAYASHI</u>:

Patrick Hayashi's account also shows that Popov failed to establish unequivocal dominion and control of the ball. Hayashi states that when he fell to the floor, the ball was there motionless, in no one's possession for Hayashi to grasp:

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[4] Major League Baseball Security Manager Paul Padilla and witness Jonah Fluxgold got a better look at the ball and that it had the word or words, "sucker" or "71 suckers" written on it.

> I saw Barry Bonds swing and make contact, and the ball go high in the air toward the arcade walkway. I positioned myself along with many other people around me, but I lost sight of the ball when I went up for the ball along with a number of fans around me.
>
> My momentum, and the momentum of the crowd, as we reached up and moved toward the ball at the same time, caused a pile up with me at the bottom of a pile, face down. ***Right after I hit the ground, I looked up and spotted a baseball on the ground within my reach.*** The baseball lay motionless on the ground by itself, and was not in anyone's possession. No one was holding onto the baseball, it was not in anyone's glove, and it was not in anyone's clothes. I immediately reached over for the baseball, and placed it in my glove. I also held onto the baseball with my right hand.

(Hayashi Dec. ¶¶ 11-12, emphasis added.)

4. <u>SCOTT SICILIANO</u>:

Scott Siciliano, a recently discovered witness who captured Barry Bonds' 69th home run ball, saw Popov bobble the 73rd home run ball, and saw a loose ball.

5. <u>PAUL CASTRO</u>:

Paul Castro is one of Popov's witnesses who declared that Popov "caught" the Bonds ball. But Mr. Castro now clarifies that when he used the word "caught," he meant that he merely saw the ball go into Popov's glove, and cannot attest to facts establishing that Popov had unequivocal dominion and control of the ball. Mr. Castro states,

> When Bonds struck his 73rd home run ball, I moved towards the location where I thought the ball would land. I saw Alex Popov (APOPOV@) catch the ball, ***meaning go into POPOV's glove.*** Immediately thereafter, I saw POPOV fall down with others in the crowd who fell on top of him and around him.
>
> In the split seconds that followed the ball entering into POPOV=s glove, I saw him bring his glove down to his chest as he was falling, ***but I cannot attest to whether POPOV had complete control of the ball.***
>
> . . . POPOV fell to the ground in front of me, his head was near my foot. Jeff Hacker fell on top of POPOV, ***and then I went to the ground, not because I was knocked over, but because I was looking for the ball. . . . Since I saw POPOV falling, I***

(Padilla Depo. 32:22-33:9; Fluxgold Depo. 9:13-17.)

> ***thought that his falling or hitting the ground might cause him to drop the ball. I was looking to see if the ball had come loose, and if it had come loose and I recovered it, I would have considered it to be my ball.*** There were many fans feeling around for the ball on the ground and I was among them.
>
> . . . POPOV started to get up, my buddy Jeff was right next to him. I saw POPOV=s glove on the ground with a ball in his glove. My first thought was Athere=s the ball,@ but POPOV was patting himself down, searching his clothes, patting his waist, putting his hands inside his jacket, saying something like AI=ve got the ball right here.@ Looking at the ball in his glove, I could see the letters ASUC@ handwritten on the ball by a marking pen of some sort. Since these letters were wrapped around the ball, I could only see the letters ASUC.@

(Castro MSJ Dec. ¶¶ 3, 4, 6, 7, emphasis added.)

6. <u>JEFF HACKER</u>:

Jeff Hacker is another of Popov's witnesses who said he saw Popov "catch" the ball. But like Mr. Castro, Mr. Hacker clarified that when he used the word "catch," he meant that he saw the ball go into Popov's glove. He, too, cannot attest to facts establishing that Popov had unequivocal dominion and control of the ball:

> I saw Alex Popov (hereinafter referred to as "POPOV") catch the ball, meaning go into his glove, and immediately thereafter, the momentum of the crowd surging to the ball caused POPOV and those near him (including me) to fall into the bottom of the pile-up...
>
> Like everyone else in the pile-up, I was hoping to recover the 73rd home run ball. While I saw the ball enter POPOV's glove and saw him go down with it, ***I cannot attest that he held it securely or maintained control of it after hitting the ground.*** I was also thinking that he might drop it as a result of his falling or the ball might come loose as a result of his impact with the ground, raising the possibility that it was rolling around somewhere. If the ball came loose in this way, I would have considered it a free ball, and if I was lucky enough to get it, I would think I would be entitled to keep it.
>
> I heard POPOV yell words to the effect of "Get off me" and "I've got the ball!" After I heard him say these words, I assumed that POPOV still had the 73rd home run ball. I was down under the pile for some time waiting for people to get off of me.
>
> When I was finally able to get off him, and POPOV opened up his glove, POPOV was holding a ball upon which I could see letters wrapped around the ball, and I could

see the letters "SUC." It was obvious that this ball was not the real 73rd home run ball."

(Hacker MSJ Dec. ¶¶ 3-6, emphasis added.)

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7. BYRON ROETHLER:

Byron Roethler is yet another of Popov's witnesses who said he saw Popov "catch" the Barry Bonds ball, but cannot attest to facts establishing that Popov had unequivocal dominion and control of the ball. Roethler, in fact, like many others, thought there was a good chance Popov might drop the ball, and thus, he went after the ball. He states,

> I was amongst the fans who fell in the pile-up of fans looking for the ball. In my experience, most foul balls or home run balls hit into the stands, more often than not, will come loose, meaning that the first fan or two that comes in contact with the ball will not be able to hang onto it. Therefore, while I saw POPOV catch the ball, I was hoping that he might not be able to hang onto it and that there would be a chance for me to recover it. If this happened, I would have considered it my ball.

(Roethler MSJ Dec. ¶ 5.)

8. FORMER MAJOR LEAGUE BASEBALL UMPIRE JIM EVANS:

Popov contends that the Videotape shows that Popov "caught" the ball. (Popov's Reply Brief in Support of OSC Re Preliminary Injunction, p. 1.) However, 28-year major league baseball umpire Jim Evans, a trained and experienced observer of baseball catches, says the Videotape does not show that Popov caught the ball according to Official Baseball Rules. Rule 2.00 of the Official Baseball Rulebook[5], which defines a "catch," states that mere contact with the ball is not sufficient, and that a player must gain "secure possession" of a ball and firmly hold it long enough to prove that

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[5] This Rule states, "A CATCH is the act of a fielder in getting secure possession in his hand or glove of a ball in flight and firmly holding it...It is not a catch however, if simultaneously or immediately following his contact with the ball he collides with a player, or with a wall, or if he falls down, and a result of such collision or falling, drops the ball...In establishing the validity of the catch, the fielder shall hold the ball long enough to prove that he has complete control of the ball and

he has "complete control" of the ball and that his release of the ball is voluntary and intentional. Rule 2.00 closely parallels the legal concept of unequivocal dominion and control.

Applying Rule 2.00 to the Videotape of Popov's alleged catch, major league baseball umpire Jim Evans gave the following expert opinion:

> I have reviewed a copy of the videotape of Barry Bonds' 73rd homerun which, on information and belief, was shot by a KNTV cameraman ("the Videotape"), and which Alex Popov ("POPOV") claims is proof of his "catching" the baseball. Based upon my review of the Videotape and my experience as an umpire, it is my opinion that the Videotape does not show that POPOV caught the baseball because he met none of the criteria defining a catch as defined in Rule 2.00 of The Official Baseball Rules. It is questionable whether or not he ever got "firm and secure possession" as required by Rule 2.00. ***He did not meet the criteria of "firmly holding it" as evidenced by the fact that he did not end up with the ball. The Videotape depicts POPOV falling backwards as he is trying to secure the ball in his glove; however the pocket of the glove is still open and the ball appears loose. At this point, POPOV is not "firmly holding" the ball as required by Rule 2.00***. When last seen before POPOV falls out of view of the camera, almost all of the ball's circumference is clearly visible in the outermost finger portion of the glove's pocket-side and the pocket has not been closed. It is very difficult for a person to get and maintain secure control of a ball in this position because there is little direct finger pressure on the ball since the leather finger tunnels of the glove are considerably longer than most fingers. Balls are often dislodged and dropped by even the best players in the Major Leagues when they fall to the ground, collide with another player, or crash into a wall. This is especially true when the ball is positioned near the fingertips where there is minimal control. Based upon what I have personally witnessed as an umpire in the Major Leagues for 28 years, when the ball is in this precarious position as depicted in the Videotape, it is very possible that the ball was jarred out of POPOV's glove before he reached the floor or upon impact with the floor. Additionally, maintaining possession of the ball when the open pocket of the glove is facing down is difficult and complicated even further when one is using only one hand as is the case in the Videotape. This is why players are taught to use two hands when securing a fly ball and to turn the pocket of the glove skyward as soon as possible. Understandably, POPOV had no time to take any of these precautions to secure the ball before he was bumped. Because he did not end up with the ball, he was unable to maintain firm and secure possession and thus was unable to voluntarily release the ball.
>
> The Videotape depicts the ball entering POPOV's glove and almost instantaneously, he drops out of sight among the fans scrambling for the ball. When a player attempts a catch in the stands and goes out of the umpire's sight, the umpire bases his ultimate decision on the legality of the catch on the following facts: (a) Did the player have

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that his release of the ball is voluntary and intentional."

> reasonable control of the ball before he and the ball went out of the umpire's sight? (b) While out of the umpire's sight, did the umpire see any evidence that the player did not maintain firm and secure possession? (c) Did the player return to the umpire's sight in a reasonable amount of time? Did the player come up with firm and secure possession of the ball while in control of his body? In reviewing the Videotape to address these questions, ***it is my opinion that POPOV did not have reasonable control of the ball before he and the ball went out of sight as indicated by the precarious position of the ball near the fingertips of his glove as stated above, the fact that he was falling backwards, the fact that the open pocket portion of the glove is facing down as he is falling, the fact that he is attempting a one-handed catch, and the fact that he collides with other fans and with the ground***. Obviously, the Videotape does not depict POPOV ending up with the ball and thus does not show that he was able to maintain firm and secure possession, nor does it depict him being able to voluntarily release the ball. Thus, the Videotape does not show that POPOV caught the baseball.

(Evans MSJ Dec. ¶¶ 8, 9, emphasis added.)

C. POPOV'S WITNESSES WHO SAY HE HAD UNEQUIVOCAL DOMINION AND CONTROL OF THE BALL WERE NOT IN A POSITION TO MAKE SUCH OBSERVATIONS.

Popov claims that eight witnesses in close proximity to Popov say that the Barry Bonds 73rd homerun ball "was firmly in POPOV's mitt when POPOV" fell. (Popov's MSJ MPA, p. 4.) However, Doug Yarris was the only witness among the eight who claimed he could see the glove when Popov was on the ground. Yet, at his deposition in this case, Douglas Yarris did not even correctly identify where he was standing when Barry Bonds came up to bat in the first inning. Douglas Yarris testified that he was standing about 5 feet from a medallion or marker on the concrete commemorating Barry Bonds' 500th home run. In fact, the medallion commemorating Barry Bonds' 500th home run is nowhere on the arcade walkway, but is outside of the stadium on the promenade flanking McCovey Cove. Also, Douglas Yarris did not keep his eyes on Popov's glove the whole time they were on the arcade walkway. For one, Douglas Yarris testified that he lost sight of Popov's glove and the ball when he (Yarris) was hit by the crowd and went to the ground. Then when he (Yarris) hit the ground, he was unable to move both his head and his body for seconds

because they were pinned to the ground. Douglas Yarris further testified that he took over a minute or a minute and a half to work his way off the ground. In fact, Douglas Yarris does not appear anywhere on the Keppel videotape for at least 1:06 minutes after Barry Bonds hit the home run ball, and when he does appear on the videotape, he is looking away from Popov towards a commotion on the edge of the crowd towards center field. Given the testimony of Jim Callahan that he hit the ground at the same time Popov did and immediately saw in Popov's glove a ball that he "knew was not the home run ball because it had large letters on it that looked like it came from a thick, black felt pen" (Callahan Dec. ¶¶ 11-12), and Russ Reynolds testimony about the "sucker" ball in Popov's glove, it is plain that any ball Yarris might have seen in Popov's glove was the "sucker" ball.

The fact that Popov failed to secure unequivocal dominion and control of the ball is supported by Popov's own admissions. In his deposition, Popov admitted that he was "not sure of the exact time frame" of when the ball left his grasp (Popov Depo. 171:12-172:10), he did not feel the ball coming out of his glove (Popov Depo. 172:4-6), and he did not see anyone's hand take the ball from his glove (Popov Depo. 172:12-14).

D. BECAUSE MAJOR LEAGUE BASEBALL WAS PLAINLY NOT INDIFFERENT TO WHAT BECAME OF THE BALL OR WHO THEREAFTER POSSESSED IT, POPOV'S THEORY OF ABANDONMENT FAILS.

Popov misstates the law and the facts in arguing that the disputed baseball became abandoned property when it entered the stands because Major League Baseball and the San Francisco Giants "relinquished any claim of ownership" over it. Popov's MSJ MPA, p. 9.

Martin v. Cassidy (1957) 149 Cal.App.2d 106, 110, states that "Abandonment is defined as the 'voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it and **is entirely indifferent as to what may become of it or as to who may thereafter possess it.**'" (emphasis added.)

Major League Baseball was far from indifferent with respect to the 73rd homerun ball. On the contrary, as discussed above, Major League Baseball engaged in an elaborate, detailed, specially-staffed, expensive, and logistically difficult process to recover the ball and the person that possessed it, to authenticate the ball, and to affix a special holographic sticker on the ball before returning it to its new owner in a plastic case.

Thus, contrary to Popov's contentions, the ball was plainly not "abandoned property."

III. POPOV'S CONVERSION CAUSE OF ACTION ALSO FAILS BECAUSE THE EVIDENCE DOES NOT SUPPORT HIS CLAIM THAT HE WAS WRONGFULLY DENIED OWNERSHIP OF THE BARRY BONDS BALL.

Popov's conversion claim also fails because he cannot establish the second essential element of his conversion claim, namely, "the defendant's conversion by a wrongful act or disposition of property rights." (*Burlesci v. Petersen, supra,* 68 Cal.App.4th at p. 1065.) The evidence does not show that Popov was deprived of ownership of the ball by a wrongful act by any person. In addition, since Popov never had unequivocal dominion and control of the ball, Hayashi's refusal to give Popov the ball was not wrongful.

Popov contends that Hayashi's "act of asserting title to the BASEBALL, and his refusal to return the BASEBALL to POPOV each constitute the tort of conversion." (Popov's MSJ MPA, p. 11.) Popov's contention is only true if Popov had unequivocal dominion and control of the ball in the first place. However, since the evidence establishes that Popov never had unequivocal dominion and control of the ball (see Section III, *supra*), Hayashi's exercise of dominion and control over the ball and his refusal to give the ball to Popov was not wrongful. Thus, Popov's claims for conversion and also for specific recovery of property fail.

IV. BECAUSE POPOV HAS NO EVIDENCE THAT HAYASHI COMMITTED ANY WRONGFUL ACT TO ACQUIRE POSSESSION OF THE BALL, POPOV'S CONSTRUCTIVE TRUST CLAIM ALSO FAILS.

The essential elements of an action for constructive trust are: (1) that plaintiff committed fraud, breach of fiduciary duty, breach of promise or other wrongful conduct to acquire the disputed property; (2) the existence of the disputed property. (5 Witkin, California Procedure, Pleading §§ 796, 798 ("plaintiff is not entitled to the remedy of constructive trust unless he pleads a cause of action based on some fraud or other wrongful act of the defendant."); *Smith v. Bliss* (1941) 44 Cal.App.2d 171, 177.)

Popov's constructive trust action fails because he has no evidence that Hayashi committed any wrongful act to acquire the Barry Bonds ball. Hayashi's account of how he found the ball is not disputed or controverted. Hayashi said the "baseball lay motionless on the ground by itself, and was not in anyone's possession. No one was holding onto the baseball, it was not in anyone's glove, and it was not in anyone's clothes. I immediately reached over for the baseball, and placed it in my glove. I also held onto the baseball with my right hand." (Hayashi Dec. ¶ 12.)

Popov himself testified that he did not see a hand take the ball from his glove; no one saw a hand take the ball from his glove; he did not see Patrick Hayashi take the home run ball from his glove; he does not know if anyone saw Patrick Hayashi take the home run ball from his glove; he does not know if Patrick Hayashi threw him to the cement; he does not know if Patrick Hayashi piled on him; he does not know specifically if Patrick Hayashi ever tugged on his clothes; and he has never seen any videotape that shows Patrick Hayashi tugging on his clothes.

Kathryn Sorensen testified that she never saw Patrick Hayashi take the home run ball out of Popov's glove; she never saw anyone take the home run ball out of Popov's glove; she never saw Patrick Hayashi cause any injuries to Popov; she never saw Patrick Hayashi participate in knocking Popov to the ground; Patrick Hayashi did not pile on top of Popov; she never saw Patrick Hayashi's fingers grabbing at Popov; she never actually saw Patrick Hayashi's hands while he was on the

ground of he arcade walkway; and she never saw Patrick Hayashi kick Popov. While Kathryn Sorensen claimed that she saw Patrick Hayashi punch Popov, she testified that her definition of punch was: "Vigorously throwing (indicating) one's arms into someone, yeah." However, Kathryn Sorensen testified that she never saw Patrick Hayashi's hands (open-fisted or close-fisted).

Douglas Yarris testified that he never actually saw the act of Patrick Hayashi taking a ball out of Popov's glove, and he never saw a ball stolen out of Popov's glove as follows:

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Q. Now, is it true that you did not ever actually see Patrick Hayashi take a ball out of Alex Popov's glove?
A. Never saw the act of that happening, no.

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Q. Did you actually see it stolen?
A. No.

Douglas Yarris also testified that he never saw Patrick Hayashi attack anyone; he never saw Patrick Hayashi kick anyone; he never saw Patrick Hayashi grab any person; he never saw Patrick Hayashi scratch anyone; and he never saw anyone bitten that day.

Paul Padilla and Lee Jett testified that they never saw any fan conduct that warranted ejection from the ball park, and Lee Jett, a high-ranking police officer, never saw any crimes committed on the arcade walkway, including any assault, battery, or robbery.

Because there is no evidence that Hayashi committed any wrongful act to acquire the baseball, Popov is unable to establish an essential element of his cause of action for constructive trust. Thus, Popov's constructive trust cause of action fails as a matter of law and fact.

V. AS A MATTER OF LAW AND FACT, POPOV CANNOT MEET HIS BURDEN OF PROOF WITH REGARD TO HIS CAUSES OF ACTION FOR ASSAULT AND BATTERY.

Popov cannot meet his burden of proof on his assault and battery causes of action because he

assumed the risk of and/or consented to contact with Hayashi and others who attempted to obtain the Barry Bonds ball. Furthermore, what Popov's sole witness interpreted as an offensive contact with Popov was merely Hayashi attempting to get to his feet from the scrum that took place in the arcade walkway at Pacific Bell Park.

BAJI 7.50 lists the essential elements of a claim of battery as: (1) an intentional act by defendant which resulted in a harmful or offensive contact with plaintiff's person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss or harm to plaintiff. The Restatement (Second) of Torts § 21(1) provides that a defendant is liable for assault if (1) he acts intending to cause a harmful or offensive contact with plaintiff or another person, or an imminent apprehension of such a contact; and (2) plaintiff is thereby put in such imminent apprehension.

A. BECAUSE POPOV'S FELLOW SPECTATORS OWED HIM NO DUTY TO REFRAIN FROM CONDUCT INHERENT IN THE COMPETITION FOR THE HOMERUN BALL, THE ASSAULT AND BATTERY CLAIMS FAIL.

In his fourth and fifth causes of action, Popov alleges that Hayashi assaulted and battered him in the arcade walkway of Pac Bell Park, causing him to lose possession of Barry Bonds' 73rd homerun ball. This court should now grant judgment as a matter of law in favor of Hayashi on these claims, on the grounds: (1) that neither Hayashi nor the other fans in the arcade walkway owed Popov a legal duty not to aggressively pursue the homerun ball; (2) that such aggressive pursuit of the ball was inherent to the competition in which these fans were engaged; and (3) that, by voluntarily placing himself in the area where Bonds' homerun ball was most likely to land, Popov assumed the risk of the conduct that ensued.

1. <u>DUTY AND ASSUMPTION OF RISK IN</u>

GENERAL

a. DUTY

Whether a defendant owes a duty to a particular plaintiff (or class of plaintiffs) is a question of law to be determined solely by the court. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313.) At its heart, the issue is ultimately a conclusory one – "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) By far, the most important of these policy considerations is the foreseeability of risk to the plaintiff. (*Id.*, at p. 739.) Under the normal rule, the defendant's duty of care extends to all those "who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (*Tarasoff v. The Regents of the University of California* (1976) 17 Cal.3d 425, 434-435.)

An important caveat to this general rule, however, is that context plays a crucial role in shaping duty. Hence, in certain contexts and activities, the risk of harm is so intertwined with the activity itself that courts have refused to impose any legal duty. Justice Cardozo observed this very point in the famous *Palsgraf* case, noting that, while a person who drives recklessly through a city street is no doubt negligent, "If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed." (*Palsgraf v. Long Island Railroad Company* (1928) 248 N.Y. 339, 344.) As such, "the nature of [an activity] is highly relevant in defining the duty of care owed by the particular defendant." (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

b. ASSUMPTION OF RISK

The term "assumption of risk" has been used by the courts in many different senses. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 303.) Traditionally, however, the concept has been understood as

one involving consent.

> In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. The situation is then the same as where the plaintiff consents to the infliction of what would otherwise be an intentional tort . . . The result is that the defendant is relieved of all legal duty to the plaintiff.

(Prosser, Law of Torts (4th ed. 1971) § 68, p. 440.)

In California, the courts apply a slightly different approach which focuses not so much on the plaintiff's consent, but on the defendant's duty to the plaintiff. (*Knight v. Jewett*, *supra*, 3 Cal.4th at pp. 308, 313; *Cheong v. Antablin*, *supra*, 16 Cal.4th at p. 1067.) Under this approach, the California Supreme Court has recognized two distinct categories of the defense: primary and secondary assumption of risk. The latter category arises when the defendant breaches a duty to the plaintiff, but the plaintiff knowingly chooses to encounter the risk of such a breach. (*Id.*, at p. 314.) For example, where the sponsor of a dance applies a slippery substance to the floor's surface, and a patron dances on the floor knowing that the substance is there, the doctrine of secondary assumption of risk applies. (*Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328-329.) Under California law, however, cases involving secondary assumption of risk do not absolve the defendant of liability, but are subsumed into the comparative fault analysis. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 315; *Cheong v. Antablin*, *supra*, 16 Cal.4th at p. 1068.) Consequently, the plaintiff who tumbles upon the slick dance floor may still maintain an action against the sponsor of the event; her recovery, however, will be apportioned in accordance with her own culpability for her injuries.

(*Bush v. Parents Without Partners*, *supra*, 17 Cal.App.4th at pp. 328-330; *Knight v. Jewett*, *supra*, 3 Cal.4th at p. 314.)

Primary assumption of risk, on the other hand, is not a tort defense in and of itself, but refers simply to the absence of any duty to protect the plaintiff from a particular harm or danger. (*Id.*, at p. 308, fn. 3; *Cheong v. Antablin*, *supra*, 16 Cal.4th at pp. 1067-1068.) As such, the existence (or non-existence) of such primary assumption of risk turns on the same policy-based considerations as the "existence and scope of [the] defendant's duty of care." (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 313.) This inquiry "is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity." (*Ibid.*, *emphasis* in original.)

Unlike its secondary counterpart, primary assumption of risk (i.e., lack of duty) does not merge with comparative fault analysis, but operates as a complete bar to any recovery. (*Id.*, at p. 314-315.) Therefore, where the court determines that a case falls within the primary assumption of risk doctrine, the defendant is relieved of legal duty – and hence liability – to the plaintiff. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 308, fn. 3.)

2. <u>DUTY AND ASSUMPTION OF RISK IN SPORTS ACTIVITIES</u>

Whether framed as an issue of consent, or one involving duty, courts have consistently held that those who participate in sporting activities assume the risks inherent in those activities. (See, e.g., *Thomas v. Barlow* (N.J. 1927) 138 A. 208 [accidental blow to jaw during basketball game]; *McGee v. Board of Education of City of New York* (1962) 226 N.Y.S.2d 329 [coach struck by baseball]; *Gauvin v. Clark* (1989) 404 Mass. 450, 454-455 [player injured by illegal blow with hockey stick].) This rule holds true not only for organized sports, but also for recreational activities with no formalized rules or officiating. (*Marchetti v. Kalish* (1990) 53 Ohio St.3d 95, 100-101 [child injured playing "kick the can"]; *Crawn v. Campo* (1994) 136 N.J. 494, 500 [informal softball

game].) It also holds true when the injury-producing conduct constitutes a penalty under the game's internal rules. (*Gauvin v. Clark*, *supra*, 404 Mass. at pp. 454-455; *Crawn v. Campo*, *supra*, 136 N.J. at pp. 505-506.) As the courts have recognized, such rules cannot set the standard for legal liability, since "violations of rules, even of rules imposed for safety reasons, are often a 'part of the game.'" (*Crawn v. Campo*, *supra*, 136 N.J. at pp. 505-506.)

By the same token, courts have also applied the assumption of risk doctrine to injuries suffered by spectators – particularly when those injuries are foreseeable. (*Quinn v. Recreation Park Association* (1935) 3 Cal.2d 725, 729 [fan struck by foul ball]; *Morton v. California Sports Car Club* (1958) 163 Cal.App.2d 685, 687-688 [fan at car race injured by flying tire].) The rationale for these decisions is grounded in consent: when a spectator chooses to place himself in an area which exposes him to contact with the game's instrumentalities, he has voluntarily assumed the risk of any resulting injuries. In *Morton*, for example, plaintiff chose to sit in an area of the race course in which he knew he might be struck by flying debris. (*Morton v. California Sports Car Club*, *supra*, 163 Cal.App.2d at p. 689.) Similarly, in *Judd v. Scranton Republican* (1938) 32 Pa.D.&C. 712, 715, plaintiff suffered injuries while attending a "soap box derby," after he and others in the crowd surged forward into the street, causing him to be struck in the leg by one of the racers.[6] The Court dismissed plaintiff's action, finding that he had assumed the risk of being injured in this manner. "[O]ne who places himself as a spectator in positions of danger at athletic contests, horse races, and similar events, and is injured by some occurrence in the progress of the race, game, or contest, may not recover therefore . . ." (*Id.*, at p. 715.)

After *Knight v. Jewett*, *supra*, 3 Cal.4th 296, courts of this state employ a duty analysis to

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[6]A soap box derby is a race in which children ride four-wheel, gravity-propelled cars down a hill, sometimes reaching speeds as high as 40 miles per hour.

determine the tort liability of those who participate in sporting events. This analysis focuses not on the participants' consent, but on "the nature of the sport or activity in question and on the parties' general relationship to the activity." (*Id.*, at p. 313.) Under the facts of *Knight*, the plaintiff brought suit for assault, battery and negligence, due to injuries arising out of an informal touch football game. Several minutes into the game, the female plaintiff had told the male defendant to stop playing so rough. On the very next play, however, the defendant collided with, and stepped on, plaintiff while attempting to make an interception. As a result, plaintiff suffered injuries to her small finger, which eventually required amputation. The trial court granted summary judgment in favor of the defendant, finding that, as a matter of law, plaintiff assumed the risk of her injuries by participating in the game.

In upholding the trial court's decision, the Supreme Court focused on the nature of sports in general – noting that "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself." (*Id.*, at p. 315.) In this regard, the Court echoed the words of numerous other courts in holding that even ordinary negligence is an inherent risk of most sports – as, for instance, when a batter is hit by an errantly thrown pitch or a basketball player is struck by a stray elbow. (*Id.*, at p. 316.) Citing ample case authority from other states, the Court opined that such occasionally careless conduct is simply inherent in the sports themselves, and that "vigorous participation in . . . sporting events likely would be chilled if legal liability were to be imposed" under such circumstances. (*Id.*, at p. 318.) It thus concluded that:

> [A] participant in an active sport breaches a legal duty of care to other participants – i.e., engages in conduct that properly may subject him or her to financial liability – only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

(*Id.*, at p. 713.)

(*Id.*, at p. 320.)

Because touch football qualified as a sports activity, and because the defendant's conduct had not run afoul of this newly-fashioned legal standard for such activities, the Court concluded that the defendant had not breached any duty of care toward the plaintiff. As such, it held that the defendant was entitled to summary judgment under the primary assumption of risk doctrine.

3. WHERE A CLAIM ARISES OUT OF A SPORTS ACTIVITY, *KNIGHT'S* NO-DUTY RULE APPLIES, REGARDLESS OF WHETHER THE CLAIM IS FOUNDED ON NEGLIGENCE OR ON INTENTIONAL TORT.

Though framed in the language of duty and assumption of risk, the decision in *Knight* actually does more than just limit the duty of those who participate in sports activities. It confers a form of civil immunity upon those who accidentally, or even recklessly, injure another during the course of such sporting endeavors. (See *Crawn v. Campo*, *supra*, 136 N.J. at p. 504 [recognizing "partial immunity" for sports participants].) This distinction is important because if *Knight's* holding went merely to duty, it would have no application in the realm of intentional tort, where concepts such as duty and assumption of risk do not apply.

In *Knight*, however, the plaintiff sued not only for negligence but also for assault and battery. In considering these claims, the Court drew no distinction between liability for intentional torts and liability for negligence. Rather, it fashioned a single standard, applicable to all lawsuits based on injuries arising out of sports competitions – regardless of the theory on which plaintiff seeks recovery. Under this standard, liability may be affixed only when a defendant: (1) intentionally injures another participant; or (2) engages in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport. Because the plaintiff in had failed to make this showing, the Court upheld the summary judgment not only on the negligence claim, but on the assault and battery claims, as well. (*Id.*, at p. 321.)

4. THE RACE TO CAPTURE THE BARRY BONDS HOMERUN BALL CONSTITUTED A SPORTING ACTIVITY AND, HENCE, FELL WITHIN *KNIGHT'S* NO-DUTY RULE.

Since the decision in *Knight* , courts of this state have applied its no-duty doctrine across a wide variety of sports settings, including such non-contact activities as water skiing (*Ford v. Gouin* (1992) 3 Cal.4th 339, 345), downhill snow skiing (*Cheong v. Antablin*, *supra*, 16 Cal.4th 1063, 1069), sailing (*Stimson v. Carlson* (1992) 11 Cal.App.4th 1201, 1206), golfing (*Dilger v. Moyles* (1997) 54 Cal.App.4th 1452, 1454), rafting (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252), horseback riding (*Harrold v. Rolling J Ranch* (1993) 19 Cal.App.4th 578, 588), fishing (*Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551, 553), and even a cattle roundup (*Domenghini v. Evans* (1998) 61 Cal.App.4th 118, 121). In each of these decisions, the Court focused on the inherent dangers of the activity and on whether imposition of a legal duty "might chill vigorous participation in the implicated activity . . ." (*Mosca v. Lichtenwalter*, *supra*, 58 Cal.App.4th at p. 553.) That the courts have consistently answered this question in the affirmative shows that they will give the broadest possible construction to the definition of sporting activities.

Under this broad definition, the race to capture the Barry Bonds homerun ball constituted a sporting activity within the meaning of *Knight*. The small confines of the area, the large number of people, the apprehension lingering over the crowd, and the fleeting nature of the competition itself – combined to create an environment, which carried a substantial likelihood of becoming spirited and boisterous. As Justice Cardozo put in an often-cited case:

> One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

(*Murphy v. Steeplechase Amusement Co.* (1929) 250 N.Y. 479, 482-483 [denying recovery to

plaintiff injured on amusement park ride called 'the Flopper'].)

Since the inception of this case, Popov has seemingly tried to portray himself as a passive spectator at a baseball game, who was attacked without provocation by an unruly mob. (Popov Depo., 98:1-18, 157:2-25, 158:1-12.) This description ignores the realities of the situation for, in this case, Popov's presence in the arcade walkway rendered him far more akin to a competitor in a sports event than to a passive observer of a baseball game.

Had Popov wished to merely watch the Giants game, he could have simply entered the park, and taken the seat which he had already reserved. Instead, he traded that seat for the chance to **stand**, with a crowd of people, where Bonds was most likely to hit a homerun. Moreover, Popov was also well aware that a Bonds homerun would not constitute any ordinary homerun ball; it would constitute the final, record-setting homerun of the 2001 season. And, if Bonds' 500th homerun would garner "huge piles of cash" – as the Giants' website suggests – one can only imagine the perceived value of a ball representing one of the most hallowed records in the history of American sports. (Plaintiff's Memorandum in Support of Preliminary Injunction, p. 3.) Indeed, this value is not merely perceived, for when the single-season homerun record was last broken – during Mark McGwire's 70-homerun season in 1998 – the 70th and final homerun ball sold at auction for about $3,050,000. Under such circumstances, Popov can hardly claim surprise over "the kind of overexuberant conduct" displayed by his fellow spectators, in their zeal to capture an historic and valuable baseball. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 321 [conc. opn. of Mosk, J.].)

The prospect of taking home a souvenir baseball is part of the experience of attending a Major League Baseball game. Moreover, in their efforts to catch or retrieve homeruns, many fans bring their gloves to the game or, in the case of Pacific Bell Park, drive their boats up to the stadium, in the hopes that a ball will go out of the park and land in the Bay. When a fan does catch a foul ball

or homerun, television cameras often fasten upon that person, bringing him momentary fame and accolades.

Furthermore, an article at the San Francisco Giants' website, "How to Catch a 500th Home Run Ball," goes to great lengths to glamorize the competitive aspect of pursuing a homerun ball. By so doing, it not only encourages fans to participate in these contests, but it imbues them with a spirit of competition, by emphasizing not only the contest itself, but the ingenuity and skill which its winner often exhibits.

In *McLeod Store v. Vinson* (Ky. 1926) 281 S.W. 799, a small department store sponsored a contest, whereby competitors tried to capture guinea hens, which had been released onto the sidewalk and street area in front of the store. Those who succeeded in the contest were to receive prizes ranging from $2 to $7 in value, along with the captured guinea hen. Upon release of the guinea hens, "a scramble ensued," in which one man was pushed through a glass window. During the scramble, plaintiff fell to the ground – either due to his own inadvertence or due to another's affirmative conduct. Six or eight others then fell upon him, fracturing his leg. After a jury awarded him $5,000 in damages, the appellate court reversed, holding that, by entering the contest, plaintiff "assumed the ordinary risks incident thereto." (*Id.*, at p. 800.) Being trampled and injured in this manner was one such ordinary risk.

While *McLeod* employed a traditional, consent-based assumption of risk approach, its analysis is just as salient under the duty rationale adopted in . For, in considering whether sports participants owe a duty to their fellow participants, *Knight* focused on the nature of the activity, and on the risks which are inherent to that activity. (*Knight v. Jewett*, *supra*, 3 Cal.4th at pp. 313, 315.) This is precisely the approach set forth in *McLeod*, which talked of the "ordinary risks" incident to the guinea hen catching contest.

The scramble for the Barry Bonds homerun ball was very much like the guinea hen race in *McLeod* – except that the prize in this case had far greater historical and monetary value. In both cases, the contest involved a crowd of people, scurrying to snare the same wayward object. In both cases, there was an inherent danger of physical contact, with zealous competitors likely to engage in a certain amount of roughhousing in order to win the contest. And, in both cases, the risks of such physical contacts should have been perfectly clear to the participants – particularly in this case, where the prize was a very valuable baseball, as opposed to a guinea hen. As such, if being knocked down and trampled was an ordinary risk of entering a guinea hen race, then ending up in a pile of people would sem an inherent risk of a contest to capture a record-setting home run ball.

Finally, in determining whether the fans' conduct constituted an inherent risk of the Bonds home run contest, this court should not lose sight of the fact that it was not just one or two, but numerous fans, who were involved in the pile up for the homerun ball. Obviously, this fact does not, in and of itself, render the conduct lawful or within "the range of the ordinary activity involved in the sport." (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 320.) However, it is, at the least, strong circumstantial evidence of the conduct's foreseeability or ordinariness, within the context of the sport. As *Knight* and other cases have made clear, even actions such as intentionally throwing at a batter, or striking someone with a hockey stick, will not normally give rise to civil liability, since such actions are reasonably to be expected within the context of the sport. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 316.) Under this standard, then, the question is not how the conduct would be judged if it occurred outside the playing field; it is whether such conduct is the type which – regrettably or not – sometimes occurs during the course of that particular sport. The fact that a large number of participants independently engage in a particular type of conduct is highly relevant to making this determination.

In short, the scramble to procure the Barry Bonds homerun ball was a sporting activity within the meaning of *Knight*. Therefore, the participants' only duty to Popov was to not intentionally injure him, and to not engage in conduct far outside the boundaries of the game. Here, plaintiff has presented no evidence to show that his fellow fans intended to injure him during the chase for the Bonds homerun ball. To the contrary, Lee Jett testified that the motives behind the fans' conduct was not to injure anyone, but simply to obtain possession of the Bonds homerun ball. (Jett Depo., 52:9-18.) While their efforts to do so were spirited, they were not "so reckless as to be totally outside the range of the ordinary activity" in such competitions. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 320.) Hence, this court should grant judgment as a matter of law in favor of Hayashi, under the primary assumption of risk doctrine set forth in *Knight v. Jewett*, *supra*, 3 Cal.4th 296.

B. BECAUSE POPOV IMPLICITLY CONSENTED TO THE PHYSICAL CONTACT WHICH OCCURRED DURING THE PURSUIT OF THE BONDS BALL, HIS ASSAULT AND BATTERY CLAIMS FAIL.

Lack of consent is an essential element of Popov's battery claim. BAJI 7.50. The concept of consent is closely related to the doctrine of assumption of risk. (See *Tavernier v. Maes*, *supra*, 242 Cal.App.2d at pp. 551-552.) Under normal circumstances, assumption of risk applies only in the arena of negligence; consent, on the other hand, applies to intentional torts, such as assault and battery. (*Ibid.*) As previously seen, however, this distinction is of little import in the context of sports activities, where participants receive partial immunity for both intentional and negligent torts. (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 321.)

On the other hand, if this court rejects Hayashi's argument that the scramble for the Barry Bonds homerun ball was a sporting activity, *Knight's* partial immunity rule becomes irrelevant, and the concepts of duty and assumption of risk do not apply. However, even under this view of events, this court should still grant Hayashi judgment as a matter of law, on the grounds that Popov

implicitly consented to the physical contact which he now seeks to characterize as an assault and battery.

Under BAJI 7.50, plaintiff's lack of consent is an essential element of a battery claim. It is well-established in California that, where a person consents to conduct that might otherwise constitute an intentional tort, an action for assault or battery will not lie. (*Tavernier v. Maes*, *supra*, 242 Cal.App.2d at p. 552.) Strictly speaking, consent is not a defense to battery, but negates the existence of any tort in the first place. (*Ibid.*) "It is a fundamental principle of the common law that Volenti non fit injuria – to one who is willing, no wrong is done." (*Ibid.*)

Consent to an intentional tort may be either express or implied. The latter, and more common, type of consent occurs where, for instance, a person participates in a "sport, game or contest" which involves the potential for physical contact (Prosser, Law of Torts (4th ed. 1971) § 18, p. 102; see also *Knight v. Jewett*, *supra*, 3 Cal.4th at p. 336 [dis. opn. of Kennard, J.].) In addition, implied consent also occurs as to "ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage . . ." (*Wallace v. Rosen* (In. 2002) 765 N.E.2d 192, 197.) As with the doctrine of assumption of risk, context plays a central role in determining the existence of consent.

In evaluating whether or not a plaintiff has implicitly consented to a particular contact, the courts employ the same analysis as in traditional assumption of risk cases. The focus in these traditional cases is on the plaintiff's voluntary actions, and on the likely consequences of such actions. (See, e.g., *McLeod Store v. Vinson*, *supra*, 281 S.W. 799 [guinea hen race]; *Judd v. Scranton Republican*, *supra*, 32 Pa. D. & C. 712 [soap box derby]; *Morton v. California Sports Car Club*, *supra*, 163 Cal.App.2d 685 [fan injured at car racing track]; *Gauvin v. Clark*, *supra*, 404 Mass.

450 [college hockey player].) Where the injury results from the plaintiff's voluntary decision to engage in activity subjecting him to physical contact, he will be deemed to have both consented to, and assumed the risk of, the risks inherent to the activity (regardless of whether that activity constitutes a "sport"). Under such circumstances, the assumption of risk would operate as a bar to his recovery for negligence; the consent, on the other hand, would preclude his recovery for intentional torts.

As previously discussed, Popov voluntarily went to Pacific Bell Park on the last day of the 2001 baseball season. Once there, he voluntarily traded in his seat for entry into the standing-room-only arcade walkway where Bonds hits most of his homeruns. As with everyone else in the large crowd, Popov was aware that if Barry Bonds hit a homerun that day, the ball would have great historical and monetary value. And, as with the injured plaintiff in *McLeod's* guinea hen race, Popov surely must have known that the competition to grab the Bonds homerun ball would be spirited. Nonetheless, he went ahead and accepted that risk.

Because Popov voluntarily placed himself into what he knew to be the center of an intense competition, he cannot now complain of the physical contact which occurred, nor can he recover damages based on property which never belonged to him. This court should grant judgment as a matter of law in favor of Hayashi on all causes of action.

C. BECAUSE POPOV CANNOT MEET HIS BURDEN OF PROOF WITH SUBSTANTIAL EVIDENCE, THE CAUSES OF ACTION FOR ASSAULT AND BATTERY FAIL.

In order to be liable for a battery, a defendant must intentionally commit an act resulting in a harmful or offensive contact with the plaintiff's person. (BAJI No. 7.50.) The Restatement (Second) of Torts § 21(1) provides that a defendant is liable for assault if (1) he acts intending to cause a harmful or offensive contact with plaintiff or another person, or an imminent apprehension

of such a contact; and (2) plaintiff is thereby put in such imminent apprehension.

In this case, Popov contends that Hayashi was involved in the pile-up for the Bonds homerun ball (Popov Depo., 144:15-17), vigorously threw his arms, but not fists, into Popov (Sorensen Depo. 60:12-61:6) and that he was digging for the ball while Popov was lying on the ground. (Popov Depo., 151:21-23.) Assuming, *arguendo*, that such facts are true, they do not establish an assault or battery against Popov. Rather, in order to recover on his claims of assault and battery, Popov must demonstrate that Hayashi physically touched him – or at least attempted to do so.

Here, Popov's testimony fails to establish that Hayashi ever touched him, attempted to touch him, or placed him in apprehension of being touched. During his deposition, Popov admitted that he is not sure Hayashi ever: (1) threw him to the cement (Popov Depo., 157:2-13); (2) piled on him (Popov Depo., 157:14-22); (3) tugged on his clothes (Popov Depo., 161:15-25); (4) bit him (Popov Depo., 169:8-15); or (5) cut or scratched him. (Popov Depo., 170:17-25, 171:1-2.)

Furthermore, Popov has no evidence that he was damaged, harmed, injured or suffered a loss as a result of Hayashi's alleged contact with Popov. While Popov has photographs of bruises or injuries he alleged suffered on October 7, 2001, he cannot link any of those injuries to Hayashi's alleged contact. Thus, because injury, damage, loss or harm to plaintiff is an essential element of a battery claim (BAJI 7.50), Popov's battery claim fails.

Absent any evidence of a harmful or offensive contact by Hayashi, or of injury, damage, loss or harm resulting from such alleged contact, and absent evidence of Popov's apprehension of an imminent harmful or offensive contact by Hayashi, Popov cannot recover on his claims of assault and battery.

CONCLUSION

For over 70 years, the custom and practice at Major League Baseball games has been that a

home run ball was fair game until someone had complete control, and firm and secure possession of it. Otherwise, there could be, and often was, a spirited scramble for the ball.

In this case, the home run ball made only momentary contact with Popov's glove. During the 6/10 of a second that the home run ball is visible in the Keppel videotape, the ball was not secure in the upper webbing of Popov's glove. Popov immediately began falling backwards and down before the crowd could react to him, and he hit the hard surface of the arcade walkway at considerable speed. Scott Siciliano saw Popov bobble the ball and saw a loose ball. Jim Callahan and Russ Reynolds kept their eyes on Popov's glove at all times, and the only ball Popov retained in his glove was a sucker ball. Patrick Hayashi went to the ground at the same time that Popov did, and he immediately saw the home run ball loose on the ground.

In his zeal to commandeer the Barry Bonds home run ball, Popov is suddenly critical of the customs and practices of Major League Baseball fans that he was once so much a part of. Without regard to its implications to the national past time, and based on the unabashed legal conclusions of three law professors who seem to think that what actually happens at the ball park is irrelevant to the issue, Popov asks the Court to now change the rules for him, and to adopt a radical and extremist definition of the term "catch" that would fundamentally alter what has been happening in ballparks throughout America for over 70 years.

If so, Jim Evans cautions, the scope and number of disputes over balls hit into the stands will become epidemic, and we are going to need a night court judge in every section of the every ballpark in America.

Patrick got the home run ball fair and square, and the Court should confirm his ownership of the ball.

Date: October 15, 2002 Respectfully submitted,

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