IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT – DIVISION ONE
NO. B262873

JAMES BROWN,
Plaintiff and Respondent,

vs.

ELECTRONIC ARTS INC.,
Defendant and Appellant.

On appeal from
Superior Court of California, County of Los Angeles
Case No. BC520019
Hon. Maureen Duffy-Lewis

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Respondent knows of no entities or persons with either (1) an ownership interest in 10 percent or more in the party or parties filing this certificate (California Rules of Court 8.208(d)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (California Rules of Court 8.208(d)(2)).

DATED: February 11, 2016 Respectfully Submitted,

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I. INTRODUCTION

Since the 1980s, defendant-appellant Electronic Arts (EA) has produced and sold *Madden NFL* football videogames. These games generate billions for EA by depicting actual NFL players, using their jersey numbers, physical attributes, skill, and statistics to simulate NFL gameplay. EA relies on the use of actual players to market the game to fans of NFL football and fans of the players themselves.

Plaintiff-respondent James "Jim" Brown is an NFL legend. He is widely recognized as the best running back and among the best players of all time. EA tried to pay Brown to use his likeness in *Madden NFL* games featuring historic teams and players as the star running back for the 1965 Cleveland Browns. Brown expressly refused. Nonetheless, EA added Brown's likeness to the game, omitting Brown's name but including his other attributes: height, weight, skin color, playing years, right-handedness, playing ability, and for some editions his actual jersey number. Brown filed this right of publicity action, and EA moved to strike the complaint under California's anti-SLAPP statute, Civil Code section 425.16, arguing that EA's First Amendment and statutory defenses defeated Brown's claims as a matter of law.

The trial court correctly rejected EA's motion to strike. The issues in this case are not novel. EA has repeatedly misappropriated athletes' rights in its football videogames. Each time, courts have rejected EA's First Amendment arguments and found the games are not transformative, not protected by the public interest defense, and not covered by the public affairs

exemption of Civil Code section 3344(d). (See, e.g., *Keller v. Electronic Arts (In re Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1284 (*Keller*).) EA raises the same defenses in this appeal.

EA tried to raise one more defense to Brown's claims—the incidental use defense—but in a parallel case the Ninth Circuit has now rejected that one, too. (See *Davis v. Electronic Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1181 (*Davis*), pet. for cert. filed Oct. 6, 2015 (U.S. No. 15-424).) Addressing the same videogame at issue here, *Davis* held that professional football players are not incidental to a simulation of NFL football. (*Ibid.*) As one of the most accomplished NFL football players ever, Jim Brown is hardly incidental either. It is for good reason that on appeal, EA has moved this argument from first to last place in its brief.

EA's secondary arguments fare no better. EA's transformative use argument contradicts the leading decision of the California Supreme Court, *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 406 (*Comedy III*), and in *Davis* the Ninth Circuit refused to apply the defense to this very videogame. (*Davis*, *supra*, 775 F.3d at p. 1178.) Contrary to what EA argues, *Keller* and *Davis* evaluated EA's videogames as a whole and found that the use of player likenesses was not transformative. The Ninth Circuit's decision adhered to the Second District decision in *No Doubt v. Activision* (2011) 192 Cal.App.4th 1018, 1033 (*No Doubt*), upholding right of publicity claims concerning avatars in a videogame.

As *Keller* also confirms, EA's marketing of this videogame does not qualify for constitutional protection as a matter of public interest nor does it fall within the statutory exemption for a broadcast or account of public affairs. The videogame does not disseminate information in the public interest, nor is it sold in connection with any factual broadcast or account. EA is simply merchandising Brown's likeness in a game that simulates football.

Finally, EA has forfeited its new opening argument that all ROP claims that relate to expressive works are subject to strict scrutiny. EA never raised this argument in the trial court. Regardless, the argument conflicts with the governing balancing test as laid down by the U.S. Supreme Court and the Supreme Court of California. A right of publicity claim does not arise out of the expressiveness of a work; it arises out of the commercial appropriation of the property interest in a plaintiff's image or likeness. Ever since the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562 (*Zacchini*), courts have balanced the right of publicity against the interests protected by the First Amendment. To apply strict scrutiny to Brown's claim would conflict with the holdings of countless cases including *Zacchini*, *Comedy III*, *No Doubt*, *Keller*, and *Davis.*

For these reasons and others discussed below, the trial court's order should be affirmed.

II. STATEMENT OF THE CASE

A. Factual Background[1]

1. The Madden NFL Videogame Franchise

EA manufactures, distributes, and sells *Madden NFL*, a popular and successful videogame franchise that simulates professional American football games using vivid depictions of real NFL players. (1 Appellant's Appendix (AA) 45.) The game sells millions of copies. (1 AA-1.) EA releases a new edition of *Madden NFL* each year on multiple videogame platforms, including Sony PlayStation, Xbox, and Nintendo Wii. (Respondent's Appendix (RA) 151, 214-238.) EA takes pains to ensure the games simulate professional football games in the most realistic manner possible as compared to actual NFL football. (1 AA-45-46.)

EA owes the great success and commercial value of *Madden NFL* to its realism—including its use of real NFL players. EA's promotion of *Madden NFL* trumpets this realism. (RA-243-251, 300.) EA replicates the skill levels of NFL players through a ranking system and gives the likenesses of NFL players in the Madden NFL games the very attributes that the NFL players

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[1] As in *Davis*, "EA does not challenge the plaintiffs' ability to state or support any substantive element of their claims. Instead, EA argues it is not reasonably probable the plaintiffs will prevail, because their claims are barred by [six] affirmative defenses under the First Amendment. . . ." (*Davis, supra,* 775 F.3d at p. 1177.) The trial court found that "the evidence presented in this matter—both by the plaintiff and by the defendant—is sufficient to show there is a probability of prevailing on the merits of the causes of action set forth in the complaint." (2 AA-536.)

have in real life—including the same teams, positions, height, weight, and years of experience, among other characteristics. (1 AA-78; RA-239.)

Since 2000, many versions of Madden NFL game began to include "historic teams," including the 1965 Cleveland Browns, for whom he was the star player. (1 AA-46; RA-255-258, 300.) Since adding the videogame features that use former players' likenesses, EA has been the leading videogame publisher in North America, enjoying billions in annual revenue. (RA-214-238.)

2. Jim Brown

Jim Brown is known to the public and football fans alike as one of the greatest football players of all time. (RA-252-254, 272-282.) Brown played nine seasons in the NFL and is most readily identifiable as the all-pro and record-breaking running back for the Cleveland Browns from 1957 to 1965. (RA-255-258.) He is widely considered the best running back in the history of the game and is often credited with revolutionizing the position. (RA-272-282.)

Brown is regarded as one of the most influential and accomplished athletes of all time, and was recently named by ESPN as the fourth greatest athlete of the 20th Century, behind only Babe Ruth, Michael Jordan, and Muhammad Ali. (RA-252-254.) He has been inducted into the NFL Hall of Fame, the College Football Hall of Fame, and the Lacrosse Hall of Fame, was named by the Sporting News as the greatest football player of all time, and was the first and greatest athlete featured in

iconic sports historian Bert Randolph Sugar's, The 100 Greatest Athletes of all Time. (RA-255-282.)

Besides his record-breaking exploits as a professional football player and all-around athlete, Brown achieved significant fame and recognition as a star of both television and film over the last four decades. Brown's roles range from guest appearances on the highly popular television series *I Spy* to supporting roles in critically acclaimed films such as *The Dirty Dozen* and *Any Given Sunday*. (1 AA-3¶13; RA-255-258; http://www.imdb.com/name-/nm0000987/?ref_=fn_al_nm_1.) His autobiography, *Out of Bounds*, was published in 1989 and became an instant bestseller. (1 AA-3¶13; Jim Brown & Steve Delsohn, *Out of Bounds* (Zebra Books 1989).)

Brown is widely recognized by the public as an iconic NFL athlete. For over four decades Brown has invested substantial time, energy, and effort into developing and promoting his distinctive celebrity. Because of his wide-ranging achievements on and off the football field, Brown has cemented his status as a well-known and readily identifiable public figure, and one of the greatest NFL football players of all time. (RA-14-15¶¶13-20; RA-17-18¶¶29-34.)

3. EA Blatantly Uses Plaintiff's Likeness in Connection with the Sale of its Madden NFL Videogame.

Today NFL players license their publicity rights, through their respective agent, to the National Football League Players Association ("NFLPA"), who grants group licenses to companies like EA in exchange for compensation. (1 AA 47¶13.) When

Brown played professional football, the NFL had a league-wide policy prohibiting players from using lawyers or agents to negotiate compensation. Neither the NFLPA nor videogames existed, so licensing likeness rights for videogames such as Madden NFL was not contemplated during Brown's negotiations with the Cleveland Browns. Brown therefore never entered into any agreement in which he signed away his rights of publicity for *Madden NFL*. In fact, EA repeatedly asked Brown to consent to the use of his likeness in the game. Each time, Brown refused. (1 AA-5¶¶26-30.)[2]

Nonetheless, EA knowingly and intentionally created a virtual player on the historic 1965 Cleveland Browns team mimicking the characteristics of Brown and designed to resemble Brown such that the general public and football fans perceived the avatar to be the virtual depiction of Brown. (1 AA-104-131.) The virtual Brown is the star running back of the Cleveland Browns, and is also a fullback with nine years in the NFL, weighing approximately 228 pounds, 6'2" tall, right handed, African-American, who is the best player in the game (as rated by EA). (1 AA-62-63, 104-131.) These characteristics are substantively identical to Brown's actual characteristics. (1 AA-104-131; RA-255-258.)

The use of Brown's likeness in Madden NFL started in 2001, where the historic 1965 Cleveland Browns team includes a

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[2] EA does not argue or attempt to present evidence that Brown ever consented to use of his likeness. (See *Davis*, *supra,* 775 F.3d at p. 1177.)

star running back wearing #32—the same number worn by Brown during his NFL tenure. (E.g., RA-239, 300.) Virtual player #32 is undoubtedly intended to represent Brown and would be recognized as Brown by football fans.

In the Madden NFL '04 game and later versions, EA introduced a new feature offering advanced access to historical teams' rosters. (RA-240-242.) The game permits users to edit these rosters as they see fit—including adding names to jerseys—but the default settings start with a star virtual running back for the 1965 Cleveland Browns that uses Brown's characteristics. (1 AA-72-137; RA-240-242.) As the game matured, EA incorporated even more of Brown's attributes into his profile—including additional views of his digital avatar from full-body and up-close shots, to views with and without a helmet. (1 AA-72-137.)

In later editions, the virtual running back for the historic 1965 Cleveland Browns is an African-American running back boasting a skill level of 99—the highest level achievable in the game. (1 AA-104-131.) He also is 6'2", 228 pounds, twenty-nine years old, right-handed, and has nine years of professional league experience. (1 AA-104-131.) Again, these attributes are identical to Brown's actual attributes in 1965. (RA-255-258.)

In an effort to avoid infringement, EA simply omitted Brown's name and changed the jersey number of Brown's virtual twin to 47 (instead of using Brown's customary number 32) as the avatar got more and more realistic. (1 AA-104-131; RA-239.) Despite EA's "scrambling" of jersey numbers, the games are designed so consumers of Madden NFL will have no difficulty

identifying Brown. If the historic 1965 Cleveland Browns in the Madden NFL videogame did not include its greatest player, then a feature purporting to be historic or great teams would lose its credibility and appeal to consumers.

Omitting Brown's name and scrambling his jersey number ultimately had little consequence because EA designed Madden NFL to allow for player customization. (RA-240-242.) Gamers can quickly download edited rosters of historical teams to update errors or omissions in the player's profile, such as Brown's actual name and jersey number. (RA-240-242.) EA further encouraged users of the *Madden NFL* videogame to use the historic rosters by allowing users to achieve certain milestones in the game to unlock and use historic rosters as a reward for excelling at the game. (RA-300.)

As the games themselves show, the *Madden NFL* game does not report facts or disseminate information. The simulated games do not reflect real-life events, nor are they a source of commentary on public affairs. Consumers do not purchase the *Madden NFL* game as a source of information about football players or the game of football itself. Indeed, EA has made the game uninformative by omitting Brown's name and changing his jersey number. (1 AA-104-131; RA-239.)

B. Procedural History

Brown filed the complaint in this action on August 30, 2013, alleging that EA violated his right of publicity by using his likeness in the *Madden NFL* game for commercial purposes without his consent. (1 AA-1.) The complaint included claims for

violation of California Civil Code section 3344, violation of the right of publicity under California common law, violation of California's Unfair Competition Law (UCL), Bus. & Prof. Code section 17200, and unjust enrichment. (1 AA-10-12.)

After answering the complaint, EA filed a Special Motion to Strike under California Civil Code section 425.16 in late 2013. EA filed an updated Special Motion to Strike several months later, which superseded the first motion. (1 AA-21.)

The trial court denied the Special Motion to Strike, holding that Brown showed a probability of prevailing and none of EA's defenses defeats Brown's claims as a matter of law. "As both sides admit, [Brown] is well known as one of the best football player[s] of all time (as well as an actor of renown). Brown is iconic and unique. His likeness is not merely incidental to the game." (2 AA-532.) The trial court followed the Ninth Circuit's holding in *Keller* that the public interest defense does not apply to videogames because the videogame was not "a means for obtaining information about real-world football games" and EA "is not publishing or reporting factual data." (*Keller*, *supra*, 724 F.3d at p. 1283.) Accordingly, the Court also rejected EA's argument under the "public affairs" exemption of Civil Code section 3344(d). The transformative use test provided no defense because, consistent with the rulings in *No Doubt* and *Keller*, the videogame character depicting Brown was directly tied to his personal characteristics. The trial court rejected EA's request to apply the *Rogers* test as inconsistent with *Comedy III*.

C. Statement of Appealability

The trial court's order denying the Special Motion to Strike is appealable. (See Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13).)

D. Anti-SLAPP Standard and Standard of Review

The purpose of the anti-SLAPP statute is to "encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Code Civ. Proc., § 425.16, subd. (a).) When an anti-SLAPP motion is filed, the initial inquiry is whether the moving defendant has made a threshold showing that the challenged causes of action arise from protected activity, that is, activity by defendants in furtherance of their constitutional right of petition or free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 citing Code Civ. Proc., § 425.16, subd. (b)(1).) Brown does not dispute that this test is met and the anti-SLAPP statute applies.

Thus, this Court's role is to "determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) The plaintiff must show "both that the claim is legally sufficient and that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1267 (*Hylton*).) Because an anti–SLAPP motion is brought at an early stage of proceedings, "the plaintiff's burden of establishing a probability of prevailing is not high." (*Overstock.com, Inc. v. Gradient*

Analytics, Inc. (2007) 151 Cal.App.4th 688, 699 (*Overstock.com*).) An anti-SLAPP motion is granted only if a claim "lacks even minimal merit." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

The Court draws all factual inferences in favor of the plaintiff and must deny the motion if "the claim is legally sufficient" and "there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment." (*Hylton*, *supra,* 177 Cal.App.4th at p. 1271; see also *Overstock.com, supra,* 151 Cal.App.4th at 699.)

The trial court's denial of an anti-SLAPP motion is reviewed *de novo*. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

III. ARGUMENT

A. The Trial Court Correctly Determined That the Appearance of Jim Brown in the Game Is Not Incidental

The trial court rightly dispensed with EA's argument that its use of Brown's likeness in *Madden NFL* was so incidental as to be protected under the First Amendment. (2 AA-532.) Jim Brown, arguably the greatest football player in the history of the game, is not "incidental" to a game that simulates NFL football. As the trial court put it, "Jim Brown is not a 1 in 7,500 player"—he is "iconic and unique." (*Ibid.*)

The trial court's holding parallels the Ninth Circuit's reasoning in *Davis*, *supra*, 775 F.3d 1172, where the Ninth Circuit outlined four factors to determine whether a use is incidental enough to warrant First Amendment protection:

> (1) whether the use has a unique quality or value that would result in commercial profit to the defendant;

(2) whether the use contributes something of significance;

(3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and

(4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.

(Id. at p. 1180.) EA argues at length that the First Amendment does not permit right of publicity claims where the plaintiff's likeness is merely incidental. But EA cannot simply assume that *Madden NFL* passes the test. All four factors weigh heavily against EA. Instead of showing incidental use, they highlight Jim Brown's prominence.

Jim Brown's appearance in the game "has a unique quality or value that would result in commercial profit." EA takes pains to include accurate likenesses of real players and pays large sums to license likenesses of current players. (1 AA-47¶13; RA-243-251, 300.) EA includes a relatively small number of historic teams and advertises those teams as an attractive feature of the game. (1 AA-62-63.)

Jim Brown's appearance in the game "contributes something of significance" because it enriches the playing experience. (See *Davis*, *supra*, 775 F.3d at p. 1180.) Purchasers of the Madden NFL game can simulate football matchups involving Jim Brown and even control his actions on the field. EA made Brown's avatar a standout among hundreds of professional football players by assigning it a player rating of 99—the highest possible in the game. (1 AA-104-131.)

There could not be a closer relationship between Jim Brown's avatar and the purpose and subject of the work. He is a football great in a game that simulates pro football.

Finally, Jim Brown is a permanent default fixture of the videogame. He is prominent in that he is the most highly rated player in the game. And he is infinitely repeatable as a preloaded player in the game. EA handpicked Jim Brown and his historic team because Brown's likeness and identity are central to the game of football and the *Madden NFL* experience. "EA includes only a small number of particularly successful or popular historic teams. . . . If EA did not think there was value in having an avatar designed to mimic each individual player, it would not go to the lengths it does to achieve realism in this regard." (*Davis*, *supra,* 775 F.3d at p. 1181.)

Disregarding the trial court's examination of Jim Brown's prominence in both football and *Madden NFL*, EA says that the trial court misread *Pooley v. National Hole-In-One Ass'n* (D.Ariz. 2000) 89 F.Supp.2d 1108 (*Pooley*). There was no misreading: *Pooley* adopted and applied the same four factors that *Davis* applied to the videogame at issue in this case. (See *Pooley*, *supra*, 89 F.Supp.2d at p. 1112.) EA urges the court to limit those factors to the realm of purely commercial speech, but neither *Pooley* nor *Davis* imposes any such limitation. Contrary to EA's assertion, the trial court never "whittled the test down" to whether Brown is "a professionally and financially successful celebrity, who has been paid for his affiliation and services." Rather, it examined the

use of the likeness in the context of the game. (Appellant's Opening Brief (AOB) 50.)

Nor can the use of Brown's likeness be compared to the facts of any case cited by EA. *Madden NFL* is nothing like the account of the 1927 Munich Olympic massacre at issue in *Ladany v. William Morrow & Co., Inc.* (S.D.N.Y. 1978) 465 F.Supp. 870, 871, where the plaintiff was an unknown athlete (a speedwalker) present at a terrorist attack. (AOB 51.) Brown is not an unknown athlete in one inconsequential scene of a newsworthy event.

Similarly, Brown's case is worlds apart from fleeting depictions of other plaintiffs in a textbook, an infomercial, a song lyric, a fictional movie about crime in New York, or a documentary about the Woodstock music festival, which EA attempts to compare.[3] California's right of publicity statute separately exempts accounts of public affairs, but that exemption

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[3] AOB 48-52, citing *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 (news article about plaintiff republished in textbook for college writing course entitled *From Thought to Theme: A Rhetoric and Reader for College English*); *Aligo v. Time-Life Books, Inc.* (N.D. Cal. Dec. 19, 1994, No. C 94-20707 JW) 1994 WL 715605, at p. *1 (infomercial promoting 1960s rock music anthology, with four-second depiction of book cover showing plaintiff, an unidentified police officer responding to student demonstration); *Lohan v. Perez* (E.D.N.Y. 2013) 924 F.Supp.2d 447, 455-56 (use of plaintiff Lindsay Lohan's name in single line of pop song); *Preston v. Martin Bregman Prods., Inc.* (S.D.N.Y. 1991) 765 F.Supp. 116, 119 (murder mystery movie set in New York City depicted plaintiff as an unidentified prostitute who appeared in street scene for less than five seconds); *Man v. Warner Bros., Inc.* (S.D.N.Y. 1970) 317 F.Supp. 50, 53 (depiction of plaintiff's 45-second musical performance at Woodstock in a feature-length documentary).

does not apply to a videogame such as *Madden NFL* as explained more fully below.

The value of EA's product flows directly from the identities and careers of the football players within it, not least Jim Brown. And to the extent Judge Thomas dissented in *Keller* on the basis that "[t]he quantity of players involved dilutes the commercial impact of any particular player," the Ninth Circuit rejected that view and declined in *Davis* to revisit it en banc. (*Keller*, *supra*, 724 F.3d at p. 1276, fn. 7; see *Davis*, *supra*, 775 F.3d at p. 1181; Order, *Davis v. Electronic Arts, Inc.* (9th Cir. Jul. 10, 2015, No. 12-15737) Dkt. 98 [denying petition for rehearing en banc].) Players' unions routinely negotiate and enforce group licenses arising from the individual and collective commercial value of player likenesses. (1 AA-47¶13; see also Brief for Amici Curiae NFL Players Ass'n et al., *Keller v. Electronic Arts, Inc.* (9th Cir. Nov. 5, 2010, No. 10-15387) Dkt. 41, at pp. 1-2.)

Finally, EA misrepresents the status of Brown's avatar in the game. The 2006 edition presents historic teams as an option immediately after a user clicks "play now," and users may also edit historic teams as a separate game feature. (1 AA-62-63.) EA promoted the fact that its games incorporated historic teams and presented users with the option of playing with those teams and players. "Even if the mention of plaintiff's name or likeness is brief, if the use stands out prominently or enhances the marketability of the defendant's product or service, the doctrine of incidental use is inapplicable." (*Yeager v. Cingular Wireless LLC* (E.D. Cal. 2009) 673 F.Supp.2d 1089, 1100 (*Yeager*).)

Given Brown's prominence in the sport, the use of his team and avatar is not a random coincidence. The value of the game is its realism, and that realism enables the user to seek out the most highly rated player and simulate his play. In view of this and the other analysis above, EA's contrarian claim of victory under the factors listed in *Davis* rings especially hollow. Brown is not a "bit" player like the athlete in *Ladany*. EA itself tried to purchase Brown's likeness, when he refused EA nonetheless capitalized on the unique value and status of Brown as a legendary football player to create and market its product to the public.

EA raised incidental use as the very first point in its anti-SLAPP Motion. Then, in *Davis*, the Ninth Circuit squarely rejected the incidental use defense as to thousands of NFL players less prominent that Jim Brown. EA has now relegated this argument to the last section of its brief.[4] In any event, the incidental use defense presents a question of fact. (See *Yeager*, *supra*, 673 F.Supp.2d at p. 1101.) This Court should not hesitate to reject it just as the trial court did.

B. The Trial Court Correctly Found That The Game Exploits Brown's Identity Without Transforming It

1. EA Capitalizes on Brown's Sports Achievements

The trial court correctly held that *Madden NFL* does not "transform" Brown's likeness in such a way that it is protected by the First Amendment. The likeness in the game accurately represents the identifiable features of Jim Brown's identity: His

[4] 1 AA-22.

height, weight, right-handedness, race, team, years of play, accomplishments, and relative ability. EA used these very attributes of student-athletes in its NCAA football videogames, and the Ninth Circuit held that the use was not transformative. (*Keller*, *supra*, 724 F.3d at p. 1284.) Applying this holding, the Ninth Circuit has now rejected EA's defense as to other retired players in *Madden NFL*. (*Davis*, *supra*, 775 F.3d at p. 1181.)

The California Supreme Court established the transformative use defense to right of publicity claims in *Comedy III, supra,* 25 Cal.4th at page 406. This First Amendment defense arises when "a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." (*Ibid.*) The inquiry is "whether the literal and imitative or the creative elements predominate in the work." (*Id.* at p. 407.) A defendant may establish that the use is transformative if the work "contains significant transformative elements" or "the value of the work does not derive primarily from the celebrity's fame." (*Ibid.*)

The transformative use test applies the following five factors:

1. Whether the celebrity likeness is merely one of the raw materials from which an original work is synthesized, or whether the imitation of the celebrity is the very sum and substance of the work in question.

2. Whether the work is primarily the defendant's own expression—as long as that expression is something other than the likeness of the celebrity.

3. Whether the literal and imitative or the creative elements predominate in the work.

4. In close cases, whether the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.

5. Whether an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame.

(*Keller*, *supra*, 724 F.3d at p. 1274.)

The Court of Appeal has applied this test in two different videogame cases. In one case, the rock band No Doubt sued a videogame company for exceeding the scope of its license to use the band members' likenesses in the videogame *Band Hero*. (*No Doubt*, *supra*, 192 Cal.App.4th at p. 1022.) No Doubt alleged that the defendant exceeded the scope of the license because the game allowed users to make the band sing songs it would never sing. (*Id.* at p. 1024.) Users could also impose female voices onto male band members and vice-versa and make band members perform solo, all in violation of the license. (*Ibid.*)

The Court rejected the defendant's transformative use defense because the avatars in *Band Hero* were "painstakingly designed to mimic their likenesses," and nothing about the context of the videogame was transformative. (*No Doubt, supra,*

192 Cal.App.4th at p. 1033.) "That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." (*Id.* at p. 1034.)

The other case was brought by a popular singer who claimed a resemblance to a videogame character. (*Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 50-51 (*Kirby*).) The character differed from the plaintiff in that the character was a news reporter, not a singer, and in the game her role was to investigate a fictional alien invasion of Earth in the 25th Century. (*Id.* at p. 52.)

In *Davis* and *Keller*, the Ninth Circuit found EA's NCAA and *Madden NFL* videogames analogous to the game in *No Doubt*. These football videogames simply portray the athletes doing what they do as amateur or professional athletes. Taking the game as a whole into account, *Madden NFL* does not transform Brown's likeness. Instead, it is a product designed to capitalize on his celebrity status by appealing to fans of NFL football and Jim Brown himself. *Kirby* does not help EA: The videogame in that case transformed the plaintiff's characteristics into a whole new character (a news reporter) in a new setting (futuristic battles against aliens). (*Kirby*, *supra*, 144 Cal.App.4th at p. 52.) *Madden NFL* promises to deliver to its users Jim Brown doing what he is best known for, playing football.

2. *EA Mischaracterizes the Ninth Circuit's Analysis in Davis and Keller*

Contrary to EA's argument, *No Doubt*, *Keller*, and *Davis*, did not misapply California law. *No Doubt* scrutinized the entire context of No Doubt's appearance in *Band Hero*, comparing and contrasting the setting and user experience in that game with the elements at issue in *Kirby*. (See *No Doubt*, *supra*, 192 Cal.App.4th at pp. 1034-35.) As explained above, the Court found that depicting the band performing its own music as well as songs it would never sing in various concert settings did not transform the likenesses. The game capitalized on No Doubt's fame because it merely showed No Doubt's avatars "doing exactly what they do as celebrities." (*Id.* at p. 1034.)

Similarly the Third Circuit examined the context of the avatars in EA's NCAA sports videogames and determined that the use of the likeness in the context of those games was not transformative. The realism of the games turned on realistic depictions of the players, making them the "sum and substance" of the game. (*Hart v. Electronic Arts, Inc.* (3d Cir. 2013) 717 F.3d 141, 168 (*Hart*).)

In *Keller* and *Davis* the Ninth Circuit followed suit. *Keller* expressly held that it considered the work as a whole and not merely the depictions of the athletes. (*Keller*, *supra*, 724 F.3d at p. 1278.) Both courts considered and rejected the very argument EA makes here, that *No Doubt* was wrongly decided. (*Id.* at p. 1276; *Davis*, *supra*, 775 F.3d at pp. 1177-78.) Courts have not "struggled to frame the transformative-use analysis" as EA

suggests (AOB 26)—each of these cases applied the transformative test of *Comedy III* in a straightforward manner and considered the entirety of the work at issue.

Nor is EA correct that *Keller* purports to limit transformative use to "distortion and manipulation." (AOB 28.) Consistent with both *Comedy III* and *No Doubt, Keller* holds that the defense may still arise if the work as a whole is transformative, which *Madden NFL* is not. EA cites the observation in *Comedy III* that "biographies and docudramas involve transformative expression." That a visual depiction and a biography might lead to different outcomes as *Comedy III* suggests does not reflect a categorical "medium-specific rule" (AOB 31)—it simply reflects the fact-specific nature of the test. For example, dramas, documentaries, and biographies include over-arching narrative, description, and commentary not shared by every videogame—certainly not shared by *Madden NFL*. The game is not an editorial; it is a product that allows users to simulate the activities of real professional athletes. It is more akin to a realistic Jim Brown action figure than a biography about Jim Brown.

Thus, EA is wrong that four different cases decided by four different panels in three different courts misunderstood *Comedy III*. The fact that the First Amendment protects some "realistic depictions in realistic scenarios"—which would include things like biographies and news reporting—does not immunize every depiction of a celebrity in every product simply because the depiction and its context are realistic. "EA elected to use avatars

that mimic real college football players for a reason"—their commercial value was too great to pass up. (*Keller*, *supra*, 724 F.3d at p. 1276, fn. 7.)

Similarly meritless is EA's suggestion that cases applying the transformative use test under copyright law require a different result. In each of these cases, the copyrighted work owned by the plaintiff was used in a completely transformative context divorced from the original expressive purpose and commercial value of the work. For example, the Ninth Circuit has held that an online database using thumbnails of copyrighted images is transformative of the images because the database had no relation to the expressive purpose of the photographs. (*Perfect 10, Inc. v. Amazon.com, Inc.* (9th Cir. 2007) 508 F.3d 1146, 1165.)[5] Here, EA cannot claim any such "fair use" of Brown's likeness. *Madden NFL* directly exploits the market value of Brown's fame and accomplishments for what they are.

Finally, EA can get no mileage out of the trial court order in *Noriega v. Activision*. (AOB 34-35.; Order on Defendants'

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[5] See also *Authors Guild, Inc. v. Google Inc.* (S.D.N.Y. 2013) 954 F.Supp.2d 282, 291 (online database using snippets of books is transformative), aff'd *sub nom. Authors Guild v. Google, Inc.* (2d Cir. 2015) 804 F.3d 202; *SOFA Entm't, Inc. v. Dodger Prods., Inc.* (9th Cir. 2013) 709 F.3d 1273, 1278-79 (use of *Ed Sullivan Show* clip in a play is transformative); *Cariou v. Prince* (2d Cir. 2013) 714 F.3d 694, 706 (jarring collage of serene portrait and landscape photographs is transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.* (2d Cir. 2006) 448 F.3d 605, 609 (use of concert posters in biography was transformative, as "courts have frequently afforded fair use protection to the use of copyrighted material in biographies").

Special Mot. to Strike, BC 551747 (L.A. County Super. Ct. Oct. 27, 2014.) Fundamentally, "trial courts make no binding precedents." (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 282.) Beyond this, convicted criminal and former military dictator Manuel Noriega was depicted in a game that simulated Special Forces operations in Panama. There is simply no comparison between a case involving such a fleeting use of a political figure and the case at bar. EA's reliance on a trial court decision underscores the weakness of its position.[6]

3. The Transformative Use Test Cannot Apply As a Matter of Law

To the extent any dispute as to transformative use remains, the application of the defense is a question of fact. (*Keller*, *supra*, 724 F.3d at p. 1274.) Based on the facts discussed above, a reasonable juror could conclude that EA's virtual players are the same sort of "literal, conventional depictions" of a public figure as the sketch in *Comedy III*, *supra*, 25 Cal.4th at page 409, and therefore imitative rather than transformative.

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[6] The same analysis applies to *Vijay v. Twentieth Century Fox Film Corp.* (C.D.Cal. Oct. 27, 2014, No. CV 14-5404 RSWL EX) 2014 U.S. Dist. Lexis 152098, at p. *13, cited by EA, which involved a momentary appearance by an extra in the movie *Titanic.* To the extent EA invokes other videogames featuring political leaders, those games might implicate similar protections for political speech, *Frazier v. Boomsma* (D. Ariz. Aug. 20, 2008, No. 07-CV-8040) 2008 WL 3982985, at *4, but any hypothetical claim would turn on the specific features of the games, facts which are not before this court.

C. The Rogers Test Does Not Apply

The Court should likewise refuse EA's invitation to rewrite California's right of publicity law by importing an inapposite test from the trademark case *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994 (*Rogers*). EA raises this argument even though it directly conflicts with *Comedy III* and was considered and rejected in *No Doubt*, *Keller*, *Davis*, and *Hart*.

In *Rogers*, the plaintiff (Ginger Rogers) brought a Lanham Act claim regarding the use of her name in the title of Federico Fellini's movie *Ginger and Fred*, which "only obliquely relate[d] to Rogers." (*Rogers*, *supra*, 875 F.2d at p. 996.) The Court held that there could be no Lanham Act liability unless the name is unrelated to the content of the movie or falsely suggests an endorsement by the plaintiff which might confuse the public. (*Id.* at pp. 1001-1002.) And while *Rogers* applied the same test to bar a right of publicity claim under Oregon law, it did not purport to apply California law or extend the test beyond "the use of a celebrity's name in a movie title." (*Id.* at p. 1004; see *Keller*, 724 F.3d at pp. 1280-82.)

The Sixth Circuit's decision in *Parks v. LaFace Records* (6th Cir. 2003) 329 F.3d 437, 461, is similarly irrelevant in its use of the *Rogers* test because it addressed only the use of a name in the title of a song. As EA itself recognizes (AOB 27), the Sixth Circuit does not apply the *Rogers* test to all right of publicity cases; it applies the transformative use test to cases involving likenesses. (See *ETW Corp. v. Jireh Publ'g* (6th Cir. 2003) 332 F.3d 915, 934, 936.)

Other cases cited by EA are inapposite because they addressed biographical works (some of them fictionalized)—and thus different underlying facts from those here—and they did not apply California law. (*Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 436; *Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F.Supp. 331, 332-34; *Ruffin-Steinback v. dePasse* (E.D. Mich. 2000) 82 F.Supp.2d 723, 726; *Montgomery v. Montgomery* (Ky. 2001) 60 S.W.3d 524, 526-27 [biographical music video].) In addition to not applying California law, *Romantics v. Activision Publ'g, Inc.* (E.D. Mich. 2008) 574 F.Supp.2d 758, 769-70 did not involve any actionable use of a name or likeness.

As *Hart* and *Keller* recognize, to apply the *Rogers* test to all right of publicity cases would effectively abolish the cause of action. (*Hart*, *supra*, 717 F.3d at p. 157; *Keller*, *supra*, 724 F.3d at p. 1280.) Unlike a Lanham Act claim, the right of publicity does not exist to prevent customer confusion. Instead, it protects the intellectual property interest in the social utility of the plaintiff's identity. (*Keller*, *supra*, 724 F.3d at p. 1280.) No California court has held the *Rogers* test to bar right of publicity actions, and the test is inconsistent with *Comedy III*.

D. The Game Does Not Purport To Disseminate News Or Information, So The Trial Court Rightly Rejected Public Interest And Public Affairs Defenses

1. This Videogame Does Not Publish Matters in the Public Interest

This court should likewise follow the Ninth Circuit's lead and reject EA's public interest defense. (See *Keller*, *supra*, 724 F.3d at pp. 1282-83; *Davis*, *supra*, 775 F.3d at pp. 1178-79.) In

Madden NFL, EA is not "publishing or reporting factual data." (*Davis*, *supra*, 775 F.3d at p. 1179, citation omitted.) It is merely a simulation of football contests based on factual data. *Madden NFL* "is a game, not a reference source." (*Keller*, *supra*, 724 F.3d at p. 1283.) EA's inclusion of some publicly available data in its game does not insulate it from right of publicity claims. (*Id.* at p. 1283, fn. 12.) The game is not a reference source for facts about NFL football. (*Id.* at p. 1283.)

Indeed, as *Keller* noted, EA cannot claim that its football videogames inform the public. While *Madden NFL* depicts current players (who grant licenses) as realistically as possible—and includes additional facts and background about these players—EA deliberately disguised likenesses of Brown and other historic players in the game (removing player names and changing jersey numbers, and omitting background information) in a shallow attempt to evade right of publicity law. The scrambling of jersey numbers and omission of player names in *NCAA Football* directly undermined EA's argument that it was reporting facts about Brown. (See *Keller*, *supra*, 724 F.3d at p. 1283.) So doing, EA has further undermined the informative value of the game and confirmed its intent to capitalize on the commercial value of Brown's fame and accomplishments through his thinly disguised avatar.

EA argues that "even traditional news reports about sports teams often convey information about players without identifying them by name." (AOB 42.) But EA's deliberate omission of names and scrambling of some jersey numbers is more than a lack of

detail. It is at least a question of fact whether this deliberate subterfuge impairs the flow of information, as the *Keller* court concluded, while still capitalizing on Brown's identity. (See *Motschenbacher v. R. J. Reynolds Tobacco Co.* (9th Cir. 1974) 498 F.2d 821, 827 [distinctive markings of famous driver's race car in advertisements sufficient to support finding that likeness was used and defeat summary judgment, even though defendant changed car numbering and did not show driver's face].)

Thus, the holding of *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536 (*Dora*) does not apply. The court there held that the First Amendment barred right of publicity claims relating to a documentary about surfing. (*Id.* at p. 542-43.) *Madden NFL* is not analogous to a documentary. Likewise, *Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790 (*Montana*) held that the First Amendment barred claims relating to poster-format reprints of newspaper pages reporting Joe Montana's Superbowl victory. (*Id.* at pp. 792-93.) Again, the posters themselves reported news. *Madden NFL* does not report the news. And though *Madden NFL* incorporates some factual data, it does not publish or report facts and therefore not comparable to the baseball information websites at issue in *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 410 (*Gionfriddo*) and *C.B.C. Distribution v. Major League Baseball Advanced Media* (8th Cir. 2007) 505 F.3d 818, 822-23.

Thus, *Keller* as well as the California cases on point amply support the trial court's brief statement that "the public interest defense does not apply to videogames." (2 AA-532.) *Madden NFL*

does not publish matters in the public interest and therefore does not trigger the defense. EA fails to explain its argument that this holding somehow poses a threat to "reciting facts in newspapers and evening news broadcasts." (AOB 41.) News broadcasts are not at issue here.

To accept EA's argument would insulate any product from right of publicity challenges as long as it included publicly available facts. This would vitiate the right of publicity. Brown's very likeness and physical characteristics are publicly available facts. The use of his height, weight, and other statistics does not change his likeness into news or reporting. The fundamental purpose of the game is the appropriation of his likeness not to report facts, but to allow users to assume his identity to play football.

2. The Statutory Public Affairs Exemption Does Not Apply to a Fictional Game

For similar reasons, Brown's claims do not fall within the statutory public affairs exemption found in the right of publicity statute. (Civ. Code, § 3344, subd. (d).) The publication of Brown's avatar in the game is not "in connection with" any public affairs "broadcast or account," so by its own terms the statutory exemption does not apply. (*Ibid.*) The games are unconnected with any dissemination of news or information about public affairs. As already explained, the games do not report facts as to Jim Brown and other historic players—they attempt to conceal the use of Jim Brown's image and simulate imaginary football

games. EA admits that it does not "recreate or recount actual historical games." (1 AA-31.)

EA skips over any discussion of the plain meaning of the statutory text and argues that the general legislative purpose of section 3344 restricts the right of publicity to cases of false endorsement. (AOB 44.) But this interpretation conflicts with the clear and unambiguous language of the statute. The statute provides liability for both the use of a name or likeness "for purposes of advertising or selling . . . products, merchandise, goods, or services" *and* the use of a name or likeness "on or in products, merchandise, or goods." (Civ. Code, § 3344, subd. (a).) The statute thus prohibits more than just advertising uses. And the public affairs exception expressly requires the use to be "in connection with" a broadcast or account.

The isolated statement in legislative history cited by EA does not change the analysis. The "primary determinant" of the legislative intent is the words that the Legislature used: this is the language "that has successfully braved the legislative gauntlet." (*MacIsaac v. Waste Mgmt. Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.) If the language is "clear and unambiguous," the Court's "task is at an end, for there is no need for judicial construction." (*Id.* at p. 1083.) The language of the statute expressly extends to non-advertising uses and the exemption applies only to broadcasts or accounts.

As already explained, *Madden NFL* does not involve any broadcast or account in connection with public affairs, nor does it inform the public about NFL football. This basic fact

distinguishes this case from *Montana*, *Dora*, and *Gionfriddo.* "Although California courts typically analyze the statutory [public affairs] and the common law [public interest] defenses separately, both defenses protect only the act of publishing or reporting." (*Davis*, *supra*, 775 F.3d at p. 1179, quotation omitted.) The public affairs exemption does not shield *Madden NFL*. (*Ibid.*)[7]

E. EA's Suggestion That Expressive Elements Preclude Any Right Of Publicity Claim Conflict With Governing Law

EA has forfeited the argument that the right of publicity is subject to strict scrutiny. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221.) EA's trial court brief raised arguments about incidental use, public interest, public affairs, transformative use, and the *Rogers* test. It did not raise strict scrutiny. (1 AA-22.)

Even if the Court considers EA's new argument, Brown's right of publicity claims are not subject to strict scrutiny. Since the U.S. Supreme Court's decision in *Zacchini*, *supra*, 433 U.S. 562, federal and state courts have balanced the interests protected by the right of publicity against the interests protected by the First Amendment. The decisions of the Ninth and the

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[7] The trial court rejected EA's public affairs argument as going to Brown's prima facie case rather than providing a statutory or constitutional defense. (2 AA-533.) This is not a "misreading" of the statute as EA contends (AOB 43), but even if it were, the trial court correctly rejected EA's public interest and public affairs arguments together.

Third Circuits in *Keller, Hart*, and *Davis* confirm that a balancing test applies, as does the binding decision of the California Supreme Court. (See *Comedy III*, *supra*, 25 Cal.4th at pp. 391, 401; *Keller*, *supra*, 724 F.3d at p. 1271; *Hart*, *supra*, 717 F.3d at p. 149; *Davis*, *supra*, 775 F.3d at p. 1177.)

As the above cases demonstrate, the U.S. Supreme Court and California Supreme Court have both held that strict scrutiny does not apply to right of publicity claims arising from expressive works. The First Amendment does not immunize expressiveness per se, let alone when it comes to an intellectual property right such as the right of publicity. EA's strict scrutiny argument is a last grasp for blanket immunity for all right of publicity actions arising from the use of a celebrity's likeness in a videogame. And it would potentially sweep much more broadly, barring such claims as to any type of expressive work.

"[T]he state's interest in preventing the outright misappropriation of such intellectual property by others is not automatically trumped by the interest in free expression or dissemination of information." (*Comedy III*, *supra*, 25 Cal.4th at p. 401; see also *Zacchini*, *supra*, 433 U.S. at pp. 573, 576-77.) The right of publicity stands alongside well established protections for similar property rights such as trade secrets, trademarks, and copyright.

Thus, courts have long upheld right of publicity claims arising from likenesses in expressive works, including photographs, posters, sculptures, and now in *No Doubt, Keller*, and *Davis*, videogames. (See *KNB Enters. v. Matthews* (2000) 78

Cal.App.4th 362, 364-65 [upholding right of publicity claims relating to sales of photographs]; *Winterland Concessions Co. v. Fenton* (N.D. Cal. 1993) 835 F.Supp. 529, 530-34 [upholding right of publicity claims of musicians relating to sales of posterbooks and calendars]; *Brinkley v. Casablancas* (N.Y. App. Div. 1981) 438 N.Y.S.2d 1004 [upholding right of publicity claims relating to sales of Christie Brinkley posters].)

Cases cited by EA do not tell otherwise. It is irrelevant that other California courts addressed claims arising out of advertising. (AOB 17, fn. 2.) The California Supreme Court addressed non-advertising uses of a likeness. (*Comedy III*, *supra*, 25 Cal.4th at pp. 391, 393.) Another decision addressed the use of NFL game footage and applied a balancing test to the right of publicity claims at issue. (*Dryer v. National Football League* (D. Minn. 2014) 55 F.Supp.3d 1181, 1188, appeal docketed (8th Cir. Oct. 28, 2014, No. 14-3428).) *Frazier v. Boomsma* (D. Ariz. Aug. 20, 2008, No. 07-CV-8040) 2008 WL 3982985, at *4 applied strict scrutiny only because the case involved "core political speech" about dead soldiers—*Zacchini* was not discussed. And *Arkansas Writers' Project, Inc. v. Ragland* (1987) 481 U.S. 221 addressed a discriminatory tax on magazines and has no relevance to the right of publicity.

EA also cites law review articles characterizing the right of publicity as "content based" and then jumps to the conclusion that strict scrutiny applies. But the right of publicity is no more "content based" than other forms of protection for intellectual property. The U.S. Supreme Court, the California Supreme

Court, and the California legislature have spoken with one voice. No court has adopted the reasoning of—or even cited—any of the law review articles in EA's brief. To call the right of publicity "content based" does not overturn the governing constitutional test set forth in *Zacchini*; nor does it undermine the valuable interests that the right of publicity protects. EA's policy preference is best addressed to the California legislature, not the courts. (See, e.g., *California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 632.)

California has adopted the transformative use test to evaluate First Amendment protection of expressive elements of a work that appropriates a person's right of publicity. That test sits alongside several other protections and exemptions, none of which apply here. The expressive-use test that EA advocates would erase this regime. It is not surprising that EA failed to raise this argument in the trial court, given that it is not just unsupported but fatally conflicts with governing law.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Superior Court.

DATED: February 11, 2016 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8647 words, including footnotes. In making this certification I have relied on the word count of the computer program used to prepare the brief.

DATED: February 11, 2016 Respectfully Submitted,

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PROOF OF SERVICE

I am employed in Maricopa County, over the age of 18 years, and not a party to or interested in the within action. My business address is 11 West Jefferson Street, Suite 1000, Phoenix, Arizona 85003.

On February 11, 2016, I served the foregoing document:

RESPONDENT BRIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of February, 2016, at Phoenix, Arizona.

/s/ Amy Nolan
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