

1 KEKER, VAN NEST & PETERS LLP  
 R. JAMES SLAUGHTER - #192813  
 2 rslaughter@keker.com  
 R. ADAM LAURIDSEN - #243780  
 3 alauridsen@keker.com  
 NICHOLAS D. MARAIS - #277846  
 4 nmarais@keker.com  
 CHESSIE THACHER - #296767  
 5 cthacher@keker.com  
 633 Battery Street  
 6 San Francisco, CA 94111-1809  
 Telephone: 415 391 5400  
 7 Facsimile: 415 397 7188

8 Attorneys for Defendant  
 ELECTRONIC ARTS INC.

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

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

15 Plaintiffs,

16 v.

17 ELECTRONIC ARTS INC.,

18 Defendant.

Case No. 3:10-cv-3328-RS (DMR)

**REPLY IN SUPPORT OF DEFENDANT  
 ELECTRONIC ARTS INC.'S MOTION  
 FOR SUMMARY JUDGMENT**

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

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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<u>Page</u>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND.....	2
III. ARGUMENT .....	3
A. Avatars Purportedly Depicting Plaintiffs Are Not Identifiable .....	3
B. Plaintiffs’ Claims Are Barred By the First Amendment.....	5
1. Plaintiffs have not overcome the First Amendment’s presumption against content-based restrictions on expressive works.....	6
2. EA’s alleged inclusion of real-life elements in <i>Madden NFL’s</i> historic team feature is categorically protected by the First Amendment.....	8
3. <i>Madden NFL</i> is transformative. ....	9
C. Plaintiffs’ Claims Are Preempted by the Copyright Act .....	11
D. Plaintiffs’ Ancillary Claims Fail as a Matter of Law.....	11
1. Plaintiffs’ UCL claim fails because Plaintiffs do not have a vested ownership interest in EA’s profits. ....	11
2. Plaintiffs’ offer no evidence to support their conversion or trespass against chattels claims.....	13
3. Plaintiffs do not contest EA’s motion for summary judgment of their unjust enrichment claim.....	14
E. Only <i>Madden NFL 09</i> Falls Within the Statute of Limitations .....	14
IV. CONCLUSION.....	15

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Federal Cases**

*Brown v. Entm’t Merchs. Ass’n*  
564 U.S. 786 (2011)..... 1, 5

*C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media*  
505 F.3d 818 (8th Cir. 2007) ..... 9

*Celotex Corp. v. Catrett*  
477 U.S. 317 (1986)..... 3, 13

*Davis v. Electronic Arts Inc.*  
775 F.3d 1172 (9th Cir. 2015) ..... 6, 7, 9, 13

*Davis v. Electronic Arts Inc.*  
No. 10–03328 RS., 2012 WL 3860819 (N.D. Cal. Mar. 29, 2012)..... 6, 9, 10

*Fraley v. Facebook*  
830 F. Supp. 2d 785 (N.D. Cal. 2011) ..... 11, 12

*Groupion, LLC v. Groupon, Inc.*  
859 F. Supp. 2d 1067 (N.D. Cal. 2012) ..... 12

*Henley v. Dillard Dep. Stores*  
46 F. Supp. 2d 587 (N.D. Tex. 1999) ..... 3

*In re NCAA Student-Athlete Name & Licensing Litig.*  
724 F.3d 1268 (9th Cir. 2013) ..... 7, 8

*Kremen v. Cohen*  
337 F.3d 1024 (9th Cir. 2003) ..... 13, 14

*Maloney v. T3 Media, Inc.*  
853 F.3d 1004 (9th Cir. 2017) ..... 11

*Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*  
74 F. Supp. 3d 1134 (N.D. Cal. 2014) ..... 12

*Motschenbacher v. R.J. Reynolds Tobacco Co.*  
498 F.2d 821 (9th Cir. 1972) ..... 4

*Newcombe v. Adolf Coors Co.*  
157 F.3d 686 (9th Cir. 1998) ..... 3, 4, 5

*Pesina v. Midway Mfg. Co.*  
948 F. Supp. 400 (N.D. Ill. 1996) ..... 3

*Ramirez v. Ghilotti Bros. Inc.*  
941 F. Supp. 2d 1197 (N.D. Cal. 2013) ..... 14, 15

1 *Sarver v. Chartier*  
 813 F.3d 891 (9th Cir. 2016) ..... 6, 7, 10

2

3 *Waits v. Frito-Lay, Inc.*  
 978 F.2d 1093 (9th Cir. 1992) ..... 3

4 *White v. Samsung Electronics Am., Inc.*  
 971 F.2d 1395 (9th Cir. 1992) ..... 4

5

6 *Williams Electronics, Inc. v. Arctic International, Inc.*  
 685 F.2d 870 (3d Cir. 1982)..... 2, 3

7 *Zacchini v. Scripps-Howard Broadcasting Co.*  
 433 U.S. 562 (1977)..... 6, 7

8

9 **State Cases**

10 *Comedy III Prods., Inc. v. Gary Saderup, Inc.*  
 25 Cal. 4th 387 (2001) ..... 10

11 *de Havilland v. FX Networks, LLC*  
 B285629, 2018 WL 1465802 (Cal. Ct. App. Mar. 26, 2018) ..... 1, 6, 8, 9, 10

12

13 *Guglielmi v. Spelling-Goldberg Prods*  
 25 Cal. 3d 860 (1979) ..... 6, 8, 9

14 *Kirby v. Sega of Am., Inc.*  
 144 Cal. App. 4th 47 (2006) ..... 1

15

16 *Korea Supply Co. v. Lockheed Martin Corp.*  
 29 Cal. 4th 1134 (2003) ..... 12

17 *Winter v. DC Comics*  
 30 Cal. 4th 881 (2003) ..... 10

18

19 **Federal Rules**

20 Fed. R. Civ. P. 56..... 12

21

22

23

24

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1 **I. INTRODUCTION**

2 The core of Plaintiffs' opposition to EA's summary judgment motion is the false  
3 presumption that the law treats video games differently than other expressive works. It does not.

4 The Supreme Court unequivocally ended that debate in *Brown v. Entm't Merchs. Ass'n*,  
5 564 U.S. 786 (2011), where it confirmed that "[l]ike the protected books, plays, and movies that  
6 preceded them, video games communicate ideas—and even social messages—through many  
7 familiar literary devices (such as characters, dialogue, plot, and music) and through features  
8 distinctive to the medium (such as the player's interaction with the virtual world). That suffices to  
9 confer First Amendment protection." *Id.* at 790; *see also Kirby v. Sega of Am., Inc.*, 144 Cal.  
10 App. 4th 47, 58 (2006) ("Video games are expressive works entitled to as much First Amendment  
11 protection as the most profound literature.").

12 The protection afforded by the First Amendment is appropriately broad and precludes  
13 right-of-publicity claims asserted against expressive works. The California Court of Appeal  
14 recently confirmed this protection in a case challenging the portrayal of a real person in a TV  
15 movie. *See de Havilland v. FX Networks, LLC*, B285629, 2018 WL 1465802 (Cal. Ct. App. Mar.  
16 26, 2018). *De Havilland* held:

17 Authors write books. Filmmakers make films. Playwrights craft plays. And  
18 television writers, directors, and producers create television shows and put them on  
19 the air -- or, in these modern times, online. The First Amendment protects these  
20 expressive works and the free speech rights of their creators. Some of these works  
21 are fiction. Some are factual. And some are a combination of fact and fiction...

22 Books, films, plays, and television shows often portray real people. Some are  
23 famous and some are just ordinary folks. Whether a person portrayed in one of  
24 these expressive works is a world-renowned film star -- "a living legend" -- or a  
25 person no one knows, she or he does not own history. Nor does she or he have the  
26 legal right to control, dictate, approve, disapprove, or veto the creator's portrayal  
27 of actual people.

28 *Id.* at \*1. Add the words "video games" to the *de Havilland* court's introductory list of expressive  
works—as *Brown* requires—and the only conclusion is that the First Amendment bars Plaintiffs'  
right-of-publicity claims attacking *Madden NFL 09*.

Similarly, video games must be treated in the same manner as other copyrighted works for  
purposes of copyright preemption. The only question left open from EA's motion to dismiss on

1 copyright preemption was whether, in the video game medium, the avatars were sufficiently  
2 “fixed” to be afforded copyright protection. EA proved in its opening papers that the avatars are  
3 fixed (*see* ECF 345-2 (“Cowan Decl.”); *Williams Electronics, Inc. v. Arctic International, Inc.*,  
4 685 F.2d 870 (3d Cir. 1982)) and Plaintiffs do not respond at all to this point. Plaintiffs’ claims  
5 are preempted by the Copyright Act.

6 Finally, but not least, Plaintiffs cannot carry their burden on identifiability—which is a  
7 central element of their right-of-publicity claim. The three Plaintiffs must offer evidence that  
8 each of them is identifiable by more than a *de minimus* number of people other than themselves.  
9 Plaintiffs offer a hodge-podge of Internet posts purportedly establishing identifiability. Not only  
10 is that evidence inadmissible, but none of it concerns the Plaintiffs. EA is entitled to summary  
11 judgment because the Plaintiffs cannot prove they are identifiable in *Madden NFL 09*.

## 12 **II. FACTUAL BACKGROUND**

13 Plaintiffs’ factual background section repeatedly relies on evidence unrelated to the  
14 historic teams or the game at issue. Plaintiffs argue that EA generally sought to “authentically”  
15 represent NFL players, but the evidence Plaintiffs cite concerns *Madden NFL’s* current teams—  
16 not historic teams. *See* ECF 358-1 (“Op.”) at 3-4. When Plaintiffs do cite evidence regarding  
17 historic teams, it does not concern the game at issue, *Madden NFL 09*, but instead relates to  
18 games released in the late 1990s and early 2000s, years before the period covered by Plaintiffs’  
19 claims. *See, e.g.*, Op. at 4-10 (citing ECF 353-2 (“Henri Decl.”), Ex. 15 (2004 email); Ex. 12  
20 (testimony discussing 1996 game); Ex. 20 (1998 email)).

21 The witnesses Plaintiffs rely upon in an attempt to establish that EA sought to depict real  
22 retired NFL players actually testified the opposite. *See, e.g.*, Declaration of Adam Lauridsen  
23 (“Lauridsen Decl.”), Ex. A (Carty Depo. at 64:15-23 (“[T]he historic teams were not supposed to  
24 be an accurate representation of real players.”)); Ex. B (Strauser Depo. at 67:4-11 (“After 2003,  
25 we were not seeking to be authentic with the player characters.”)); ECF 345-1 (“Slaughter  
26 Decl.”), Ex D (Moore Depo. at 98:15-20 (“[N]o one would have had the time to do that  
27 [determine whether the heights, weights, ages, positions for the historic teams were accurate  
28 representations of real players], and it wasn’t a priority. I think the only thing that might have

1 been spot-checked was: Do they have human being heights and weights.”)). As established by  
 2 EA’s unrebutted analysis of twenty randomly selected historic teams from *Madden NFL 09*, the  
 3 vast majority of historic team avatars do not have counterparts on the real teams with the same  
 4 heights, weights, years played and positions. ECF 345 (“Mot.”) at 9; Slaughter Decl., Ex. L  
 5 (NERA Report).<sup>1</sup> Plaintiff DuPree correctly acknowledged that *Madden NFL* “scrambled the  
 6 [retired players] into anonymity.” Slaughter Decl., Ex. O at 222.

### 7 **III. ARGUMENT**

#### 8 **A. Avatars Purportedly Depicting Plaintiffs Are Not Identifiable**

9 EA established in its motion the “absence of evidence,” *Celotex Corp. v. Catrett*, 477 U.S.  
 10 317, 325 (1986), that would prove that the named Plaintiffs were “readily identifiable”<sup>2</sup> by more  
 11 than a *de minimus* number of people.<sup>3</sup> See Mot. at 6-8. It was Plaintiffs’ burden to go beyond the  
 12 pleadings and adduce competent, admissible evidence that “set[s] forth specific facts showing that  
 13 there is a genuine issue for trial.” *Celotex*, 477 U.S. at 322 n.3. Plaintiffs undisputedly fail to  
 14 carry their burden.

15 Plaintiffs’ only purported evidence on “identifiability” is their own say-so. See Op. at 18  
 16 (citing depositions of Plaintiffs Ferragamo, Davis and DuPree). This is not legally sufficient at

17  
 18 <sup>1</sup> Plaintiffs baselessly accuse EA of “rig[ging]” the NERA Report’s analysis. Opp. at 1. EA used  
 19 the same official team media guides that Plaintiffs claim the Court may rely upon. See, e.g.,  
 20 Henri Decl., Ex. 21. And NERA conducted a separate analysis to account for any rosters  
 21 potentially featuring preseason-only players. NERA Report ¶ 19. Excluding such players had no  
 22 material impact on the analysis. See *id.* & ECF 177-8 (NERA Report Exhibits) at Ex. 6.

21 <sup>2</sup> The “readily identifiable” requirement applies to California common-law claims. See  
 22 *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

22 <sup>3</sup> See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992); *Henley v. Dillard Dep.*  
 23 *Stores*, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999); *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 400,  
 24 42 (N.D. Ill. 1996). Plaintiffs ignore *Pesina* and fail to distinguish *Waits* and *Henley*. In *Waits*,  
 25 the court held that “when voice is a sufficient indicia of a celebrity’s identity, the right of  
 26 publicity protects against its imitation for commercial purposes without the celebrity’s consent.”  
 27 978 F.2d at 1098. Here, similarly, the Court must test whether the accused parts of EA’s avatars  
 28 are “sufficient indicia of a celebrity’s identity” to be actionable. And *Henley* does not, as  
 Plaintiffs argue, contradict EA’s position. The *Henley* court merely held that the identifiability  
 requirement is not as high as in trademark law—where “a significant percentage of potential  
 customers [must] be likely to be confused.” 46 F. Supp. 2d at 595 n.7. The court still held, as  
 here, that there must be more than merely plaintiff or a “*de minimus* number of persons.” *Id.* at  
 595 (“The results of this survey clearly prove that Don Henley was reasonably identifiable in  
 Defendant’s ad to more than a *de minimus* number of persons.”).

1 summary judgment; otherwise, any right-of-publicity plaintiff could survive by simply attesting  
2 that they believe that a defendant has depicted them.<sup>4</sup> In contrast, EA established through a  
3 random survey of 1,253 adults *who played football video games* when *Madden NFL 09* was  
4 released that the vast majority of consumers did not associate the avatars at issue with any real  
5 person. Mot. at 7-8. Those consumers who did identify the historic team avatars with real people  
6 were far more likely to identify the avatars as persons other than Plaintiffs. *See* ECF 345-3 (Decl.  
7 of E. Deborah Jay), Ex. C (Jay Report) at 6-8, Table 1. After eight years of litigation, the only  
8 specific evidence Plaintiffs put forth regarding identifiability is their own opinion. That is not  
9 enough.

10       Instead of putting forth evidence to meet their burden, Plaintiffs argue that “the common  
11 law right of publicity does not require Plaintiffs to demonstrate that the public identifies the  
12 avatars in *Madden NFL* as them.” Op. at 15. Not so. In fact, each of the cases Plaintiffs cite  
13 point to evidence that a broader group—not just the plaintiff himself—identifies the plaintiff in  
14 the challenged material. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the image at issue  
15 “displays several uniquely distinguishing features” and “[s]everal of plaintiff’s affiants who had  
16 seen the commercial on television had immediately recognized plaintiff’s car.” 498 F.2d 821,  
17 822 & 827 (9th Cir. 1972). In *Newcombe v. Adolf Coors Co.*, the plaintiff, “along with family,  
18 friends and former teammates, immediately recognized the pitcher featured in the advertisement.”  
19 157 F.3d 686, 689 (9th Cir. 1998). And in *White v. Samsung Electronics Am., Inc.*, the aspects of  
20 the advertisement left “little doubt about the celebrity the ad is meant to depict” because the  
21 plaintiff was “the only one” who could be associated with them all. 971 F.2d 1395, 1399 (9th  
22 Cir. 1992). These cases establish that actionable appropriations of identity must be supported by  
23 evidence that the public associates the depiction with the plaintiff. *See Motschenbacher*, 498 F.2d  
24 at 827 (“[T]hese markings were not only peculiar to the plaintiff’s cars but they caused some  
25 persons to think the car in question was plaintiff’s and to infer that the person driving the car was

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26  
27 <sup>4</sup> Plaintiffs cite various Internet posts to support their identifiability argument. Setting aside that  
28 the evidence is not admissible, *none* of it includes evidence that any consumer identifies any  
avatar in *Madden NFL 09* as one of the named Plaintiffs.



1 the plaintiff.”); *Newcombe*, 157 F.3d at 692 (“[B]ased on the record before us, Newcombe is the  
2 only one who has such a stance.”). Again, Plaintiffs lack any such comparable evidence.

3 Finally, Plaintiffs’ declaration from their purported expert, Jonathan Levav (“Levav”),  
4 does nothing to meet their burden. *See* ECF 358-2 (“Levav Decl.”). Levav did not conduct a  
5 survey of his own or render any opinion (let alone a qualified and admissible one) regarding  
6 whether the avatars are identifiable.<sup>5</sup>

7 Indeed, Levav’s declaration is only useful as further evidence that Plaintiffs’ claims  
8 cannot be maintained as a class action. Levav suggests—contrary to Plaintiffs’ Motion for Class  
9 Certification—that avatars cannot be identified by viewing height, weight, age and years played  
10 information. *See* Levav Decl. ¶ 9. Instead, he claims, persons must actually play the *Madden*  
11 *NFL 09* game with the specific avatar at issue to make that determination. *Id.* at ¶¶ 10, 13. Levav  
12 states that persons would need to understand “the way [an avatar] plays on the field” before they  
13 could decide whether an avatar is identifiable. *Id.* at ¶ 10. Few things could be more ill-suited for  
14 class-wide adjudication than the analysis Plaintiffs advocate: the one-by-one consideration of  
15 individual avatars’ performance during *Madden NFL 09* gameplay.

### 16 **B. Plaintiffs’ Claims Are Barred By the First Amendment**

17 Plaintiffs do not dispute that *Madden NFL 09* is an expressive work that receives the same  
18 First Amendment protection as a film, television show or book. *See Brown v. Entm’t Merchs.*  
19 *Ass’n*, 564 U.S. 786, 790 (2011). But rather than grapple with the limits the First Amendment  
20 places on Plaintiffs’ claims, Plaintiffs argue that all First Amendment arguments were resolved

21 <sup>5</sup> Levav is not qualified to criticize the Jay Report or provide opinions regarding appropriate  
22 procedures for right-of-publicity surveys. Plaintiffs do not establish that Levav has ever served as  
23 an expert witness, conducted a trademark or a right-of-publicity survey, or undertaken other work  
24 that would qualify him as an expert in the preparation and implementation of consumer surveys.  
25 His declaration should be given no weight. Even if considered, Levav’s criticisms of Dr. Jay’s  
26 survey are not well-taken. Dr. Jay screened survey participants to question only people likely to  
27 have played football video games such as *Madden NFL 09*. It was not, as Levav suggests, a  
28 group unconnected to likely consumers of the game. *See* Levav Decl. ¶ 6. Moreover, Levav  
suggests that survey participants should have been informed that avatar jersey numbers did not  
correspond to jersey numbers worn by real players. *Id.* at ¶ 12. But the legal question is whether  
the avatars are readily identifiable as they would have been viewed by the public. Informing  
survey respondents that the jersey numbers do not correspond to jersey worn by real players  
would not be presenting the game as it would have been played at the time and therefore the  
results of any such survey would not shed light on whether the avatars were readily identifiable.

1 years ago on EA’s Motion to Dismiss. Op. at 19-20. Not so. The legal landscape has changed,  
 2 with both the Ninth Circuit and California Court of Appeals further explaining the First  
 3 Amendment limits on right-of-publicity claims. See Mot. at 11-12. And factually, the Court’s  
 4 and Ninth Circuit’s decisions on EA’s motion to dismiss assumed as true Plaintiffs’ allegations.<sup>6</sup>  
 5 In the years of discovery since Plaintiffs filed their complaint, EA has developed a factual record  
 6 that differs in numerous material ways from Plaintiffs’ allegations. Based on these developments,  
 7 in the law and the factual record, summary judgment is appropriate under three distinct First  
 8 Amendment theories.

9 **1. Plaintiffs have not overcome the First Amendment’s presumption**  
 10 **against content-based restrictions on expressive works.**

11 The Ninth Circuit recently confirmed that right-of-publicity claims targeting expressive  
 12 works are content-based restrictions on speech and thus presumptively unconstitutional. *Sarver v.*  
 13 *Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). To justify such a restriction, the plaintiff must show  
 14 a “compelling state interest in preventing the defendants’ speech.” *Id.* at 906. Plaintiffs show no  
 15 such interest. Indeed, the First Amendment protects the creators of expressive works such as EA,  
 16 “the storytellers and artists who take the raw materials of life—including the stories of real  
 17 individuals, ordinary and extraordinary—and transform them into art, be it articles, books,  
 18 movies, or plays.” *Id.* at 905; see also *de Havilland*, 2018 WL 1465802, at \*6 (“Our courts have  
 19 often observed that entertainment is entitled to the same constitutional protection as the  
 20 exposition of ideas.” (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 862  
 21 (1979))).

22 In *Sarver*, the Ninth Circuit acknowledged that right-of-publicity claims may be  
 23 maintained when a work is “tantamount to ‘preventing [a plaintiff] from charging an admission  
 24 fee’ to view what was ‘the product of [his] own talents and energy.’” *Id.* at 904 (quoting *Zacchini*  
 25

26 <sup>6</sup> *Davis v. Electronic Arts Inc.* (“*Davis II*”), 775 F.3d 1172, 1176 n.1 (9th Cir. 2015) (“For  
 27 purposes of this appeal, EA concedes the *Madden NFL* series uses the plaintiffs’ likenesses.”);  
 28 *Davis v. Electronic Arts Inc.* (“*Davis I*”), No. 10–03328 RS., 2012 WL 3860819, at \*1 (N.D. Cal.  
 Mar. 29, 2012) (“Notably, for purposes of its present motions, EA accepts plaintiffs’ allegations  
 that it used some protectable element of plaintiffs’ likenesses in *Madden NFL*.”)).

1 *v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977)). In *Zacchini*, “the broadcast  
2 of a film of [Zacchini’s] entire act pose[d] a substantial threat to the economic value of that  
3 performance,’ and protection provided an ‘economic incentive’ for him to develop such a  
4 performance of public interest.” *Sarver*, 813 F.3d at 904 (quoting *Zacchini*, 433 U.S. at 575-79).  
5 But that is not the case here. Plaintiffs put forth no evidence that the *Madden NFL 09* historical  
6 team avatars capture their “entire act” or are a substitute for watching Plaintiffs actually play  
7 professional football. It is undisputed that the avatars do not share numbers, facial features or  
8 unique playing behaviors with Plaintiffs. The historic team avatars cannot be used to recreate  
9 Plaintiffs’ actual seasons, careers or performances—they allow game-players only to create  
10 fictionalized match-ups between teams from different eras. And there is no risk that the historic  
11 team avatars will lessen the economic incentive for Plaintiffs to develop their professional  
12 football careers, since Plaintiffs have been retired for decades. In short, EA’s creation of generic  
13 avatars for historic teams from past decades is not equivalent to a television station’s airing of a  
14 human cannonball’s entire act, depriving him of the ability to charge his audience admission.

15 Plaintiffs ignore this obvious distinction. Instead, they argue that their alleged avatars on  
16 the historic teams in *Madden NFL 09* are indistinguishable from the avatars on college teams  
17 included in EA’s *NCAA Football* that were the subject of *In re NCAA Student-Athlete Name &*  
18 *Licensing Litig.* (“*Keller*”). Op. at 21-22. That comparison does not hold, because it ignores the  
19 material distinctions that EA identified in its opening brief. Mot. at 12. The *Madden NFL 09*  
20 historic teams do not allow game-players to compete as *current* NFL players simulating the  
21 *current* professional season, as the Ninth Circuit held was possible for the college football and  
22 college players at issue in *Keller*. 724 F.3d 1268, 1271-72 (9th Cir. 2013). The *Madden NFL 09*  
23 historic team avatars do not wear the actual jersey numbers of real players, do not have the same  
24 “facial features” as real players, and do not model the “unique, highly identifiable playing  
25 behaviors” of real players—all material factors in the Ninth Circuit’s ruling in *Keller*. *Id.* When  
26 the Ninth Circuit considered this case at the pleading stage, it assumed all the same similarities  
27 between avatars and real players present in *Keller* were present in the *Madden NFL 09* historic  
28 teams. *Davis II*, 775 F.3d at 1177 n.2 (“EA does not seek to distinguish this case from *Keller*”).

1 Now, on a full evidentiary record, the differences between the current college team avatars in  
2 *Keller* and the NFL historic team avatars here are material and undisputed.

3 **2. EA’s alleged inclusion of real-life elements in *Madden NFL’s* historic**  
4 **team feature is categorically protected by the First Amendment.**

5 Separate from the presumption against content-based restrictions, expressive works that  
6 mix elements of real life with fiction—like docudramas and *Madden NFL 09’s* historic team  
7 feature—are categorically protected by the First Amendment from right-of-publicity claims.  
8 After EA filed its Motion (but before Plaintiffs filed their opposition), the California Court of  
9 Appeals issued an unequivocal affirmation of such First Amendment protection in *de Havilland*.  
10 2018 WL 1465802, at \*6-8. The plaintiff in *de Havilland* alleged that she did not grant  
11 permission to defendant “to use [her] name, identity[,] or image in any manner” in a docudrama  
12 television show. *Id.* at \*1. The lower court held that, “because [the show] tried to portray de  
13 Havilland as realistically as possible, the program was not ‘transformative’ under *Comedy III*  
14 *Productions* and therefore not entitled to First Amendment protection.” *Id.* But on appeal, the  
15 court rejected this transformative-use focused approach to the defendants’ realistic portrayal of de  
16 Havilland in the docudrama. “[T]his reasoning would render actionable all books, films, plays,  
17 and television programs that accurately portray real people. Indeed, the more realistic the  
18 portrayal, the more actionable the expressive work would be. *The First Amendment does not*  
19 *permit this result.*” *Id.* (emphasis added).

20 The California Court of Appeal’s decision in *de Havilland* is just the most recent case in a  
21 line of authority recognizing First Amendment protection for the inclusion of real-life elements in  
22 expressive works. In *Guglielmi*, the California Supreme Court established that “[w]hether the  
23 publication involved was factual and biographical or fictional, the right of publicity has not been  
24 held to outweigh the value of free expression . . . [Otherwise,] the creation of historical novels  
25 and other works inspired by actual events and people would be off limits to the fictional author.”  
26 25 Cal. 3d at 872. And in reviewing fantasy sports works—that use athletes’ names, likenesses  
27 and biographical data in “fantasy” works of entertainment—courts uphold broad First  
28 Amendment protection and expressly analogize the fantasy games to video games, like *Madden*

1 *NFL 09*. See, e.g., *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced*  
 2 *Media*, 505 F.3d 818, 823 (8th Cir. 2007). Plaintiffs’ opposition ignores *de Havilland*, *Guglielmi*  
 3 and the fantasy sports cases, failing to even cite them, let alone distinguish them. Because EA’s  
 4 dispositive argument goes un rebutted, the Court should grant summary judgment.

5 EA posed a hypothetical in its opening brief: “If a filmmaker cast generic-looking actors  
 6 as unnamed characters that shared Plaintiffs’ height, weight, age, and years of experience in a  
 7 docudrama about historic NFL teams, there would be little doubt that the First Amendment would  
 8 protect the filmmaker from Plaintiffs’ right of publicity claims.” Mot. at 15. Plaintiffs do not  
 9 answer this scenario, but the California Court of Appeals does: “The creators of *The People v.*  
 10 *O.J. Simpson: American Crime Story* can portray trial judge Lance Ito without acquiring his  
 11 rights. *Fruitvale Station*’s writer and director Ryan Coogler can portray Bay Area Rapid Transit  
 12 officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game*  
 13 *Change* without acquiring her rights.” *De Havilland*, 2018 WL 1465802, at \*8. The same  
 14 unequivocally holds true for *Madden NFL 09*: EA may create historic team avatars in *Madden*  
 15 *NFL 09* with the same heights and weights as Tony Davis, Vince Ferragamo and Tony DuPree  
 16 without acquiring their rights. Any other result would treat *Madden NFL 09* differently from  
 17 other expressive works, and that is not permitted.

### 18 **3. *Madden NFL* is transformative.**

19 The transformative-use test provides a third reason, distinct from the presumption against  
 20 content-based restrictions and the categorical protection of docudramas and similar works, for  
 21 granting summary judgment based on the First Amendment. When previously considering EA’s  
 22 transformative use defense on a motion to dismiss/anti-SLAPP motion, this Court and the Ninth  
 23 Circuit assumed the truth of Plaintiffs’ allegations. *Davis II*, 775 F.3d at 1176 n.1; *Davis I*, 2012  
 24 WL 3860819, at \*1. EA did not contest, for that motion only, that EA used Plaintiffs’ likeness.<sup>7</sup>  
 25 Based on Plaintiffs’ allegations, the Court concluded that “EA’s use of plaintiffs’ likenesses,  
 26

27 <sup>7</sup> In the *Davis* appeal, EA also did “not attempt to distinguish *Madden NFL* from *NCAA*  
 28 *Football*.” 775 F.3d at 1178. Now, EA has established several material differences between the  
 two games (Mot. at 12, 16)—all of which Plaintiffs ignore, and thus are undisputed.

1 though highly sophisticated, is the digital equivalent of transferring the Three Stooges’ images  
2 onto a t-shirt.” *Davis I*, 2012 WL 3860819, \*5. Now, undisputed facts from the fully developed  
3 factual record prove a different story.

4 Plaintiffs do not contest that the elements they claim EA misappropriated—their height,  
5 weight, age and years played—are only some of the “raw materials” from which the historic team  
6 avatars are created. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406  
7 (2001). This concession is dispositive. When the Court last considered the transformative-use  
8 defense, it did not have the benefit of a full factual record showing that the historic team avatars  
9 have generic faces and bodies; that they are comprised of dozens of other ratings and elements  
10 that are the subjective and creative work of EA’s game designers and programmers; and that they  
11 are used in fictional, counter-factual game situations, where teams from different eras compete  
12 against each other. Mot. at 16-17. This undisputed mix of fictional and allegedly real elements in  
13 EA’s expressive work is transformative. *De Havilland*, 2018 WL 1465802, at \*9 (“The fictitious,  
14 ‘imagined’ interview in which Zeta-Jones [portraying the plaintiff] talks about Hollywood’s  
15 treatment of women and the Crawford/Davis rivalry is a far cry from T-shirts depicting a  
16 representational, pedestrian, uncreative drawing of The Three Stooges.”). Even if certain *Madden*  
17 *NFL 09* historic team avatars are “less-than-subtle evocations” of actual NFL players, *see Winter*  
18 *v. DC Comics*, 30 Cal. 4th 881, 890 (2003), the other creative elements from which they are  
19 constructed and their use in fantasy “historical” match-ups render them transformative.

20 The Court need not reach the transformative use test to find that the First Amendment bars  
21 Plaintiffs’ claims. *Sarver*, 813 F.3d at 904 n.6; *de Havilland*, 2018 WL 1465802, at \*9 n.9.  
22 Because *Madden NFL 09* is an expressive work, Plaintiffs’ right-of-publicity claims are  
23 presumptively unconstitutional content-based restrictions on speech. Plaintiffs have not  
24 introduced evidence rebutting this presumption. But even if the Court applied the transformative-  
25 use test, Plaintiffs claims are barred because the elements that Plaintiffs claim EA  
26 misappropriated are only some of the “raw materials” from which the historic team avatars are  
27 created. *Comedy III*, 25 Cal. 4th at 406.

28 For all these reasons, Plaintiffs’ claims are barred by the First Amendment.

1           **C. Plaintiffs' Claims Are Preempted by the Copyright Act**

2           In its order on EA's motion to dismiss, the Court held that EA's alleged use of Plaintiffs'  
3 identities was not protected under the Copyright Act because it "was not fixed in a tangible  
4 medium of expression." ECF 317 ("MTD Order") at 4. EA established in its opening brief that  
5 courts have held the audiovisual elements of video games—such as the avatars that allegedly  
6 depict Plaintiffs—to be "fixed" as the term is interpreted under the Act, even when the game is  
7 interactive or some aspects of the element may appear to change based on game-player input.  
8 Mot. at 18; *see also* ECF 345-2 (Cowan Decl.). Thus, copyright preemption applies and  
9 Plaintiffs' claims are barred, just like the analogous claims in *Maloney v. T3 Media, Inc.*, 853  
10 F.3d 1004 (9th Cir. 2017).

11           Plaintiffs do not respond to EA's argument. Instead, Plaintiffs mischaracterize the Ninth  
12 Circuit's holding in *Maloney*, claiming that it bars the application of copyright preemption to  
13 video games. The Court already correctly rejected this argument:

14           Under the rule set out in *Maloney*, exemption from copyright preemption is only  
15 available when the likenesses are being used to promote a product or artistic work,  
16 either by appearing *on* merchandise, or in stand-alone advertising. Plaintiffs'  
17 argument that they have always been alleging EA used their likenesses *in* the  
18 games for financial gain misses the point. They have not alleged the images have  
19 been used in stand-alone promotional material, or *on* the "merchandise."

20           MTD Order at 3 n.3. Plaintiffs—not EA—"improperly seek[] to relitigate the identical argument  
21 this court considered and rejected." *See Op.* at 22.

22           **D. Plaintiffs' Ancillary Claims Fail as a Matter of Law**

23           **1. Plaintiffs' UCL claim fails because Plaintiffs do not have a vested  
24 ownership interest in EA's profits.**

25           Plaintiffs rely exclusively on *Fraley v. Facebook*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) to  
26 support their UCL claim. *See Op.* at 23. *Fraley*, however, is inapposite. There, plaintiffs alleged  
27 that they sustained economic loss "resulting from Facebook's failure to compensate them for their  
28 valuable endorsements." *Id.* at 811. Likening that unpaid compensation to unpaid wages, the  
court explained that because plaintiffs had alleged that they could "prove that their endorsement  
of commercial products to their Facebook Friends has concrete, quantifiable value for which they

1 are entitled to compensation,” they had sufficiently alleged a vested ownership interest in the  
2 unpaid compensation. *Id.* at 812. The court thus found that the relief sought was authorized by  
3 the UCL and permitted the claim to proceed.

4 Unlike the *Fraley* plaintiffs, however, Plaintiffs here are not seeking wrongfully withheld  
5 compensation for EA’s alleged use of their likenesses. Rather, Plaintiffs are seeking  
6 “disgorgement of EA’s profits.” ECF 231-1 (Second Amended Complaint) at ¶ 118. But  
7 Plaintiffs have no vested ownership interest in EA’s profits. *See Groupion, LLC v. Groupon,*  
8 *Inc.*, 859 F. Supp. 2d 1067, 1083 (N.D. Cal. 2012) (granting summary judgment where plaintiff  
9 had not submitted evidence showing that plaintiff “ha[d] any ownership interest of any of  
10 [defendant’s] profits.”); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,  
11 1150, 63 P.3d 937, 947 (2003) (disgorgement of profits “where the[] profits are neither money  
12 taken from a plaintiff nor funds in which the plaintiff has an ownership interest . . . is not an  
13 authorized remedy in an individual action under the UCL”). Plaintiffs therefore cannot succeed  
14 on their UCL claim.

15 Even if Plaintiffs sought compensation for EA’s alleged use of their likenesses (rather  
16 than EA’s profits, as their complaint seeks), their UCL claim would fail because they offer no  
17 evidence that their likenesses have “concrete, quantifiable value for which they are entitled to  
18 compensation.” *Fraley*, 830 F. Supp. 2d at 812. Unlike at the motion to dismiss stage, mere  
19 allegations are not sufficient to survive summary judgment. *Mil-Spec Monkey, Inc. v. Activision*  
20 *Blizzard, Inc.*, 74 F. Supp. 3d 1134, 1139 (N.D. Cal. 2014) (nonmovant must set forth “evidence,  
21 not speculation”); *see also* Fed. R. Civ. P. 56(c)(1)(B). Plaintiffs, however, have not offered any  
22 evidence to show that their likenesses have “concrete, quantifiable value.” *Fraley*, 830 F. Supp.  
23 2d at 812. Nor will Plaintiffs be able to do so at trial. There is no evidence in the record on  
24 which Plaintiffs can rely to prove the value of their likenesses, and Magistrate Judge Ryu recently  
25 ordered that Plaintiffs are precluded from “offering any lay testimony regarding the value of their  
26 names, images, identities, and/or likenesses, other than the information already provided in their  
27 responses.” ECF 356 (“Sanctions Order”) at 7-8. In fact, the record establishes that Plaintiffs’  
28 likenesses do not have value—the NFLPA never entered into a license on behalf of the former



1 players because, despite its efforts, no parties were interested in licensing their likenesses.  
 2 Lauridsen Decl., Ex. C (Nahra Depo Tr. at 19:18-20:13 (testifying that NFLPA never entered into  
 3 a group licensing agreement on behalf of former NFL players because “there wasn’t much  
 4 interest in that group because it didn’t contain, for the most part, those types of players that the  
 5 licensees wanted.”)).<sup>8</sup>

6 **2. Plaintiffs’ offer no evidence to support their conversion or trespass**  
 7 **against chattels claims.**

8 In its opening papers, EA established that Plaintiffs (1) do not have a cognizable property  
 9 interest that can support a claim for conversion or trespass; and (2) have no evidence that their  
 10 likenesses had value or that EA’s alleged use of their likenesses interfered with that value. Mot.  
 11 at 21-23. Plaintiffs undisputedly fail to meet their burden because they offer no evidence to rebut  
 12 EA’s arguments. *Celotex*, 477 U.S. at 322 n.3.

13 Instead, Plaintiffs argue only that there is no merger requirement under California law and  
 14 that, as a result, they can bring trespass and conversion claims based on the taking of intangible  
 15 property. Op. at 24. But, Plaintiffs misunderstand EA’s argument. EA does not argue that a  
 16 plaintiff may *never* base a conversion or trespass claim on intangible rights. To the contrary, EA  
 17 argues that “where the alleged interference is to an intangible interest...the plaintiff must prove  
 18 that the intangible property (1) is capable of precise definition; (2) is capable of exclusive  
 19 possession and control, and (3) the owner must have established a legitimate claim to  
 20 exclusivity.” Mot. at 21-22 (citing *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003)).  
 21 Plaintiffs make no attempt to establish that the “economic value in Plaintiffs names, images,  
 22  
 23

24 <sup>8</sup> The Ninth Circuit did not find, as Plaintiffs assert, that Plaintiffs’ likenesses have economic  
 25 value. See Op. at 23-24. Rather, the court (which decided *Davis* before discovery had begun and,  
 26 for the purposes of the motion, accepted all of Plaintiffs allegations as true) found only that  
 27 “having acknowledged the likenesses of current NFL players carry substantial commercial value,  
 28 EA does not offer a persuasive reason to conclude otherwise as to the former players.” *Davis II*,  
 775 F.3d at 1181 (finding EA did not establish a probability of prevailing on its incidental use  
 defense). The full record now establishes that there is no evidence that Plaintiffs’ likenesses have  
 concrete and quantifiable value.

1 identities, and/or likenesses” meets the requirements defined in *Kremen*.<sup>9</sup> Plaintiffs therefore  
 2 have not and cannot meet their burden to show that there is a triable issue of fact regarding their  
 3 conversion and trespass claims.

4 **3. Plaintiffs do not contest EA’s motion for summary judgment of their**  
 5 **unjust enrichment claim.**

6 Plaintiffs fail to address EA’s argument regarding their unjust enrichment claim. As EA  
 7 demonstrated, Plaintiffs have put forth no evidence to show that they are entitled to a constructive  
 8 trust or restitution. Mot. at 23-24. Plaintiffs do not contest this. *See Ramirez v. Ghilotti Bros.*  
 9 *Inc.*, 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal. 2013) (failure to respond to an argument on the  
 10 merits in opposition concedes the argument). The Court should thus grant summary judgment of  
 11 Plaintiffs’ unjust enrichment claim.

12 **E. Only *Madden NFL 09* Falls Within the Statute of Limitations**

13 Plaintiffs no longer dispute that right-of-publicity claims are subject to a two-year statute  
 14 of limitations in California. *See* Mot. at 24. Instead, Plaintiffs argue that EA presents no  
 15 evidence to establish that no other *Madden NFL* games with historic teams were published during  
 16 the statutory period (July 29, 2008 or later) and that new claims were created as to older games  
 17 through EA’s continued sales. Op. at 24-25. Both arguments fail. Undisputed evidence  
 18 establishes that “[e]ach annual edition of *Madden NFL* is published no later than August of the  
 19 previous year.” Slaughter Decl., Ex. A (Ferwerda Decl.) ¶ 6. Based on this rule, *Madden NFL 08*  
 20 was published no later than August 2007, and thus is well beyond the two-year statutory period  
 21 for right-of-publicity claims, as are all earlier games.

22 Plaintiffs claim that EA lowered the price for *Madden NFL 09* during the statutory  
 23 period—but *Madden NFL 09* price drops are irrelevant since the game is already within the  
 24 statutory period. As for *Madden NFL 08*, EA establishes that the last price drop occurred on May  
 25 2, 2008. *See* Ferwerda Decl. ¶ 7. Plaintiffs’ foundation objection to this evidence is easily  
 26

27 <sup>9</sup> Pursuant to Magistrate Judge Ryu’s Sanctions Order, “the *only* theory of property rights that  
 28 Plaintiffs may assert in this action is the economic value in Plaintiffs names, images, identities,  
 and/or likenesses.” Sanctions Order at 7 (emphasis in original).

1 overruled based on Mr. Ferwerda’s extensive experience with the *Madden NFL* franchise. *Id.* at  
 2 ¶¶ 2-5. And Plaintiffs’ purported evidence regarding *Madden NFL 08*, Henri Decl. Ex. 35, does  
 3 not show that EA reduced the price during the statutory period—only that the game was still for  
 4 sale in 2011, an irrelevant fact given the single publication rule.<sup>10</sup>

5 Regardless, the Court need not reach the issue of which games fall within the statute of  
 6 limitations because all of Plaintiffs’ claims are barred for the reasons explained above and in  
 7 EA’s opening brief.

#### 8 **IV. CONCLUSION**

9 For these reasons, EA respectfully requests that the Court enter judgment for EA on all of  
 10 Plaintiffs’ claims.<sup>11</sup>

11 Dated: April 12, 2018

KEKER, VAN NEST & PETERS LLP

13 By: /s/R. James Slaughter

14 R. JAMES SLAUGHTER  
 15 R. ADAM LAURIDSEN  
 16 NICHOLAS D. MARAIS  
 17 CHESSIE THACHER

Attorneys for Defendant  
 ELECTRONIC ARTS INC.

18  
 19  
 20  
 21 <sup>10</sup> Plaintiffs’ citation to a single Amazon.com sales page for the purported release date of a “EA  
 22 Sports Collection” including *Madden NFL 08* is not admissible evidence for the work’s first  
 23 publication. *See* Henri Decl., Ex. 37. Plaintiffs provide no foundation for what Amazon is  
 24 purporting to describe or whether the date is accurate. Plaintiffs could have asked EA about this  
 work’s release during discovery, but they did not. They fail to lay sufficient foundation for the  
 website’s content, and thus lack any admissible evidence regarding the Sports Collection  
 package’s release date.

25 <sup>11</sup> Pursuant to Local Rule 7-3(a), EA’s evidentiary objections to Plaintiffs’ proffered evidence are  
 26 contained within the body of this memorandum. For ease of the Court’s reference, EA objects to  
 27 the following Henri Declaration exhibits: 5-7, 9, 11-12, 15, 20, 22, 25, 29, 35-36, 38, 43, 50  
 28 (relevance/Rule 403); 14, 23 (foundation and relevance/Rule 403); 42 (hearsay and  
 relevance/Rule 403); 21, 41 (foundation and hearsay); 8, 16, 26-28, 30-34, 37, 39-40, 44-46  
 (foundation, hearsay, and relevance/Rule 403). EA also incorporates by reference all objections it  
 raised during depositions. EA objects to the following Levav Declaration exhibits: 2-3  
 (foundation, hearsay, and relevance/Rule 403).