

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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<b>JOHN FACENDA, JR., executor of the</b>	:	
<b>estate of JOHN FACENDA and JOHN</b>	:	
<b>FACENDA, JR. in his own right</b>	:	<b>CIVIL CASE NO.</b>
<b>1028 Foster Avenue</b>	:	
<b>White Haven, PA 18961</b>	:	
	:	
<b>Plaintiff</b>	:	
<b>v.</b>	:	
	:	
<b>N.F.L. Films, Inc.</b>	:	
<b>One N.F.L. Plaza</b>	:	
<b>Mt. Laurel, New Jersey 08054</b>	:	
<b>And</b>	:	
	:	
<b>The National Football League</b>	:	<b>JURY TRIAL DEMANDED</b>
<b>280 Park Avenue</b>	:	
<b>New York, NY 10017</b>	:	
	:	
<b>And</b>	:	
<b>N.F.L. Properties, LLC</b>	:	
<b>280 Park Avenue</b>	:	
<b>New York, NY 10017</b>	:	
	:	
<b>Defendants</b>	:	

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**PLAINTIFF'S  
CIVIL ACTION COMPLAINT**

**The Parties**

1. Plaintiff John Facenda, Jr. is the executor of the estate of John Facenda, having received letters testamentary from the Register of Wills of Delaware County, Pennsylvania. Plaintiff is citizen of the Commonwealth of Pennsylvania, residing therein at 1028 Foster Avenue, White Haven, Pennsylvania, 18661.

2. John Facenda, Plaintiff's decedent, was a domiciliary of Pennsylvania at the time of his death, residing at 217 North Lexington Avenue, Havertown, Pennsylvania, Delaware County.

3. Plaintiff is the natural son of John Facenda, and is also the sole heir of John Facenda.

4. Defendant, National Football League (hereinafter sometimes referred to as “the NFL”) is an unincorporated association founded in 1920 as the American Professional Football Association (in 1922 the APFA changed its name to the National Football League). The NFL consists of thirty two (32) independent, for-profit football clubs and maintains a principle place of business at 280 Park Avenue New York, NY 10017.

5. The NFL also owns and operates NFL Network, a television station launched in November 2003 that is broadcast through various cable and satellite providers. By 2005, “NFL Network” was available to 70 million U.S. homes with a total of 35 million subscribers. NFL Network also has distribution deals in Canada and Mexico.

6. Defendant NFL regularly engages in business throughout the Commonwealth of Pennsylvania, which is home to two NFL franchises, the Philadelphia Eagles and the Pittsburgh Steelers; defendant likewise regularly engages in business in Philadelphia and its contiguous counties.

7. Defendant N.F.L. Properties, L.L.C. is a limited liability corporation organized under and existing by and under the laws of Delaware, the state of its incorporation.

8. Defendant N.F.L. Properties, L.L.C. is the exclusive representative of the National Football League and its thirty-two Member Clubs for the licensing and protection of their names, logos, symbols and other identifying marks. Defendant is a subsidiary of National Football League Properties, Inc., a corporation formed in 1962 to act as the licensing arm of the NFL.

9. Defendant N.F.L. Properties, L.L.C. regularly engages in business throughout the Commonwealth of Pennsylvania, and in particular, in Philadelphia and its contiguous

counties. Pennsylvania is home to two NFL franchises (including the Philadelphia Eagles) and the defendant regularly and routinely acts to protect and/or promote the names, logos, symbols and other identifying marks associated with said teams.

10. Defendant N.F.L. Films, Inc. is a corporation organized under and existing by and under the laws of Delaware, the state of its incorporation, with a principle place of business located at One N.F.L. Plaza, Mt. Laurel, New Jersey 08054.

11. Defendant N.F.L. Films, Inc. has, since the 1960's, been engaged in the business of filming and/or distributing motion pictures of N.F.L. Football games for promotional or other purposes, and is likewise engaged in other cinematic and entertainment productions.

12. N.F.L. Films, Inc. had been a "subsidiary" of the National Football League in that the N.F.L. owners owned the defendant corporation N.F.L. Films, Inc.

13. Defendant N.F.L. Films, Inc. is and has been, at all times relevant to this action, a subsidiary of defendant National Football League Properties, L.L.C. As set forth elsewhere in this Complaint, defendant National Football League Properties, L.L.C. acts as the representative for N.F.L. Films, Inc., negotiating contracts on behalf of its subsidiary.

14. Alternative to the above averments, N.F.L. Films, Inc. is a division of National Football League Properties, L.L.C. and/or the National Football League.

15. Defendant N.F.L. Films, Inc. regularly engages in business throughout the Commonwealth of Pennsylvania, and in particular, in Philadelphia and its contiguous counties. Defendant regularly films football games at Lincoln Financial Field in Philadelphia, and produces other projects in Pennsylvania and the Philadelphia area.

### **Jurisdiction**

16. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, as there is diversity of citizenship between plaintiff, a Pennsylvania resident and citizen, and the

defendants, which are citizens of New York and Delaware. The amount in controversy, exclusive of interest and costs, exceeds the sum of seventy five thousand (\$75,000.00) dollars.

17. This Court also has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as it involves a controversy arising, inter alia, under 15 U.S.C. 1125 (a).

18. Venue is proper in this district, pursuant to 28 U.S.C. § 1391(a), because the defendants regularly engage in business in Pennsylvania and in the Philadelphia area.

19. At all times material hereto, defendants acted by and through their agents, employees and servants.

### **The History of John Facenda**

20. John Facenda, plaintiff's decedent, was a legendary broadcast pioneer whose career spanned decades. From 1935 through 1952, he was an announcer on WIP, a Philadelphia radio station. Beginning in 1948, he was the anchorman for WCAU-TV news, and throughout the 1950's and 1960's anchored the top-rated evening news program in Philadelphia. In 1971, the Broadcast Pioneers of Philadelphia named him "Person of the Year."

21. As a result of his distinctive voice and six decades in Philadelphia broadcasting, John Facenda is not only widely known, but is, in fact, known as "the Voice of Philadelphia."

22. In 1984, Mr. Facenda was presented with the Governor's Award for lifetime achievement by the Philadelphia Chapter of the National Academy of Television Arts and Sciences.

23. In the mid-1960's, Mr. Facenda began narrating game-footage and highlight reels for N.F.L. Films, Inc. utilizing his distinctively rich, baritone voice and dramatic cadence to describe slow motion highlights of the week's National Football League games (set to a similarly distinctive and dramatic musical score). Mr. Facenda transformed the printed words into dramatic performances which, to this day, are recognized for their unique sound, melodious

delivery, and dramatic inflection. Mr. Facenda performed this role for approximately twenty years and is widely known as the voice of those films.

24. In fact, the current web-site for N.F.L. Films, Inc. identifies Mr. Facenda as one of its “founding fathers”, noting that “his mellifluous tones made a pre-game coin toss as dramatic as the game winning touchdown” and that “when the legendary voice of John Facenda is blended with the power of N.F.L. Films, Inc.’s classic music, you have the signature sound of NFL Films.”

25. In fact, the current N.F.L. Films, Inc. website notes that “John Facenda...became synonymous with N.F.L. Films when he narrated the studio’s first film, *They Call It Pro Football* in 1965.”

26. Steve Sabol, President of N.F.L. Films, Inc. described Mr. Facenda’s voice as “an instrument. With his compelling, arresting voice...when he spoke, everyone listened. His voice enabled us to write lean, simple, muscular scripts that conveyed the passion and the struggle and the intensity of the game.”

27. Mr. Facenda did not merely recite the scripts; through his pacing, delivery, and additions to the passages, he created a unique and distinctive performance and likewise created a standard against which those who subsequently provided narrative performances would be judged.

28. In fact, sports fans throughout the nation have respectfully dubbed John Facenda’s voice, “the Voice of God” as well as “the Voice of Doom”.

29. In recognition of his work and his uniquely distinctive contribution to N.F.L. Films, Inc., Facenda was inducted into the Football Hall of Fame.

**Mr. Facenda's Relationship With N.F.L. Films, Inc.**

30. Throughout most of the 1960’s, 1970s and early 1980’s, Mr. Facenda rendered

his "compelling and arresting" dramatic "signature" voice-over services with N.F.L. Films, Inc. as an independent contractor, and without a contract or other written agreement.

31. In or around 1983, Defendant N.F.L. Films, Inc. provided Mr. Facenda with a document titled "release" which purported to extend to N.F.L. Films, Inc. a license to use audio sequences recorded in connection with specified 1982 highlight films and to use Mr. Facenda's voice and likeness in connection with those recordings "provided, however, that such use does not constitute an endorsement of any product or service." A copy of the "release" which was drafted by N.F.L. Films, Inc. and executed by Mr. Facenda on or about March 18, 1983 is attached hereto as exhibit "A".

32. Mr. Facenda executed similar documents with respect to the "1979 Pittsburgh Steelers Hilite Film", the 1979 Los Angeles Rams "Hilite Film" and a production entitled "Super Bowl XIV". Copies of these documents are attached as exhibit "B". These documents, entitled "releases", were also drafted by N.F.L. Films, Inc. and likewise purportedly extended to the defendant a license to use the specified audio and video recordings of Mr. Facenda and to use his voice and likeness in connection with those recordings "provided, however, that such use does not constitute an endorsement of any product or service."

33. In or around April 1984, Mr. Facenda executed a document drafted by N.F.L. Films, Inc. which, according to the defendant, purported to establish a "blanket release" with respect to his future performances; this document, entitled "release", like the other documents drafted by N.F.L. Films, Inc. contained an express prohibition against the use of Mr. Facenda's voice and likeness for purposes of product or service endorsements. A copy of the 1984 "release" is attached hereto as exhibit "C".

34. Neither N.F.L. Films, Inc., N.F.L. Properties, L.L.C., nor the NFL, was possessed of the right to use Mr. Facenda's voice in connection with any endorsement of a product or service. In addition to his other rights, Mr. Facenda was the sole possessor of the right to employ or license his voice and/or likeness in connection with any endorsement of a product or service.

35. Even under the express terms of the "releases" it had drafted, N.F.L. Films, Inc. did not seek or claim any exclusive right to Mr. Facenda's voice and likeness and did not retain any right to use or license Mr. Facenda's voice where such use "constitute(d) an endorsement of any product or service."

36. The exclusion for endorsements and other such commercial uses was a material part of the aforesaid agreements, as Mr. Facenda was, at the time, engaged in providing voice-over work and other narrative services for various products and services, and was otherwise actively engaged in various commercial ventures, independent of his work with N.F.L. Films, Inc.

37. By expressly retaining the right to use his voice for commercial endorsement purposes, Mr. Facenda confirmed his retention of control over the commercial uses to which his voice could be put and likewise confirmed his exclusive right to secure the financial benefits of any such uses.

#### **The NFL's Commercial Use of John Facenda's Voice**

38. The NFL has, throughout the years, entered into marketing and licensing arrangements with various providers of products and services through which said providers are authorized to reference the NFL and/or particular NFL players or otherwise represent that they are "official sponsors" of the NFL.

39. The NFL exacts fees and royalties for such uses.

40. Among the entities with which the NFL has entered into such licensing agreements is Electronic Arts, a creator, manufacturer and seller of electronic video games, including games marketed under the "EA Sports" brand name.

41. In December 2004, defendant NFL and Electronic Arts entered into a contract which extended to Electronic Arts a five year exclusive right to create video games using NFL

stadiums, teams, and player likenesses (the NFL Players Association was also a party to the contract).

42. On information and belief, Electronic Arts, in exchange for said exclusive rights, paid and/or agreed to pay defendant NFL and the NFL Players Association valuable consideration, including an increased royalty rate, worth between \$300 million and one billion dollars. The actual cost to Electronic Arts, and the consideration consequently realized by the defendant NFL, is dependent upon various factors, including the number of video games sold and/or revenue realized by Electronic Arts.

43. The precise terms of the agreement between the NFL and Electronic Arts are not available to Plaintiff; the above referenced terms have been reported in various news media.

44. In connection with the aforesaid licensing agreement, Electronic Arts developed and marketed the “Madden 2006” electronic video football game, played on devices such as the Sony Playstation, and Playstation 2.

45. “Madden 2006” is the latest edition of Electronic Arts’ popular “Madden” series of electronic video football games and was initially marketed in August 2005.

46. John Madden is the former coach of the Oakland Raiders, and, for years has been a popular and respected football commentator who has worked for CBS, Fox, and ABC television.

47. The Madden series of electronic video football games simulate professional football contests using audio commentary specifically provided by John Madden.

48. In addition to the audio commentary of Mr. Madden, the Madden games allow gamers to create “virtual” teams, using the names of NFL teams, NFL stadiums, and digitally created replicas of actual NFL players.

49. The National Football League directly and indirectly has profited from and continues to realize revenue and earnings from the sales of Madden 2006. Defendant realizes valuable royalties, and the game provides a vehicle for marketing the NFL, its teams and its players.

50. The NFL also has a vested interest in promoting the Madden videogame, as the game's commercial success would provide the defendant with the ability negotiate similar, if not more lucrative royalty and licensing agreements when the exclusive arrangement with Electronic Arts expires in 2010.

51. In or around August 2005, the NFL caused to be broadcast on its NFL Network a program devoted to publicizing and promoting the Madden 2006 football game (hereinafter sometimes referred to as "the commercial").

52. The broadcast of "The Making of Madden 2006" was coordinated with the marketing of the Madden 2006 videogame. The program was a blatant commercial for the product; in fact, the broadcast was coordinated to coincide with the release of the game. The commercial was broadcast on multiple occasions between August 5 and August 8, 2005, and the game was released on August 9, 2005.

53. The commercial featured actual recordings of the voice of John Facenda, taken from his professional work with NFL Films.

54. The voice of John Facenda that was utilized in the commercial broadcast was provided by and/or purportedly licensed by defendant N.F.L. Films, Inc., N.F.L. Properties, L.L.C. and/or the National Football League.

55. At the time that the voice of John Facenda was utilized in the commercial, defendants N.F.L. Films, Inc., N.F.L. Properties, L.L.C. and/or the National Football League had no legal or equitable right to so license Mr. Facenda's voice for purposes of commercial endorsements. That right remained vested with Mr. Facenda and his estate.

56. Use of Mr. Facenda's voice was, among other things, designed or intended by the defendants to augment the purported "authenticity" of the game by highlighting its connection to the storied tradition and history of the National Football League.

57. Neither John Facenda nor his estate had ever conferred upon Electronic Arts, EA Sports, N.F.L. Films, Inc., the NFL, or N.F.L. Properties, L.L.C. permission to use Facenda's voice in connection with this commercial enterprise. The agreements between Facenda and N.F.L. Films, Inc. did not confer upon the defendants any right to utilize Mr. Facenda's voice and likeness for this purpose.

58. Viewers watching the commercial would be misled and were misled into believing that Facenda and/or the Facenda Estate had endorsed Madden 2006 by permitting the use of Mr. Facenda's voice in connection with the commercial.

59. The NFL, N.F.L. Films, Inc. and N.F.L. Properties, L.L.C. had actual knowledge that the Facenda estate was actively pursuing its legal remedies to redress any unauthorized use of Mr. Facenda's voice in connection with other commercial ventures; in November 2004, in response to a subpoena issued in connection with litigation initiated by the Facenda estate alleging an unauthorized use of his voice, defendants produced the documents which have been identified herein as exhibits "A", "B" and "C".

60. Despite actual knowledge that they had no right to use Mr. Facenda's voice or likeness in connection with endorsements of products or services, and actual knowledge that the Facenda estate was vigorously protecting its lawful interest in the licensing and control of Mr. Facenda's voice and likeness, the defendants took no steps to secure the permission of the Facenda estate before employing Mr. Facenda's voice in connection with the NFL- Electronic Arts commercial enterprise.

61. The Estate of John Facenda received no compensation for the unauthorized use of Mr. Facenda's voice in the commercial.

**Count One**

**JOHN FACENDA, JR., INDIVIDUALLY AND AS EXECUTOR  
OF THE ESTATE OF JOHN FACENDA, VERSUS ALL DEFENDANTS  
UNAUTHORIZED USE OF NAME OR LIKENESS (42 Pa.C.S. §8316)**

62. Plaintiff incorporates the averments of paragraph 1 through 61 as if each was fully set forth herein.

63. Plaintiff John Facenda, Jr. is the executor of the Estate of John Facenda, as well as its sole heir, and is authorized to bring this action pursuant to 42 Pa.C.S. §8316.

64. The distinctive voice of John Facenda has commercial value.

65. The voice in the commercial is and would reasonably be identified as that of John Facenda.

66. Defendants derived advantage and/or benefit from the unauthorized use of Mr. Facenda's voice and likeness.

67. Defendants unlawfully used the voice of John Facenda without the consent of the Facenda estate or its representatives, for commercial and advertising purposes.

68. Defendants so misappropriated the voice of John Facenda without the consent of the executor of Mr. Facenda's estate or other authorized representatives.

69. Defendants, in particular the National Football League, intended to realize financial benefit and/or realized such benefit by their unauthorized use of Mr. Facenda's voice in the commercial, as the voice conferred historical legitimacy upon the game so as to increase awareness of and consequently sales of the game (which, in turn, translated into increased royalties for the game paid to the NFL).

70. Defendants NFL, N.F.L. Films, Inc. and NFL Properties, L.L.C., knowing that they had no right to license or otherwise permit the use of Mr. Facenda's voice or likeness, did so and in so doing caused the damages described elsewhere in this Complaint.

71. As a result of defendants' unauthorized use of John Facenda's likeness, to wit his voice, plaintiff has sustained loss or injury including, but not limited to, depreciation of the value of John Facenda's voice in connection with future commercial pursuits, and loss of the compensation which would otherwise have been due to the Estate in connection with the commercial broadcast including original and residual compensation. Moreover, the defendants realized significant value and benefits by employing Mr. Facenda's voice in the commercial, as it conferred historical legitimacy upon the game and helped to increase awareness of it among the public.

72. Additionally, the defendants had actual knowledge that they were using Mr. Facenda's voice without any right, license or permission in connection with the commercial. Accordingly, defendants knowingly misappropriated Mr. Facenda's likeness (to wit, his voice) in disregard for the rights and interests of his estate.

73. Defendants' knowing misappropriation of Mr. Facenda's voice and flagrant disregard for plaintiff's interests warrants the imposition of punitive damages.

74. Plaintiff, on behalf of the estate of John Facenda, seeks damages for all injuries, damages and losses resulting from defendant's misappropriation of John Facenda's likeness including, but not limited to damages for the fair market value of Mr. Facenda's voice, damages for good will, and for the value that use of Facenda's voice brought to the Madden 2006 commercial; said damages include the amount which Mr. Facenda's voice was deemed to have been worth to the defendants and the diminution of value of John Facenda's voice in connection with future commercial pursuits.

WHEREFORE, plaintiff demands damages against the defendants in an amount in excess of one hundred and fifty thousand (\$150,000.00) dollars together with interest, costs, punitive damages and such other relief as this Court may deem just and necessary.

**COUNT TWO:  
JOHN FACENDA, JR. EXECUTOR OF THE ESTATE OF  
JOHN FACENDA VERSUS ALL DEFENDANTS  
LANHAM ACT (15 U.S.C.S. § 1125)**

75. Plaintiff incorporates the averments of the preceding paragraphs as if each was set forth at length.

76. Defendants, in connection with the advertising and marketing of Madden 2006, used the voice of John Facenda in a manner that was likely to cause confusion, cause mistake, or deceive the public as to the affiliation, connection or association of John Facenda with said product and/or to suggest, imply and/or represent approval of Madden 2006 by John Facenda and/or his estate, and/or to cause confusion, mistake or deception as to the sponsorship or approval by Mr. Facenda and/or his estate.

77. The voice in the commercial was and would reasonably be identified as that of John Facenda.

78. Defendants derived pecuniary and financial advantage or benefit from the unauthorized use of Mr. Facenda's likeness (to wit: his voice).

79. Defendants intentionally, deliberately and willfully used Mr. Facenda's voice, without the consent or permission of Mr. Facenda's estate or other authorized representatives.

80. The Estate of John Facenda has a reasonable interest to be protected by 15 U.S.C. § 1125 and sustained a direct injury as a consequence of defendants' misappropriation.

81. As a result of defendants' unauthorized use of John Facenda's likeness, to wit his voice, plaintiff has sustained loss or injury including, but not limited to, depreciation of the value of John Facenda's voice in connection with future commercial pursuits, and loss of the compensation which would otherwise have been due to the Estate in connection with the commercial for Madden 2006 including original and residual compensation, loss of the value that use of Facenda's voice brought to the Madden 2006 commercial.

82. Plaintiff, on behalf of the estate of John Facenda, seeks damages for all injuries, damages and losses resulting from defendant's misappropriation of John Facenda's likeness including, but not limited to damages for the fair market value of Mr. Facenda's voice, damages for good will, and for the value that use of Facenda's voice brought to the Madden 2006 commercial; said damages include the amount which Mr. Facenda's voice was deemed to have been worth to the defendants and the diminution of value of John Facenda's voice in connection with future commercial pursuits.

WHEREFORE, plaintiff demands damages against the defendants in an amount in excess of one hundred and fifty thousand (\$150,000.00) dollars, together with interest, punitive damages, an award of attorneys' fees, and such other relief as this Court deems just and necessary.

**COUNT THREE:  
JOHN FACENDA, JR., EXECUTOR OF THE ESTATE OF  
JOHN FACENDA VERSUS ALL DEFENDANTS  
INVASION OF PRIVACY**

83. Plaintiff incorporates the averments of the preceding paragraphs as if each was fully set forth herein.

84. Defendants appropriated to their use and benefit the voice of John Facenda without the consent or permission of his estate or his authorized representatives.

85. Defendants deliberately utilized John Facenda's voice in order to sell Electronic

Arts' product (and, accordingly for their financial interest), knowing that they did not have permission or consent to do so.

86. John Facenda's voice is distinctive and widely known not only in the Philadelphia area, but also throughout the United States.

87. The defendants misappropriated Mr. Facenda's likeness (i.e., his voice) for the value associated with it and not in an incidental manner or for a newsworthy purpose.

88. The voice in the commercial was and would reasonably be identified as that of John Facenda.

89. Defendants derived financial advantage or benefit from the unauthorized use of Mr. Facenda's likeness.

90. Plaintiff, on behalf of the estate of John Facenda, seeks damages for all injuries, damages and losses resulting from defendant's misappropriation of John Facenda's likeness including, but not limited to damages for the fair market value of Mr. Facenda's voice, damages for good will, and for the value that use of Facenda's voice brought to the Madden 2006 commercial; said damages include the amount which Mr. Facenda's voice was deemed to have been worth to the defendants and the diminution of value of John Facenda's voice in connection with future commercial pursuits.

91. Defendants had actual knowledge that they were using Mr. Facenda's voice in connection with the commercial. Accordingly, defendants knowingly misappropriated Mr. Facenda's likeness (to wit, his voice) in disregard for his rights and the rights and interests of his estate.

92. Defendants' knowing misappropriation of Mr. Facenda's voice and flagrant disregard for plaintiff's interests warrants the imposition of punitive damages.

WHEREFORE, plaintiff demands damages against the defendants in an amount in excess of one hundred and fifty thousand (\$150,000.00) dollars together with interest, punitive damages and such other relief as this Court may deem necessary.

**THE BEASLEY FIRM, LLC**

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By: \_\_\_\_\_  
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Dated: \_\_\_\_\_