BRIAN D. HENRI (State Bar No. 200205)
brianhenri@henrilg.com
HENRI LAW GROUP
640 W. California Ave, Suite 210
Sunnyvale, California 94806
Telephone: (650) 614-5807
Facsimile: (650) 618-1937

AUSTIN TIGHE *(admitted pro hac vice)*
austin@feazell-tighe.com
FEAZELL & TIGHE LLP
6618 Sitio Del Rio Boulevard
Building C-101
Austin, Texas 78730
Telephone: (512) 372-8100
Facsimile: (512) 372-8140

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL E. DAVIS, aka TONY DAVIS, VINCE FERRAGAMO, and BILLY JOE DUPREE, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ELECTRONIC ARTS, INC.,

Defendant.

CASE NO. 10-cv-3328 RS

RETIRED NFL PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: April 26, 2018
Time: 1:30 p.m.
Dept.: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

Complaint Filed: July 29, 2010
Trial Date: TBD

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INTRODUCTION

The First Amendment and Copyright Act do not shield theft. Courts in this district and the Ninth Circuit, as well as California superior and appellate courts, have all confirmed that right of publicity law prohibits Electronic Art's Inc.'s taking of athletes' personas (whether there are students or retired professionals) for its sports simulation video games. EA knows this, which is why it pays over $30 million per year to license the likenesses of current NFL players for its *Madden NFL* video games. Faced with stark legal and factual clarity, EA misstates the law, misrepresents the factual record, and rehashes the same legal arguments it previously raised that were considered and rejected by this Court and the Ninth Circuit.

Recognizing its arguments are non-starters under relevant Ninth Circuit authority holding that the common law right of publicity broadly prohibits virtually any unauthorized evocation of Plaintiffs' identities for commercial gain and is not limited to names or photographs, EA ignores those cases. Instead, EA seeks to create its own test by cherry-picking phrases from the statutory right of publicity test for determining whether a likeness appears in a photograph and the separate test for determining whether a singing voice is sufficiently distinctive and famous to warrant protection from imitation, to assert that Plaintiffs must demonstrate that a substantial portion of the public readily identifies them solely from viewing pictures in *Madden NFL* with no other information. Furthermore, despite overwhelming evidence -- which includes EA's admissions in deposition testimony, contemporaneous documents, and marketing materials – that Retired NFL Players are easily identifiable in Madden NFL based upon EA's literal depiction of their attributes and accurate impersonation of their play, EA misrepresents the record to argue that they are not. EA even goes so far as to have its experts rig survey results by comparing the 75-man preseason rosters to the 50-man roster in the game to manufacturer discrepancies in the data. *See* Garrett Decl. and Report. EA also conducted a purported survey of identifiability that did not actually test identifiability, withheld relevant identifiable information, and where participants were not even shown, much less allowed to play the video games. (*See* Declaration and report of Deborah Jay, Ph.D. and Plaintiffs objections to same.) In fact, the "Lanham Act survey methodology" used by

EA's purported expert is flatly contrary to the very authority she cites to try to validate it. [1]

Similarly, EA asserts that plaintiffs lack standing under the UCL to obtain restitution for EA's taking of their publicity rights by ignoring authority directly on point from this district which holds that they do have standing and can seek restitution. Next, EA regurgitates the identical legal arguments regarding the First Amendment, copyright preemption, and Plaintiffs conversion, trespass to chattels, and unjust enrichment claims; that EA previously raised in its prior motions to dismiss and anti-SLAPP motion that this Court and the Ninth Circuit considered and rejected. Under the doctrine of the law of the case, EA should be prohibited from relitigating these already decided legal issues. Indeed, EA identifies no relevant or material change in the law or facts warranting reconsideration.

Finally, EA raises a procedurally improper and mostly unintelligible argument regarding the statute of limitations that is unsupported and contrary to the evidence. For all the above reasons, EA's motion for summary judgment should be denied in its entirety

STATEMENT OF FACTS

A. The Parties.

Plaintiffs Michael E. ("Tony") Davis, Vince Ferragamo, and Billy Joe Dupree (collectively "Plaintiffs") are retired National Football League ("NFL") players whose names, images, likenesses, and/or identities appear in EA's *Madden NFL* video games without authorization. Plaintiffs are suing EA on behalf of themselves and a proposed class of more than 7,500 similarly situated former NFL players. Declaration of Sony Barari ISO Plaintiffs Op. to EA's Mtn. to Dismiss/Anti-SLAPP ("Barari Decl.") at ¶¶ 16-21, 38-82, 87-88, 93-94, 99-100 & Exs. 12-17, 34-

[1] Dr. Jay States that she based her "survey design on Lanham Act Surveys, and cites Professor McCarthy's treatises as purportedly supporting her methodology. *See* Jay Decl. ¶¶ 3, 5, 6. In fact, however, her survey is inconsistent with Professor McCarthy's treatise which notes that the right of publicity is distinguishable from the Lanham Act precisely because it does not require a plaintiff to show that the a portion of the public identified him or her in the defendant's unauthorized use: "unlike trademark law, which requires a significant percentage of potential customers to be likely confused, there should be no particular quantum of people who in fact identified plaintiff from Defendant's use." J. Thomas McCarthy, *the Rights of Publicity and Privacy,* §3:18 (2d. ed. 2010); *See also* Declaration of Jonathan Levav, Ph.D.
(footnote continued)

78. 83-84, 89-90, 95-96 (Dkt. Nos. 99, 99-3 to 100-5)[2]; Declaration of Brian Henri in Support of Plaintiffs' Op. to MSJ ("H Decl.") at Exs. 1-3 (Declarations of Davis, Ferragamo, & DuPree).

Defendant Electronic Arts Inc. ("EA") "is a developer and publisher of video games, including *Madden NFL,* which EA publishes annually" across a variety of different gaming platforms (i.e. Sony PlayStation, Nintendo Wii etc.). *Davis v. Electronic Arts Inc.,* 775 F.3d. 1172, 1175 (9th Cir. 2015); EA's Answer ¶ 16 (Dkt. No. 322).

B. *Madden NFL* Simulates Current and Historic NFL Football.

"*Madden* NFL is a video game series that allows consumers to simulate a NFL football game." *See* H. Decl. Ex. 4 (Decl. of J. Strauser, Ex. Prod. Of *Madden* NFL [*Brown v. EA*] at ¶ 1); H Decl. Ex. 5 (J. Linzner, EA's Head of Licensing. Trial Tr. ("TT") [*Parrish v. NFPA*], at pp. 1310, 1187, 1190-1). As EA's *Madden NFL* "Game Design Document" summarizes: "the intent of the game is to create a realistic simulation of the sport of NFL football, allowing the players to have complete control over the players and teams as they experience the *many different game modes* available." H. Decl. Ex 6 (Doc. Bates No. ("BN") EA00003855). In many of the Annual Versions and Platform Editions of *Madden NFL* users had the option of choosing between game modes using "current" teams or "historic" and "all-time" teams. *See* H. Decl. Ex. 4 (Strauser Decl. ¶ 7). Unlike the "current team" game mode, which features all 32 NFL teams in the year that the game was released, not all historic teams are represented in *Madden NFL. Id.* Rather, EA selected the only "major significant historic teams" including "all Super Bowl Teams – winners and losers" that it deemed most valuable to consumers. H. Decl. Ex. 7 (EA00038380-1 [EA Email Discussion]); H. Decl. Ex. 8 (Post by EA employee J. French at BN RNFLPLYR014102).

C. The Cornerstone of *Madden NFL* is its "Authentic" Virtual Representations of Actual NFL Players Allowing Users to Become Those Players in its Video Game

EA admits that the core mission of *Madden NFL* is to accurately impersonate NFL players:

> One of the brand tenets of EA Sports is to be as authentic as possible. We have found that it is pleasing to our customers to be able to use the real athletes

[2] For the Court's convenience the contents of the Barari Declaration are being lodged with the court on a flash drive, along with several other electronic exhibits and large files.

> depicted as realistically as possible and acting as realistically as possible, performing in a virtual way in the video game.

H. Decl. Ex. 9 (J. Linzner TT. [*O'Bannon v. EA*] at p. 1658). As EA's Rule 30(b)(6) witness Ryan Ferwerda admits, EA seeks to allow users to become, or play as, their favorite NFL players in *Madden NFL*:

> Q. Madden – Madden wants to put consumers – to allow consumers to be their favorite players right? …
> A. I think that Madden [NFL] tries to do everything, so that you can make yourself, you can play your favorite players …So I think it's more about an authentic NFL experience where you can live your own version of an NFL fantasy."

H. Decl. Ex. 10 (R. 30(b)(6) Depo. Tr. of R. Ferwerda pp. 283, 11, 55); H. Decl. Ex. 16 (R. 30(b)(6) Depo Notice). In fact, EA credits the success of *Madden NFL* to its accurate simulation of NFL football and realistic representation of actual NFL players:

> The *Madden* titles are successful because they allow consumers to simulate play involving any of the 32 NFL teams, **using real NFL players** and real NFL coaches. **The simulations capture the nuances of NFL contests to the fullest extent technology allows, including not only on-field play** but also the team's logos and colors, the players' uniforms, the **teams' tendencies and capabilities, and even the players' celebrations** and the crowds' chants.

H. Decl. Ex. 11 (EA's Amicus Brief in *American Needle, Inc. v. National Football League,* at 2 (emphasis added)). Accordingly, the Ninth Circuit previously held in this case that, "EA's use of the former [NFL] players' likenesses …is central to EA's main commercial purpose – to create a realistic virtual simulation of football games involving current and former NFL teams." *Davis,* 775 F.3d at 1175. Furthermore, because the above-mentioned ruling from the Ninth Circuit was made after considering the evidence and argument presented by the parties on the issue in connection with EA's claimed incidental use defense, it is binding as to further proceedings under the doctrine of law of the case. *See Pit River Home and Agr. Co-Op. Ass'n v. U.S,* 30 F.3d 1088, 1097 (9th Cir. 1994) ("The 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case.").

D. The Historic and All-Time Player Characters in Madden NFL are Based Upon and Depict the Retired NFL Players Who Played for The Actual NFL Team.

Like the current teams in *Madden NFL,* the historic and all-time teams are comprised of

virtual characters or avatars that are based upon and literally depict the Retired NFL Players who played on the actual NFL team.[3] In fact, EA's player database specifically identifies each Virtual Retired NFL Player in *Madden NFL* by the "real first and last name" of the Retired NFL Player it is based upon and depicts. *See* H. Decl. Ex. 14 (EA's Player Database for MaddenNFL09 containing the first and last names of every Retired NFL Player in Columns EB and EC[4]); H. Decl. Ex. 13 (R. 30(b)(6) Depo. of D. Moore pp 97-98 [admitting that EA's database identifies every historic team avatar by the name of the Retired NFL Player it represents]; p 273 [admitting the player databases reflects the attributes and ratings that appear in the *Madden NFL* video games]).

1. EA Accurately Depicts Former NFL Players' Actual Attributes in Madden NFL

True to its goal of authentically representing NFL players in *Madden NFL*, EA admits that the historic and all-time team characters in its video games contain the physical and biographical attributes of the Retired NFL Players upon which they are based and depict.[5] In fact, EA's employees admit that they created the historic team characters by taking Retired NFL Players' identifiable physical and biographical attributes – e.g. heights, weights, skin color, ages, NFL experience etc. – from NFL reference materials and pasting those attributes into the corresponding

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[3] H. Decl. Ex. 15 (EA correspondence admitting historic player characters have attributes and ratings applicable to the actual players); *See* H. Decl. Ex. 12. (J. Strauser Depo Tr. pp. 45-50, 68-69); H. Decl. Ex. 13 (R. 30(b)(6) Depo Tr. of D. Moore at pp. 71-72, 89, 91-93, 97-98, 112-113 209-10; 273, 318-319, 339-340;); H. Decl. Ex. 14 (); H. Decl. Ex. 15 (EA Emails BN EA00012973); H. Decl. Ex. 17 (*Madden NFL* "Official Guides BN EA00001558, EA00001286).

[4] To assist the Court, the following is a summary of the location of several relevant columns of player attributes contained in the EA's database and that appear in the Madden NFL video games. The relevant Columns followed by a – indicating the attribute: F-position AI-PLYR_HEIGHT; AJ-WEIGHT; AK-PLYR_AGE; AL-PLYR_YEARSPRO; EB-Real First Name; EC-Real Last Name.

[5] H. Decl. Ex. 15 (EA internal document noting that the historic player "…player ratings and attributes are applicable to the actual players." At BN EA00012973): H. Decl. Ex 18 (EA's Amended Responses to Requests for Admission ("RFA") Nos. 17-23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47) H. Decl. Ex. 13 (R. 30(b)(6) Depo Tr. of D. Moore pp. 112-13, 318-19); H. Decl. Ex. 12 (Strauser Depo. Tr. pp. 45-50, 68-69); H. Decl. Ex. 17 (*Madden NFL* "Official Guides BN EA00001558, EA00001286).

(footnote continued)

player character based upon that Retired NFL Player. H. Decl. Ex. 12 (Strauser Depo. Tr. pp. 45-50, 68-69); H. Decl. Ex. 15 (BN EA00012973). Furthermore, EA's employees also (1) painstakingly cross-referenced the fields of attributes data for Retired NFL Players against Reference materials to insure its accuracy;[6] and (2) obtained reference materials from an NFL historian and used those materials "to build accurate historical reference for all of the NFL teams [in *Madden NFL*] …[and] to continue improving data in the game." H. Decl. Ex. 21 (BN EA0038912-4); *see also* H. Decl. Ex. 22 (BN EA00000147). EA also admits that the *only* attribute it scrambled or randomized for Retired NFL Players was jersey numbers in a limited number of annual versions of the game. *See* R. 30(b)(6) Moore Depo. Tr. pp. 50, 112, 221 318-9.

It must also be noted that EA concedes it was easier to create accurate historic player characters than current player characters, because the attributes and performance data for Retired NFL Players is fixed and EA did not need to forecast future performance. H. Decl. Ex. 13 (R. 30(b)(6) Depo. D. Moore p. 189). In addition, once perfected, the historic characters could be reused in later annual version of the games. Id. at p. 89; H. Decl. Ex. 19 (D. Moore Decl. at ¶ 9).

To illustrate EA's literal depiction of former NFL players in *Madden NFL,* Plaintiffs provide the Court with screen prints of their historic-team avatars taken from infringing editions of *Madden NFL* and reference materials (e.g. team media guides[7]) containing their actual attributes when they played for that historic team. These documents, along with EA's player databases, demonstrate the Virtual Former NFL Players in Madden NFL contain the identical attributes as the real-life former NFL players upon which they are based. Barari Decl. ¶¶ 22-82, Exs. 18-78. For example, the *Madden NFL* video games present plaintiff Vince Ferragamo as the starting quarterback for the 1979 Los Angeles Rams, at 6'3", 207 lbs., 26 years old, in his third year as a

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[6] H Decl. Ex. 20 (BN EA00039082).

[7] Specifically, Plaintiffs provide "A media guide is a sports-related press kit, distributed as a book or binder, and published by sports teams before the start of the sporting season. It features information relating to the team players, history, statistical records and other similar items." *See e.g.* Wikipedia definition at https://en.wikipedia.org/wiki/Media_guide.

(footnote continued)

pro, and with a light skin tone, just as he appears in the 1979 Rams media guide.[8] Barari Decl. ¶¶ 14, 22-29, Exs. 10, 18-25. EA similarly presents accurate likenesses and attributes of Plaintiffs Tony Davis and Billy Joe Dupree and their teammates on each of their teams that EA included in the Madden NFL franchise. Barari Decl. ¶¶ 16-21, 38-82, 87-88, 93-94, 99-100 & Exs. 12-17, 34-78, 83-84, 89-90, 95-96.

Next, to illustrate the scale of EA's accurate depiction of Retired NFL Players attributes, Plaintiff's counsel compared the information in Madden NFL for 1979 Tampa Bay Buccaneers to that in the Media Guide for the 1979 Buccaneers. Plaintiffs identified 44 players whose real first and last names appear in EA's Madden NFL 09 player database for the 1979 Buccaneers team who also appear in the Media Guide for that team. Comparing the six attributes -- position, height, weight, age, years pro, and skin tone -- for those 44 players in *Madden NFL* to the media guide reveals that 262 of the 264 attributes exactly match the media guide. *See* H. Decl. ¶ 22, Ex. 21 (Chart of said comparison). In other words, 99.24% of the historic team attributes *Madden NFL* are identical to those attributes listed in the media guide. *Id.* Only two players had a single discrepancy in their attributes -- Dewey Selman's years pro is listed in Madden NFL as 4 instead of 1, and Aron Brown's age is listed as 21 instead of 23). *Id.*

2. *Madden NFL* Accurately Depicts Former NFL Players by Position, Team, and Depth Chart.

In addition to accurately depicting Retired NFL Players' physical and biographical attributes in their corresponding avatar, EA also placed those avatars on the correct team, in the correct position, and accurately represented the depth chart for each historic team. H. Decl. Ex 22 (D. Moore email BN EA00038421); H. Decl. Ex. 23 (Madden NFL 09 Depth Chart BN EA00027106); H. Decl. Ex. 24 (C. Carty Depo. Tr. p. 104). Specifically, like its depiction of

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[8] *Madden NFL* also depicts Mr. Ferragamo as a quarterback for the 1984 Rams at 6'3", 212 lbs. (five pounds heavier than in 1979), 30 years old, in his seventh year as a pro, and with a light skin tone, again just as he appears in the 1984 Rams media guide. *See* FAC ¶ 44; Barari Decl. ¶¶ 15, 30-37, Exs. 11, 26-33. Thus, EA adjusted the likeness of Mr. Ferragamo in its games to reflect changes between 1979 and 1984, including changes to his weight, age, and years in the league. (footnote continued)

current teams, EA used a depth chart table to accurately identify whether each Retired NFL Player was a starter, second-string, or third-string player by assigning ranking number for same.[9] *Id.* Accordingly, consumers could easily identify Retired NFL Players in Madden NFL because the avatars that appear in the starting lineup for the historic teams, accurately represent the Retired Former NFL players who started for that team. For example, Billy Joe DuPree was the starting Tight End for the 1977 Dallas Cowboys. As evidence in the depth chart table for Madden NFL 09 (Bates No. EA00027106), Mr. Dupree's avatar is assigned a depth chart number of 0, and accurately appears as the starting tight end for the 1977 Cowboys historic team in *Madden NFL*.[10]

3. The Avatars in *Madden NFL* Impersonate the Play of the Former NFL Players They Depict.

EA assigned "ratings" in various physical and football-skill categories so that the Virtual Former NFL Player plays football in *Madden NFL* just like the former NFL player it depicts played in the NFL (i.e. the Virtual Former NFL Player impersonates the real-life former NFL player it depicts). *See e.g.* H. Decl. Ex. 14 (Madden NFL 09 PS2 database BN EA00011675 – Rating can be seen at Columns I, K-AF). EA's "Ratings Czar", Donnie Moore, described EA's rating process as follows:

> We have over 21,000 players in the Madden Database alone including all of the current, historical and fantasy teams in the game. We pretty much break it down by a player's physical talents and his technique talents. His physical talents would include his Speed, Agility, Acceleration, Strength, Jumping, Throwing Power. Some of the technique-based attributes include Awareness, Pass Blocking,

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[9] Specifically, EA assigned starters a 0, second-string players a 1, third-string players a 2 and fourth-string players a 3. H. Decl. Ex. 23 (BN EA00027106)

[10] The Depth Excel Spreadsheet BN EA00027106 contains three pages DEPTH CHART, PLAYER, and TEAM. As indicated in the TEAM page, the Team Id No. for the 1977 Dallas Cowboys is 126. In the PLAYER page, Mr. Dupree's avatar for the 1977 Dallas Cowboys is at row 13126 as indicated in columns EB and EC which contain the name Billy Joe DuPree, and column DZ listing the above-mentioned Team ID no. 126 (for the 1977 Dallas Cowboys). Column A (PLYR_ID) of that row, denotes that EA assigned Mr. DuPree's avatar on the 1977 Dallas Cowboys a Player ID No. of 6264. Proceeding to the DEPTH CHART page of this document, in row 8230 you can see that Mr. DuPree's avatar appears as the starting Tight End for the 1977 Cowboys historic team in Madden NFL – Column A contain the PLYR_ID 6264, Column B contains the position "TE", and column C contains a 0 indicating that he is a starter.

> Catching, Carrying, Tackling.
> …
> Our top priority in Central Data, is to create the most accurate representation of each and every player in the NFL. From his height and his weight, to his speed and his strength …

H. Decl. Ex 25 (D. Moore Interview BN EA00019721).

EA's admits in its contemporaneous communications that the historic and all-time teams in *Madden NFL* are comprised of Virtual Former NFL Players containing "player ratings and attributes [that] are applicable to the actual players." H. Decl. Ex. 15 (BN EA00012973). EA also admits that it did not scramble or alter ratings for historic team player characters. H. Decl. Ex. 13 (R. 30(b)(6) Moore Depo.Tr. pp. 50, 112-114, 318-9).

EA attempts to dispute its prior admissions by through the unqualified testimony of its employees Donny Moore and Ryan Ferwerda who assert that EA rated the historic teams based upon the overall strength of the team. The testimony EA cites lacks foundation because both witnesses testified that they did not create historic player characters, and both claimed that they could not identify anyone who did – despite being designated as EA 's Rule 30(b)(6) witnesses on such topics. *See* H. Decl. Ex. 10 (R. 30(b)(6) Deo Tr. Ferwerda Depo. Tr. pp. 52, 55-58, 287-88); H. Decl. Ex. 13 (R. 30(b)(6) Depo Tr. D. Moore at. pp. 79, 135, 201-202).

Furthermore, it must be noted that Mr. Strauser testified that he instructed EA "Central Data" department to scramble historic player ratings and attributes in or around 2003. Henri Decl. Ex. 12. (Strauser Depo. Tr. 132-33). Mr. Moore testifies that he remembers receiving the instruction from Mr. Strauser and that it was *never followed*. H. Decl. Ex. 13 (R. 30(b)(6) Depo Tr. D. Moore at pp. 318-19). Moore further testified that he was therefore not surprised that the ratings and attributes data he reviewed for historic players in the game were accurate. *Id.*

E. EA Actively Advertised and Marketed It Use of Retired NFL Players' Identities.

EA publicized its use of Retired NFL Players' Identities in Madden NFL in several ways. For example, by naming the game features at issue "Historic" and "All-Time," EA intentionally sought to communicate to its consumers that the "historic" and "all-time" avatars depict actual Retired NFL Players. Next, through Madden NFL 03, the historic and all-time team avatars

accurately depicted the jersey number of the Retired NFL player they depict. H. Decl. Ex. 12 (Strauser Depo Tr. pp. 33-34). In the 2004 Annual Version of Madden NFL, however, EA began altering or "scrambling" the numbers of Retired NFL Players in Madden NFL. *Id.* Yet in this same Annual Version, EA introduced a feature that allowed consumers change the jersey numbers back to accurate numbers and to insert actual player names. Furthermore, EA actively advertised its use of Retired NFL Players' identities and its inclusion of sufficient information in *Madden NFL* for consumers to identify the Retired NFL players and edit their names into the game:

> Historic Rosters are back again. You can play All-Star Teams for each franchise, or dip into some of the greatest teams of all time. . . They allow you to play 'what if -type games. Just select the teams and away you go back in time to play the game. The players do not have their actual names but you can edit them if you want optimum realism.[11]

F. EA Admits, and The Evidence Establishes, that the Retired NFL Players Are Identifiable in *Madden NFL*.

In its deposition testimony, contemporaneous documents, and marketing materials, EA admits that the Retired NFL Players are identifiable from the viewable information contained in its *Madden NFL* video games.[12] For example, EA concedes because there are only a few players per position on each team, and EA accurately portrays the Retired NFL Players' physical and biographical attributes, users can identify or determine which actual retired players the virtual players represent: "…I don't know if it would be very easy, but I – I don't think it is a nuclear science problem." H. Decl. Ex. 13 (R. 30(b)(6) Depo Tr. D. Moore. pp 261-2; 339-340; 318-319. In fact, Mr. Moore also admitted that even before he joined EA, he knew who the former NFL

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[11] H. Decl., Ex. 17 (Official Guides for Madden NFL 2007-2008); *see also* H. Decl. Ex. 10 (R. 30(b)(6) Depo. R. Ferwerda PP. 249-250); H. Decl. Ex 26 (email from J. Strauser to Consumer BN EA00000189); H. Decl. Ex. 27 (RNFLPLY008669-79 ["Historic Teams. This feature allows you to edit the rosters of old school teams, adding appropriate names…"]; H. Decl. Ex. 28 BN RNFLPLYR012977 [IGN Guide] ("Madden NFL 04 features a number of historic teams for you to test out. And while the real names and numbers of the player's aren't accurate (damn lawyers), there is a handy player editor that enables you to update your roster to include all of the real names you have the time and patience to add.").

[12] H. Decl. Ex. 13 (*See* R. 30(b)(6) Moore Depo Tr. at pp 117-8, 260-2); H. Decl. Ex. 17 (Madden NFL Official Guides); H. Decl. Ex. 24 C. Carty Depo Tr. pp. 170-1, 166-8, 241-2.

players were in *Madden NFL* when he played the historic teams. *Id.* at 117-8.

Likewise, EA admits in its internal communications that *Madden NFL* accurately depicts Retired NFL Players' attributes and ratings precisely so that consumers can identify those players in the game and edit former NFL players correct numbers and actual name if the user chooses to do so: "If the user wants to edit his favorite historic player to be more accurate, the option to edit is available. It should be noted that the player ratings and attributes are applicable to the actual players." H. Decl. Ex. 15 (BN EA00012973).

G. There is Substantial Evidence Demonstrating that *Madden NFL* Users Readily Identified Retired NFL Players in *Madden NFL*

In addition to EA's admissions, there is also substantial evidence demonstrating that users of Madden NFL could, and did, accurately identify the former NFL players in *Madden NFL*. *See e.g.* RNFLPLYR012446-8; RNFLPLR014623-25. First, there are dozens of examples posted on YouTube where users correctly identify every former NFL players on a historic team and used the edit feature in Madden NFL to insert the correct name and number for each player. *See* H. Decl. Ex. 32 (BN RNFL014661-14708 contained on flash drive lodged by Plaintiffs). In fact, there are demonstrations posted on YouTube that show, step-by-step, how the user identified the former NFL player, and use the edit feature to insert his name and correct jersey number. *See e.g.* H. Decl. Ex. 31 (RNFLPLR 14665 Video Lodged with the Court on Flash Drive) *https://www.youtube.com/watch?v=TDpliApKUno&t=1501s*. In addition, numerous users have posted videos of *Madden NFL* games played using historic teams that identify the former NFL players by their names and numbers. H. Decl. Ex. 32 The videos also demonstrate the announcers saying the names of the former NFL players in the game. *Id.*

Second, many users posted spreadsheets online specifically identifying each former NFL player on a historic team next to their unedited name and number in *Madden NFL*. *See e.g.* H. Decl. Ex. 32 (BN RNFLPLYR012833-6; RNFLPLYR014169-70 (1978 cowboys); RNFLPLYR014156 (1994 Chiefs); RNFLPLY012998 (all historic teams in Madden NFL 06). In fact, there were even people selling edited historic team rosters identifying the former NFL players by name and actual number, so that other users did not have to go through the trouble of editing

the names and numbers themselves. *See* H. Decl. Ex. 30.

Third, there are numerous discussion threads for *Madden NFL* where users indicate that they know the identity of former NFL players on the historic teams and/or describe how he or she edited their names and numbers into the game. *See e.g.* H. Decl. Ex. 41 (postings on EA website). In fact, EA's addition of the "edit feature" in *Madden NFL* 04 allowing consumers to insert the actual names and numbers of former NFL players was done in response to numerous consumer requests indicating that they know who the former NFL players are and requesting the ability to insert their names into the game. H Decl. Ex. 36 EA00019675

Fourth, counsel in this case and in other cases, were able to identify the former NFL players in historic teams and have submitted evidence demonstrating same. H. Decl. Ex. 41 In addition, each of the Plaintiffs at their depositions were able to identify themselves and their teammates – based solely on screenshots shown to them by EA's counsel.

H. EA Knew that it Needed a License

EA licensed and paid more in excess of $30 million per year for the right to use current NFL players identities and likenesses in *Madden NFL* pursuant to a group license with the NFLPA. H. Decl. Ex. 42. EA knew that it needed a license and to pay for its use of Retired NFL players identities and likenesses. H. Decl. Ex. 39 (correspondence from NFLPA "all retired players …their identity must be altered so that it cannot be recognized).

PROCEDURAL HISTORY

A. This Court Previously Denied Two Motions to Dismiss Raising the Same Legal Arguments as EA's Motion for Summary Judgment.

EA filed two separate motions to dismiss in this case which were denied by this Court. As set forth below, much of EA's motion for summary judgment is consists of EA's improper attempt to litigate legal issues it previously raised and that the Court considered and ruled against EA. Under the law of the case doctrine those order should remain binding and the Court should summarily deny EA's improper attempts to relitigate such issues in its current motion.

B. EA's Motion for Partial Summary Judgment on Plaintiffs' Statutory Claim.

This Court previously granted EA's motion partial summary judgement on Plaintiffs

statutory right of publicity claims because the Court determined, "[a]s construed by the Ninth Circuit …'likeness' as used in [Cal. Civ. Code] section 3344 is narrower than under the common law. Order Granting Partial Summary Judgment ("PSJ Order") (Dkt. No. 263), p.4 (citing *Midler v. Ford Motor Co.,* 849 F.2d. 460, 463 (9th Cir. 1988). Therefore, the Court refused to consider the fact that the player models or avatars in *Madden NFL* are molded to Plaintiffs' exact physical and biographical attributes (e.g. height, weight, skin tone, age, team, position, experience) labeling such evidence "additional contextual information" that the Court held is not actionable on a statutory claim. The Court noted, however, that such information "may support a claim under the common law."[13]

I. LEGAL STANDARD

An order granting summary judgment is only proper "when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1135 (N.D. Cal. 2014) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *and Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th

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[13] Plaintiffs respectfully assert that this Court erred in granting partial summary judgement on Plaintiffs statutory claim in at least three respects. First, the Court erred by finding as a matter of law that, "no reasonable fact finder could conclude that a particular avatar is identifiable as a particular player based solely on the appearance of the image." At their depositions, the Plaintiffs each identified themselves and teammates based solely on being shown screen shots of their avatars by EA's counsel. [cites]. Under Ninth Circuit authority this is sufficient to state a triable issue of fact on a statutory right of publicity claim. *See Newcombe v. Adolf Coors, Co.,* 157 F.3d 686, 689 (9th Cir. 1998) (reversing summary judgment on statutory claim based upon drawing of professional baseball pitcher where plaintiffs face was not recognizable because drawing was based upon photograph of the plaintiff, and the plaintiff and some of his teammates recognized plaintiff from the drawing). Second, this Court's holding that "likeness as used in section 3344 is narrower than the common law" is contrary to the plain language of section 3344 which prohibits the unauthorized use of "another's name … or likeness, *in any manner*, …"[13] Civ. Code 3344(a); *see also Maloney v. T3 Media, Inc.,* 853 F.3d 1004, 1020 fn. 16 (9th Cir. 2017) ("The elements of a common law right-of-publicity claim are subsumed within those of a statutory claim"). Furthermore, the Court's holding that of "likeness" under section 3344 does reach digital avatars molded to the Plaintiff's exact features is inconsistent with Ninth Circuit authority suggesting that "a caricature or impressionistic resemblance" that is "molded to [the plaintiff's] precise features" would be a "likeness" under section 3344. *See White*, 970 F.2d at 1397.

Cir. 1987)). "The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material." *Id.* (*citing Celotex*, 477 U.S. at 324). Furthermore, the evidentiary standard for evidence opposing a motion for summary judgment "is not whether the evidence would be admissible at trial – it is whether it *could* be presented at trial in an admissible form.'" *Fab Films, LLC v. JP Morgan Chase Bank, N.A.*, 2017 WL 2608858 (C.D. Cal. March 13, 2017) (Hon. Phillip Gutierrez) at * 5 (*quoting Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012).

"As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party fails to meet its initial burden, the opposing party has not obligation to produce anything. *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).

Where a non-moving party presents evidence calling the credibility of the moving party or its witnesses into question, summary judgment is inappropriate and must be denied. *See SEC v. Koracorp. Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) ("The courts have long recognized that summary judgment is singularly inappropriate were credibility is at issue").

ARGUMENT

I. EA FAILS TO ESTABLISH THE LACK OF TRIABLE ISSUES OF FACT ON PLAINTIFFS' COMMON LAW RIGHT OF PUBLICITY CLAIM

California law recognizes a common law "right of publicity that protects individual's right to profit from the commercial value in his or her identity." *Ross v. Roberts*, 222 Cal.App.4th 677, 684 (2013); J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 28:3 (4th ed.) (the right of publicity "is the inherent right of every human being to control the commercial use of his or her identity."). A defendant misappropriates an individual's common law right of publicity when: (1) it uses the Plaintiff's identity, persona, or fame; (2) without consent; and (3)

resulting in injury.[14] *See White v. Samsung Elec. Am., Inc.*, 971 F.3d 1395 (9th Cir. 1992).

EA claims to challenge the first element of Plaintiffs' common law misappropriation claim by asserting that "Plaintiffs have no evidence that the public identifies the avatars in *Madden NFL* as Plaintiffs." Motion p. 7. In fact, however, EA's motion is procedurally defective and should be denied because the common law right of publicity does not require Plaintiffs to demonstrate that public identifies the avatars in *Madden NFL* as them. As set forth below, EA's arguments are based upon its mischaracterizations of the law and misrepresentation of fact. There are clear triable issues of fact on Plaintiffs' common law claim and EA's motion should be denied.

A. The common law right of publicity is not limited to name or likeness, it broadly covers anything evoking Plaintiffs' identities or personas

Rather than address well-defined Ninth Circuit case law regarding the common law right of publicity, EA instead misrepresents that Plaintiffs must satisfy the statutory test for misappropriation of a likeness in a photograph (Civ. Code § 3344(b)(1)[15]) – i.e. establish that they are readily identifiable solely from pictures within *Madden NFL*. *See* Motion p. 6. Contrary to EA's argument, Ninth Circuit Court's "have frequently held that California's common law right of publicity protects celebrities from appropriations of their *identity* not strictly definable as 'name or picture.'" *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d. 407, 414 (9th Cir. 1996) (citing

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[14] Some cases state that the right of publicity is established by "'(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.'" *Maxwell v. Dolezel*, 231 Cal.App.4th 93, 97 (2014) (quoting *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 793 (1995)). Ninth Circuit case law establishes, however, that "the name and likeness formulation" referred to in the common law right of publicity is not "an element of the right of publicity," it is merely "a description of the types of cases in which the cause of action had been recognized." *White v. Samsung Elec. Am., Inc.*, 971 F.3d 1395 (9th Cir. 1992); *see also Abdul-Jabbar v. General Motors Corp.*, 85 F.3d. 407, 414 (9th Cir. 1996).

[15] Civil Code section 3344(b) defines "photograph" as a still or moving photo "…of any person, such that the person is readily identifiable." Section 3344(b)(1) provides that "[a] person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use."

Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d. 821, 827 (9th Cir. 1974). In fact, "[u]nlike Civil Code section 3344, the scope of the common law tort applies not only to a person's 'name or likeness,' but also to that which is distinctive or personal to the individual, such as their professional persona." *Page v. Something Weird Video,* 960 F.Supp. 1438, 1442 (C.D. Cal. 1996). The Ninth Circuit has recognized that virtually any unauthorized evocation of an individual's identity for commercial purposes is sufficient to create a triable issue of fact regarding the appropriation of a person's common law right of publicity. *See e.g. Newcombe v. Adolf Coors, Co.,* 157 F.3d 686, 692 (9th Cir. 1998) (drawing of professional baseball pitcher's stance alone is sufficient even when his face was not viewable and the artist altered his uniform, number, and the stadium); *Wendt v. Host Intern, Inc.,* 197 F.3d 1284 (9th Cir. 1999) (use of animatronic robots at an airport bar improperly invoked identities of two actors from the television series "Cheers") *Waits v. Frito-Lay Inc.,* 978 F.2d 1093 (9th Cir. 1992) (use of "sound alike" singer in commercial violated Tom Wait's California common law right of publicity).

In *Motschenbacher v. R.J. Reynolds Tobacco Co.,* 498 F.2d. 821 (9th Cir. 1974), a professional race car driver brought a common law right of publicity claims against the defendant regarding its unauthorized use of an altered photograph of the plaintiff's race car in a commercial. Although the plaintiff was driving the car in the photograph, his facial features could not be seen. In addition, the defendant altered the plaintiff's car by changing the number from "11" to "71", removing sponsors, and adding a "spoiler." The district court granted summary judgment because it held the plaintiff was not identifiable in the ad and the Ninth Circuit reversed.

The *Motschenbacher* Court held that district Court's conclusion of law "to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations on the car." *Id.* at 827. The Court held that because the car under consideration contained features that are unique or distinguishing to the plaintiff (such as its pinstriping), there was a triable issue of fact as to plaintiff's common law publicity claim.

In a later case the Ninth Circuit explained the *Motschenbacher* holding as follows:

> California law will recognize an injury from, 'an appropriation of the attributes of one's identity' …It was irrelevant that *Motschenbacher* could not be

> identified in the ad. The ad suggested that it was he. The ad did so by emphasizing the signs or symbols associated with him.

Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (reversing summary judgment on Bette Midler's common law right of publicity claim where defendant imitated her distinctive singing voice in a commercial).

The Ninth Circuit similarly addressed the common law right of publicity in the context of a motion for summary judgment in *White v. Samsung Elec. Am., Inc.*, 971 F.3d 1395 (9th Cir. 1992). Specifically, Vanna White, hostess of the "Wheel of Fortune" game show, brought statutory and common law right of publicity claims against the defendant regarding its advertisement, set in the future, featuring a robot in a blond wig turning letters on a game show set. The district court granted summary judgment on both the statutory and common law claims.

The *White* Court affirmed summary judgment on the plaintiff's statutory claim, holding that the ad did not contain plaintiff's "'likeness' within the meaning of section 3344" because defendant "used a robot with mechanical features, and not, for example, a manikin molded to Ms. White's precise features." *Id.* at 1397-98. The Court reversed summary judgment on Ms. White's common law claim, however, because it held that "the common law right of publicity reaches means of appropriation other than name or likeness." *Id.* at 1398. In fact, the court noted that the common law broadly covers any appropriation of identity and "does not require that appropriation of identity be accomplished through any particular means to be actionable." *Id*. The *White* Court held that, "[v]iewed separately the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict." *Id.* at 1399. The Court noted that the robot in the ad dressed like Vanna White and is in the process of turning a letter on a game show set just like what Ms. White is known for. *Id.*

Under the above-mentioned holdings, EA misappropriated Plaintiffs' common law rights of publicity in that least three ways, which collectively and individually establish triable issue of fact requiring the denial of EA's motion. First, EA appropriated the Retired NFL Players' publicity rights by creating avatars containing Plaintiffs' physical and biographical attributes and placing them on the same team and in the same position that that the Plaintiffs' played. *See e.g.*

Davis, 775 F.2d at 1181 (noting Vince Ferragamo appears in Madden NFL on the same 1979 Rams teams, in the same position, and with the identical physical and biographical attributes as he appeared in the Media Guide for that team). Second, there is a triable issue of regarding EA creation of avatars that are designed to impersonate in *Madden NFL* the way that the Retired NFL Player it is based upon and depicts played football in the NFL. Indeed, the California Supreme Court has recognized that impersonation represents "what may be the strongest case for a right of publicity." *Comedy III, Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 402 (2001). Third, EA suggested to consumers by naming the teams "historic" and "All-time" and in its marketing that *Madden NFL* used Plaintiffs identities (i.e. had avatars depicting actual NFL players that played on the historic teams). *See* Decl. of J. Levav, Ph.D. These facts collectively and individually require the denial of EA's motion. *See Midler,* 849 F.2d at 463.

B. Plaintiffs Raise Triable Issues of Fact as To Their Identifiability in *Madden NFL*

Contrary to EA's assertion, the evidence demonstrates that Plaintiffs are identifiable in *Madden NFL*. In fact, standing alone EA's admission in deposition testimony, documents, and its marketing materials require the denial of its motion.

EA's assertion that Plaintiffs could not identify themselves or their teammates at their depositions misstates facts. Contrary to EA's assertion, the Plaintiffs were able to identify themselves and their teammates at their depositions solely from being shown screen prints from the game by EA's counsel. For example, Vince Ferragamo successfully identified himself on the 1979 Rams, and his receivers Henry Ellard and Ron Brown from the 1984 Rams. Ferragamo Depo. Pp. 14-16; 22-26.[16] Likewise, Tony Davis correctly identified himself, and his teammates Doug Williams and Steve Wilson, solely from the screen print pictures from Madden NFL without any other identifying information (i.e. without being shown heights, weights, ages, years pro etc.). Likewise, Mr. Dupree successfully identified himself and teammates at his deposition. *See e.g.* DuPree Depo tr. pp. 45-47.

[16] The accuracy of the testimony is confirmed by EA's database for MaddenNFL09 at H. Decl. Ex. 14 (BN EA00011675) which is being lodged with the Court.

Next there is substantial evidence demonstrating that users of *Madden NFL* could accurately identify the Retired NFL plaintiffs from viewable information in the game. Such evidence includes: user communications with EA, postings on EA's Website, Consumer postings and spreadsheets of historic team rosters with the actual Retired NFL Players' names; postings on the Internet showing how users edited the rosters to insert the correct names.

Furthermore, the record shows that Counsel in this case and in other cases, were able to accurately identify the Retired NFL players in Madden NFL from the information contained with EA's video games. H Decl. Ex. 41. Again, these facts, collectively and individually create triable issues on Plaintiffs' common law misappropriation of publicity rights claim.

EA cites *Waits v. Frito-Lay*¸ 982 F.2d 1093 (9th Cir. 1992), and *Henley v. Dillard Dep't Stores*, 46 F.Supp.2d 587, 595 (N.D. Tex. 1999), as purportedly standing for the proposition that "[s]ome courts, including the Ninth Circuit, have held that the allegedly misappropriated image must be widely understood and publicly known as the plaintiff." EA's Motion at p. 6. Neither case, however, stands for such a proposition. In fact, *Henley* stands for the opposite position for which EA cites it, noting that, "'[u]nlike trademark law, which requires a significant number of potential customers be likely confused, there should be no particular quantum of people which in fact identified plaintiff from defendant's use.'" *Henley*, 46 F.Supp.2d at 595 fn. 7 (*quoting* J. Thomas McCarthy, 1 *the Rights of Publicity and Privacy* § 3.4[A]; *see also Newcombe,* 157 F.3d at 689 (finding plaintiffs was identifiable because he and his teammates recognized him). Furthermore, the "widely known" language cited by EA, refers to the *Waits* Court's "formulation of the elements of a voice misappropriation case" to determine when a celebrity singer' voice is sufficiently distinctive and famous to prohibit imitation. *See Waits,* 982 F.2d. at 1099-1102. Because Plaintiffs are NFL players not singers, it has no application.

Accordingly, for the above reasons, EA's motion should be denied.

II. EA'S FIRST AMENDMENT DEFENSE FAILS FOR THE REASONS PREVIOUSLY ARTICULATED BY THIS COURT AND THE NINTH CIRCUIT.

EA rehashes First Amendment arguments that have been thoroughly rejected by the Court

in this case, Judge Wilkin (in the NCAA right of publicity case), and by the Ninth Circuit (in both this case and the NCAA case).[17] In fact, protecting the value associated with an individual's identity or likeness has long trumped the claims based on the First Amendment, as the Supreme Court of the United States recognized over forty years ago when upholding the right of publicity against a First Amendment challenge:

> [T]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

EA's argument that the legal and factual landscape has changed warranting a different conclusion, is disingenuous. For example, EA cites *Sarver v. Chartier,* 813 F.3d 891, 903 (9th Cir. 2016) as purportedly standing for the proposition that "California's right of publicity laws, when applied against an expressive work like *Madden NFL,* are content based restrictions on speech and therefore presumptively unconstitutional." Motion p. 11. *Sarver* stands for the opposition position to which EA cites it. In fact, the *Sarver* Court reiterated that Ninth Circuit Courts "have interpreted *Zacchini* to uphold the right of publicity in where the defendant appropriates the economic value that the plaintiff has built in an identity or performance" and cited approvingly the Ninth Circuit decisions in this case, the NCAA case (*Keller v. EA*) as well as the *Newcombe, White, Hilton v. Hallmark Cards,*599 F.3d 894, 903 (9th Cir. 2010) cases, *Sarver.* 813 F.3d at 904. The Sarver Court then noted: "In sum, our precedents have held that speech which either appropriates the economic value in a performance or a persona or seeks to capitalize off a celebrity's image in commercial advertisements is unprotected by the First Amended against a California right of publicity claim." *Id.* at 905.

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[17] *See Davis,* 775 F.3d 1172, *In re NCAA Student-Athlete Name and Likeness Licensing Litig.,* (a.k.a. *Keller v. Electronic Arts, Inc.*) 724 F.3d 1268, 1272 (9th Cir. 2013); *Davis v. Electronic Arts Inc.*, 2012 WL 3860819 (N.D. Cal. Mar. 29, 2012) (RS); Keller *v. Electronic Arts Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (CW).

A. EA's Transformative Use Defense Also Fails for the Reasons Previously Articulated by This Court and the Ninth Circuit.

EA also rehashes the same transformative use defense arguments that have been squarely rejected by this Court and the Ninth Circuit which have previously held that EA's use of athletes' likeness in its simulation video games "was not, as a matter of law, transformative use." *See* Davis, 775 F.3d at 1177; *Keller,* 724 F.3d at 1277-79. EA asserts that the prior rulings were based upon "assumed facts" and that changes in the factual record warrant a different result. EA's assertion is false. In fact, both this Court and the Ninth Circuit took judicial notice of *Madden NFL* video games. In addition, Plaintiffs proffered the same evidence from EA's games and NFL Media Guides demonstrating EA's accurate depiction of Plaintiffs' features in Opposition to EA's anti-SLAPP motion, as they do now. The Ninth Circuit specifically cited to said evidence and summarized the factual basis for it Opinion as follows:

> Although the players on the historic teams are not identified by name or photograph, each is described by position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport. For example, Madden NFL includes a historic team for the 1979 Los Angeles Rams that played in that year's Super Bowl. Vince Ferragamo, a plaintiff in this action, was a quarterback on the 1979 Rams. He is Caucasian and was listed in the 1979 Rams media Guide as a 26 year-old, six-foot three-inch, 207-pound third-year NFL player. Madden NFL depicts an avatar who is a quarterback for the 1979 Rams and has the identical physical characteristics. *Madden NFL* also includes the 1984 Los Angeles Rams, for which Ferragamo was again a quarterback. The 1984 Rams media guide lists Ferragamo as a 30–year–old, six-foot three-inch, 212–pound seventh-year NFL player. *Madden NFL* depicts an avatar on the 1984 Rams with identical physical characteristics.
>
> The plaintiffs similarly alleged that *Madden NFL* similarly includes without authorization, accurate likenesses of Plaintiffs' Michael Davis and Billy Joe DuPree, as well as roughly 6000 other former NFL players …

Davis, 775 F.3d at 1175-76. EA fails dispute any of the above-mentioned facts.

The Ninth Circuit noted that that the transformative use defense "'is a balancing test between the First Amendment and the right of publicity based upon whether the work in question adds significant creative elements so as to be transformed into something other than a mere celebrity likeness or imitation." *Id.* at 1177 quoting *Keller*, 724 F.3d at 1273 (quoting *Comedy III, Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001)). It found EA's depiction was not

transformative because: "[l]ike *NCAA Football, Madden NFL* replicates players' physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life – playing football for an NFL team." *Id.* Furthermore, the court rejected EA's arguments concerning its minor alterations and the skill of its employees in creating *Madden NFL* because it held that: "the 'graphics and other background content of the game are secondary, and the expresive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of [Plaintiffs] to commercially exploit [their] fame.'" *Id. at* 1178 (quoting *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018 (2011); *see also Keller,* 724 F.3d at 1277 (quoting and holding same regarding EA's NCAA football games).

EA fails to identify any new facts demonstrating that it transformed Plaintiffs avatars into something other than a "replicat[ion] [of their] physical characteristics …in the performance of the same activity for which they are known" to commercially exploit their fame. *Davis,* 775 F.3d. at 1178. The best EA's army of lawyers could come up with after scouring the deposition transcripts and document productions in this case, is cite a vague statement from its Rule 30(b)(6) witnesses, Donny Moore, that "height, weight, [age and experience] "are 4 items out of 100." *See* Motion p. 17. Tellingly, EA ignores Mr. Moore's testimony three pages later noting that is review of the attributes information in EA's Madden NFL databases in preparation for his deposition showed "a lot of consistencies" with the Retired NFL Players that the avatars depict. H. Decl. Ex. 13 (D. Moore Depo. Tr. 317-18). For all the above reasons, EA's motion must should be denied,

III. EA'S COPYRIGHT PREEMPTION DEFENSE FAILS

EA mischaracterizes this Court's recent Order deny its motion to dismiss, and improperly seeks to relitigate the identical argument this court considered and rejected. As the Court correctly notes, the mere fact "[t]hat an artistic work is subject to copyright protection …does not mean every element within the work is copyrightable." Order p. 3 (Dkt. No. 317). In fact, in *Maloney v. T3 Media, Inc.*, 853 F.3d. 1004, (9th Cir. 2017), the Ninth Court specifically noted that EA's use of athletes' likenesses and identities is not copyrightable and is not subject to copyright preemption. *Id.* at p. 1018 fn. 13. Accordingly, this Court's correctly rejected EA's copyright

preemption assertion and EA's motion should be denied.

IV. EA FAILS TO MEET ITS BURDEN AS TO PLAINTIFFS' OTHER CLAIMS

A. Plaintiffs Are Entitled to Restitution Under the UCL For EA's Unauthorized Taking of Their Valuable Publicity Rights.

EA seeks summary judgment by asserting that "Plaintiffs' are not entitled to any relief" under the UCL and therefore lack standing. *See* Motion p. 19. Notably, EA ignores authority from this district that is directly on point and holds otherwise. *See Fraley v. Facebook, Inc.,* 830 F.Supp.2d 785, 810 (N.D. Cal. 2011). In *Fraley*, a class of Facebook users brought right of publicity, UCL, and unjust enrichment claims against Facebook over its unauthorized use of their names, photographs and identities to endorse third-party products. Just as EA argues here, the defendant in *Fraley* asserted that the plaintiffs were not entitled to relief under the UCL.

Judge Koh rejected the defendant's argument noting that, "under the UCL. 'the concept of restoration or restitution …is not limited only to the return of money or property that was once in the possession of that person. Instead restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.'" *Id.* (quoting *Lozano v. AT&T Wireless Servs., Inc.,* 504 F.3d 718 (9th Cir. 2007). The *Fraley* Court held that the Plaintiffs "have a vested interest in their right of publicity which … Defendant has unlawfully appropriated without their consent." If further held that where plaintiffs possess rights of publicity with an economic value, and the defendant has appropriated that right without authorization or compensation, the Plaintiffs are entitled to restitution under the UCL. *Id.* at 812.

The facts here nearly identical to those in *Fraley*. Plaintiffs have a vested interest in their rights of publicity that EA appropriated without consent and compensation. Accordingly, like the plaintiffs in *Fraley* Plaintiffs are entitled to restitution. *Id.* To the extent EA argues the rights it appropriated have no economic value, that argument was previously raised by EA in connection with its incidental use defense and rejected by the Ninth Circuit and therefore cannot be relitigated under the doctrine of law of the case. *See Pit River,* 30 F.3d at 1097. In fact, after considering the evidence – including EA's license agreement with current NFL players – the Ninth Circuit Court held, "having acknowledged that that the current NFL players carry substantial economic value,

EA does not offer a persuasive reason to conclude otherwise as to the former players." Davis, 775 F. 3d at 1181.

B. **EA's Conversion and Trespass to Chattels Claims Fail for the Reasons Articulated in this Court Prior Order.**

Here again EA improperly seeks reconsideration of a legal issue it raised in its original motion to dismiss that this Court considered and ruled on. As the Court previously ruled, "California courts no longer apply the merger requirement, and have instead indicated a willingness to entertain conversion or trespass to chattels claims, even when the alleged interference is to an intangible interest. *Order* Denying Motion to Dismiss pp. 13-14 (Dkt No. 110) (citing *Kremen v. Cohen,* 377 F.3d 1024, 1034 (9th Cir. 2003) (asserting conversion claim with respect to plaintiff's intangible interest in a domain name); *A&M Records Inc. v. Heilman,* 75 Cal.App.3d 554, 570 (1977) ("misappropriation and sale of intangible property of another without authority from the owner is conversion). EA does not assert any change in controlling law or facts since the Court denied its motion to dismiss. In fact, subsequent authority is entirely consistent with this Court's ruling and requires denial of EA's motion. *See e.g. Welco Electronics, Inc. v. Mora,* 223 Cal.App.4th 202, 214-15 (theft and use of something the plaintiff has a right to control [credit card] is sufficient to state a claim for conversion). Because EA appropriated publicity rights that Plaintiffs have a right to control, EA's motion should be denied.

V. EA'S STATUTE OF LIMITATIONS ARGUMENT MUST BE DENIED

As an initial matter, EA's statute of limitations arguments is not properly presented and should be denied because it is unclear what EA exactly EA is claiming and what evidence its contends Plaintiffs must present to defeat the motion. In addition, EA plainly bears the burden of proof as to its statute of limitations defense and EA offers no admissible evidence[18] to support its assertion that "*Madden NFL 09*" is the only Madden title featuring historic teams that falls within statute of limitations." In fact, said assertion is belied EA's concession in footnote 31, that the

[18] Plaintiffs Object to Paragraph 7 of the Ferwerda Decl. on the grounds that it lacks foundation, is conclusory and speculative. Furthermore, as set forth below, it is contrary to the evidence.

statute of limitations on Plaintiffs UCL claim is four (4) years and therefore covers Madden NFL 08 and 07 regardless of republication. Furthermore, EA's assertion is contrary to the evidence.

For example, a new claim is triggered under the single publication rule where a defendant consciously continued to publish infringing games from earlier annual versions, republished games, and/or expanded its unauthorized use of Plaintiffs likeness by, for example, lowering the prices of games to reach new audiences. *See Schneider v. United Airlines,* 208 Cal.App.3d 71, 76 (1989)("where republication reaches a new entity or person, repetition justifies a new cause of action); Kanarak v. Bugliosi, 108 Cal.App.3d 327, 332 (1980)([The] single publication rule … does not include separate aggregate publications on different occasions ….")); *Moser v. Triarc Co., Inc.,* 2007 WL 1111245 (S.D. Cal. Mar. 29, 2007) (Knowingly Republishing the same defamatory information gives rise to a new cause of action"). Plaintiffs present evidence of such republication and expanded use. For example, EA bundled *Madden NFL* 08 with its hockey, basketball, golf, and soccer titles and which it republished on September 22, 2008 as "EA Sports Collection." Henri Decl. Ex. 37. In addition, contrary to inadmissible testimony of Ryan Ferwerda cited in EA's motion, the evidence – including the testimony of EA's own expert witness -- demonstrates that after EA published Madden NFL 09 it lowered the price and continued to sell earlier versions of Madden NFL targeting a more costs-conscious consumer group. *See* H Decl. Ex. 35 (screen print from EA's website in 2011 selling Madden NFL 08 for $9.95); Ex. 36 and 37 (Declaration and deposition testimony of EA's expert witness).

CONCLUSION

For all the foregoing reasons, EA's motion to dismiss should be denied in its entirety.

Dated: March 29, 2017

HENRI LAW GROUP

By: */s/ Brian D. Henri*
BRIAN D. HENRI
Attorneys for Retired NFL Plaintiffs