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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

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

16 Plaintiffs,

17 vs.

18 ELECTRONIC ARTS, INC.,

19 Defendant.

CASE NO. 10-cv-3328 RS

**PLAINTIFFS' MOTION FOR LEAVE TO  
FILE A MOTION FOR  
RECONSIDERATION OF THIS  
COURT'S ORDER DENYING CLASS  
CERTIFICATION**

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT: Plaintiff’s Michael E. Davis, Vince Ferragamo, and Billy Joe DuPree (“Plaintiffs”) will, and hereby do, pursuant to Local Rule 7-9 seek leave to file a motion for reconsideration of this Court’s Order Denying Class Certification, dated August 17, 2018 (Dkt. 387) and for the Court to enter a new Order certifying the class. This motion is made on the grounds that (1) the Court manifestly failed to consider evidence and legal argument presented; and misapprehended the nature of the claim being asserted.

Plaintiffs have acted with reasonable diligence in bringing this motion after receiving and reviewing the Court’s Order. This motion is based on this Notice of Motion, the accompanying memorandum of points and authorities, the papers and exhibits previously filed in connection with EA’s motion for Class Certification, Plaintiff’s request for judicial notice, and on the pleadings and records on file in this action.

Dated: August 30, 2018

HENRI LAW GROUP

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **SUMMARY OF ARGUMENT**

3 Pursuant to Local Rule 7-9 Retired NFL Plaintiffs Michael E. Davis, Vince Ferragamo,  
4 and Billy Joe Dupree respectfully request leave to file a motion for reconsideration of this Court's  
5 Order Denying Class Certification of former NFL players claims regarding the unauthorized use  
6 of their likenesses in defendant Electronic Arts Inc. ("EA") *Madden NFL* video game franchise.

7 In denying class certification, the Court held that "[f]or a player to prevail, he must show  
8 there is an avatar in the game that is sufficiently identifiable as him to constitute a  
9 misappropriation." Order p. 5 (Dkt. 387). The Court then went on to conclude that *individual*  
10 *issues predominate* under rule 23(b) because "each and every avatar alleged to represent a  
11 particular player will have to be examined to determine if there is an appropriation of the specific  
12 player's identity within the meaning of the common law tort." *Id.* at p. 6. As set forth below,  
13 Plaintiffs request reconsideration because the Court (1) erroneously required each that each  
14 individual be specifically identified; and (2) manifestly failed to consider dispositive evidence and  
15 argument showing that EA employed a common scheme of literally depicting former NFL  
16 players' attributes and impersonating their play and therefore the precise issue which the Court  
17 identified as individual, is in fact a common issue.

18 First, contrary to the Court's holding, each class member is not required to "sho[w] that  
19 game users readily identify him [in Madden NFL]" to state a claim for common law  
20 misappropriation. *Id.* at 5-6. Rather, as the Ninth Circuit established in *Midler v. Ford Motor Co.*,  
21 849 F.2d 460 (9th Cir. 1988):

22 "California will recognize an injury from 'an appropriation of the attributes of  
23 one's identity.'...it was irrelevant that [the plaintiff] could not be identified in  
24 the ad. The add suggested that it was he. The ad did so by emphasizing signs  
and symbols associated with him."

25 *Id.* at 463 (citing *Motschenbacher v. R.J. Reynolds Tobacco. Co.*, 498 F2d 821, 824 (9th Cir.  
26 1974). Indeed, under Ninth Circuit authority, the common law right of publicity prohibits  
27 "anything at all that evokes [a] person's identity." *Wendt v. Host International, Inc.*, 197 F.2d  
28 1284, 1285 (9th Cir. 1999) (Judge Kozinski's dissent to order denying petition for rehearing)

1 (citation omitted). Just as a video game allowing users to simulate famous rock bands such as “No  
2 Doubt” and “The Beatles” evokes the identities of the members of those bands, here EA’s conduct  
3 of including specific “historic” teams such as the 1979 Los Angeles Rams in its NFL simulation  
4 video game likewise evokes the identities of the former NFL players who played on those teams.  
5 *See e.g. No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018, 1034-35 (2011)  
6 (Activision’s use of the band No Doubt in its Band Hero simulation video game is not  
7 transformative because the games’ “depiction of No Doubt performing songs is motivated by the  
8 commercial interest in using the band’s fame to market Band Hero”); *see also EA Victory Over*  
9 *Ex-NFL Players Should Be Reversed*, by Ron Katz (published in Law360, dated August 27, 2018)  
10 attached as exhibit 1 to Plaintiffs’ Request for judicial Notice (“RJN”). As set forth in detail  
11 below, and acknowledged in this Court’s contemporaneous Order denying EA’s Motion for  
12 Summary Judgment (“Order Denying MSJ”), EA unequivocally suggests to consumers that the  
13 former NFL players who played for those historic teams represented in *Madden NFL* are in the  
14 video games. *See* Order Denying MSJ at p. 5 (Dkt. 386). As the *Midler* Court makes clear and  
15 contrary to this Court’s holding, EA’s conduct of suggesting that the former NFL players are in  
16 *Madden NFL* is enough to state a misappropriation claim, and it is “irrelevant” whether each class  
17 member can be identified within the game. *See Midler*, 849 F.2d at 463 (citing *Motschenbacher*,  
18 498 F2d at 424).

19         Second, even if the law required that Class members show they are identifiable in Madden  
20 NFL –which it does not – Plaintiffs respectfully submit that the Court erred by manifestly failing  
21 to consider the evidence cited by Plaintiffs demonstrating that such an issue presents a common  
22 [not individual] issue for the class. Specifically, the evidence establishes that EA employed a  
23 common scheme regarding how former NFL players’ attributes, ratings, and position appear in  
24 *Madden NFL*. Therefore, contrary to the Court’s holding, the issue of whether *Madden NFL*  
25 provides sufficient identifiable information to state a claim for misappropriation is a common  
26 issue for the class, not an individual one. *See e.g. Vinci v. American Can Co.*, 9 Ohio St. 3d. 98,  
27 102 (1984) (certifying right of publicity class action brought by Olympic athletes and finding  
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1 common issues predominate because “the injuries sustained by the class flow from identical  
2 operative facts, i.e. the appellants 1980 Dixie Limited Edition Olympic cups promotion”).

3 Accordingly, this Court should reconsider the Order denying class certification and issue a  
4 new order certifying the class.

## 5 **II. STATEMENT OF FACTS RELEVANT TO THE MOTION.**

6 Plaintiffs’ motion for class certification proffered evidence and argument establishing that  
7 EA “imported the physical characteristics (i.e. height, weight, skin tone, etc.) and biographical  
8 attributes (e.g. players’ ages, NFL experience, etc.) for former NFL players [from official team  
9 rosters]... and pasted them into the corresponding virtual player in *Madden NFL* (i.e. the player in  
10 the same position and same team as the former NFL player)” *See e.g.* Plaintiffs Motion for Class  
11 Certification (“Plaintiffs MCC”) at pp. 3-4 and evidence cited therein. In fact, EA’s player  
12 databases contain columns listing the “real first name” and “real last name” of each former NFL  
13 player that appears in *Madden NFL*. *Id.* at p. 4. In addition, Plaintiffs proffered evidence,  
14 including EA’s depth Charts for *Madden NFL*, demonstrating that “*Madden NFL*  
15 identifies where each historic player appears on the depth chart of the team for the position that  
16 they play” – i.e. a former NFL player who was the starting quarterback for a historic team  
17 accurately appears as the starting quarter back in *Madden NFL* for that historic team. *See*  
18 Spreadsheet Appendix and evidence cited therein.

19 Plaintiffs also provided evidence establishing that EA “assigned various ratings to the  
20 historic player characters – such as speed, arm strength, accuracy, catching ability, etc. – so that the  
21 virtual player characters in *Madden NFL* impersonate the way that their real-life counterparts  
22 played.” Plaintiffs’ MCC p. 4. Furthermore, Plaintiffs provided the Court with internal EA  
23 documents demonstrating that EA “purposefully provided accurate attributes and player ratings on  
24 a class-wide basis so that consumers could identify the former NFL players despite its scrambling  
25 of [player] numbers.” *Id.* p. 6. For example, in one document provided to the Court, EA’s  
26 Executive Producer for *Madden NFL*, Jeremy Strauser, responds to an inquiry from another EA  
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1 employee who noted that a historic player’s jersey number was not accurate in *Madden NFL* as  
2 follows:

3           This is as Designed. . . . If the user wants his favorite player to be accurate, the  
4           option to edit is available. It should be noted that the player ratings and  
5           attributes are applicable to the actual players.

6 *Id.* at p. 6.

7           Next, Plaintiffs provided evidence establishing that EA advertised its use of former NFL  
8           players’ likenesses in *Madden NFL* and its feature allowing users to input the formers NFL  
9           players’ names into the games:

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

15 *See* Plaintiffs MCC at p. 6.

16           EA’s marketing of *Madden NFL*’s simulation of real NFL teams and the actual players on  
17           those teams was so prolific that in briefing before the United States Supreme Court EA bragged  
18           that “[t]he Madden titles are successful because they allow consumers to simulate play involving  
19           any of the 32 NFL teams, using real NFL players and real NFL coaches.” *See e.g.* Plaintiffs’  
20           MCC pp. 2-3 (citing EA’s Amicus Brief in *American Needle v. NFL*).

21 **III. ARGUMENT**

22 **A. The Court Manifestly Failed to Consider Dispositive Legal Authority Holding That A  
23 Plaintiff is Not Required to Show He is Identifiable in the Defendant’s Work to State  
24 a Misappropriation Claim.**

25           This Court should reconsider its Order denying class certification because the Court  
26           erroneously held that each class member is required to “sho[w] that game users readily identify  
27           him [in *Madden NFL*]” to state a claim for common law misappropriation and failed to consider  
28           dispositive authority cited by Plaintiffs holding otherwise. *See* Cert Order p. 5 (Dkt. 387).  
Specifically, as discussed above, contrary to this Court’s holding, in *Midler* the Ninth Circuit held  
that:

1 “California will recognize an injury from ‘an appropriation of the attributes of  
2 one’s identity.’...it was irrelevant that [the plaintiff] could not be identified in  
3 the ad. The ad suggested that it was he. The ad did so by emphasizing signs  
and symbols associated with him.”

4 *Midler*, 849 F.2d at 463 (citing *Motschenbacher*, 498 F.2d at 824); Plaintiffs’ Reply Brief p. 13  
5 (citing same) (Dkt 360). Similarly, “[i]n *White v. Samsung Elec. Am., Inc.*, 971 F.2d. 1395, 1399  
6 (9th Cir. 1992), [the Ninth Circuit] held that the right of publicity extends not just to name,  
7 likeness, voice, and signature of a famous person, but to anything at all that evokes that person’s  
8 identity.” *Wendt*, 197 F.2d at 1285 (Judge Kozinski’s dissent to order denying petition for  
9 rehearing). In fact, both the Supreme Court of the United States and the Supreme Court of  
10 California have noted that "what may be the strongest case for a right of publicity" involves "the  
11 appropriation of the very activity by which the entertainer acquired his reputation in the first  
12 place." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 532, 576 (1977); *see*  
13 *Comedy III Prod. Inc. v. Saderup*, 25 Cal. 4th 387, 402 (2001) ("[T]he court recognized that  
14 the Elvis impersonation, as in *Zacchini*, represented 'what may be the strongest case for a 'right  
15 of publicity' ...").

16 As this Court notes in its Order Denying MSJ, both this Court and the Ninth  
17 Circuit have previously recognized that this action precisely fits the “strongest case for  
18 right of publicity” on a class-wide basis because “plaintiffs’ likenesses are shown  
19 engaged in the activity – playing football [in the NFL] – which earned them fame”. *See*  
20 Order Denying MSJ p. 6 (Dkt. 386). That Order further holds that: “EA unquestionably  
21 marketed the ‘historical teams as providing the players [users] the ability to engage in realistic  
22 recreations of the actual teams ... and [that] various physical and performance characteristics [i.e.  
23 heights, weights etc.] and performance characteristics [i.e. ratings] were reflected in the [former  
24 NFL Player] avatars.” *Id.* p. 5. Furthermore, the Order Denying MSJ notes that EA  
25 designed and marketed a feature allowing consumers to input the former NFL Class  
26 Members’ names into their *Madden NFL* avatars and that “Plaintiffs proffer evidence that  
27 members of the public took advantage of this features.” *Id.* In summary, there can be no  
28 dispute that EA suggested to its consumers that the former NFL players who played on

1 the “historic” teams are in the *Madden NFL* video games by, among other things: (1)  
2 designing and marketing *Madden NFL* as a simulation of the real NFL teams and NFL players; (2)  
3 naming the feature at issue “historic teams,” and referring to specific historical teams (e.g. the  
4 “1979 Los Angeles Rams”); (3) systematically including the former NFL players’ physical and  
5 biographical characteristics in their *Madden NFL* avatars; and (4) permitting users to input the  
6 former NFL players’ names into their avatars. Under binding Ninth Circuit precedent such  
7 conduct is sufficient to state a common law misappropriation claim, and contrary to this Court’s  
8 holding, it is “irrelevant” whether each class member can be identified within the *Madden NFL*.  
9 *See Midler*, 849 F.2d at 463 (citing *Motschenbacher*, 498 F2d at 424).

10 **B. The Court Should Reconsider Its Order Because It Failed to Consider Dispositive**  
11 **Evidence and Argument and Based Thereon Erroneously Held that an Issue**  
12 **Common to the Class is an Individual Issue.**

13 As set forth above, and discussed in the Court’s Order Denying MSJ, Plaintiffs presented  
14 the Court with evidence and argument establishing that EA employed a common scheme of  
15 literally representing former NFL players’ physical and biographical characteristics and  
16 impersonating their play. However, the Court’s order fails to mention or address any such  
17 evidence. Instead, the order broadly states that:

18 Here, plaintiffs have pointed to no significant common issues of law or fact that  
19 bear on each former NFL players’ potential claim for misappropriation of  
20 identity. While the players’ individual claims would arise in the common  
21 context of the *Madden* game, the overlap in the evidence needed to prove each  
22 claim would be limited to matters of general background and would be largely  
23 uncontested.

24 The Court’s ruling is unclear because its fails to identify or address any of the Rule 23(b) evidence  
25 and argument that Plaintiffs proffered in support of the motion for class certification.

26 Next, the Court holds that:

27 for a player to prevail, he must show that there is an avatar used in the game that  
28 is sufficiently identifiable as him to constitute a misappropriation...  
...Whether each player has a claim or not turns on the specific characteristics of  
the player’s identity and whether he can be identified by virtue of how those  
characteristics have been reflected in his avatar. EA’s potential liability to any  
former NFL player cannot be determined on a class-wide basis.

1 Order pp. 5-6. Here, the Order demonstrates the Court’s manifest failure to consider dispositive  
2 evidence and argument presented by Plaintiffs in several respects. First, as discussed above,  
3 contrary to the Court’s holding, Class members are not required to show that they are identifiable  
4 in *Madden NFL* to state a claim for misappropriation. Second, even if the Class members were  
5 required to show identifiability in the Madden NFL games, such an issue is common to the class  
6 based upon EA’s common scheme of literally depicting former NFL players in *Madden NFL*.  
7 Specifically, because EA employed a common scheme of: (1) representing former NFL players’  
8 attributes (i.e. heights, weights, age, NFL experience, skin tone etc.) in *Madden NFL* by cutting  
9 and pasting them from official team rosters; (2) accurately placing former NFL players’ avatars in  
10 the correct teams and in the correct position; and (3) accurately simulating their play through a  
11 common ratings system; the issue of whether such conduct is sufficient to “constitute a  
12 misappropriation” is a common question to the class, not an individual one. *See e.g. Vinci*, 9 Ohio  
13 St. 3d. at 102. Indeed, the nature of the common question presented is perfectly illustrated in EA’s  
14 internal documents wherein EA expressly admits that it specifically designed the historic player  
15 characters to have “accurate attributes and ratings” precisely so that users of *Madden NFL* can  
16 identify the former NFL players and utilize the feature in the game allowing them to input the  
17 former NFL players real names:

18           This is as Designed.(sic) ...If the user wants his favorite player to be accurate,  
19           the option to edit is available. It should be noted that the player ratings and  
                  attributes are applicable to the actual players.

20 *See* Plaintiff’s MCC at p. 6. Furthermore, as the Court notes in its Order Denying MSJ, “Plaintiffs  
21 presented evidence that members of the public in fact took advantage of those features.” Order  
22 Denying MSJ p. 5 (Dkt. 386). In other words, the evidence establishes not only that EA employed  
23 a common scheme to provide accurate ratings and attributes so that the former NFL players are  
24 identifiable to users, but also that EA’s scheme worked as intended and that users can and did  
25 identify the former NFL players based upon the data within the game. *Id.*

26           Accordingly, the Court plainly erred by holding that whether *Madden NFL* provides  
27 sufficient identifiable information to constitute misappropriation presents a predominantly  
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1 individual instead of common issue and therefore denying class certification.

2 **CONCLUSION**

3 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this  
4 motion for leave, reconsider its order denying class certification, and issue a new order granting  
5 certification of the class.

6 Dated: August 30, 2018

HENRI LAW GROUP

7  
8 By: /s/ Brian D. Henri  
BRIAN D. HENRI  
9 Attorneys for Retired NFL Plaintiffs

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