No. ____

IN THE

Supreme Court of the United States

LENWOOD HAMILTON, A/K/A HARD ROCK OR SKIP HAMILTON,
Petitioner,

v.

LESTER SPEIGHT, A/K/A RASTA THE URBAN WARRIOR, A/K/A AUGUSTUS "COLE TRAIN" COLE; EPIC GAMES, INC.; MICROSOFT, INC., A/K/A MICROSOFT CORP.; MICROSOFT STUDIOS; THE COALITION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Epic Games used Lenwood "Hard Rock" Hamilton's face and voice in its billion-dollar *Gears of War* video game franchise without his permission. The Third Circuit used a version of the Supreme Court of California's "transformative use test" to determine that Epic Games had a First Amendment right to use Hamilton's image and voice without his permission. The questions presented are:

1) whether the First Amendment right to free speech protects using a person's actual likeness without permission when weighed against that person's property, privacy, and dignity rights against unauthorized use of his likeness, and

2) whether the First Amendment right to free speech protects a video game maker's unauthorized use of a person's face and voice in a game?

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The Petitioner in this case is Lenwood Hamilton, an individual. Petitioner was the plaintiff and appellant below.

The Respondents are Lester Speight, Epic Games, Inc., Microsoft Inc., Microsoft Studios, and The Coalition, which were defendants and appellees below.

The related proceedings are:

1) Hamilton v. Speight, 413 F. Supp. 3d 423 (E.D. Pa. 2019) – Judgment entered September 26, 2019; and

2) Hamilton v. Speight, No. 19-3495, 827 Fed. Appx. 238, 2020 WL 5569454, (3d Cir. 2020) – Judgment entered September 17, 2020.

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INTRODUCTION

Quoting a brief of amici curiae, the Third Circuit expressed serious concern in *Hart* v. *Electronic Arts, Inc.* that some variations of the "transformative use test" could lead a court to wrongly find that there is a First Amendment right to place the image of the Dalai Lama or the Pope in a violent shoot-em-up game against their wishes. 717 F.3d 141, 167 (3d Cir. 2013). That fear is now realized.

Courts have wrestled with the First Amendment implications of using someone's likeness for decades. And without this Court's guidance, they have developed myriad tests for determining when a person has a right to exclude others. The most prominent test is the Supreme Court of California's "transformative use test," which the Third Circuit adopted and modified. But other tests have arisen. The Supreme Court of Missouri adopted the "predominant use test." And the "relatedness test" has been used by Second and Fifth Circuits. The Sixth Circuit has used both the "relatedness test" and the "transformative use test." Other circuits and state courts of last resort have used other methods of resolving these issues.

Here, the Third Circuit held, under the transformative use test, that the First Amendment provides companies *a constitutional right* to take a person's exact likeness and use it in videogames or art or film, so long as the likeness is used in an uncharacteristic way—in this case, changing the person's outfit and having him battle space aliens in a violent and gory video game. Indeed, it ruled that Hamilton's disgust with how Epic Games used his likeness weighed *in favor of* protection.

Under the Third Circuit's standard, a pornographer can use the likeness of a star actress who has never done a nude scene to create a CGI pornographic film. A person can use a holographic version of a pro-gun celebrity actor to give a concert in support of gun control. And, as here, a video game company can take a pacifist's face and voice and plaster it as a primary character in a war-raging video game. Indeed, neither the district court nor the Third Circuit offered a limiting principle as to how their test, if broadly adopted, would not create a free speech right allowing a filmmaker to include an entire song in a movie. The First Amendment free speech clause does not protect theft of a person's likeness in the name of "art" any more than it protects theft of a person's song or artwork. But the Third Circuit's determination that incorporative use—transferring a literal depiction of a person into a larger work—is the same as "transformative" use and creates exactly that right.

This is an issue of extreme importance now that technological advance allows anyone to manipulate a person's face and voice digitally. The Court should grant the writ and resolve the disjointed recognition across courts on how the First Amendment applies to using a person's actual likeness. And it should hold that, absent certain facts rendering it core speech and accounting for the victim's privacy, dignity, and property, there is no protection for using a person's actual likeness without permission.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lenwood Hamilton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is currently unreported, and it is reproduced at page 1a of the appendix to this petition ("App."). The District Court's opinion is reported at 413 F. Supp. 3d 423 and is reproduced at page 7a of the appendix to this petition.

JURISDICTION

The opinion and order of the Third Circuit denying affirming the district court's opinion was entered September 17, 2020. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statute is set forth in the appendix to this petition. App. 33a.

STATEMENT OF THE CASE

A. The defendants incorporate Lenwood Hamilton's image and voice into a character, Augustus Cole, for their popular *Gears of War* video game.

After being a high school football star and playing Division I football, Plaintiff Lenwood Hamilton had a promising chance to play in the NFL. JA405. But he was falsely accused of rape, convicted, and only cleared—and his conviction overturned—after discovery that a prosecution witness lied at trial. JA44-45. After prison, he had trouble catching on with a

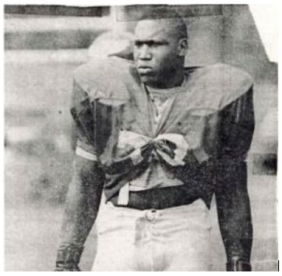
team, but he got to play a short stint with the Philadelphia Eagles in the 1987 season. JA03, 252.

Hamilton ultimately became a professional wrestler. JA04, 253. He developed a character named Hard Rock Hamilton and in the 1990s, he was able to develop his own wrestling organization, Soul City Wrestling—a family-friendly entertainment organization. JA04. Soul City held bouts mostly in and around Philadelphia, and Hamilton used Soul City as a platform to spread his messages to kids about drug awareness and the importance of an education. JA05, 405-07. Soul City reached a wide audience through numerous television and newspaper stories. App. 9a.

In 1998, shortly after Hamilton started Soul City, Defendant Lester Speight joined, performing as "Rasta the Voodoo Mon." App. 10a. The two soon discussed Speight's plans for developing a violent video game, and Hamilton told Speight that he did not want to take part in glorifying murderous violence. App. 10a. A couple years later, development began on what would ultimately become an extremely popular video game: *Gears of War*. JA416. "*Gears of War* is an extremely violent cartoon-style fantasy video game series." App. 10a. It takes place on a fictional planet where human characters fight "a race of exotic reptilian humanoids." App. 10a. The game's plot line focuses on a four-person squad of fictional characters battling the reptilian humanoids, one of which is "Augustus Cole." App. 11a.

Cole "is a large, muscular, African American male who is a former professional athlete who played the fictional game thrashball, a highly fantastical and fictionalized sport that loosely imitates American football in some ways." App. 11a. "Cole and Hamilton

share broadly similar faces, hair styles, races, skin tones, and large, muscular body builds." App. 11a. They are so similar that Hamilton's son and his friends referred to Cole as "Mr. Hamilton" when they played the game. JA409. And a facial recognition expert has testified that Hamilton's likeness is that of Cole. JA410, 472-73. Indeed, pictures from Exhibits B and C of the district court's opinion, App. 28a-29a, show an uncanny similarity.



They also share similar voices. Op. 4. People who have heard the two voices testified that they sound the same, and a voice expert has confirmed that they are virtually identical, JA410, 446.

The striking similarities between Hamilton and the Cole character are no coincidence. "Speight had input into how the Cole character looked and had influence over the character." App. 12a. Indeed, Speight "decided which voice to use for Augustus Cole," App. 11a, and provided the voice, JA419.

B. The defendants give Cole a personality abhorrent to Hamilton.

Defendants put Cole in military gear for the first two *Gears of War* games, and in the third, game players can "obtain alternative 'skins'" with different outfits. App. 12a. They also gave him a violent personality. App. 12a. Hamilton was offended at his

likeness being used on the character because he "'is ignorant, he's boisterous and he shoots people, he cusses people out.'" App. 22a. The character's portrayal is "'totally against what [Hamilton] believe[s] in.'" App. 22a. And the Cole character stands in direct opposition to what Hamilton was trying to do with Soul City Wrestling. App 22a-23a.

C. Hamilton sues the defendants for misappropriation of his likeness, and the district court ultimately grants summary judgment in the defendants' favor based on the transformative use test.

Hamilton sued the defendants for violation of his right of publicity, including four counts: (1) unauthorized use of name or likeness under 42 Pa. C.S.A. § 8316, (2) common law misappropriation of identity, (3) common law invasion of privacy, and (4) unjust enrichment. App. 7a n.1.

Defendants moved for summary judgment on the ground that they have a First Amendment free speech right that outweighs Hamilton's ownership of his own likeness. App. 14a. The district court agreed. App. 14a. Citing the Third Circuit's decision in *Hart* v. *Elec. Arts, Inc.*, 717 F.3d 141, 150 n.12 (3d Cir. 2013), the court purported to apply the transformative use test to balance the defendants' First Amendment interests against Hamilton's interest in his own likeness. It stated that the Third Circuit required determining whether the plaintiff's "identity" has been transformed, considering both the plaintiff's likeness and biographical information. App. 20a. According to the district court, in video games, the context provides the biographical information comparison, such that the character must do in the

game what the plaintiff does in real life. App. 22a-23a.

With respect to Cole's physical characteristics, the district court stated it and Hamilton have "similar faces, hair styles, skin tone, and large body build." App. 22a. It did not address the evidence that children playing the game identified Cole as looking like Hamilton, nor did it mention the expert testimony that the physical and vocal likenesses between Hamilton and Cole are virtually identical. But the court appeared to presume that Cole adopted Hamilton's actual physical likeness, as it relied on other factors to find the defendants' design of the Cole character "transformative." App. 22a-23a.

The district court compared pictures of the Cole character and Hamilton, asserting that, despite the similarities in various aspects of personal physical appearance, the defendants "transformed" Hamilton's likeness by putting him in different outfits, giving Cole a personality Hamilton finds abhorrent, and placing him in a "fantastical" environment. App. 21a. The biographical information differed because, of course, Hamilton never battled "cartoonish reptilian humanoids" and the Cole character does not "engage in professional wrestling" in the game. App. 21a. According to the district court, Hamilton was just a "raw material" and not the "sum and substance" of Cole's character, as if a defendant must mimic the entire look and personality of a person to lose First Amendment free speech protection stealing someone's image and voice. App. 21a.

The court did not explain *any* limiting principle that would stop the defendants from placing Hulk Hogan, Michael Jordan, or Jennifer Lawrence's face,

body, and voice on Cole as an unchallengeable expression of their First Amendment free speech rights.

D. The Third Circuit affirms, applying a version of the transformative use test that allows nearly unlimited use of a person's actual likeness without permission.

Hamilton appealed to the Third Circuit, arguing that there is only a narrow free speech right when using someone's actual likeness. In an unpublished decision relying on its published opinion in *Hart*, the Third Circuit offered no assistance, further explanation, or limitation on the use of a person's actual likeness in any context so long as it is somewhat different from his or her profession. The court noted that "Hamilton and Cole have similar skin colors, facial features, hairstyles, builds, and voices." App. 4a. But it also ruled that "significant differences reveal that Hamilton was, at most, one of the 'raw materials from which [Augustus Cole] was synthesized.'" App. 4a (citation omitted). *None* of these "significant differences" involved Hamilton's appearance or voice. Instead, the "differences" were professional—Hamilton does not fight aliens and never served in the military—as well as Cole's violent personality. App. 4a-6a. According to the Third Circuit, this rendered Hamilton's likeness "'so transformed that it has become primarily the defendant's own expression,'" and it affirmed the district court's decision. App. 6a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS AND STATE COURTS OF LAST RESORT ARE DIVIDED ON WHEN THE FIRST AMENDMENT PROTECTS USING A PERSON'S ACTUAL LIKENESS.

"The right of publicity grew out of the right to privacy torts, specifically, from the tort of 'invasion of privacy by appropriation.'" *Hart*, 717 F.3d at 150. It protects four particular interests: "(1) the personal injury of unwanted and unwarranted public exposure; (2) the personal, noncommercial, injury of compelled speech and false association; (3) the unfair competition claim of false endorsement or false connection; and (4) the unauthorized commercial misappropriation of an individual's name, identity, or persona." Matthew R. Grothouse, *Collateral Damage: Why the Transformative Use Test Confounds Publicity Rights Law*, 18 Va. J.L. & Tech. 474, 552 (Summer 2014). These interests are more than simple economic advantage. "The things and people with which individuals choose to associate reflect their character and values." Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225, 229 (Fall 2005). And "[a]ll individuals have a legitimate interest in autonomous self-definition." *Id*. at 231. Thus, the right of publicity protects personal privacy interests, individual dignity, and property rights in addition to pecuniary interest.

Indeed, the Restatement (Second) of Torts, § 652 C, states that "[o]ne who appropriates to his own use or benefit the name or likeness of the other is subject to liability to the other for invasion of privacy." Also, the right to publicity, "like copyright . . . offers

protection to a form of intellectual property that society deems to have social utility." *Hart*, 717 F.3d at 159. That makes sense. A right to exclude others from use is endemic to a property right. *Burns* v. *Pa. Dept. of Correction*, 544 F.3d 279, 287 (3d Cir. 2008) (adopting "bundle of rights" theory of property to hold a prisoner has a property interest in his inmate account). And "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978).

While the interests protected by the right of publicity are clear, its scope is not. "[T]he right of publicity is currently defined negatively." Eric E. Johnson, *Disentangling the Right of Publicity*, 111 Nw. U.L. Rev. 891, 894 (2017). "In saying what the right of publicity is not, the courts largely rely on two doctrinal vehicles: (1) freedom of expression (including the application of the 'newsworthiness exception') and (2) copyright preemption." *Id* at 904. The right of publicity is thus "utterly dependent upon the First Amendment and other subtrahends to give it its essential shape." *Id*.

This Court addressed the First Amendment's impact on claims involving the right of publicity in 1977 and has not revisited the issue since. In *Zacchini* v. *Scripps Howard Broadcasting Co.*, the Court ruled that the First Amendment did not prohibit a right of publicity action based on a news program airing an entire 15-second human cannonball act. 433 U.S. 562, 573 (1977). The Court focused on the fact that the whole act had been broadcast, thereby limiting the performer's ability to make money attracting an audience—they had seen it already. *Id* at 578. As

Justice Powell pointed out in his dissent, the Court's opinion offered no guidance in far more common contexts. Justice Powell, and the two Justices who joined him, would have held "that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation." *Id*. at 581 (Powell, J. dissenting).

Since then, the Court has said no more, and the First Amendment doctrine has become a mess. "In the right-of-publicity context, the First Amendment is both incredibly weak and incredibly strong." Johnson at 911. Courts, focused only on economic incentive reasoning, have applied the First Amendment to dismiss valid claims where defendants have invaded victims' privacy and dignity. "[O]ne does not need to read many cases to see that the right of publicity is dogged by the First Amendment at every turn." *Id*.

In 1989, the Second Circuit applied a loosely defined test regarding the relationship between the identity taken and the overall work, subsequently dubbed the "relatedness" test. *Rogers* v. *Grimaldi*, 875 F.3d 994, 1004-05 (2d Cir. 1989). There, Ginger Rogers claimed the title of a movie about two fictional Italian cabaret performers—"Ginger and Fred"—violated the Lanham Act and her right of publicity. *Id*. at 996-97. The Second Circuit stated that the Lanham Act must be construed narrowly to avoid infringing First Amendment rights. *Id*. at 998. It then ruled that "[i]n the context of allegedly misleading titles using a celebrity's name," the balance between customer confusion and free expression "will normally not support application of the Act unless the title has no artistic relevance to the

underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads." *Id*. at 999. Regarding the right of publicity, the court determined under Oregon law that Rogers had not stated a claim, given Oregon's expansive recognition of free expression rights. *Id*. at 1004-05. The Sixth Circuit later applied the relatedness test in *Parks* v. *LaFace Records*, 329 F.3d 437, 458 (6th Cir. 2003) (whether title "Rosa Parks" was "wholly unrelated" to lyrics of a song was an issue of fact for jury resolution).

The Fifth Circuit has nodded toward the relatedness test, but ultimately articulated an "actual malice" test in *Matthews* v. *Wozencraft*, 15 F.3d 432 (5th Cir. 1994). There, the court addressed a fictional book and movie that were based on biographical details in the plaintiff's life. *Id*. at 436. The Fifth Circuit noted that discussing a person's public activities is not misappropriation of his likeness, *id*. at 439, and it resolved that he could not recover for the fictionalized aspects because the book made him a public figure "and neither the book nor the movie holds out [plaintiff] in a false light or in an embarrassing way; thus, his claim is meritless," *id*. at 440.

Then, the Supreme Court of California devised the transformative use test. In *Comedy III Prods., Inc.* v. *Gary Saderup, Inc.*, the court resolved a case involving t-shirts with images of The Three Stooges. 25 Cal.4th 387, 393 (2001). The shirts were not commercial speech, but rather the defendant's "portraits of The Three Stooges [were] expressive works and not an advertisement for or endorsement of a product." *Id*. at 396. And the court expressed a concern that "the very importance of celebrities in society means that the right of publicity has the potential of censoring

significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity's meaning." *Id*. at 397.

The Supreme Court of California considered adopting the fair use defense from copyright law but determined—without much explanation—that some fair use factors would not apply to depicting a person's likeness. *Id*. at 404. So the court limited its analysis to the first factor—the purpose and character of the use. *Id*. It then determined that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity." *Id*. The court did not address other interests, such as privacy and dignity, that are protected by controlling the distribution of one's own likeness—even after acknowledging that the right of publicity arises from the right to privacy. The court also did not address the role the likeness plays in the artistic endeavor—which, of course, indicates the expressive value of using the likeness. Notably, the Supreme Court of California stated that "a literal depiction of a celebrity, even if accomplished with great skill, may still be subject to a right of publicity challenge." *Id*. The Tenth Circuit applied a similar test in *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 95 F.3d 959, 972-73 (10th Cir. 1996) ("Because celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society.")

The Third Circuit first applied the transformative use test in the video game context in *Hart*. It

considered the test superior because it "aims to balance the interest protected by the right of publicity against those interests preserved by the First Amendment." *Hart*, 717 F.3d at 163. Thus, when applied to the video game representation of a college football player where his image was not used, but his physical attributes, number, height, weight, and biographical details were similar, the video game had not transformed his likeness enough to establish a First Amendment interest. *Id*. at 166-68.

In 2003, the Supreme Court of Missouri recognized that "[c]ourts throughout the country have struggled with" the issue of when the First Amendment bars a tort claim based on misappropriating someone's likeness, noting "the *Zacchini* Court limited its holding to the particular facts of the case—the appropriation of plaintiff's 'entire act'." *Doe* v. *TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003). The court addressed whether the First Amendment barred a right of publicity claim by a hockey player whose name was used in a popular comic book. *Id*. at 370. The parties agreed that the comic book character did not physically resemble the plaintiff, nor did their professions match, as the comic book character was a murderous Mafia don. *Id*. But the shared name and "the common persona of a tough-guy 'enforcer'" allegedly created "an unmistakable correlation" between the plaintiff and the character. *Id*.

The Supreme Court of Missouri rejected prior tests, focusing instead on the role the likeness played in the expression itself to balance the interests. It stated that "[r]ight of publicity cases, both before and after *Zacchini*, focus instead on the threshold legal question of whether the use of a person's name and identity is 'expressive,' in which case it is fully

protected, or 'commercial,' in which case it is generally not protected." *Id*. at 373. The court recognized that both the relatedness test and the transformative use test have a fundamental weakness: "they give too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components." *Id*. at 374. They then render any claim untenable where there is an expressive component at all. *Id*. "Though these tests purport to balance the prospective interests involved, there is no balancing at all—once the use is determined to be expressive, it is protected." *Id*.

The court thus promulgated the "predominant use" test. *Id*. If the defendant's product exploits the plaintiff's identity for commercial advantage, it is not protected, but if "the predominant purpose of the product is to make an expressive comment on or about the celebrity, the expressive values could be given greater weight." *Id*. Because using the hockey player's name had little literary value and was "predominantly a ploy to sell comic books and related products," the First Amendment did not bar the claim.

When the Eighth Circuit confronted a right of publicity claim, it decided not to articulate a test at all, and instead, it balanced the First Amendment interests against the interests in protecting the right of publicity. *C.B.C. Distrib. & Mktg.* v. *Major League Baseball Advanced, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007). There, a fantasy baseball company faced right of publicity claims over its use of names and statistics. *Id*. at 823. The Eighth Circuit recognized that it must weigh the speech interests against both the economic and non-economic interests of the subject baseball players. *Id*. at 824. Noting the players' interest in protecting knowledge and use of their statistics was

minimal, the court ruled that the First Amendment barred the claim.

Here, the Third Circuit has developed a new version of the transformative use test that is even more aggressive, and it is inconsistent with the California courts, thus creating *another* branch of analysis for addressing the First Amendment protection for using someone's likeness without permission. Hamilton made numerous allegations regarding the similarities in both physical appearance and voice between himself and Cole. Both Hamilton and Cole are African-American men with the same facial features and skin tone; Cole's voice sounds like Hamilton's; Cole's way of speaking sounds like Hamilton's professional wrestling persona; Cole's hair looks like Hamilton's; and Cole's physique looks like Hamilton's. *See* JA06, 410. Hamilton also supported these factual assertions with declarations and expert testimony. *See* JA410-11, 422 ("I believe Cole's physical appearance looks very much like Hamilton's including face, race, skin tone, hair style, and physique. I believe Cole's voice sounds exactly like Hamilton's voice."); JA428 (same); JA426 (expert Report of Edward J. Primeau concluding, based on biometric testing, that Cole's voice is "extremely similar" to Hamilton's); JA 472-73 (expert Report of Dr. Behnam Bavarian concluding, based on biometric testing, that there is "strong similarity" between Cole's face and Hamilton's face).

This is not a "transformative" use. It is incorporative and not entitled to First Amendment protection. Yet the Third Circuit ruled as a matter of law that Hamilton had no claim when defendants dressed that uncanny likeness up in battle gear and placed it in a war on an Earth-like fictional planet. It

thereby cheapened the importance of literal likeness, which should be the primary consideration on whether a right of publicity claim is barred by the First Amendment's Free Speech Clause. And as the primary consideration, it should come with a much more stringent standard to find that incorporation of a literal likeness into an "artistic" work is transformative.

Notably, neither the Third Circuit nor the defendants have cited a single case in which the transformative use test found First Amendment free speech clause protection for using a literal likeness when the "artistic" work was not a commentary on the person whose likeness was used, let alone a video game. That likely is because the notion of transformative use requires "the use of some elements of a prior author's composition to create a new one that, at least in part, *comments on that author's works*." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (emphasis added). If the "artistic" endeavor's "commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh," the assertion that it is fair to borrow others' intangible property "diminishes accordingly" or even "vanish[es]." *Id*. The Third Circuit has created a new branch to one of many tests, and there is no consistency among jurisdictions.

"The situation goes far beyond a mere circuit split. Courts across the country apply multiple different approaches to constitutional analysis." Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 127 (October, 2020). While there are three major tests, the

discussion above establishes that courts all over the country have applied myriad standards for determining the First Amendment's impact on right of publicity claims. And "[t]he exact meaning and method of applying the transformative [use] test remains disputed. Courts that claim to apply this analysis do so in different ways." *Id*. at 129. Looking at the issue through a purely economic lens, courts applying the transformative use test have completely missed the deep personal interests people have in their own likenesses, that at least the Eighth Circuit acknowledged in *C.B.C.*. 505 F.3d at 824; *see also* McKenna at 285.

As the Third Circuit stated in *Hart* and reiterated here, the transformative use test "restricts right of publicity claims to a very narrow universe of expressive works." App. 4a n.4, *quoting Hart*, 717 F.3d at 163. Thus, it does nearly nothing to protect individual privacy and property rights in one's own image. Moreover, it fails to recognize the lack of a First Amendment free speech interest in specifically infringing on someone else's property, privacy, and dignity rights. The right to burn a flag does not include the right to steal someone else's flag and burn it—even if that would enhance the person's speech by expressing his disdain for the person who flew it.

The time has come for this Court to provide a test for courts and legislatures to apply when determining whether the First Amendment's free speech clause limits the ability to apply state or federal law to protect a person's identity interests. That test should begin at recognizing that a person's face and voice may not be used without his or her permission, with certain exceptions based on an implicit license people provide by going out into public or engaging in public

acts, such as newsworthiness, *de minimis* use (making an amusing meme), and use that obviously does not misrepresent the individual (such as parody and satire of the plaintiff's public acts).

In the copyright context, Congress has adopted the fair use test to balance the parties' interests, and this Court has acknowledged that balance does not violate the First Amendment. *Eldred* v. *Ashcroft*, 537 U.S. 186, 221 (2003) (holding that further First Amendment protection of using copyrighted works is unnecessary because the fair use doctrine and the idea/expression dichotomy adequately protect free speech). A modified version of that test that recognizes privacy and dignity interests—and not simply hacking away important elements of it as the Supreme Court of California did in fashioning the transformative use test—would be most effective for determining whether a free speech interest exists at all and then balancing those interests. The Court should grant the writ so that it can adopt a test that establishes uniform law on how the First Amendment applies to claims involving misappropriation of a person's likeness.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The existing First Amendment menagerie has myriad harmful effects. "[C]ourts are flailing about in a sea of inconsistent, vague, and unhelpful First Amendment tests," Post & Rothman at 132, as the need for a coherent test only grows. The transformative use test derived from a purely consumerist approach—the Supreme Court of California concerned itself only with the lost economic opportunity. *Comedy III*, 25 Cal.4th at 403 ("the right of publicity

is essentially an economic right"). It thus opened the door for rulings like the Third Circuit's here, where the court ruled that a person's moral objection to the way in which his face is used is evidence that the use is constitutionally protected. This ignores the privacy and dignity interests underlying the right to publicity, and it ignores common sense that a person should have a right not to have his face and voice taken and applied to a character that represents him as violent and murderous.

Of course, a person implicitly licenses his image and voice by participating in public acts—to a degree—for purposes of news coverage or lampooning, depending on the context. But unless this Court provides a test by which lower courts can discern the difference, the myriad inadequate tests applied by various courts around the country will lead to inconsistent rulings and further widespread theft of likenesses. In jurisdictions using the transformative use test, the lack of guidance from this Court will lead to an extreme lack of protection for peoples' privacy and dignity under the guise of a free speech right.

People do not have a First Amendment free speech right to others' likenesses any more than they have a free speech right to their songs, their paintings, or any other publicly available expression of themselves. There is no basis for the notion that a person's likeness—his or her face and voice—are any less protected than any other thing personal to him or her, such as her art or other intellectual property. Indeed, the personal interest in one's likeness is arguably greater than the interest in a song or a work of art. A person's face and voice are intimately intertwined with identity, and control over others' use of one's face and voice is important to an individual's psyche.

People constantly strive to protect their reputations and how other people see them. Celebrities provide myriad examples, such as actors and actresses who refuse to perform nude or even kiss another person on screen. McKenna at 282. Similarly, the vast majority of people, who are not celebrities, have economic, privacy, and dignity rights against, for instance, an ex-boyfriend digitally placing her face into a pornographic video. McKenna at 280. Thus, the property right in one's face and voice is more than just an economic right.

These deep-seated interests are in greater danger than ever before. We are moving to a world in which it is technologically possible to take someone's likeness and do anything we want with it if unconstrained by law. People have begun using drones to obtain paparazzi photos of celebrities. Amanda Tate, *Note: Miley Cyrus and the Attack of the Drones*, 17 Tex. Rev. Ent. & Sports L. 73, 79-80 (Fall, 2015) ("Aggressive paparazzi outlets, which can receive up to $100,000 for celebrity photographs, especially if the photographs are of celebrities at their mots vulnerable or 'unguarded' moments, are the prime suspects for misuse of drone technology."). And while a state can protect against drone use over private property, a free expression right that inherently trumps privacy and publicity rights leaves no way to prevent a drone over a city street from peering into people's private lives. Numerous celebrities have expressed value in their rights to privacy and to not speak on the issues of the day. *See*, *e.g.*, Naled Ushe, *Celebrities Who Don't Talk Politics: 'Nobody Cares'*, Fox News, Nov. 1, 2020.[1] Yet,

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[1] Available at: https://www.foxnews.com/entertainment/celebrities-who-dont-talk-politics.

according to the Third Circuit, their faces and voices can be used to express beliefs they do not believe in.

Indeed, a regular person with no celebrity can become a recognizable figure overnight. For instance, a fan at a sporting event can, with the right amount of expressed despair, become the subject of internet memes and t-shirt sales. *See* Caitlyn Slater, *Comment: The "Sad Michigan Fan": What Accidentally Becoming an Internet Celebrity Means in Terms of Right of Publicity and Copyright*, 2017 Mich. St. L. Rev. 865, 868 (2017). The free speech doctrine does not prevent the television network that filmed the act from demanding its share of t-shirt sales as a violation of copyright law, but putting aside ESPN's potentially superior claim after the fan may have licensed his likeness to ESPN by attending, *id*. at 870-71, there is a critical question on whether the free expression clause prohibits states or the federal government from protecting that fan's rights.

Companies are willing to turn ordinary people into endorsers with impunity, including putting them into erectile disfunction commercials without permission, just by filming elderly people at the park. McKenna at 280. Soon, they will not need to rely on footage taken in public parks, and they will be able to create deepfake ads with the faces of friends and family. Maya Shwayder, *Why Deepfakes Will Soon Be as Commonplace as Photoshop*, Digitaltrends, Dec. 13, 2019. [2] According to the Third Circuit's standard, the infringer is *more* protected if the person whose identity is stolen does *not* use the product, and the

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[2] Available at https://www.digitaltrends.com/news/why-deepfakes-will-soon-be-as-commonplace-as-photoshop/.

company is even more protected if the victim objects to the product. And the technological advances allowing for misuses are exploding. *Id*. Those advances are used for cyber-bullying, virtual sex acts, and pornography, [3]

These misuses present a far greater concern than using someone's occupation or an athlete's statistics. Our faces and voices are intimately tied to how we interact with everyone around us. Thus, to the extent that there is a concern that a right of publicity gives individuals the ability to censor creative works they do not like, opponents of the right of publicity do not explain why individuals *should* have a right to take another's property and use it in a way that person does not like in derogation of their privacy and dignity. *See*, *e.g.*, Patrick Cronin, *Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 Colum. J.L. & Arts 221, 247 (Winter 2012). And to the extent one fears that intellectual property and privacy rights under the right of publicity will prohibit expression everywhere, those rights do not prohibit expression except as to theft. People are free to express their ideas without theft of others' faces and voices. They are not free to denigrate

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[3] *See*, *e.g.*, Tim Simonite, *Forget Politics. For Now, Deepfakes are for Bullies*, Wired, Sept. 4, 2019 https://www.wired.com/story/forget-politics-deepfakes-bullies/. Samantha Cole, *'They Can't Stop Us:' People are Having Sex with 3D Avatars of Their Exes and Celebrities*, Vice, Nov. 19, 2019, www.vice.com/amp/en_us/article/j5yzpk/they-cant-stop-us-people-are-having-sex-with-3d-avatars-of-their-exes-and-celebrities; Joseph Bernstein, *How HBO Unwittingly Helped Create Insanely Hardcore "Game of Thrones" Porn*, Buzzfeed News, Feb. 11, 2015, https://www.buzzfeednews.com/article/josephbernstein/how-hbo-unwittingly-helped-create-insanely-hardcore-game-of.

people's individually cultivated identities without permission.

The First Amendment was not intended to be a weapon for such spurious use of peoples' likenesses, and this Court should correct the path of this disjointed and misguided doctrine. The Third Circuit's ruling and other tests establishing an overbroad free speech trump over the right of publicity threaten the sanctity and dignity of everyone's identity, regardless of celebrity. And the victims of this type of misappropriation need this Court to right the path so that states can develop their right of publicity laws in an environment that recognizes the proper scope of First Amendment protections.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3495

LENWOOD HAMILTON,
a/k/a HARD ROCK or SKIP HAMILTON,
Appellant

v.

LESTER SPEIGHT,
a/k/a RASTA THE URBAN WARRIOR,
a/k/a AUGUSTUS "COLE TRAIN" COLE;
EPIC GAMES, INC.;
MICROSOFT, INC., a/k/a Microsoft Corp;
MICROSOFT STUDIOS; THE COALITION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-17-cv-00169)
District Judge: Hon. Anita B. Brody

Submitted under Third Circuit L.A.R. 34.1(a)
September 10, 2020

Before: CHAGARES, HARDIMAN, and MATEY,
Circuit Judges.

(Opinion filed: September 17, 2020)

OPINION*

MATEY, *Circuit Judge*.

Lenwood Hamilton argues that defendants unlawfully used his likeness in a video game. The District Court held that the First Amendment barred Hamilton's claims. We agree and so will affirm.

I. BACKGROUND

Hamilton is a former professional athlete, entertainer, and motivational speaker. Following a brief football career, he created Soul City Wrestling, a "family-friendly" organization where he performed as "Hard Rock Hamilton." (App. at 417.) Hamilton hoped to spread a "message to kids about drug awareness, and the importance of getting an education." (App. at 417–18.) His work attracted positive attention from Philadelphia media and elected officials.

Gears of War is a video game series in which members of the Delta Squad—including Augustus "Cole Train" Cole—battle "a race of exotic reptilian humanoids" known as the Locust Horde on the planet Sera. (Opening Br. at 5.) A few years ago, Hamilton saw the game for the first time. "Looking at the

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Augustus Cole character," he felt, "[wa]s like looking in a mirror." (App. at 418.) So he sued.

Hamilton's complaint alleged that defendants[1] used his likeness in violation of his right of publicity.[2] Defendants argued that their work enjoyed the protections of the First Amendment. The District Court agreed and granted their motion for summary judgment. This appeal followed.[3]

II. DISCUSSION

The right of publicity protects individuals "from the misappropriation of their identities." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150 (3d Cir. 2013); *see, e.g.*, 42 Pa. C.S. § 8316(a). But the First Amendment protects the freedom of speech, including the content of video games. *Hart*, 717 F.3d at 148–49. To "strike a balance between [these] competing interests" in right-of-publicity cases, *id.* at 149, we ask "whether the [plaintiff's] likeness is one of the 'raw materials' from which [the defendant's] work is synthesized, or

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[1] Defendants are: Epic Games, Inc., the game's creator; Microsoft, Inc., Microsoft Studios, and The Coalition, the game's publishers and distributors; and Lester Speight, the voice actor for Augustus Cole.

[2] Hamilton brought Pennsylvania-law claims for unauthorized use of name or likeness under 42 Pa. Cons. Stat. § 8316; unjust enrichment; misappropriation of publicity; and invasion of privacy by misappropriation of identity. He also brought, then withdrew, a Lanham Act claim.

[3] The District Court had jurisdiction under 28 U.S.C. § 1332; we have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a district court's grant of summary judgment, viewing the evidence in the light most favorable to, and drawing all reasonable inferences in favor of, Hamilton. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 147 (3d Cir. 2013).

whether the depiction or imitation of the [plaintiff] is the very sum and substance of the work in question." *Id.* at 160 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Ca. 2001)). "[I]n other words," this "transformative use test" asks "whether the product containing [the plaintiff's] likeness is so transformed that it has become primarily the defendant's own expression[.]" *Id.* (quoting *Comedy III*, 21 P.3d at 809). If it has, the defendant's First Amendment rights prevail.

Here, no reasonable jury[4] could conclude that Hamilton—whether Lenwood or Hard Rock—is the "sum and substance" of the Augustus Cole character. There are no doubt similarities. Hamilton and Cole have similar skin colors, facial features, hairstyles, builds, and voices. Hamilton played football for the Philadelphia Eagles; Cole once played "thrashball"—a "fictionalized sport that loosely imitates American football" (Opening Br. at 5)—for a team with that same name. And *Gears of War* players can dress Cole in a "Superstar Cole" outfit that resembles Hard Rock Hamilton's signature costume.

But other significant differences reveal that Hamilton was, at most, one of the "raw materials from which [Augustus Cole] was synthesized." *Hart*, 717 F.3d at 160. In *Gears of War*, Cole fights a fantastic breed of creatures in a fictional world. Hamilton, of course, does not. *Cf. Kirby v. Sega of Am., Inc.*, 50 Cal.

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[4] Transformative use is an affirmative defense, so the defendants must show that "no trier of fact could reasonably conclude that the [game] was not transformative." *Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2010). Though seemingly a high burden, the defense "restricts right of publicity claims to a very narrow universe of expressive works." *Hart*, 717 F.3d at 163.

Rptr. 3d 607, 616 (Cal. Ct. App. 2006) (transformative use where musician depicted in video game "as a space-age reporter in the 25th century"). Nor has Hamilton served in the military. *Cf. Hart*, 717 F.3d at 166 (no transformative use where game depicted "digital [football player] do[ing] what the actual [football player] did while at Rutgers: . . . play[ing] college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game"); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (no transformative use where game featured "exact depictions of [band's] members doing exactly what they do as celebrities"—i.e., singing and playing music). And Hamilton himself admits that the Cole character's persona is alien to him. (App. at 581 ("This guy . . . is ignorant, he's boisterous and he shoots people, he cusses people out, *that's not me*. . . . *[a]nd it's totally against what I believe in*. . . . He stands for totally the opposite of what I was trying to do[.]").) *Cf. Winter v. DC Comics*, 69 P.3d 473, 476, 479 (Cal. 2003) (alleged depiction of musicians Johnny and Edgar Winter as "Johnny and Edgar Autumn" in comic book protected by the First Amendment; though the Autumns shared physical attributes and style of dress with the Winters, the Autumns were "depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground"—i.e., were "but cartoon characters . . . in a larger story, which is itself quite expressive").[5]

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[5] Hamilton argues that the transformative-use test does not apply to commercial speech and that the First Amendment, therefore, does not protect defendants' use of the Cole character in *Gears of War* "advertising and marketing materials." (Opening

III. CONCLUSION

If Hamilton was the inspiration for Cole, the likeness has been "so transformed that it has become primarily the defendant's own expression." The First Amendment therefore bars Hamilton's claims, and we will affirm the District Court's grant of summary judgment.

Br. at 39.) But the only mention of this argument in the District Court was in Hamilton's sur-reply brief, where a single, passing assertion that defendants' promotional materials "do[] not receive the same level of First Amendment protection that the games themselves may enjoy" was supported by a single, unexplained citation. That cannot preserve the issue, and we consider the argument forfeited. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal."); *id.* at 182 n.3 ("[W]here an issue is raised for the first time in a reply brief, we deem it insufficiently preserved for review before this court.").

Relying on copyright law principles, Hamilton also argues that the transformative-use test does not apply when the work at issue "[is] not a commentary on the person whose likeness [is] used[.]" (Opening Br. at 25.) He is incorrect. *See Winter*, 69 P.3d at 479 ("*Comedy III* did not adopt copyright law wholesale. . . . What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary *or any other specific form of expression*." (emphasis added)).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LENWOOD HAMILTON, Plaintiff, v. LESTER SPEIGHT, *et al.*, Defendants.	CIVIL ACTION No. 2:17-cv-00169-AB

September 26, 2019 **Anita B. Brody, J.**

MEMORANDUM

Plaintiff Lenwood Hamilton ("Hamilton") is a former professional wrestler and football player. In the 1990s, Hamilton created and performed as the character Hard Rock Hamilton with Soul City Wrestling, a now-defunct, family-friendly professional wrestling organization that Hamilton created. Hamilton alleges that Defendants Microsoft, Inc., Microsoft Studios, The Coalition, Epic Games, Inc., and Lester Speight (collectively, "Defendants") misappropriated the Hard Rock Hamilton character when they created Augustus Cole ("the Cole character"), also referred to in-game as Cole Train, for the popular *Gears of War* video game series.[1] In the

[1] Specifically, Hamilton alleges several causes of action relating to Defendants' violation of Hamilton's right of publicity: (1) a statutory claim for unauthorized use of name or likeness under 42 Pa. C.S.A. § 8316; (2) a common law claim for misappropriation of publicity; (3) a common law claim for

Gears of War series, the Cole character is not a wrestler but a fictional soldier who engages in highly stylized cartoon violence against formerly subterranean reptilian humanoids on a fictional Earth-like planet, Sera.

Defendants move for summary judgment on the grounds that the First Amendment right to free expression bars each of Hamilton's claims.[2] Even taking the facts in the light most favorable to Hamilton for the purposes of summary judgment, the First Amendment bars Hamilton's claims. Defendants' right to free expression outweighs Hamilton's right of publicity in this case because the Cole character is a transformative use of the Hard Rock Hamilton character. For this reason, I will grant Defendants' motion for summary judgment.[3]

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invasion of privacy by misappropriation of identity; and (4) a cause of action for unjust enrichment stemming from Defendants' use of his likeness. *See* Second Am. Compl. ¶¶ 86-93; 97-99; 100-102; 103-105.

[2] Defendants also argue, among other things, that Hamilton fails to carry his burden on summary judgment. Because I will grant Defendants' motion on First Amendment grounds, I do not reach Defendants' other arguments. This is because even where a defendant actually "infringes on the right of publicity," courts may look to "whether the right to freedom of expression overpowers the right to publicity" regardless of "the elements of the tort or whether [the defendant's] actions satisfy this standard." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150 n.12 (3d Cir. 2013).

[3] I exercise diversity jurisdiction in this case pursuant to 28 U.S.C. § 1332.

I. BACKGROUND[4]

A. Lenwood Hamilton, Soul City Wrestling, and the Hard Rock Hamilton Persona

In the 1990s, Plaintiff Lenwood Hamilton ("Plaintiff" or "Hamilton") worked as a professional wrestler. As a wrestler, Hamilton was known as Hard Rock Hamilton. Hamilton's Hard Rock Hamilton persona donned a unique look with a distinctive approach to costume, dress, and appearance.[5]

Hamilton performed as Hard Rock Hamilton in Hamilton's own local professional wrestling organization, called Soul City Wrestling. Soul City Wrestling was designed to be family-friendly professional wrestling entertainment. Beginning in 1997, Soul City Wrestling promoted and held professional wrestling bouts at numerous venues in and around Philadelphia and elsewhere. Hard Rock Hamilton was often featured as the main event at Soul City Wrestling and was the Soul City Heavyweight Champion of the World. Hamilton promoted Soul City Wrestling in local broadcast and newspaper media, including local television news, the Philadelphia Inquirer, Philadelphia Sunday Sun, Philadelphia Daily News, and Norristown Times Herald. While developing Soul City Wrestling, Hamilton also worked as a motivational speaker in Philadelphia.

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[4] I take all facts in the light most favorable to the non-moving party, Hamilton.

[5] An image of Hamilton as Hard Rock Hamilton is appended to this memorandum as Appendix A.

Before his work as a professional wrestler, Hamilton played football at NCAA Division I football programs and went on to become a professional football player. Hamilton played one game for the Philadelphia Eagles during the strike-affected 1987 NFL football season.

In 1998, Defendant Lester Speight ("Speight") joined Soul City Wrestling, where he donned the wrestling persona Rasta the Voodoo Mon. Speight knew of Hamilton and his Hard Rock Hamilton persona. On July 25, 1998, Soul City Wrestling sponsored a wrestling event at Viking Hall in Philadelphia, which featured Hamilton as Hard Rock Hamilton and Speight in his "Rasta" persona. During the after-party for that event, Speight discussed plans for a violent shoot 'em up video game with Hamilton.[6] In accordance with Hamilton's family-friendly philosophy, Hamilton informed Speight that he was not interested in taking part in a violent video game.

B. The *Gears of War* Video Game Series and the Cole Character

Gears of War is an extremely violent cartoon-style fantasy video game series. The series takes place on an Earth-like planet called Sera that is populated by a wide variety of post-apocalyptic, crumbling structures. In the game, highly stylized, outlandish, cartoonish human characters are in violent conflict on Sera with a race of exotic reptilian humanoids known as the Locust Horde.[7] The Locust Horde reptilian

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[6] Hamilton alleges that the shoot 'em up video game Speight mentioned in 1998 would eventually become the video game series *Gears of War*.

[7] This characterization of the video game series is supported in part by my in-chambers review of the games themselves, which

humanoids are rumored in the in-game narrative to have been born out of a research accident related to Imulsion, a fictional energy source. However, the Locust Horde no longer inhabits its former subterranean environment after being driven above-ground by other subterranean reptilian creatures. The series primarily follows a military unit called Delta Squad, which consists of the fictional characters Marcus Fenix, Dominic Santiago, Damon Baird, and the Cole character. The reptilian humanoid members of the Locust Horde engage in extremely violent conflict with the Delta Squad and the rest of the planet's surface-dwellers; their conflicts center on fantastical, cartoonish firearms controlled by the players.

Throughout the *Gears of War* series, Defendant Lester Speight, Hamilton's former wrestling mate, provided the voice for the Cole character.[8] In the game, the Cole character is a large, muscular, African American male who is a former professional athlete who played the fictional game thrashball, a highly fantastical and fictionalized sport that loosely imitates American football in some ways, although the characters do not play thrashball. Speight had input into how the Cole character looked and had influence over the character. For example, Speight decided which voice to use for Augustus Cole. He also

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were put into the record along with a game console and controller by Defendants. *See* Declaration of Ambika Doran in Support of Motion to Dismiss, (ECF No. 25-3) (attaching *Gears of War* games).

[8] Although the in-game appearance for the characters are three-dimensional computer-generated images ("CGI"), their voices are provided by actors.

suggested that the game designers make the Cole character's arms bigger.

Cole and Hamilton share broadly similar faces, hair styles, races, skin tones, and large, muscular body builds. Cole's and Hamilton's voices also sound similar. The default Cole character in *Gears of War* is adorned in military gear.[9] The Cole character does not change in appearance from *Gears of War 1* and *Gears of War 2*.

However, in *Gears of War 3*, the third game in the series, players can obtain alternative "skins," or appearances, for the characters, including the Cole character. In *Gears of War 3*, for instance, players can utilize a skin or outfit for Cole known as Superstar Cole. This skin is a nonmilitary or civilian look for Cole.[10] Superstar Cole wears a fedora, sunglasses, sweatbands or compression bandages, a watch, and a chain necklace with a replica of a *Gears of War* weapon hanging from it. There is also a skin for Thrashball Cole, which emphasizes Cole's background as a former thrashball player.[11] There is similarly no reference in the games to the Hard Rock Hamilton name or any other biographical information about Hard Rock Hamilton.

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[9] Defendants' uncontested submission of an "exemplary" Cole character is included as Appendix B.

[10] A comparison of Cole dressed as Superstar Cole and Hard Rock Hamilton is displayed in Appendix D of this memorandum.

[11] A comparison of Cole dressed as Thrashball Cole and Hard Rock Hamilton is displayed in Appendix C of this memorandum.

II. LEGAL STANDARD

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Id.* In ruling on a motion for summary judgment, the court must draw all inferences from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its initial burden, the nonmoving party must then "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. Both parties must support their factual positions by: "(A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

The inquiry at summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

III. DISCUSSION

Defendants move for summary judgment on Hamilton's claims. Defendants argue, among other things, that each of Hamilton's claims is barred by the First Amendment. Specifically, Defendants contend that their rights to expressive speech under the First Amendment outweigh Hamilton's right to publicity, if any, because the Cole character is a "transformative use" of the Hard Rock Hamilton character. *See generally Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (adopting and applying the Transformative Use Test in relation to First Amendment protection against right of publicity cases). I agree and I will grant Defendants' motion on this ground.

A. The Right of Publicity, the First Amendment, and the Transformative Use Test

Hamilton alleges several causes of action stemming from his allegation that Defendants' creation of the Cole character in the *Gears of War* video game series infringes on his right of publicity: (1) a statutory claim for unauthorized use of name or likeness under 42 Pa. C.S.A. § 8316; (2) a common law claim for misappropriation of publicity; (3) a common law claim for invasion of privacy by misappropriation of identity; and (4) a cause of action for unjust enrichment stemming from Defendants' use of his likeness. *See* Second Am. Compl. ¶¶ 86-93; 97-99; 100-102; 103-105.[12] Generally, the right of publicity

[12] Hamilton agrees that each of his Pennsylvania statutory and common law claims stems from Defendants' invasion of his "right of publicity." *See, e.g.*, Pl.'s Br. in Opp. to Defs.' Mot. for Summ.

recognizes that individuals like Hamilton may have valuable interests in their name, likeness, and identity. *See Hart*, 717 F.3d at 148-49. Lawsuits like this one seek to protect an individual where others have "misappropriate[ed] his [or her] identity for commercial exploitation." *Id*.

In cases where a plaintiff asserts a right to publicity, the First Amendment may serve as a defense. *See generally, e.g.*, *Hart*, 717 F.3d 141. Accordingly, in this case, Defendants argue that the First Amendment bars Hamilton's right of publicity claims. Specifically, Defendants contend that their creation of the *Gears of War* video game series is expressive speech and that their right to free expression outweighs Hamilton's right to publicity. Video games like *Gears of War* are expressive speech protected by the First Amendment because "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011). As such, it is "self-evident" that "video games are protected as expressive speech under the First Amendment." *Hart*, 717 F.3d at 148 (citing *Brown*, 786 U.S. at 790).

When parties assert competing rights to publicity and free expression in situations like this, a court must "balance the interests underlying the right of free expression against the interest in protecting the

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J. at 25-29.

right of publicity." *Id.* at 149 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75 (1977)). In order to conduct this balancing test, the Third Circuit utilizes the Transformative Use Test. *Id.* at 163. The Transformative Use Test was first devised and developed by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807-11 (Cal. 2001), and subsequent caselaw. Under the Transformative Use Test:

> the balance between the right of publicity and First Amendment interests turns on whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. [Courts] ask, in other words, whether the 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. And when we use the word "expression," [courts] mean expression of something other than the likeness of the celebrity.

Hart, 717 F.3d 141, 159-60 (3d Cir. 2013) (quoting *Comedy III Productions*, 21 P.3d at 809).

In *Hart*, the Court applied the test to the video game *NCAA Football*. *Id.* at 165. Plaintiff Ryan Hart, a former college football star quarterback, sued Electronic Arts, Inc., the maker of the *NCAA Football* series for violating his right of publicity by featuring a Hart-like avatar in the game without compensating him. *Id.* at 144. In *NCAA Football*, video game players

selected realistic depictions of college football teams and players, including Hart, to control the players' avatars in simulated college football games in simulated college football arenas. *Id.* at 146. As described by the Court in *Hart*:

> In no small part, the NCAA Football franchise's success owes to its focus on realism and detail—from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures that the "over 100 virtual teams" in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information. Thus, for example, in NCAA Football 2006, Rutgers' quarterback, player number 13, is 6'2" tall, weighs 197 pounds and resembles Hart. Moreover, while users can change the digital avatar's appearance and most of the vital statistics (height, weight, throwing distance, etc.), certain details remain immutable: the player's home state, home town, team, and class year.

Id. After adopting the Transformative Use Test, the court in *Hart* applied the test to *NCAA Football* and found that the video game failed the test and that Hart could continue with his right of publicity claims against the defendant. *Id.* at 167. The Court found that the in-game Hart avatar's likeness and biographical information failed to transform the character from the actual Hart, and that no aspect of the in-game context in which the Hart avatar appears sufficed to satisfy the Transformative Use Test. *Id.* at 165-171.

The *Hart* case also discussed with approval two California cases applying the Transformative Use Test: *No Doubt* and *Kirby*. In *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006), the plaintiff musician, Kierin Kirby, claimed that Sega misappropriated Kirby's likeness and signature phrases to create Ulala, a video game character who was a reporter in the distant future. The court noted that Kirby used several identical signature phrases, including "ooh la la," "groove," "meow," "dee-lish," and "I won't give up." *Id.* at 613. Like the descriptions of Hamilton and Cole in this case, the court in *Kirby* also found similarities in appearance between the two characters based on hair style and clothing choice. *Id.* The *Kirby* court held that, because there were some differences in appearance and movement between the two characters, Ulala was not merely a digital recreation of Kirby. *Id.* Thus, the court concluded that Ulala satisfied the Transformative Use standard. *See also id.* at 617 ("[A]ny imitation of Kirby's likeness or identity in Ulala is not the sum and substance of that character.").

The *Kirby* Court "reject[ed] the claim that Ulala merely emulates Kirby." *Id.* at 616. Even though, as here, "sufficient similarities preclude a conclusion that, as a matter of law, Ulala was not based in part on Kirby," the Court was "similarly unable to conclude, as a matter of law, that Ulala is nothing other than an imitative character contrived of 'minor digital enhancements and manipulations.'" *See id.* The Court found that because the Sega defendants "added new expression, and the differences are not trivial" and because "Ulala is not a mere imitation of Kirby," the defendants were entitled to summary judgment on First Amendment grounds. *Id.*

The *Hart* Court also discussed the California Court of Appeal's decision considering the right of publicity in the video game context in *No Doubt v. Activision Publishing, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011). In *No Doubt*, the rock band known as No Doubt sued the makers of *Band Hero*, a video game in which video game players perform as rock bands playing popular songs. *Id.* at 401. The video game player selects digital avatars to represent him or her as the band in the game, which included avatars specifically intended to depict the likeness of the band being used, including an avatar of the band No Doubt. *Id.* After the band had a contract dispute with the video game makers, No Doubt sued for violation of their rights to publicity in relation to the game's continued use of their name, likeness, and biographical information. *Id.* at 402.

The California Court of Appeal applied the Transformative Use Test to find that defendant's creation of the No Doubt avatars failed the test. The Court noted that the No Doubt avatars were "at all times immutable images of the real celebrity musicians." *Id.* at 410. The Court also noted that "even literal reproductions of celebrities can be 'transformed' into expressive works based on the context into which the celebrity image is placed." *Id.* (citing *Comedy III*, 21 P.3d at 811). The court ultimately found that "no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame." *Id.* at 410-11. The court explained:

> [T]he avatars perform [rock] songs as literal recreations of the band members. 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 videogame that contains many other creative elements, does not transform the avatars into anything other than the exact depictions of No Doubt's members doing exactly what they do as celebrities.

Id. at 411. Finally, the *No Doubt* Court noted that the defendant video game maker's use of realistic digital depictions of the rock band No Doubt was motivated by a desire to appeal and sell to the band's fans "because it encourages [fans] to purchase the game so as to perform as, or alongside, the members of No Doubt." *Id*.

In balancing the interests involved in the Transformative Use Test, the *Hart* Court specifically focused on whether plaintiff's "identity" had been transformed. "Identity" includes "not only [a plaintiff's] likeness, but also his [or her] biographical information." *Hart*, 717 F.3d at 165. "It is the combination of these two parts—which, when combined, identify the digital avatar as an in-game recreation of [a plaintiff]—that must be sufficiently transformed." *Id*. In cases relating to video games, a character's identity also includes or can be transformed by the "context" in which the video game character appears and operates, including where the character is depicted to be in the game and what the character does and can do in the game. *Id*.

B. Application

The Cole character satisfies the Transformative Use standard. If the Hard Rock Hamilton character influenced the creation of the Cole character at all, the

Hard Rock Hamilton character was at most one of the "raw materials" from which the Cole character was synthesized: the Hard Rock Hamilton is not the "very sum and substance of the" Cole character. *Hart*, 717 F.3d 141, 160 (3d Cir. 2013) (quoting *Comedy III Productions*, 21 P.3d at 809).

First, as discussed in further detail below, although the Hard Rock Hamilton and the Cole characters' likenesses certainly share some similarities, the Hard Rock Hamilton character's identity is obviously not the "very sum and substance" of the Cole character's identity. *Id.* Second, the context in which the Cole character appears and performs is profoundly transformative. Cole—who engages in extraordinarily stylized and fantastical violence against cartoonish reptilian humanoids on a fictional planet in a fictional war—does not "do[] what the actual" Hard Rock Hamilton character does—engage in professional wrestling on Earth. *Hart*, 717 F.3d at 166. Because of these transformative characteristics of the Cole character, Defendants meet the Transformative Use standard.

1. The Cole character's likeness and biographical information

The Cole character's identity transforms the Hard Rock Hamilton character's identity with respect to the characters' likenesses, biographical information, and personalities. First, the Cole character's biographical information substantially transforms the Hard Rock Hamilton character's biographical information. The Cole character's most important biographical information—his name, Augustus "Cole Train" Cole—bears absolutely no resemblance to the Hard Rock Hamilton character's name. The two characters'

biographical similarities—Hard Rock Hamilton formerly played football for the NFL's Philadelphia Eagles and the Cole character formerly played a fictional game called thrashball for a fictional team named the Eagles—do not suffice to overcome the fact that the Plaintiffs do not identify any other aspects of the Cole character's biography (for instance, age or birthplace) that are shared by the Cole character.

The Cole character's likeness shares some broad similarities with the Hard Rock Hamilton character. On Plaintiff's account, the two characters are both large, muscular, African American males with similar faces, hair styles, skin tone, and large body build. However, the Cole character's primary avatar wears futuristic, cartoonish heavy armor on his torso and carries various weaponry, as seen in Appendix B. Hard Rock Hamilton does not wear any of these clothing components. The primary Cole avatar does not have a hat, jewelry, tie, or cuffs like Hard Rock Hamilton. The fact that the two characters share a broad likeness of skin tone, race, body build, and hair style does not suffice to overcome the conclusion that the Hard Rock Hamilton likeness is not the sum and substance of the of the Cole character's likeness.

Hamilton admits in his own testimony that the Cole character's persona is profoundly different from the persona of Hard Rock Hamilton. Specifically, Hamilton stated that, although he asserts that the Cole character shares his likeness, the Cole character "is ignorant, he's boisterous and he shoots people, he cusses people out, that's not me. . . . And it's totally against what I believe in." Deposition of Plaintiff Lenwood Hamilton at 174:16-20. Hamilton went on to assert that "for [Defendants] to take my likeness and . . . portray me as a person that shoots people, curses

their mom out, and cusses like [the Cole character] does, that's not portraying Hard Rock Hamilton. That ain't me . . . that's not my temper. That's not my attitude. . . . [the Cole character] stands for totally the opposite of what I was trying to do . . . ." *Id.* (quoting Deposition of Plaintiff Lenwood Hamilton at 231:24-232:10). Hamilton's characterization of the profound difference between the persona of the Cole character and the persona of the Hard Rock Hamilton character further bolsters the conclusion that the Cole character transforms the Hard Rock Hamilton character.

The *Kirby* case informs my analysis of whether the Cole character's likeness, biographical information, and persona constitute a transformative use of the Hard Rock Hamilton character's identity. Just as in *Kirby*, even if there were "sufficient similarities" between the Hard Rock Hamilton character and the Cole character to preclude a conclusion that, as a matter of law, the Cole character was not based in part on Hard Rock Hamilton, I am "similarly unable to conclude, as a matter of law, that" Cole is "nothing other than an imitative character contrived of minor digital enhancements and manipulations." *Id.* at 616. The Cole character's likeness, biographical information (including but not limited to the Augustus "Cole Train" Cole name) and persona, although it may be similar in some ways to the Hard Rock Hamilton character, are absolutely not "the sum and substance" of the Hard Rock Hamilton character's likeness and identity.

The Parties dispute whether the focus of my analysis should be on the primary Cole character or on the secondary Cole avatars. I do not reach this issue because each of the Cole character avatars in this case—the primary Cole avatar, the Superstar

Cole avatar, and the Thrashball Cole avatar—transforms the Cole character. Players can opt to use the Superstar Cole and Thrashball Cole avatars only in *Gears of War 3* and *Gears of War 4*—the third and fourth editions of the *Gears of War* series. Appendix C includes a comparison of exemplary images of Hamilton himself—not Hard Rock Hamilton—as a football player compared to the Cole character as a thrashball player. Even here, there are sufficient creative differences between the two characters to satisfy the Transformative Use standard. Thrashball Cole again bears a different name, is depicted playing a fictionalized sport (although the player cannot actually use the Thrashball Cole to play thrashball in the game context), wears boots, dons only pads emblazoned with the number 83, and wears an outsized belt over dirtied football pants with visible stitching and what is ostensibly a cape. In contrast, Hamilton's footwear is not visible; he wears a small belt with white football pants; he wears a full football jersey; and Hamilton never wore the number 83. And—again—Plaintiffs put forward no evidence that the Thrashball Cole character is identified as a professional wrestler or that the Thrashball Cole's transformative persona varies from the typical Cole character persona.

Appendix D contains a comparison of exemplary images of Superstar Cole and Hard Rock Hamilton. Although Superstar Cole does in fact bear a closer resemblance to Hard Rock Hamilton than the primary Cole character, even the Superstar Cole character's physical likeness is sufficiently transformative to satisfy the Transformative Use standard. In addition, the Superstar Cole character again has a different name than the Hard Rock Hamilton character.

Plaintiffs put forward no evidence to suggest that the Superstar Cole is a wrestler or that the Superstar Cole character's persona is different from the profoundly transformative persona of the Cole character generally. Finally, the Superstar Cole character wears sunglasses and a heavily-worn undershirt with a bracelet and band of fabric around his forearm that differs from Hard Rock Hamilton, who wears a tie, collared shirt, formal vest, no sunglasses, and a chain. The optional Superstar Cole character's persona, likeness, and biographical information transform Hard Rock Hamilton's persona, likeness, and biographical information.

2. The Cole Character's context

In addition to the Cole character's transformation of the Hard Rock Hamilton character's likeness, biographical information, and personality, the Cole character appears in the profoundly transformative context of the *Gears of War* games. In the *Gears of War* games, the Cole character does not—and cannot—"do[] what the actual" Hard Rock Hamilton does. *Hart*, 717 F.3d at 166. Hard Rock Hamilton performed as a professional wrestler in Soul City Wrestling on the planet Earth. In *Gears of War*, the Cole character does not perform as a professional wrestler in Soul City Wrestling on the planet Earth. This case is thus different from *Hart*, discussed above, where the digital avatar of plaintiff and Rutgers football star quarterback Ryan Hart appeared in-game in the context of playing as a Rutgers football star quarterback during simulated Rutgers football games in the Rutgers football stadium. *See Hart*, 717 F.3d at 166. This case is also distinguishable from *No Doubt*, 122 Cal. Rptr. 3d at 410-11, because the Cole character does not even perform as a professional

wrestler on the fictional planet Sera. In *No Doubt*, also discussed above, digital avatars of the rock band No Doubt appeared in the context of and were controlled by players performing rock music as the rock band No Doubt, with the only difference being the fictionalized setting. *Id.*

Instead, the Cole character appears and performs in *Gears of War* in an extraordinarily fanciful situation. Players use the Cole character to battle formerly-subterranean reptilian humanoids on the fictional planet Sera as part of a broader military engagement stemming from a fictional energy source. Cole fights with other characters as a member of the Delta Squad.These differences—between professional wrestling on Earth as Hard Rock Hamilton and battling formerly-subterranean reptilian humanoids as the Cole character—is such a profoundly transformative change in relevant context that even taking Hamilton's characterizations of the likeness between the Cole character and Hard Rock Hamilton in the light most favorable to Hamilton, *Gears of War* is protected by the First Amendment under the Transformative Use standard.

IV. CONCLUSION

I will grant Defendants' motion for summary judgment.

s/Anita B. Brody

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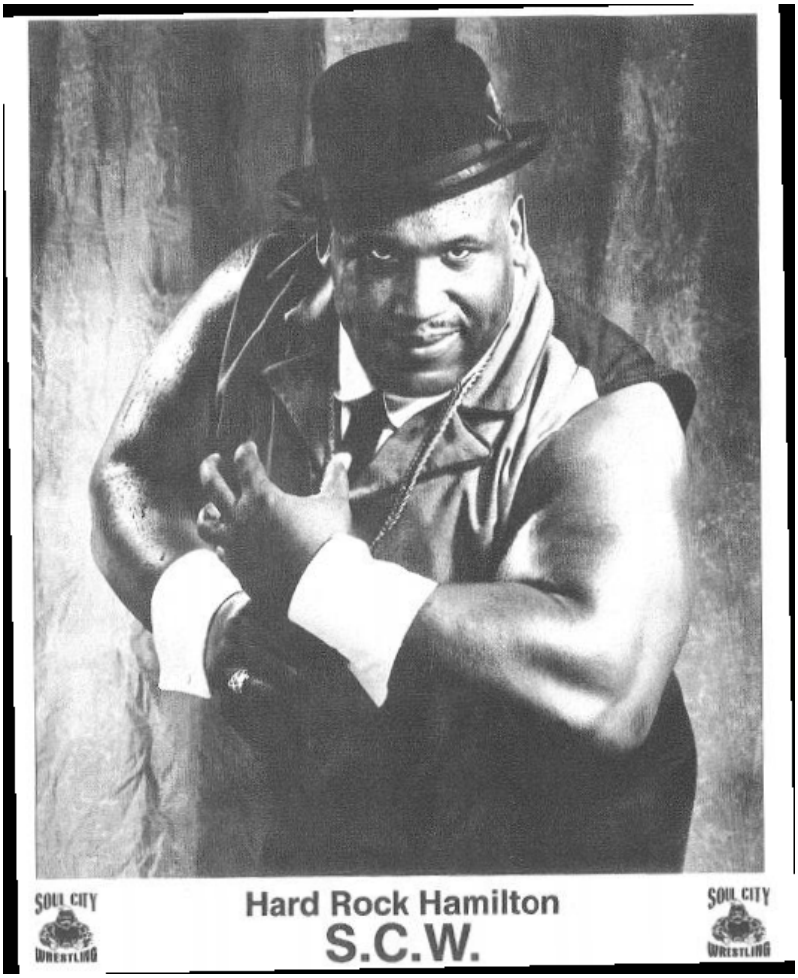
ANITA B. BRODY, J.

Copies **VIA ECF** on 9/26/2019

Appendix A

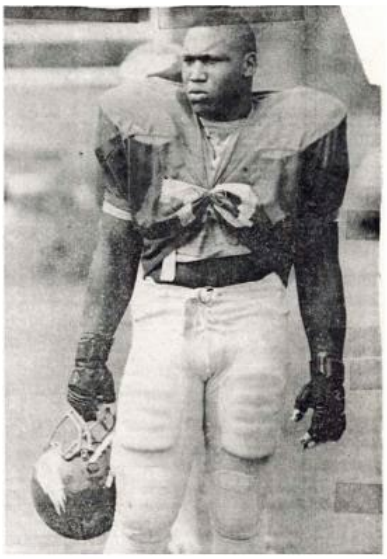


Second Amended Complaint ("SAC"), Ex. B.

Appendix B

Plaintiff's Statement of Undisputed Material Facts ¶ 9.

Appendix C



Pl's Statement of Facts at ¶ 20.

Appendix D

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3495

LENWOOD HAMILTON,
a/k/a HARD ROCK or SKIP HAMILTON,
Appellant

v.

LESTER SPEIGHT,
a/k/a RASTA THE URBAN WARRIOR,
a/k/a AUGUSTUS "COLE TRAIN" COLE;
EPIC GAMES, INC.;
MICROSOFT, INC., a/k/a Microsoft Corp;
MICROSOFT STUDIOS; THE COALITION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-17-cv-00169)
District Judge: Hon. Anita B. Brody

Submitted under Third Circuit L.A.R. 34.1(a)
September 10, 2020

Before: CHAGARES, HARDIMAN, and MATEY,
Circuit Judges.

(Opinion filed: September 17, 2020)

JUDGMENT

This cause came to be considered on appeal from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit L.A.R. 34.1(a) on September 10, 2020.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the order of the District Court entered September 26, 2019, is hereby **AFFIRMED**. Costs taxed against Appellant.

All of the above in accordance with the Opinion of the Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: September 17, 2020

APPENDIX D

Pennsylvania Consolidated Statutes

Title 42 § 8316. Unauthorized use of name or likeness.

(a) Cause of action established—Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized in subsection (b) may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use.