

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John Frederick Dryer, James Lawrence
Marshall, Joseph Michael Senser, Elvin
Lamont Bethea, Dante Anthony
Pastorini, and Edward Alvin White on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

National Football League,

Defendant.

Court File No. 0:09-cv-02182-PAM-
SRN

**PLAINTIFFS' MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR
JUDGMENT ON THE
PLEADINGS**

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INTRODUCTION

This action involves one undisputable fact: the National Football League (“NFL” or “Defendant”) uses its retired players’ identities to generate revenue. The NFL does not deny it. It claims it is entitled to do as it pleases because of the First Amendment and because of “copyright preemption.” The NFL is wrong.

Seven former players (“Retired Players” or “Plaintiffs”) have commenced this action to address the NFL’s use of their identities to promote the NFL and build the NFL brand. The overwhelming majority of retired NFL players played long before the days of multimillion-dollar contracts and suffer physically, mentally, and financially because of their playing days, while the NFL sets revenue records using their identities. This action seeks to right that fundamental wrong and ensure that retired NFL players are fairly compensated for the use of their identities.

The NFL notes, but does not move upon, several defenses, such as the existence of player contracts authorizing it to use retired players’ identities. But those contracts are expired, and any provision assigning the NFL identity rights expired with them. The NFL included no clause to make the assignments permanent, as it does in its other performer contracts. There is a reason the NFL has not moved for dismissal on these player contracts: the argument fails and, in any event, cannot be determined at the pleadings stage.

The NFL has tried its First Amendment defense before and failed. It fails here too because the First Amendment does not protect the NFL's use of retired players' identities in commercial speech and to advertise its products. Further, retired NFL players are severely deteriorating because of their sacrifices to the NFL during its economic infancy. Without the players' physical and financial sacrifices, the NFL would have never been able to grow into the billion-dollar enterprise it is today. The interest of allowing retired players to protect the value of their identities far outweighs any interest in allowing the NFL to continue profiting on these men without permission. While the NFL espouses free speech, it never allows retired players to use their own history as NFL players to market themselves. The NFL then turns around and uses these very same identities to promote itself and make millions. This standard NFL practice renders its First Amendment defense not only incorrect, but dishonest.

The Copyright Act does not preempt this action. The right of publicity is never preempted when plaintiffs assert rights only in their identity and not in any copyrighted work. A person's identity is never copyrightable, and asserting control over how it is profited upon is not equivalent to any right within the Copyright Act. The NFL's sole authority, *Baltimore Orioles*, has been distinguished and all but reversed by several Circuit Courts of Appeal on these grounds – including the Seventh Circuit that decided it.

The NFL erroneously argues unjust enrichment claims are derivative and barred when based on the same facts underlying other claims. But unjust

enrichment is not derivative when it is warranted independently by a defendant's reprehensible conduct, apart from any statutory or common law cause of action.

The NFL's motion should be denied in its entirety.

BACKGROUND

The Retired Players, Fred Dryer, Jim Marshall, Joe Senser, Elvin Bethea, Dan Pastorini, Ed White, and Toby Wright, bring this action on behalf of themselves, their former teammates, and all other retired NFL players. They challenge the NFL's¹ unauthorized use of their identities in NFL Films, and elsewhere, to build the NFL's brand, advertise itself as an entertainment product, sell products, and otherwise generate revenue. Am. Compl., ¶¶1; *passim*.

One of the NFL's key marketing strategies is to focus consumers on its past players. *Id.*, ¶¶2, 16, 17, 71, 75, 77. It is one of the simplest concepts in advertising, and done to establish the league's brand authenticity compared to competing sports and entertainment products. *Id.* With its substantial brand value, the NFL is able to garner unbelievable revenue - an estimated \$6.9 billion in 2008 alone. *Id.*, ¶¶13, 53.

The principal way the NFL uses former players to market itself is through its NFL Films division. *Id.*, ¶¶18-43, 71-77. NFL Films creates documentary-style infomercials for the league by taking raw game footage and slicing and dicing it

¹ The NFL is the Defendant in this action. Am. Compl., ¶13. The Retired Players decline the NFL's invitation to limit their action to NFL Films alone. *See* Def. Br. at 1, n.1. The NFL has carried out its misconduct through several business units, including NFL Films, among others. Am. Compl., ¶13.

into promotional films. *Id.*, ¶¶24, 76-77. NFL Films' self-described "mission" is "to promote the National Football League." *Id.*, ¶19. It has been called "the most effective propaganda organ in the history of corporate America" and creates substantial revenue for the league. *Id.*, ¶¶20, 26. In addition to using retired players as the stars of these promotional films, the NFL also uses the names of the players to sell NFL Films productions as a separate product. *Id.*, ¶¶4, 18, 22, 31-32, 39.

The uses of the retired NFL players' identities in this action are not publicly available. *Id.*, ¶¶44-50. The NFL strictly controls the public's, including the news media's, access to broadcast images of its players, and forbids retired players from using their own identities as players to promote themselves, or their charities. *Id.*

All retired NFL players signed contracts with the NFL to play football. *See* Connolly Decl. Exs. 1-11. These contracts contained, or incorporated, provisions authorizing the NFL to use the players' identities for the length of the contract. *Id.*; Am. Compl., ¶¶52, 78. The contracts prohibited the NFL from using players' identities to endorse any commercial product. *Id.* All of the Retired Players' contracts are now expired, along with any assignments therein. *Id.*

Retired NFL players are fighting an increasingly public, increasingly severe battle with disability, brain injury, and financial strain because of their service to the NFL. *Id.*, ¶¶3, 38-39, 54. The overwhelming majority of players played when salaries were modest, and sacrificed physically and financially for the growth of the league. *Id.* The Retired Players bring the present action seeking damages for

the past unauthorized use of their identities, and to stop the NFL's misconduct going forward. Am. Compl., ¶5.

STANDARD

“The Court reviews a Rule 12(c) motion for judgment on the pleadings under the same standard of review as a motion to dismiss under Rule 12(b)(6). *Aquapoly Equip. Co. v. AEC, Inc.*, No. 09-514, 2009 WL 3248320, at *3 (D. Minn. Oct. 6, 2009) (J. Kyle). “To avoid dismissal, a complaint must include ‘enough facts to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Importantly, “[w]hen reviewing a motion to dismiss, the complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's favor.” *Id.* (citing *Twombly*, 550 U.S. at 555). Thus, dismissal is not proper even if it is “doubtful that the plaintiff will be able to prove all of the factual allegations contained therein.” *Id.* (citing *Twombly*, 550 U.S. at 556). Based on these standards, the Amended Complaint cannot be dismissed. *Id.*

ARGUMENT

I. No Retired Player Contract Bars this Action.

All player contracts signed by retired NFL players are unambiguously expired. Am. Compl., ¶¶52, 78. None of the Retired Players' claims arise under these contracts. That the NFL tries to invoke them as an affirmative defense does not change this.

To support its affirmative defense, the NFL submits numerous contracts, along with NFL bylaws, with the note “The Court does not need to... interpret the scope of the express consent language at this time[.]” Connolly Decl. Exs. 1-11; Def. Br. at n.2. The NFL does not move for dismissal on these contracts because any challenge it conjures could not be resolved at the pleadings stage. *See Praktika Design & Projectos Ltd. v. Marvin Lumber and Cedar Co.*, Civil No. 06-957, 2006 WL 2788182, at *3-4 (D. Minn. Sep. 26, 2006). There may be questions, for example, whether the Internet, cable television, and other ways the NFL uses retired player identities were ever contemplated. *See Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 731 (8th Cir. 1995); (using identity in manners plaintiff did not contemplate supports conclusion that plaintiff did not authorize those uses).

Any player contract relevant to this litigation is plainly expired. *See* Connolly Decl. Exs. 1-11. This is clear from the assignment language the NFL quotes in its brief. *See* Def. Br. at 6-7. Nowhere here (or in any player contract) does it indicate the assignments were “in perpetuity” or for any period longer than the contract term. *Id.* In *Facenda v. NFL Films, Inc.*, the Third Circuit interpreted a similar NFL contract giving the league:

the unequivocal rights to use the audio and visual film sequences recorded of me, or any part of them... *in perpetuity* and by whatever media or manner NFL Films... sees fit, provided, however, such use does not constitute an endorsement of any product or service.

542 F.3d 1007, 1012 (3d Cir. 2008) (emphasis added). Thus, the NFL uses “perpetuity” clauses where it intends to. If and when the NFL moves upon its

contract defense, this and other evidence will negate any argument the player contracts have any ongoing effect. The Court should deny the NFL's motion in its entirety.

II. The First Amendment Does Not Support Dismissal Because the Retired Players Properly Allege the NFL's Unauthorized Use of Their Identities for Commercial and Advertising Purposes.

The right of publicity is well established in this district where one party uses the identity of another without permission to make money. *Ventura*, 65 F.3d at 728-31; *Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136, 1140-41 (D. Minn. 1996). The NFL claims it may profit on retired players' identities because of the First Amendment. Def. Br. at 9-16. But the First Amendment does not protect those who make unauthorized use of private information to advertise and generate revenue. The NFL has tried this defense before, and it was rejected. *See Facenda*, 542 F.3d at 1017-18.

The Eighth Circuit's First Amendment holding in *C.B.C. Distrib. and Mktg. v. Major League Baseball Adv. Media, L.P.* does not help the NFL. 505 F.3d 818 (8th Cir. 2007). It applies only to the use of publicly available information found in any newspaper and makes no assessment of the bearing of commercial speech on First Amendment protection. *Id.* at 823-24. In actuality, where a plaintiff alleges the unauthorized use of her identity for advertising and commercial purposes, the First Amendment provides no safe harbor. *Facenda*, 542 F.3d at 1017-18. This Court should not extend *C.B.C. Distribution* beyond its narrow

facts to overrule *Ventura*, a case involving the same pattern of misconduct and nearly identical facts Plaintiffs challenge here.

Nor does the First Amendment sanction exploiting the identities of others where protecting the right of publicity outweighs the interest in protecting the expression at issue. *Id.* In this case, retired NFL football players are in the midst of a serious and very public descent, physically, mentally and financially, because of their sacrifices to the NFL. The interest in protecting the identities of these men vastly outweighs any interest in allowing the NFL to continue profiting on them without permission. The First Amendment does not trump the Retired Players' plainly alleged claims and the NFL's motion should be denied.

A. The Violations Alleged By the Retired Players Have Already Been Addressed In this Jurisdiction, and Fit Squarely with Eighth Circuit Precedent.

1. *The Retired Players' Right to Protect Their Identities is Well-Established.*

Whether a sports-entertainment conglomerate may sell films of its athletes without permission has already been decided in this jurisdiction. In *Ventura*, the Eighth Circuit assessed whether a professional wrestler could recover for violation of his right of publicity against his former employer, the World Wrestling Federation ("WWF"). 65 F.3d at 727-29. *Ventura* alleged the WWF made films of him performing, and then distributed the films containing his identity for profit, after his employment and without his authorization. *Id.* at 727-28. The case went to trial, and the Eighth Circuit affirmed a jury verdict finding *Ventura's* right of

publicity was violated and awarding royalties based on the WWF's earnings. *Id.* The Eighth Circuit affirmed the determinations of the jury and this Court "in all respects." *Id.*

In *Ventura*, this Court and the Eighth Circuit each analyzed the content of the plaintiff's contracts to determine if the WWF was authorized to profit on his identity. *See id.* at 730-31 (citing District Court's findings). The facts showed Ventura performed for the WWF in two roles, as a wrestler and commentator. *Id.* This Court found Ventura's wrestling contract precluded royalties for videos of him as a wrestler, but his commentator agreement did not. *Id.* Absent this authorization, the WWF violated Ventura's right of publicity by marketing videos of him. *Id.* at 731-33. On appeal, the Eighth Circuit squarely addressed whether the WWF's use of Ventura's identity in videos was a protected use, and held it was not. *Id.* at 729. The court held, "Ventura's quantum meruit claim may succeed only if Titan's rights to use Ventura's performance are limited so that Titan is not entitled to use the performance without Ventura's consent. We believe that [WWF's] rights are limited by Ventura's right to publicity." *Id.*

Ventura is on all-fours with the Retired Players' claims. Like *Ventura*, the Retired Players allege the appropriation of their identities in videos marketed by their former employer. *See Am. Compl., passim.* Like *Ventura*, the Retired Players allege their contracts do not authorize the NFL to market films containing their identities for profit. *Id.* The cases are nearly identical.

Recently, the Eighth Circuit decided another case involving claims that a party used athletes' identities without permission. In *C.B.C. Distribution*, the Eighth Circuit assessed the First Amendment, and limited its application in right of publicity cases to those involving publicly-available statistics and other information "that is available to everyone." 505 F.3d at 823-24. Since the Retired Players do not allege the unauthorized use of public information, *C.B.C. Distribution* provides the NFL no refuge.

2. *The Retired Players' Allegations Are Consistent with C.B.C. Distribution.*

This Court should not overrule *Ventura* by extending *C.B.C. Distribution* beyond its narrow facts. Unlike *Ventura*, which addressed the marketing of films of a plaintiff after his contract ended, *C.B.C. Distribution* involved fantasy football and the use of publicly-available player statistics "available to everyone." 505 F.3d at 823. *C.B.C. Distribution* did not assess the First Amendment's limitation in the context of commercial speech, as the Retired Players allege in the present action. *Id.* at 823-24. Expanding *C.B.C. Distribution* to the advertising uses alleged here would eliminate the right of publicity altogether, and would allow anyone to use athletes' identities any way they choose. That is not only a repugnant result, it is not the law. *See, e.g., Ventura*, 65 F.3d at 728-31; *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1401, n.3 (9th Cir. 1992); *Hillerich*, 943 F. Supp. at 1140-41; *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281-83 (D. Minn. 1970).

In *C.B.C. Distribution*, the Eighth Circuit analyzed a claim by Major League Baseball (“MLB”) that a company was violating active players’ rights of publicity by using their current season statistics for a fantasy baseball game. 505 F.3d at 823-24. The Eighth Circuit determined the players’ rights of publicity did exist, and were violated. *Id.* at 822-23. The court then looked at the specific factual and statistical data being used and concluded the right of publicity must give way to First Amendment considerations. *Id.* at 823-24. The basis of the court’s conclusion was the public nature of the statistics and data at issue:

[T]he information used in CBC’s fantasy baseball games is *all readily available in the public domain* and it would be strange law that a person would not have a first amendment right to use information that is *available to everyone*.

Id. (emphasis added). Thus, the Eighth Circuit extended First Amendment protection to the use of statistics (and the players’ names, teams, etc., describing which statistics belong to whom) that are found in any newspaper. *Id.* For support, the court also noted the California state court decision *Gionfriddo v. Major League Baseball*, to the extent of its discussion of baseball players’ public statistical data.² *Id.* (citing 94 Cal. App. 4th 400, 411 (Cal. Ct. App. 2001)).

² *Gionfriddo* is an intermediate California state court decision that should have no applicability to this case. 94 Cal. App. 4th 400. It directly contradicts established precedent unequivocally holding persons, including athletes, have a right of publicity in their identities. *Ventura*, 65 F.3d at 728-31. The *Gionfriddo* court also concluded the uses there were not “advertisements,” an issue of fact that cannot be resolved at the pleading stage. 94 Cal. App. 4th at 413; *see Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d at 88-89 (2d Cir. 1989) (whether use of identity is commercial speech is issue of fact to be determined by trier of fact). More importantly, the *Gionfriddo* court concluded the plaintiffs there had “negligible

Finally, the *C.B.C. Distribution* court analyzed whether allowing free use of publicly available information was outweighed by an interest in protecting “handsomely” paid active baseball players. *Id.* at 824. The court concluded it was not.³ *Id.*

C.B.C. Distribution created no new law in this district. The distinction between using publicly available information and profiting on an athlete’s private identity is well established. *Hillerich*, 943 F. Supp. 1136. In *Hillerich*, a defendant used an athlete’s name to promote its hockey sticks and faced false endorsement and right of publicity claims as a result. 943 F. Supp. at 1138. The defendant claimed using the athlete’s identity was a protected use because invoking the player’s name merely factually, and truthfully, reported the hockey stick was the type the player used. *Id.* at 1139. Judge Tunheim disagreed, holding there is a dispositive difference between using a player’s name, statistics and other publicly

economic interests” and the defendants’ use of their identities likely “enhanced” the players’ marketability. 94 Cal. App. 4th at 415. This absurd holding has no application to retired NFL players who as a group are suffering a downward physical and financial spiral because of their playing days, and who are barred by the NFL from using their own identities as players to market themselves. Am. Compl., ¶¶3, 46-48.

³ Following *C.B.C. Distribution*, another court in this district assessed an identical suit alleging the identical public information used in a fantasy football game. *CBS Interactive, Inc. v. National Football League Players Ass’n, Inc.*, No. 08-5097, 2009 WL 1151982 (D. Minn. Apr. 28, 2009). Judge Montgomery confirmed there was “no difference between the package of information at issue here and that which was at issue in *C.B.C. Distribution*.” *Id.* at *19. Because the information at issue was identical, the court reached the same result. *Id.*

available information and using the player's *identity* to make money. *Id.* at 1140-

41. The court held:

Courts have distinguished between a newspaper's use of professional athletes names and facts pertaining to their play and use of such information for commercial purposes. The former is a fair use, the latter infringes on players' right of publicity.

Id. (citing *Uhlaender*, 316 F. Supp. at 1282).

The Retired Players do not allege the NFL has used information "all readily available in the public domain" and "available to everyone." Exactly the opposite. The Retired Players allege the uses of their identities are private, tightly-controlled by the NFL, and unavailable to anyone unless they pay substantial fees. Am. Compl., ¶¶44-50. When it comes to the likenesses of NFL players, the NFL's iron fist controls the news media and retired players themselves. *Id.*

The NFL's argument for applying *C.B.C. Distribution* to the Retired Players' allegations is not only incorrect, it is disingenuous. Applying *C.B.C. Distribution* here would plainly make the uses in this case open to commercial exploitation by anyone. *See* 505 F.3d at 824 (approving the ability to use publicly-available player data for profit without authorization from league or players). At the same time, the NFL contracts with active players to obtain these exclusive, private rights, and bars retired NFL players themselves from using *any* indicia of their own identity as a player for commercial purposes. Am. Compl., ¶¶2, 46-48. Plaintiff Wright, for example, asserts he was told he could not represent himself as

a former NFL player, by name, by image, or any way whatever, to market himself. *Id.*, ¶¶47-48. The class is awash with similar stories. *Id.*, ¶47.

For years the NFL has required its retired players to start from scratch when they stop playing, and never again capitalize on their history as players. *Id.* at ¶¶44-50. The NFL then turns around and uses these players' identities to earn money for itself. *Id.*, *passim*. And now the NFL's latest claim: the First Amendment should make players' identities open for *anyone* to use at will for profit. *See* Def. Br. at 9-14 (arguing application of *C.B.C. Distribution* to present case). This unsupportable argument would violate established precedent making this conduct unlawful. *See Ventura*, 65 F.3d at 727-31 (commercial use of former wrestler's identity to market videos violates right of publicity); *Facenda*, 542 F.3d at 1017-18 (rejecting First Amendment defense to right of publicity and Lanham Act claims); *White*, 971 F.2d at 1401, n.3 ("Unless the First Amendment bars all right of publicity actions-and it does not, *see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)-then it does not bar [case where plaintiff's identity used in commercial speech.]").

The NFL's invitation to expand *C.B.C. Distribution* to overrule *Ventura* is baseless. The Retired Players do not allege the appropriation of information "available to everyone". *C.B.C. Distribution* has no application here. The Court should deny the NFL's motion.

B. The Retired Players Properly Allege the Unauthorized Use of Their Identities in Advertising and Commercial Speech.

The Retired Players plainly allege the misappropriation of their identities through by the NFL's advertising and commercial speech. Am. Compl., ¶¶1-4, 18-24, 26, 31-36, 42, 70-77, 79-80. Where the use of a plaintiff's identity is commercial speech, the protections of the First Amendment do not apply. *Facenda*, 542 F.3d at 1017-18.

1. *The First Amendment Does Not Shield the NFL's Alleged Advertising and Commercial Speech.*

The First Amendment protects many things, but it does not protect “a disguised commercial advertisement for the sale of goods or services.” *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (quoting *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989)). Nor does it “protect ‘a subterfuge or cover for private or commercial exploitation.’” *Titan Sports*, 870 F.2d at 88 (quoting *Zacchini*, 433 U.S. at 581 Powell, J., dissenting). The Retired Players pervasively allege the NFL's use of their identities through advertising, promotional, and commercial speech. Am Compl., ¶¶1-4, 18-24, 26, 31-36, 42, 70-77, 79-80. With these allegations, dismissal on First Amendment grounds is impossible.

The NFL has tried its First Amendment defense before, and failed. In *Facenda*, the NFL faced a lawsuit for using the identity of legendary announcer John Facenda in a documentary-style infomercial regarding the cultural phenomenon *Madden NFL* video game. 542 F.3d at 1017. The full-length program aired on the NFL Network in a regular programming time slot. *Id.* at

1012. Like classic NFL Films productions, it included “interviews with NFL players, the game’s producers, and others” and spoke only in a positive regard, never criticizing the game. *Id.* As in the present case, the NFL argued the film was “expressive” and a “documentary explaining how the video game was made and depicting the phenomenon of the game’s popularity.” *Id.* at 1016. The NFL argued that “even if the film has promotional aspects... they are ‘inextricably intertwined’ with the artistic and informational elements, meaning that [the court] must treat the program as fully protected speech.” *Id.* at 1016-17 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). The Third Circuit disagreed, concluding the program was “commercial speech”. *Id.* at 1017 (using same three-factor test for “commercial speech” used in Eight Circuit). Because the facts of *Facenda* mirror the present action exactly, the same result is warranted here.

2. *Dismissal Is Impossible Because the Retired Players Properly Allege the NFL’s Use of their Identities is Commercial Speech.*

Whether the NFL’s uses of retired players’ identities are commercial speech relies on a fact-intensive test that cannot be resolved at the pleadings stage. *See Facenda*, 542 F.3d at 1016-18 (assessing “commercial speech” at summary judgment stage with facts derived from discovery); *see also Titan Sports, Inc.*, 870 F.2d at 88-89 (“commercial speech” cannot be resolved at summary judgment because question of fact “whether whatever public interest aspect might be involved “is merely incidental to [the distributors’] commercial purpose.”).

This is particularly true in the present case, where the NFL has provided the Court with numerous NFL Films as evidence of their supposedly “expressive” content. *See* Connolly Decl. Exs. 12-25 (Docket # 16-12 - 16-25). The Court must reject the NFL’s *ipso facto* assertion that these DVDs are “expressive.” *See* Def. Br. at 15 (“when the Court reviews the specific NFL Films productions ... it will see they all contain... expressive speech about athletic performances...”). As the NFL is aware, the Retired Players’ allegations must be taken as true, and they properly allege the communications at issue are commercial speech. Am. Compl., ¶¶1-4, 18-24, 26, 31-36, 42, 70-77, 79-80.

The Eighth Circuit applies the same test used in *Facenda* to determine whether speech is “commercial speech.” Thus, “[t]hree factors govern whether speech is commercial: (i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.” *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)); *see also Facenda*, 542 F.3d at 1017 (applying same). As the following makes clear, the Retired Players allege facts satisfying each of these inquiries.

- a. *The Retired Players Properly Allege the NFL Used their Identities in “Advertisements.”*

The first factor in determining “commercial speech” is whether the speech is an “advertisement.” *Porous Media Corp.*, 173 F.3d at 1120; *see also Facenda*,

542 F.3d at 1017. As in *Facenda*, the productions in the present case are “not traditional 30- or 60-second television advertisements” but documentary-style “infomercials.” 542 F.3d at 1017; Am. Compl., ¶¶76-77. “Like an infomercial, the program[s] focu[s] on one product, explaining both how it works and the source of its innovations, all in a positive tone.” *Id.* As in *Facenda*, the productions portray the NFL in only a positive light and contain no criticisms of any kind, unlike standard news accounts. *Id.* “This belies any argument that the program has a documentary purpose.” 542 F.3d at 1018.

One need look no further than the “Fabulous 50’s” production appended to the NFL’s motion. *See* Connolly Decl. Ex. 12 (Docket #16-12). The production never presents the disastrous Baltimore Colts of the mid-1950’s negatively as a terrible team, which they were, but only positively, as a jubilant gang of colorful characters. *See id; Facenda*, 542 F.3d at 1012, 1018. With expert and other evidence, a finder of fact could well determine the “Fabulous 50’s” production has no interest in reporting the facts of history, but only in advertising the NFL as an entertainment product.⁴ *Id.* Further, although this production describes the

⁴ A finder of fact could easily determine the evidentiary exhibits produced by the NFL are advertisements known as “documericals.” *See Facenda*, 542 F.3d at 1017 (documentary-style infomercials are “advertisements”). The advertising industry defines a “documerical” as:

[A]n infomercial programming format that utilizes production and creative techniques originally used in traditional documentaries. This includes an on-camera spokesperson, multiple location shooting, interviews which are live or taped, voice-over narration, and real people features which are edited into a continuously flowing

players' colorful off-the-field lives with positive cheer, it is doubtful the NFL will ever sanction an NFL Films production documenting NFL quarterback Michael Vick's conviction on dog fighting charges, or O.J. Simpson's murder trial. Nor are we likely to see an NFL Films production documenting the physical, mental, and financial decline of retired NFL football players. *See* Am. Compl., ¶54.

The Retired Players plainly allege that NFL Films are advertisements. *See, e.g.,* Am. Compl., ¶¶70-77. The first factor for "commercial speech" is established.

b. *The Retired Players Properly Allege Reference to a "Specific Product or Service."*

The second factor for finding commercial speech is "whether it refers to a specific product or service." *Porous Media Corp.*, 173 F.3d at 1120; *see also Facenda*, 542 F.3d at 1017. In *Facenda*, the Third Circuit found this "easily satisfied" by the simple fact the production had only one subject, the *Madden* game, whose history the program documented. *Facenda*, 542 F.3d at 1017. The

half-hour. The format, which is based on actuality, mirrors that of television news shows like '20/20' or '60 Minutes', and there are not elements of fiction presented in this format unless specified as 'dramatizations'.

<http://www.infomercial-production.net/infomercial-production-glossary.htm#top>. Without relevant expert and other evidence regarding advertising methods and production standards, and their application to NFL Films, it is impossible to resolve the parties' dispute whether NFL Films are "infomercials" (Am Compl. ¶¶24, 77) or solely "expressive speech about athletic performances." (Def. Br. at 15).

program provided no other discussion or context, and did not refer to any other games except historical versions of the *Madden* game. *Id.*

The Retired Players also allege the NFL Films productions focus on a single product, the NFL, as a specific, consumable entertainment product. Am. Compl., ¶¶70-77. They also allege the NFL's use of their identities to sell individual video products. Am. Compl., ¶¶4, 29-32. With the former, the DVDs produced by the NFL plainly discuss the NFL only, as an exciting, innovative, product. *Id.*, ¶¶20, 21, 24. With the latter, the advertisements and sales descriptions using the Retired Players' names refer only to the product they are describing. *Id.*, ¶¶4, 29-32.

The NFL attempts to distinguish *Facenda* by claiming it involved “a separate product” from the NFL itself. Def. Br. at 13. This distinction fails immediately. The *Facenda* court expressly noted the supposedly separate product there provided a “general promotion of NFL-branded football”, which weighed in favor of denying the First Amendment defense. *Facenda*, 542 F.3d at 1017-18. Further, requiring a “separate product” distinction runs headlong into *Ventura*. In *Ventura*, the plaintiff was a professional wrestler and announcer, and later brought an action for the WWF's sales of videotapes about *professional wrestling*. 65 F.3d at 727-28. The Eighth Circuit agreed that the WWF's unauthorized uses violated the wrestler's right of publicity because they were outside of his contract. *Id.* at 730-31.

The Retired Players have plainly alleged the communications in this case refer to a specific product or service. Am. Compl. ¶¶4, 20-21, 24, 29-32, 70-77. The second factor for “commercial speech” is established.

c. *The Retired Players Properly Allege the NFL’s Economic Motivation.*

The Retired Players’ allegations satisfy the third factor for “commercial speech,” “whether the speaker has an economic motivation for the speech.” *Porous Media Corp.*, 173 F.3d at 1120; *Facenda*, 542 F.3d at 1017.

In *Facenda*, the court confirmed the NFL’s economic motivation directly by its receipt of licensing fees associated with the video game promoted by its infomercial. 542 F.3d at 1017-18. The Third Circuit found indirect economic motivation from the game’s “general promotion of NFL-branded football.” *Id.*

The Retired Players pervasively allege the NFL’s economic motivation, including: (1) payments for licensing and other revenues generated by broadcasting NFL Films (Am. Compl., ¶26); (2) revenues from selling NFL Films productions on video (*Id.*, ¶¶28-29); and (3) the dramatic brand and associated revenues realized by the promotion of NFL-branded football. (*Id.*, *passim*). Indeed, the NFL’s economic motives in using retired players’ identities are open and obvious. Following 2008 Congressional hearings on the NFL’s mistreatment of retired players, Congresswoman Linda Sanchez of California commented:

[H]alf of all players retire because of injury, sixty percent of players suffer a concussion, at least one quarter of players suffer multiple concussions and nearly two-thirds suffer an injury serious enough to sideline them for at least half of a football season.” She also found,

“The evidence suggests that the vast majority of [retired] players needing [health] benefits do not receive them. What is even more troubling is that *through projects such as NFL Films, the NFL continues to profit off those very same players* who are denied benefits.

Am. Compl., ¶¶38-39.

The Amended Complaint plainly alleges the NFL’s economic motives. *See, e.g.,* Am. Compl., ¶¶4, 20, 21, 24, 29-32, 70-77. The third factor for “commercial speech” is established. Because the Retired Players’ allegations satisfy all three factors, they have validly alleged the NFL’s commercial speech and its First Amendment defense cannot merit dismissal. *Facenda*, 542 F.3d at 1018. The Court should deny the NFL’s motion.

C. The Interest of Recognizing Retired NFL Players’ Rights in Their Identities Strongly Outweighs Any Interest in Allowing the NFL’s to Continue Profiting On the Players’ Identities Without Permission.

Allowing retired NFL players a right in their identities dramatically outweighs any interest in allowing the NFL to continue profiting on them. Here, the NFL proposes expanding the Eighth Circuit’s decision regarding active baseball players in *C.B.C. Distribution* to cover the retired NFL football players. Def. Br. at 14-16. Given the dire and degenerating condition of retired football players, which has been made known to the NFL by Congress and the medical community, its proposal borders upon ghoulishness.

In *C.B.C. Distribution*, the Eighth Circuit determined there was little to be gained by allowing active baseball players’ rights in publicly-available

information to outweigh the defendant's use of information "that is available to everyone." 505 F.3d at 823-24. The court noted there were little economic interests to protect because, "major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements." ⁵ *Id.* at 24. The court also found little non-economic interest in protecting active baseball players, noting the only emotional harm to come from using publicly-available statistics would come if the player played poorly, "in which case media coverage would cause the same harm." *Id.*

The interests analyzed in *C.B.C. Distribution* could not be more inapplicable here. Retired NFL football players are not "handsomely" paid active players. Am. Compl., ¶¶3, 54. The overwhelming majority played long before the era of million-dollar contracts and are struggling financially, often because of the severe physical disabilities they incurred while playing football for the NFL. *Id.* Nor do retired NFL players benefit from the endorsements, sponsorships and other opportunities for active players. The NFL affirmatively bans its retired players from using their identities as players to market themselves unless they pay steep fees. Am. Compl., ¶¶2, 46-48. Thus, retired players are never allowed to use their

⁵ The *C.B.C. Distribution* court went on to note there was no "endorsement" to consider because all active players, by definition, are included in fantasy baseball so there could be no real assertion that any one player appeared to personally endorse the game. 505 F.3d at 824. This is opposite of the present case, where the NFL carefully selects retired player identities for inclusion in specific videos to maximize the promotional impact, and uses specific player names to sell its productions to the public. Am. Compl., ¶¶4, 29-32, 35-36, 70-77.

own history as an NFL player to market themselves. *Id.* At the same time, the NFL uses these very same identities to promote itself and make millions. Am. Compl. ¶¶2, 39, 48-54. This unbelievable scenario is even more unbelievable considering the fact that, as a matter of business, the NFL would never have grown to its current profitability and worth had the retired players not played for so little money. Am. Compl. ¶¶3, 53-54. In sharp contrast to the interests analyzed in *C.B.C. Distribution*, there is little or no economic interest in protecting the NFL's ability to continue exploiting retired players' identities. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003) (“[t]he rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” (quoting *Zacchini.*, 433 U.S. at 576)).

For the same reasons, there are substantial non-monetary interests worth protecting in the present case. Relevant interests include such things as “protecting natural rights, rewarding celebrity labors, and avoiding emotional harm.” *C.B.C. Distribution*, 505 F.3d at 824. Unlike the plaintiffs in *C.B.C. Distribution*, retired NFL players are in a state of deterioration to such a degree that Congress has commenced an investigation into the NFL's mistreatment of them. Am. Compl., ¶¶38-39. This treatment appears so horrific that while this action has been pending, Congresswoman Maxine Waters of California, her husband a retired NFL player, threatened to seek revocation of the league's

antitrust exemption. Associated Press: Goodell Defends NFL to Congress About Concussions *available at*: <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=151929>.

Substantial economic and non-economic interests support allowing retired NFL players to benefit from the commercial value of their identities. The NFL's untenable First Amendment defense must give way to these important considerations. The Court should deny the NFL's motion.

III. The Copyright Act Does Not Preempt Plaintiffs' Claims Because the Retired Player's Identities Are Not Within the Subject Matter of Copyright and Do Not Assert Rights Protected by the Copyright Act.

The Copyright Act, 17 U.S.C. § 301, does not preempt the Retired Players' right of publicity claims because a person's identity or *persona* is never copyrightable and a violation of those rights is not equivalent to anything within the Copyright Act. Defendant's copyright preemption defense fails.

A two-part test determines whether the rights a plaintiff asserts under a state law right of publicity are the type the Copyright Act seeks to preempt. First, a court must determine whether the rights plaintiff asserts are within "the subject matter of copyright." 17 U.S.C. § 301; *see, e.g., Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 909 (7th Cir. 2004); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001); *Heidi Ott A.G. v. Target Corp.*, 153 F. Supp. 2d 1055, 1067 (D. Minn. 2001). If so, the court assesses whether the rights asserted are "equivalent to" those protected by the Copyright Act. *Id.* Importantly, the two

prongs are conjunctive; if either one fails, there is no preemption. *Id.* The NFL cannot satisfy either prong of this affirmative defense.

A. The Retired Players' Identities Are Not Within the Subject Matter of Copyright.

The NFL fails the first prong because Plaintiffs assert only rights in their identities, not in any copyrighted work. “Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). A person’s identity is never within the subject matter of copyright. *Toney*, 406 F.3d at 910; *Facenda*, 542 F.3d at 1027-28; *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1141-42 (9th Cir. 2006); *Downing*, 265 F.3d at 1004; *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000). This is because, “A person’s likeness-her persona-is not authored and it is not fixed. The fact that an image of the person might be fixed in a copyrightable photograph does not change this.” *Toney*, 406 F.3d at 910. The basic distinction is that claims based on identity rights, as opposed to copyright-like rights, are based “*not* [on] a particular picture or photograph of plaintiff. Rather, what is protected by the right of publicity is the very identity or persona of the plaintiff as a human being.” *Id.* at 908 (internal quotation marks and citation omitted) (emphasis in original). Thus:

A photograph “is merely one copyrightable ‘expression’ of the underlying ‘work,’ which is the plaintiff as a human being. There is only one underlying ‘persona’ of a person protected by the right of publicity.” *Id.* In contrast, “[t]here may be dozens or hundreds of photographs which fix certain moments in that person's life. Copyright in each of these photographs might be separately owned by dozens or hundreds of photographers.” A persona, defined in this

way, “can hardly be said to constitute a ‘writing’ of an ‘author’ within the meaning of the copyright clause of the Constitution.”

Id. at 908-09 (quoting *Downing*, 265 F.3d at 1003-04). The NFL attempts to muddle things by citing only to *Baltimore Orioles*, an opinion that was widely pilloried and ultimately narrowed, because of its failure to address this distinction.

1. *Toney*, not *Baltimore Orioles*, Governs this Case.

Defendant’s nearly-exclusive reliance on *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986), to support the first prong of its preemption defense is seriously misplaced. Def. Br. at 16-20. What Defendant does not tell the Court is that numerous Circuit Courts of Appeal have rejected *Baltimore Orioles* and its reading of Copyright Act preemption – including the Seventh Circuit, which authored the decision. *See Toney*, 406 F.3d at 910-11; *Facenda*, 542 F.3d at 1026-28; *Downing*, 265 F.3d at 1003-05; *Brown*, 201 F.3d at 657-61; *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000);

Following criticism from its sister circuit courts and commentators, the Seventh Circuit substantially narrowed *Baltimore Orioles* to exclude from the preemption hammer the types of publicity rights asserted by the Retired Players. *See Toney*, 406 F.3d at 909-11. Where plaintiffs assert only rights in their identities, and not in any copyrighted work, the claims are not preempted. *Id.* The Seventh Circuit specifically excluded from preemption any claims for the unauthorized use of one’s identity for advertising purposes, holding, “*Baltimore*

Orioles itself makes clear that “[a] player’s right of publicity in his name or likeness would not be preempted if a company, without the consent of the player, used the player’s name to advertise its product.”” *Id.* (quoting *Baltimore Orioles*, 805 F.2d at 666, n.24); *see also Laws*, 448 F.3d at 1141 (distinguishing preempted claims from claims where plaintiff’s image “used in advertising”); at 1142 (“[defendant] did not use [plaintiff’s] image, name, or the voice recording in any promotional materials.”); *contra* Am. Compl. ¶¶1-4, 18-24, 26, 31-36, 42, 70-77, 79-80 (Retired Players’ identities used for advertising and promotion).

Numerous other courts, many in direct response to the now-eviscerated *Baltimore Orioles* decision, have acknowledged the distinction between identity rights and copyright-like rights. As the following makes clear, the Copyright Act cannot preempt Plaintiffs’ right of publicity claims.

2. *Preemption Fails Where a Plaintiff Asserts Identity Rights Only.*

Toney illustrates the clear rule for determining when the Copyright Act preempts a right of publicity claim. The rule is simple: if a plaintiff seeks redress for the unauthorized use of her identity, regardless of whether the use involves a copyrighted work, the claims are not preempted. 406 F. 3d. at 909-11. Only where a plaintiff seeks or asserts ownership rights in a specific copyrighted work can the asserted rights be equivalent to copyright and, therefore, preempted. *Id.*

The divergent results of *Toney* and *Baltimore Orioles* are illustrative of this rule. In *Toney*, a model posed for a copyrighted photograph and signed an agreement allowing her identity to be used in advertisements for a hair care

company called Ultra Sheen. *Id.* at 907. When defendant L’Oreal purchased Ultra Sheen, and the copyrighted photographs of plaintiff, it used them in a new product advertisement. *Id.* The contract assigning plaintiff’s publicity rights had expired and, consequently, she brought a claim under a state law right of publicity. *Id.* The Seventh Circuit reversed the district court’s dismissal of plaintiff’s claims as preempted, holding plaintiff asserted rights only in her identity and not any rights protected by copyright law. *Id.*

In *Toney*, as in the present case, the fact the plaintiff’s identity was used in a copyrighted work did not cause her claim to be preempted. *Id.* at 908-09. The plaintiff’s identity was not a work of authorship, and merely photographing the plaintiff did not transform her identity into a copyrightable work. *Id.* This distinction was dispositive:

The fact that Toney consented to the use of her photograph originally does not change this analysis. The defendants did not have her consent to continue to use the photograph, and therefore, they stripped Toney of her right to control the commercial value of her identity.

Id. at 910. Thus, while a copyright may last forever, the authorization to use any identity therein may not; it lasts only the length of any agreement providing the authorization. *Id.* Again, this is so even when the defendant uses the plaintiff’s identity for the exact same purpose, such as an advertisement, for which the plaintiff originally consented. *Id.*

In *Baltimore Orioles* on the other hand, the Major League Baseball Players’ Association (“MLBPA”) sued to gain co-ownership rights in copyrighted

broadcasts of full-length major league baseball games and in the revenues from broadcasting live games. 805 F.2d at 665. While couched as a right of publicity claim, the MLBPA plainly and openly sought property rights governed by the Copyright Act. *Id.* at 679. The Seventh Circuit found the state law claims equivalent to copyright claims and preempted. *Id.*

Other courts have either independently established or approved this bright-line rule. *See, e.g., Laws*, 448 F.3d 1137-45 (claims not preempted where plaintiff challenges unauthorized use of identity and not copyright rights); *Downing*, 265 F.3d at 1003-05 (same); *Brown*, 201 F.3d at 657-61 (same); *Landham*, 227 F.3d at 623 (same); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997). (same); *Del Amo v. Baccash*, No. CV 07-663-PSG, 2008 WL 4414514, at *3 (C.D. Cal. Sep. 16, 2008) (same). Indeed, the Eighth Circuit's commentary on *Baltimore Orioles* in *Ventura* was rendered in 1995, prior to the Seventh Circuit's (and multiple other circuit courts of appeal) limiting of *Baltimore Orioles* to its facts. 65 F.3d at 730,n.6; *id.* Following these decisions, *Baltimore Orioles* may only be applied to actions in which a plaintiff seeks co-ownership rights in a copyrighted work. *Id.*

The Retired Players assert rights only in their identities, and not in any copyrighted work containing their identity. Am. Compl., ¶¶1, 4, 6-12, 22, 29, 31-37, 42, 44, 53, 55⁶, 82-103. Like the plaintiffs in all of the other cases finding no

⁶ Plaintiffs seek a “fair share of the revenues the NFL has earned, and will earn, by its use of retired players’ identities”. Am. Compl., ¶53 (emphasis added). This

preemption, the Retired Players point to specific examples of the defendant's unauthorized use of their identity. *See* Am. Compl., ¶¶30-37. These examples merely provide the factual basis for asserting the NFL has used Plaintiffs' identities without authorization, and are no different than the plaintiff in *Toney*, for example, pointing to specific, unauthorized uses of her identity to assert a non-preempted right of publicity claim. *See Toney*, 406 F.3d at 907. The Retired Players assert no ownership rights, past, present or future, in any copyrighted work. *See generally* Am. Compl. Because the Retired Players assert rights only in their identities, they do not assert rights within the subject matter of the Copyright Act. None of their state or common law claims can be preempted.

B. The Retired Players Do Not Assert Rights Equivalent to Those Addressed by the Copyright Act.

The two-prong test for preemption found in § 301 of the Copyright Act is conjunctive, and since prong one fails, the NFL's Copyright Act preemption defense fails altogether. *See* 17 U.S.C. § 301. Although the Court need not assess it, the second prong in § 301's preemption test requires the NFL to show "that the right to be enforced is 'equivalent' to any of the rights set forth in § 106 [of the Copyright Act.]" *Toney*, 406 F.3d at 909. In other words, "to avoid preemption, a state law must regulate conduct that is qualitatively distinguishable from that

allegation is clear that Plaintiffs do not seek or assert any ownership interest in any recording by the NFL. Plaintiffs merely seek the present and ongoing financial compensation for the unauthorized use of their identities available for such violations. *See Ventura*, 65 F.3d at 731 (affirming payment of royalties for unauthorized use of identity in videotapes).

governed by federal copyright law, i.e., conduct other than reproduction, adaptation, publication, performance and display.” *Id.*

The Retired Players’ claims are not equivalent to claims under the Copyright Act. Circuit Courts of Appeal that have analyzed the “equivalent to” prong have focused on the specific substance of the rights asserted. Here again, where a plaintiff asserts only rights in her identity, and not in any copyrighted work, preemption fails. *See, e.g., id. at 905.* This is because “[i]dentity... is an amorphous concept that is not protected by copyright law; thus, state law protecting it is not preempted.” *Id. at 910.* In *Brown*, the Fifth Circuit assessed right of publicity claims brought by recording artists who alleged misappropriation of their identities by parties who transferred the rights to their recordings without authorization. 201 F.3d at 659. Judge Edith Jones found no preemption, holding “the tort of misappropriation of name or likeness protects a person’s *persona*.” *Id. at 658.* The court distinguished the plaintiffs’ claims from another case in which plaintiff asserted violations of both copyright and publicity rights based on the same misconduct. *Id.* The court held:

The crucial difference between the two cases is that in *Daboub* the basis of the misappropriation claim, as well as the copyright infringement claim, was the song itself, bringing it within § 301’s ambit, where as here [in *Brown*] the basis of the misappropriation claim was defendants’ use of plaintiffs’ names and/or likenesses.

Id. Since the *Brown* plaintiffs asserted only their identity rights and not any copyright-equivalent right of ownership, *Baltimore Orioles* was inapposite and there was no preemption.⁷ *Id.* at 658-59.

The Ninth Circuit has visited the issue of Copyright Act preemption several times. In *Downing*, the court analyzed a right of publicity claim brought by professional surfers, whose pictures were taken at a surfing championship, then purchased by a licensee to use in an advertising campaign. 265 F.3d at 999-1000. The surfers whose identities were used in the copyrighted pictures sought relief under the right of publicity, and the district court found the claim preempted by the Copyright Act. *Id.* at 1000. The Ninth Circuit reversed, holding the plaintiff's claims were not based on "the publication of the photograph itself" but "it is the use of the [plaintiffs'] likenesses and their names pictured in the published photograph." *Id.* at 1003.

The Ninth Circuit similarly rejected preemption in *Wendt*, where the actors who played "Norm" and "Cliff" in the T.V. show *Cheers* challenged the defendant's use of animatronic robots that resembled the plaintiffs in its taverns.

⁷ The Sixth Circuit also rejected copyright preemption where a plaintiff asserted only rights in his identity. *Landham*, 227 F.3d at 623. In *Landham*, an actor challenged a toy company's marketing of an action figure based on a character he played in the movie *Predator*. *Id.* at 621-22. The court concluded there was no preemption, but ultimately, that the plaintiff's rights were not violated because the 1.5 inch-tall toy had no face or mouth and invoked only the identity of a fictional character, not the actor's personal identity. *Id.* at 621-26. In the present case, the Retired Players allege invocation of their own identities, which have independent commercial value, unlike the plaintiff's personal identity in *Landham*. *Id.*, see, e.g., Am. Compl., ¶¶43, 44-53, 74.

125 F.3d at 810. The court held the plaintiffs' right of publicity claims contained "elements, such as the invasion of personal rights... that are different in kind from copyright infringement." *Id.* (internal quotation marks and citation omitted) (ellipses in original).

In *Laws*, the Ninth Circuit conducted an extensive analysis of the distinction between identity rights and copyright-like rights in the preemption context. 448 F.3d at 1137-46. The *Laws* plaintiff had executed a permanent authorization with a record company to use her voice in a copyrighted recording, and granted an explicit right to license or convey the recording at any time. *Id.* at 1136. When the record company later licensed the recording to a licensee who published it in another recording, the plaintiff sued the licensee under the right of publicity. *Id.* The Ninth Circuit held the plaintiff was asserting ownership and copyright rights she did not have, and that they were equivalent to rights covered by the Copyright Act. *Id.* at The court strictly distinguished the *Laws* plaintiff's claims from those asserted in *Toney* and *Downey* and limited its preemption holding to the facts of the case.⁸ *Id.* at 1141-42, 1145. Importantly, the *Laws* court noted the plaintiff's claim differed "in a significant way" from *Toney* because in *Toney*, the plaintiff's authorization contract had expired. *Id.* at 1142, n.4; see Am. Compl., ¶¶52, 78.

⁸ Cases decided within the Ninth Circuit since *Laws* have found no preemption where the plaintiff asserts rights only in identity, and not in any copyrighted work. See *Del Amo*, 2008 WL 4414514 at *3.

The Retired Players plainly assert rights only in their identities, and nowhere do they allege ownership or similar right arguably governed by the Copyright Act. Am. Compl., ¶¶1, 4, 6-12, 22, 29, 31-37, 42, 44, 53, 55, 82-103. As the contracts appended to Defendant's motion indicate, the players simply contracted to play football, to allow the NFL to photograph them doing it and use their identities for the term of the contract. *See* Connolly Decl. Exs. 1-11; Am. Compl., ¶¶52, 78. Those authorizations have now expired, but the NFL continues to use the Retired Players' identities to advertise and promote itself and otherwise generate revenue. Am. Compl., ¶¶1, 4, 6-12, 22, 29, 31-37, 42, 44, 52, 53, 55, 78, 82-103. The Retired Players nowhere allege any ownership interest in any copyrighted work. *See generally* Am. Compl. Because the Retired Players assert rights asserted only for the unauthorized use of their identities, there can be no Copyright Act preemption. *Toney*, 406 F.3d at 908-11; *Facenda*, 542 F.3d at 1026-28; *Laws*, 448 F.3d at 1138-46; *Downing*, 265 F.3d at 1003-05; *Brown*, 201 F.3d at 657-61; *Wendt*, 125 F.3d at 810; *Del Amo*, 2008 WL 4414514, at *3. The Court should deny Defendant's motion.⁹

⁹ The few other copyright preemption cases the NFL cites in passing are inapposite. For example, *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (Cal. Ct. App. 1996) was specifically rejected by the Fifth Circuit in *Brown* and the Ninth Circuit in *Downing*. *See* 201 F.3d at 658-59; 265 F.3d at 1005, n.4. In *Fleet*, the plaintiff actors sought to prevent the copyright holding television station from "distributing their performances in the film." *Downing* 265 F.3d at 1005, n.4. "This is clearly distinguishable from [a] case where the [plaintiffs'] claim is based on the use of their names and likenesses, which are not copyrightable." *Id.* Similarly, in *Stanford v. Caesars Entm't, Inc.*, the court held a right of publicity claim preempted where the plaintiffs did not merely assert their identity rights, but

IV. The Retired Players Amply Plead False Endorsement Under the Lanham Act.

To prove liability for false endorsement under the Lanham Act, “a plaintiff must show that: (1) its mark is legally protectable; (2) it owns the mark; and (3) the defendant’s use of the mark to identify its goods or services is likely to create confusion concerning the plaintiff’s sponsorship or approval of those goods or services.” *Facenda*, 542 F.3d at 1014. Here, the NFL challenges only the likelihood of confusion requirement, claiming *Rogers v. Grimaldi* governs the analysis. Def. Br. at 20-25 (citing 875 F.2d 994 (2d Cir. 1989)). But the Eighth Circuit does not follow *Rogers*. Rather, it analyzes “likelihood of confusion” independently, just as the Third Circuit did in *Facenda. Anheuser-Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 773-74 (8th Cir. 1994)

To determine “likelihood of confusion,” courts apply a multi-factor test. In the Eighth Circuit, the governing factors are called the *SquirtCo* factors. *Id.* at 774; (citing *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir.1980)). The *SquirtCo* factors, however, apply best to more common trademark infringement claims between two businesses. The Third Circuit in *Facenda* (and other circuits) have faced similar dilemmas and simply adapted the typical “likelihood of

sought to force the copyright holder to “immediately cease and desist the use, in any form” the copyrighted works. 430 F. Supp. 2d 749, 758 (W.D. Tenn. 2006). The Retired Players make no such demand or allegation. *See generally* Am. Compl. Finally, in *Glovarama, Inc. v. Maljack Prods., Inc.*, the plaintiffs asserted claims under both the Copyright Act and for violation of the right of publicity based on the same misconduct. No. 96-3985, 1998 WL 102742, at *5-6 (N.D. Ill. Feb. 26, 1998). In such situations, the right of publicity claims are equivalent to copyright claims and preempted. *Brown*, 201 F.3d at 658.

confusion” factors for businesses to the false endorsement context. Because the *SquirtCo* factors are fundamentally identical to those adapted by the Third Circuit, they can easily be adapted to the false endorsement context in this case. In any event, the Retired Players need not allege “explicit” endorsement as applied in *Rogers*, but only implied endorsement.

A. The Eighth Circuit Does Not Follow *Rogers* and Analyzes Likelihood of Confusion Independently from Any First Amendment Defense.

1. *Likelihood of Confusion Is the Test for False Endorsement In the Eighth Circuit.*

This Circuit does not follow *Rogers v. Grimaldi*. In *Anheuser-Busch, Inc. v. Balducci Publ’ns*, the district court expressly rejected *Rogers*, holding, “[t]his court sees no reason to abandon the traditional likelihood of confusion test set forth in *SquirtCo*, provided that it is applied with special sensitivity to the purposes of the trademark law and the First Amendment rights of the Defendants.” 814 F. Supp. 791, 795-96 (E.D. Mo. 1993). On appeal, the Eighth Circuit went further, holding even the district court’s “special sensitivity” test “skewed its analysis” and created a “higher standard than required.” *Anheuser-Busch*, 28 F.3d at 773-74. Thus, the Eighth Circuit held likelihood of confusion must be analyzed independently from any First Amendment defense.¹⁰ *Id.*; see *Facenda*, 542 F.3d at

¹⁰ The Retired Players analyze the NFL’s First Amendment defense independently and separately above, and it fails for the reasons stated therein. Even if this Court somehow disagrees that *Anheuser-Busch* rejected *Rogers*, it still need not reach the issue whether *Rogers* applies because the material at issue here constitutes commercial speech. *Facenda*, 542 F.3d at 1018.

1015-22 (analyzing likelihood of confusion independently from First Amendment defense). Thus, this Court must analyze likelihood of confusion separately, using a fact-intensive inquiry that cannot be resolved at the pleadings stage. *Id.*

In *Anheuser-Busch*, the Eighth Circuit confronted a typical Lanham Act claim where one company used another's trademark in its product. 28 F.3d at 773-74. The court assessed the standard factors for likelihood of confusion in such claims:

(1) the strength of the trademark; (2) the similarity between the plaintiff's and defendant's marks; (3) the competitive proximity of the parties' products; (4) the alleged infringer's intent to confuse the public; (5) evidence of any actual confusion; and (6) the degree of care reasonably expected of the plaintiff's potential customers.

Anheuser-Busch, 28 F.3d at 774 (citing *SquirtCo.*, 628 F.2d at 1091). However, these factors are not entirely applicable in the false endorsement context. *Facenda*, 542 F.3d at 1018-20. In *Facenda*, the court started with similar factors and found it necessary to adapt them into a set tailored to false endorsement claims. *Id.* at 1019-20 (citing *Downing*, 265 F.3d at 1007-08). The same approach should be followed here.

2. *The SquirtCo Factors Are Easily Adapted to False Endorsement Claims.*

In the absence of false endorsement-specific factors in the Eighth Circuit, the Court should adopt the approach of the Third Circuit, which confronted almost identical issues when deciding *Facenda*. This involves simply adapting the existing *SquirtCo* confusion factors to the false endorsement context. Many of the

factors are identical to those in *Facenda* and adapting them is not complicated. *See* 542 F.3d at 1019-20. Thus, factors for likelihood of confusion in false endorsement claims include:

- 1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended (*SquirtCo* factor 1);
- 2) the similarity of the likeness used by the defendant to the actual plaintiff (*SquirtCo* factor 2)
- 3) the relatedness of the fame or success of the plaintiff to the defendant's product (*SquirtCo* factor 3);
- 4) defendant's intent in selecting the plaintiff (*SquirtCo* factor 4);
- 5) evidence of [any] actual confusion (*SquirtCo* factor 5); and
- 6) likely degree of purchaser care (*SquirtCo* factor 6).¹¹

Id.; *see SquirtCo*, 628 F.2d at 1091. "These factors are not a distinct test, but represent the sort of considerations which a court should consider in determining whether likelihood of confusion exists." *Anheuser-Busch*, 28 F.3d at 774.

Determining likelihood of confusion is a question of fact. *Facenda*, 542 F.2d at 1024. The Retired Players satisfactorily plead facts satisfying these six factors. For example, the Retired Players allege Factor 1, Plaintiffs' level of

¹¹ *Facenda* employed two additional factors: marketing channels used, and likelihood of expansion of the product lines. 542 F.3d at 1019-20. Those factors are not included in the Eighth Circuit's *SquirtCo* analysis as they are in the Third Circuit. *Anheuser-Busch*, 28 F.3d at 774. Nor does the Eighth Circuit consider the Third Circuit's extra factor assessing "length of time the defendant used the mark". *Id.*; *see Facenda*, 542 F.3d at 1019-20. These factors have been eliminated from the analysis proposed here.

recognition. Am. Compl., ¶¶73-74. Factor 2, similarity between plaintiff and the likeness used by defendant, is inapplicable because all players appearing in NFL Films productions appear as themselves. Plaintiffs allege Factor 3, the relationship between their identity as players and their inclusion in specific productions. *Id.* Plaintiffs allege both Factor 4, the NFL's intent (*id.*, ¶75) and Factor 5, actual confusion (*id.*, ¶80.) Finally, Plaintiffs allege Factor 6, the degree of care exercised by purchasers selecting the NFL and its video products over other entertainment options. Am. Compl., ¶¶73, 74. Plaintiffs adequately plead all of these likelihood of confusion factors *passim* in the Amended Complaint and each involves a heavily fact-specific inquiry requiring survey, expert and other evidence to resolve. Given these inquiries, judgment on the pleadings is impossible.¹²

B. The Retired Players' Need Not Allege Explicit Endorsement.

The NFL wrongfully claims the Retired Players must, and cannot, allege “explicit” endorsement to allege a Lanham Act claim. Def. Br. at 23-24. But in cases such as the one at bar, “explicit” endorsement is not required, only “implied” endorsement is. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 412-13 (9th Cir. 1996).

¹² Even if *Rogers* applied in the Eighth Circuit, which it does not, judgment on the pleadings would still be impossible. *See Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (denying summary judgment where “A reasonable finder of fact... could find the [use of plaintiff's identity] to be a ‘disguised commercial advertisement’”).

In *Abdul-Jabbar*, a retired pro athlete brought Lanham Act and right of publicity claims against a company who aired an advertisement containing historical information about the athlete, including his name and the years he was NCAA tournament MVP. *Id.* at 409. The Ninth Circuit reversed summary judgment against Abdul-Jabbar, holding “a jury might find an implied endorsement through the use of his name in the advertisement.” *Id.* at 413. The court reversed even though the advertising message communicated the truthful fact that Abdul-Jabbar actually performed in those NCAA tournaments and won those awards. *Id.*; *contra* Def. Br. at 24 (arguing no Lanham Act liability where defendant merely communicates “truthful” message that player “actually performed in those games”). The very basis of identity rights are that a person published in promotional images, even copyrighted images, “*appear to* endorse the product in question.” *Toney*, 406 F.3d at 910 (emphasis added). The Retired Players amply plead this perceived endorsement. Am. Compl., ¶¶79-80.

Cases requiring a stricter standard where a person does not appear to endorse anything are consistent. Thus, where a trademark is parodied or lampooned, it appears unlikely the trademark endorses it and a stricter test may be warranted.¹³ See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, Inc.*, 886 F.2d 490 (2d Cir. 1989). Similarly, where a person’s identity is deliberately altered (unlike

¹³ Of course, parody can go too far and incur Lanham Act liability. *Anheuser-Busch*, 28 F.3d at 775-77.

others in the same material) there is little probability anyone will think the altered trademark endorses the material. *Brown v. Elec. Arts, Inc.*, No. 2:09-01598, at *9 (C.D. Cal. Sept. 23, 2009) (Connolly Decl. Ex. 26) (Docket #16-26). Unlike parody and other cases where trademarks are altered to avoid the appearance of endorsement, the Retired Players' identities are not transformed, but are presented literally as if they endorse the productions in which they appear. Am. Compl., ¶¶70-80.

Electronic Arts is plainly inapposite to the present case. *Electronic Arts* involved the supposed use of Jim Brown's identity in a game where his name was removed ("unlike most of the other characters") and his number switched from #32 to #37. No. 2:09-cv-01598, at *2, 8-9. On these facts, the court logically concluded no one could believe Brown "endorsed" the game. *Id.* at *9. The court also concluded Brown did not appear in any advertisement.¹⁴ *Id.* at *8, n.5. Thus, *Electronic Arts* is precisely opposite to the Retired Players' allegations that their unaltered identities were used for advertising and promotional purposes. Am.

¹⁴ The NFL also cites *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) Def. Br. At 22. But in *ETW*, the plaintiff's identity was used in an expressive painting, not used literally in any advertisement or promotion as in the case at bar. 332 F.3d at 936; Am. Compl., *passim*. Critically, the *ETW* court found Tiger Woods "generates a significant amount of income" as an active golfer. *Id.* at 938. This meant that when balancing the interests, the court found the interest of allowing artistic renditions of Woods outweighed any interest in protecting his right to exclusively profit from his identity. *Id.* As explained above in the First Amendment discussion, this analysis is improperly applied to retired NFL players who suffer substantial physical, mental, and financial distress because of their former playing days.

Compl., *passim*. *Electronic Arts* has been appealed to the Ninth Circuit court.¹⁵ See Notification by Circuit Court of Appellate Docket Number 09-56675, 09-cv-01598-FMC-RZx (Oct. 23, 2009) (Docket #53) (Ex. A attached to Affidavit of J. Gordon Rudd). The Court should deny the NFL's motion.

V. The Retired Players Properly Plead the NFL's Unjust Enrichment.

The NFL seeks dismissal of the Retired Players' unjust enrichment claims by reiterating its bases for dismissal elsewhere. Those arguments fail again here.

The NFL argues unjust enrichment claims are "derivative" and fail *ipso facto* because the Retired Players' publicity and Lanham Act claims based on the same facts fail. Def. Br. at 25. That is false:

To recover for unjust enrichment, the [plaintiff] must plead [the defendant] knowingly received something of value, not being entitled to that benefit, and under circumstances that would make it unjust to permit its retention.

S.E.C. v. Brown, 643 F. Supp. 2d 1077, 1083-84 (D. Minn. 2009). Thus, where facts would make it reprehensible to allow one party to profit at another's expense, unjust enrichment may be independently warranted. *Id.* Plaintiffs do not need to prove the NFL's conduct was illegal under some independent theory, but only that, because of equity, they are not entitled to recompense. *Id.* (internal quotation

¹⁵ There is also no merit to the NFL's argument that "endorsement" cannot exist in the present case because the NFL uses the identities of "all" retired players. Def. Br. at 24-25 (citing *C.B.C. Distribution*, 505 F.3d at 824). The facts of *C.B.C. Distribution* vary wildly from the present case. Where *C.B.C. Distribution* involved fantasy baseball, which requires all active players' presence to function as a game, the Retired Players correctly allege the NFL selects only specific players for inclusion in specific films to maximize the promotional effect. Am. Compl., ¶¶73, 74.

marks omitted). The Retired Players have alleged that here, noting the improper use of their identities as the factual basis for the NFL's unjust enrichment. Am. Compl., ¶138. More importantly, all of the Retired Players' claims are sound as alleged, as described throughout this memorandum.

The NFL's First Amendment arguments on unjust enrichment are duplicative of those made elsewhere. Def. Br. at 25-26. As explained above, the NFL's authority regarding information "already in the public domain" is inapplicable. Copyright preemption is similarly inapplicable for the same reasons noted above. The Retired Players assert only rights in their identities, not any copyright rights. Such claims are never preempted under the Copyright Act. *See, e.g., Toney*, 406 F.3d at 909-11.

Finally, there are no written contracts that bar Plaintiffs' unjust enrichment claims. The player contracts at issue are expired and the NFL's right to use retired players' identities expired with them.¹⁶ *See* Connolly Decl. Exs. 1-11 (player contracts). The Court should deny the NFL's motion.

VI. The NFL's Unasserted Defenses Are Irrelevant to Its Motion.

The multiple, unasserted defenses the NFL tosses up without exposition are irrelevant to this motion. The NFL moves for dismissal on four grounds only: (1) the First Amendment; (2) copyright preemption; (3) failure to state a claim under

¹⁶ The Retired Players claims do not arise under these contracts and any choice of law provision is unenforceable. *See* Def. Br. at 26, n.6. That the NFL raises an affirmative defense of "license" based on the contracts does not change Plaintiffs' claims or burden of proof.

the Lanham Act; and (4) failure to state a claim for unjust enrichment. Def. Br. at 2-3. The NFL merely suggests, without asserting, several arguments it threatens to raise should its present motion fail. The reason the NFL does not pursue these defenses now is because they fail and, in any event, cannot be determined at the pleadings stage.

First, the NFL suggests players impliedly consented to the use of their identities by sitting for “voluntary, off-the-field interviews.” Def. Br. at 5. But this is just a bald statement. The NFL does not explain how these interviews give it carte blanche to use players’ identities any way it chooses. *Id.* Nor does the NFL let on that it may hold specific authorizations from players limited narrowly to these interviews.

Next, the NFL throws a few more preemption mentions into the mix (to be decided later), all to no avail. *See* Def. Br. at 7, n.2 (footnote mention of Labor Management Relations Act (“LMRA”)); 16, n.4 (one line mention of conflict preemption). LMRA preemption does not apply because all of the Retired Players contracts are expired, with no provisions still in force. *See* Connolly Decl. Exs. 1-11. In any event, the Retired Players’ claims arise independently of any collective bargaining agreement, and LMRA preemption is no defense. *See, e.g., Nat’l Football League Players Ass’n v. Nat’l Football League*, Nos. 08-6254, 08-6255, 2009 WL 1457007, at *4 (D. Minn. May 22, 2009). Conflict preemption is similarly no defense. *Facenda*, 542 F.3d at 1028-1032; *Brown*, 201 F.3d at 659-61.

Finally, the Court need not heed the NFL's warning clouds concerning a "complex [choice of law] analysis." Def. Br. at 16, n.3. Choice of law analysis is an unremarkable feature of civil litigation, and provides no basis to dismiss a plaintiff's claims. The Court should deny the NFL's motion in its entirety.

CONCLUSION

This Court should deny the NFL's motion for judgment on the pleadings in its entirety.

Respectfully submitted,

ZIMMERMAN REED, P.L.L.P.

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s/J. Gordon Rudd, Jr.

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