

To be Argued by:
JEREMY FEIGELSON
(Time Requested: 30 Minutes)

APL-2017-00028
New York County Clerk's Index No. 156443/14

Court of Appeals
of the
State of New York

LINDSAY LOHAN,

Plaintiff-Appellant,

– against –

TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES,
ROCKSTAR GAMES, INC. and ROCKSTAR NORTH,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

JEREMY FEIGELSON
JARED I. KAGAN
ALEXANDRA P. SWAIN
DEBEVOISE & PLIMPTON LLP
Attorneys for Defendants-Respondents
919 Third Avenue
New York, New York 10022
Tel.: (212) 909-6000
Fax: (212) 909-6836

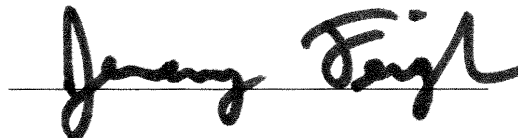
Date Completed: May 31, 2017

CORPORATE DISCLOSURE STATEMENT

Defendant-Respondent Take-Two Interactive Software, Inc. is the parent company of Defendant-Respondents Rockstar Games, Inc. and Rockstar North Limited. The following companies also are subsidiaries of Defendant-Respondent Take-Two Interactive Software, Inc.: 2K Australia Pty. Ltd.; 2K Czech, s.r.o.; 2K Games (Chengdu) Co., Ltd.; 2K Games (Hangzhou) Co. Ltd.; 2K Games (Shanghai) Co., Ltd.; 2K Games, Inc.; 2K, Inc.; 2K Marin, Inc.; 2K Play, Inc.; 2K Games Songs LLC; 2K Games Sounds LLC; 2K Games Tunes LLC; 2K Vegas, Inc.; 2KSports, Inc.; A.C.N. 617 406 550 Pty Ltd.; Cat Daddy Games, L.L.C.; Digital Productions S.A.; DMA Design Holdings Limited; Double Take LLC; Firaxis Games, Inc.; Frog City Software, Inc.; Gathering of Developers, Inc.; Gearhead Entertainment, Inc.; Indie Built, Inc.; Inventory Management Systems, Inc.; Irrational Games, LLC; Jack of All Games Norge A.S.; Jack of All Games Scandinavia A.S.; Joytech Europe Limited; Joytech Ltd.; Kush Games, Inc.; Maxcorp Ltd.; Parrot Games, S.L.U.; Rockstar Events Inc.; Rockstar Games Songs LLC; Rockstar Games Sounds LLC; Rockstar Games Toronto ULC; Rockstar Games Tunes LLC; Rockstar Games Vancouver ULC; Rockstar Interactive India LLP; Rockstar International Limited; Rockstar Leeds Limited; Rockstar Lincoln Limited; Rockstar London Limited; Rockstar New England, Inc.; Rockstar San Diego, Inc.; Social Point, K.K.; Social Point, S.L.; T2 Developer, Inc.; Take 2

Interactive Software Pty. Ltd.; Take 2 Productions, Inc.; Take-Two Asia Pte. Ltd.; Take-Two Chile SpA; Take-Two Europe (Holdings) Limited; Take-Two GB Limited; Take-Two Holdings III LLC; Take-Two Holdings II LLC; Take-Two Holdings LLC; Take-Two Interactive Austria GmbH; Take-Two Interactive Benelux B.V.; Take-Two Interactive Canada Holdings, Inc.; Take-Two Interactive Canada, Inc.; Take-Two Interactive Espana S.L.; Take-Two Interactive France SAS; Take-Two Interactive GmbH; Take-Two Interactive Japan G.K.; Take-Two Interactive Korea Ltd.; Take-Two Interactive Software Europe Limited; Take-Two Interactive Software UK Limited; Take-Two International B.V.; Take-Two International Holdings L.P.; Take-Two International GmbH; Take-Two Invest Espana, S.L.; Take-Two UK Holdings Limited; Talonsoft, Inc.; Techcorp Ltd.; Venom Games Limited; Visual Concepts China Co., Ltd.; Visual Concepts Entertainment; VLM Entertainment Group, Inc.; Weazel Studios Incorporated; and WC Holdco, Inc.

Dated: May 31, 2017
New York, New York

A handwritten signature in black ink, appearing to read "Jeremy Feigelson", is written over a horizontal line.

Jeremy Feigelson
Jared I. Kagan
Alexandra P. Swain
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Tel: (212) 909-6000
Fax: (212) 909-6836

Attorneys for Defendants-Respondents

TABLE OF CONTENTS

Preliminary Statement.....	2
Questions Presented	4
Background	5
I. The Creative Work At Issue: Grand Theft Auto V	5
A. The Plot Of The “Escape Paparazzi” Random Event	5
B. The “Beach Weather” and “Stop and Frisk” Artworks.....	9
II. The Appellate Division’s Dismissal Of This Case	15
A. The Supreme Court’s Order	15
B. The Appellate Division’s Order	16
Argument.....	18
I. Ms. Lohan’s Claim Regarding The Transition Screen Artworks Is Time-Barred	18
II. GTAV Does Not Use Ms. Lohan’s “Name, Portrait, Picture Or Voice” As The Statute Requires	21
III. Creative Content in Expressive Works Like GTAV Is Absolutely Protected, Because It Is Not For Purposes Of “Advertising” Or “Trade” As The Statute Requires.....	25
A. Expressive Works Like GTAV Are Absolutely Protected, Even When the Works Allegedly Depict Or Evoke Real People	26
B. The Content of GTAV Fits Squarely Within The New York Rule Of Absolute Protection	28
C. The Use Of GTAV’s Creative Content To Promote The Work Itself Also Is Absolutely Protected.....	29
IV. Constitutional Free Speech Values Support The Statutory Grounds For Dismissal	33
V. Rockstar North Is Not Subject To Personal Jurisdiction	34
Conclusion	36

TABLE OF AUTHORITIES

CASES

<i>Ali v. Playgirl, Inc.</i> , 447 F. Supp. 723 (S.D.N.Y. 1978)	24
<i>Allen v. Nat’l Video, Inc.</i> , 610 F. Supp. 612 (S.D.N.Y. 1985)	24
<i>Altbach v. Kulon</i> , 302 A.D.2d 655 (3d. Dep’t. 2003).....	28
<i>Benefits by Design Corp. v. Contractor Mgmt. Servs.</i> , 75A.D.3d 826 (3d Dep’t 2010).....	35
<i>Binns v. Vitagraph Co.</i> , 210 N.Y. 51 (1913).....	32
<i>Bondar v. LASplash Cosmetics</i> , No. 12 Civ. 1417(SAS), 2012 WL 6150859 (S.D.N.Y. 2012).....	19
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	33
<i>Cohen v. Herbal Concepts, Inc.</i> , 63 N.Y.2d 379 (1984)	23
<i>Costanza v. Seinfeld</i> , 279 A.D.2d 255 (1st Dep’t 2001)	17, 21, 30, 31
<i>Ehrenfeld v. Bin Mahfouz</i> , 9 N.Y.3d 501 (2007)	34
<i>Foster v. Svenson</i> , 128 A.D.3d 150 (2015)	28, 29
<i>Hoepker v. Kruger</i> , 200 F. Supp. 2d 340 (S.D.N.Y. 2013)	28, 30
<i>Hoosac Valley Farmers Exch., Inc. v. AG Assets, Inc.</i> , 168 A.D.2d 822 (3d Dep’t 1990).....	19

<i>Leonard v. Gateway II, LLC</i> , 68 A.D.3d 408 (1st Dept. 2009)	35, 36
<i>Loftus v. Greenwich Lithographing Co.</i> , 192 A.D. 251 (1st Dep’t 1920)	24
<i>Lohan v. Perez</i> , 924 F. Supp. 2d 447 (E.D.N.Y. 2013)	26, 27
<i>Lohan v. Take-Two Interactive Software, Inc.</i> , 142 A.D.3d 776 (1st Dep’t 2016)	17, 21
<i>McGowan v. Smith</i> , 52 N.Y.2d 268 (1981)	34
<i>Messenger v. Gruner + Jahr Print. & Publ’g</i> , 94 N.Y.2d 436 (2000)	32
<i>Nussenzweig v. diCorcia</i> , 9 N.Y.3d 184 (2007)	19
<i>Onassis v. Christian Dior-NY Inc.</i> , 122 Misc. 2d 603 (Sup. Ct. N.Y. Cnty. 1984)	24
<i>Porco v. Lifetime Entm’t Servs., LLC</i> , 147 A.D.3d 1253 (3d Dep’t 2017)	33
<i>Ryan v. Feeney & Sheehan Bldg. Co.</i> , 238 N.Y. 43 (1924)	20
<i>Spahn v. Messner, Inc.</i> , 18 N.Y.2d 324 (1966)	32
<i>Stephano v. News Publ’n</i> , 64 N.Y.2d 174 (1984)	31
<i>Toscani v. Hersey</i> , 271 A.D. 445 (1st Dep’t 1946)	23
<i>Wojtowicz v. Delacorte Press</i> , 58 A.D.2d 45 (1st Dep’t 1977), <i>aff’d</i> , 43 N.Y.2d 858 (1978)	22, 23

STATUTES

N.Y. Civil Rights Law § 51	<i>passim</i>
N.Y. CPLR § 215(3)	3, 18
N.Y. CPLR § 302(a)(1)	34
N.Y. CPLR § 3211(a)(1)	1
N.Y. CPLR § 3211(a)(5)	21
N.Y. CPLR § 3211(a)(7)	1
S05857, Reg. Sess. 2017-2018 (N.Y. 2017)	25

OTHER AUTHORITIES

5 N.Y. JUR. 2D Appellate Review § 791	20
3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 (2009)	25, 31
David K. Li, <i>Seinfeld rakes in \$2.7 bil</i> , N.Y POST (June 7, 2010)	31
Josh Grossberg, <i>Lindsay Lohan: A Timeline of All Her Arrests (and Boy, There Are a Lot of ‘Em)</i> , E! NEWS (Nov. 29, 2012)	27
Keza MacDonald, <i>Grand Theft Auto V Review: Grand in Every Sense</i> , IGN (Sept. 6, 2013)	8
Stephen Rex Brown, <i>Manhattan judge who called Newser ‘wiseass’ hit with demotion</i> , N.Y. DAILY NEWS (May 15, 2017)	16

Defendants-Respondents Take-Two Interactive Software, Inc. and its subsidiaries, Rockstar Games, Inc. and Rockstar North Limited (together, “Take-Two”), respectfully request that the Court affirm the decision below dismissing this case. Plaintiff-Appellant Lindsay Lohan has sued for the purported violation of her right of publicity under Section 51 of the New York Civil Rights Law (“Section 51”). The claim is based on Take-Two’s celebrated video game Grand Theft Auto V (“GTAV”); Ms. Lohan claims that three distinct fictional characters in GTAV are all “recognizable” as her. *See, e.g.*, Lohan Br. at 1. The Appellate Division properly dismissed the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), and based on documentary evidence, pursuant to CPLR § 3211(a)(1).

This case comes before the Court in parallel with *Gravano v. Take-Two Interactive Software, Inc. et al.*, APL-2017-00027. *Gravano* raises nearly identical issues regarding GTAV. To minimize the burden on the Court, Take-Two is addressing the common issues principally in its separate brief in *Gravano* (“Take-Two *Gravano* Br.”). This brief assumes familiarity with Take-Two’s arguments in *Gravano*, includes cross-references to the arguments in *Gravano* that are applicable here, and focuses on the issues unique to Ms. Lohan’s claim.¹

¹ As a courtesy, Take-Two is serving on Ms. Lohan’s counsel a copy of its brief in *Gravano*, a copy of the *Gravano* record, and a copy of Ms. Gravano’s brief.

PRELIMINARY STATEMENT

Ms. Lohan's claim failed below for the same core reasons that the claim in *Gravano* failed:

- *The statutory test is not “recognizability,” but whether a plaintiff’s actual “name, portrait, picture or voice” have been used – which plainly did not happen here.* The fictional characters at issue are “Lacey Jonas,” who appears in a gameplay sequence called “Escape Paparazzi,” and two unnamed characters in a pair of visual artworks called “Beach Weather” and “Stop and Frisk.” These characters simply are not Ms. Lohan – that is, they do not use her “name, portrait, picture or voice” as the plain language of Section 51 requires.
- *Section 51 only reaches “advertising purposes” or “trade” purposes – not creative content in expressive works such as novels, books, movies, television shows, songs, or, here, video games.* Even if Ms. Lohan's name, portrait, picture or voice had been used in GTAV (which they were not), such use in the creative content of an expressive work is not “advertising” or “trade.” That is the plain meaning of the statute. It also is the clear rule followed for decades by the courts of New York in dismissing claims just like this one.
- *Constitutional free speech considerations strongly support affirming the dismissal.* The New York rule protecting creative content in expressive works against right of publicity claims flows not just from the words and purpose of Section 51, but from the First Amendment and from New York's own constitutional principles.

This case also presents three issues – and three grounds for dismissal – that are not found in *Gravano*.

First, the claim regarding the artworks “Beach Weather” and “Stop and Frisk” is untimely. These artworks originally were released separate and apart from GTAV itself – 20 months before suit was filed – as a form of early promotion for the game. The statute of limitations, however, is one year. CPLR § 215(3).

Second, the promotional use of “Beach Weather” and “Stop and Frisk” is fully protected against Ms. Lohan’s Section 51 claim. It is well-settled that the use of artistic content from a creative work to advertise that work enjoys full protection against Section 51 claims, just like the work itself.

Third, with respect to Defendant-Respondent Rockstar North, dismissal also should be affirmed based on the lack of personal jurisdiction. Rockstar North is a company incorporated in the United Kingdom. It has its sole place of business in Edinburgh, Scotland. It is not alleged to have any ties to New York or to the facts of this case.

The unanimous decision below should be affirmed in full, and this case should be dismissed with prejudice.

QUESTIONS PRESENTED

1. Should the Appellate Division's order dismissing the Amended Complaint for failure to state a cause of action be affirmed because Take-Two did not use Ms. Lohan's "name, portrait, picture or voice" as is required by Section 51 of the Civil Rights Law?

This Court should answer in the affirmative.

2. Should the Appellate Division's order dismissing the Amended Complaint for failure to state a cause of action be affirmed because creative content in an expressive work, like the content in GTAV, is not as a matter of law a use for purposes of "advertising" or "trade" under Section 51 of the Civil Rights Law?

This Court should answer in the affirmative.

3. Should the Appellate Division's order dismissing the Amended Complaint for failure to state a cause of action also be affirmed on constitutional free speech grounds?

The Appellate Division did not reach this question. This Court should answer in the affirmative.

4. Should the Appellate Division's order dismissing the Amended Complaint be affirmed on the alternate ground that Ms. Lohan's claim regarding the

advertising use of the “Beach Weather” and “Stop and Frisk” artworks is time-barred?

The Appellate Division did not reach this question. This Court should answer in the affirmative.

5. Should the Appellate Division’s order dismissing the Amended Complaint be affirmed with respect to Defendant-Respondent Rockstar North on the ground that the court lacked personal jurisdiction given that Rockstar North is a foreign corporation incorporated under the laws of the United Kingdom with its principal place of business in Edinburgh, Scotland and given that Rockstar North has no alleged ties to New York or to this case?

The Appellate Division did not reach this question. This Court should answer in the affirmative.

BACKGROUND

I. THE CREATIVE WORK AT ISSUE: GRAND THEFT AUTO V

A. The Plot Of The “Escape Paparazzi” Random Event

GTAV allows players to experience over 100 hours of on-screen gameplay in and around “Los Santos,” a fictionalized version of Los Angeles and Southern California. In addition to 80 main story missions, the game includes over 60 “random events” – brief optional missions, with plots, animated action, dialogue, sound and visual effects, that players can choose to engage in or ignore. *Take-Two Gravano Br.* at 4-7.

Ms. Lohan is suing over the animated character “Lacey Jonas,” a fictional actress and singer who appears in a “random event” in GTAV called “Escape Paparazzi.”² If the player drives through a particular alleyway in “Los Santos,” he or she may come across a spot where the animated character of a young woman is hiding. The woman – “Lacey Jonas” – will ask the player to drive to her home while evading a group of chasing paparazzi that are trying to take a picture of her. Rosa Aff. ¶ 8 (R. 64).

If the player chooses to drive “Lacey Jonas,” she gets in the car and makes a string of comments that satirize both the cultural cliché of the self-absorbed Hollywood celebrity and the media that celebrates them. She tells her rescuer that the paparazzi are following her because she is “really famous” – the “third most bankable actress slash singer in Vinewood,” which is the “Los Santos” version of Hollywood. *Id.* & Ex. 2 (R. 69) (video captures of “Escape Paparazzi”). The “Jonas” character frets about being photographed because she is not wearing

² Exhibit 3 to the Affidavit of Jeff Rosa (Nov. 11, 2014) (“Rosa Aff.”) (R. 70) is a book-length guide to GTAV, which makes it possible to review the game content without electronic means. The guide “provides a detailed written description of various aspects of GTAV [and] accurately describes the content of GTAV.” Rosa Aff. ¶ 4 (R. 63). The record also contains the actual video game on a disk, *id.* Ex. 1 (R. 68) and a DVD of the “Escape Paparazzi” gameplay sequence at issue here. *Id.* Ex. 2 (R. 69). Take-Two is loaning a gaming console to the Clerk’s Office, to facilitate the Court’s review of the game disk exhibit.

makeup and has gained weight. She expresses surprise that the driver does not recognize her: “Come on, are you serious? I’m Lacey Jonas! How out of touch are you?” *Id.* Ex. 2 (R. 69). If the player is controlling Franklin, for example, he will respond: “Oh! Oh [expletive], I heard of you. Romantic comedies and cheerleading dance-off movies. Right?” *Id.*³

If the player successfully evades the paparazzi, the drive ends with “Lacey Jonas” being dropped off safely at her house in the “Vinewood Hills” section of Los Santos. *See id.* Ex. 3 (R. 70) at 282. “Escape Paparazzi” lasts approximately five minutes. *Id.* ¶ 8 (R. 64).

The screenshot on the next page at left shows the player’s character being asked by “Lacey Jonas” to drive her home at the start of the random event. Subtitles in the screenshots reproduce dialogue from the game. At left “Lacey Jonas” greets the driver by saying: “Can you give me a ride past them? I’m hardly wearing any make-up!” The screenshot at right shows the paparazzi in pursuit on a motorcycle calling out “Just one picture!”

³ “There are four different version of the “Escape Paparazzi” random event depending on whether the player is controlling Michael, Franklin, or Trevor, but the content of the random event is essentially the same in all four.” Rosa Aff. ¶ 7 (R. 64).



(Rosa Aff. Ex. 2) (R. 69)



(Rosa Aff. Ex. 2) (R. 69)

The “Escape Paparazzi” random event is one of many experiences in the GTAV parody world. As one critic has put it, GTAV

both gives you tremendous freedom to explore an astonishingly well-realised world and tells a story that’s gripping, thrilling, and darkly comic. [. . . GTAV] is not only a preposterously enjoyable video game, but also an intelligent and sharp-tongued satire of contemporary America.⁴

The Amended Complaint alleged, in purely conclusory terms, that the Escape Paparazzi random event uses “a Lindsay Lohan avatar” and uses Ms. Lohan’s “portraits” and “voice and accent.” Am. Compl. ¶ 58 (R. 27). The Amended Complaint also alleged, again in conclusory terms, that GTAV uses “identical events to [Ms. Lohan’s] life.” *Id.* ¶ 65 (R. 28).

⁴ Keza MacDonald, *Grand Theft Auto V Review: Grand in Every Sense*, IGN (Sept. 6, 2013), available at <http://www.ign.com/articles/2013/09/16/grand-theft-auto-v-review>.

B. The “Beach Weather” and “Stop and Frisk” Artworks

Ms. Lohan claims that her publicity rights also were violated by two visual artworks entitled “Beach Weather” and “Stop and Frisk.” These artworks originally were released well ahead of GTAV itself to promote the game; just as a movie studio releases posters and trailers with movie imagery before releasing the movie, Take-Two did that for GTAV. Both of the artworks first were published on or about November 1, 2012 – a year and eight months before this lawsuit was filed. *See Rosa Aff. Ex. 8 (R. 75); Affirmation of Jared I. Kagan (Nov. 12, 2014) (“Kagan Aff.”) Ex. 9 (R. 124-126).*

“Beach Weather” and “Stop and Frisk” (shown on the next page) are digitally created paintings. Each one depicts a different, unnamed fictional blond woman:

- In “Beach Weather,” an unnamed woman in a bikini holds up her index and middle fingers in the familiar “V” sign (here, a reference to this being Grand Theft Auto V, the fifth edition in a series, as noted in the logo at lower left). She is taking a selfie with her cell phone, with the logo of GTAV’s Apple parody brand “iFruit” logo visible on the back of the phone. The Los Santos skyline appears in the background, along with Del Perro Pier, where many events in the game take place. *See, e.g., Rosa Aff. Ex. 3 (R. 70) at 294 (“Hotel Assassination” Mission).*
- In “Stop and Frisk,” an unnamed woman – wearing a concert t-shirt for the fictional in-game band Love Fist, aviator sunglasses, shorts and a fedora – is frisked by a severe-looking female police officer. Artwork depicting the city of Los Santos makes up the background, and the game’s Cognoscenti Cabrio car (*id.* (R. 70) at 33) is in the foreground.



(Rosa Aff. Ex. 7) (R. 74)



(Rosa Aff. Ex. 9) (R. 79)

Within the game, “Beach Weather” and “Stop and Frisk” are displayed to players as transition screen artworks, which are the first thing that a player experiences when loading the game disk into a game console. Approximately ten transition screen artworks – including “Beach Weather” and “Stop and Frisk” – float across the screen like a movie title sequence while the game code is loading into the console’s memory. *See Rosa Aff. ¶ 10 & Ex. 5 (R. 65, 72)*. The transition screens introduce players to the visual world of GTAV, much like the scenes that unfold behind the opening credits of a movie. *See id.* Exs. 1, 5 (R. 68, 72).

Both “Beach Weather” and “Stop and Frisk” bear the hallmarks of GTAV’s distinctive visual style: they use color and detail to create an immersive satirical world and they portray images from Los Santos that “evoke[] and satirize[] the anxieties of 21st-century life” – in these cases, selfie culture and the trope of the reckless party-girl. *See Kagan Aff. Ex. 5 (R. 113-16)*.

These transition screen artworks are not displayed in isolation but are displayed to users along with a variety of gameplay information. For example, the image below shows the “Stop and Frisk” transition screen with a note on the left side that informs players to “[g]o to any ATM [in Los Santos] to check your bank balance” – a feature that is vital to success in the game. The image on the next page shows the “Beach Weather” transition screen, in this instance including information on how players can change the appearance of their character’s bullet-proof vest. The transition screen artworks thus are part and parcel of the interactive GTAV gameplay experience.

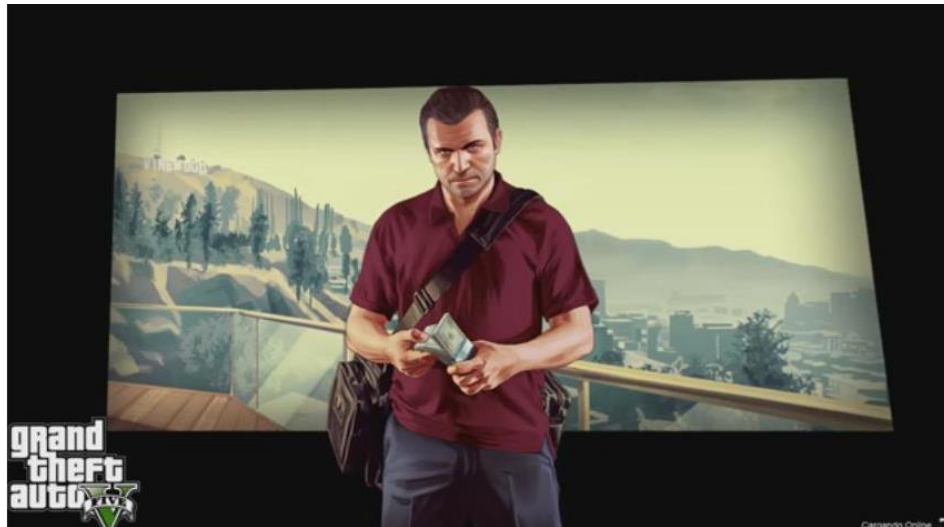


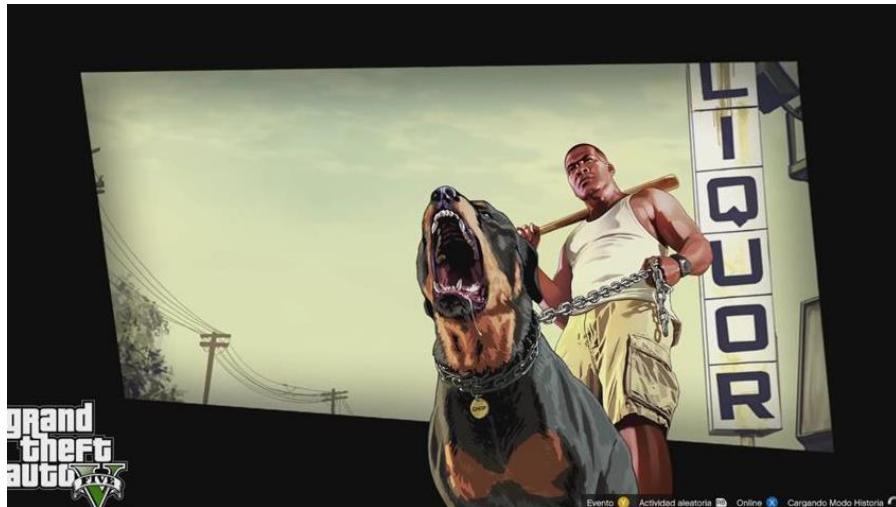
(Rosa Aff. Ex. 5) (R. 72)



(Rosa Aff. Ex. 5) (R. 72)

In addition to “Beach Weather” and “Stop and Frisk,” GTAV includes numerous other transition screen artworks. These include images of various GTAV characters and their homes or places of business, city streets, beach and desert landscapes, and other notable locations in Los Santos. *Id.* Examples of additional transition screen artworks from the game are shown below. *See Rosa Aff. Ex. 1 (R. 68).*





The Amended Complaint alleged in conclusory terms that “Beach Weather” and “Stop and Frisk” incorporated Ms. Lohan’s “likeness, image and portrait by using Plaintiff’s Fedora, Sunglasses, Jeans, White Shirt, and Jewelry” and by using “suggestive references” to Ms. Lohan, *i.e.*, “by prominently displaying the letter ‘L’ and a skull-shaped letter ‘O’, on the White T-shirt of the image in the foreground of the shirt overtly and subliminally suggesting ‘LO’ for Ms. Lohan.” Am. Compl. ¶¶ 30-31 (R. 23). Ms. Lohan also alleged that the “Beach Weather”

and “Stop and Frisk” artworks were used on the physical game discs, on the packaging for the game (like a DVD case) and in advertising and promotion for GTAV. *Id.* ¶¶ 28, 74, 82-83 (R. 23, 29, 30). Ms. Lohan further alleged, but later withdrew the allegation, that Take-Two used these two artworks on certain merchandise. *Id.* ¶ 82 (R. 30).⁵

II. THE APPELLATE DIVISION’S DISMISSAL OF THIS CASE

A. The Supreme Court’s Order

The procedural history of this case parallels the *Gravano* case. Both cases were assigned to the Supreme Court, New York County (Kenney, J.). Take-Two moved to dismiss both cases on essentially the same grounds – *i.e.*, that creative content in expressive works is not an “advertising” or “trade” purpose, and that GTAV did not use either plaintiffs’ “name, portrait, picture or voice.” In its motion in *Lohan*, Take-Two also raised the statute of limitations and personal jurisdiction points that are unique to this case.

In a pair of cursory orders issued on the same day, the Supreme Court denied the motions in both cases. *See* Mar. 11, 2016 Order (R. 5-6) (*Lohan*); Mar. 11,

⁵ Take-Two did not sell such merchandise (*Rosa Aff.* ¶ 14 (R. 66)), and Ms. Lohan conceded in her brief to the Appellate Division that the merchandise referenced in the Amended Complaint “is pirated un-authentic merchandise from unrelated sources” that was not produced by Take-Two. *Br. for Plaintiff-Appellant to App. Div.* at 38 (Apr. 26, 2016). Ms. Lohan’s present appeal is not directed to any merchandise.

2016 Order (Gravano R. 6-7). The orders did not even mention or discuss the New York rule that expressive works and their creative content are absolutely protected against Section 51 claims. Instead, the Supreme Court mistakenly held that the degree of resemblance between the plaintiffs and the fictional characters was an issue of fact. *Id.*

The Supreme Court acknowledged that Ms. Lohan’s claims were filed outside of the limitations period, but refused to dismiss them – holding that Take-Two did not “prove” that a limited exception to the statute of limitations known as the “republishing exception” was “not applicable to this case.” Order at 2 (R. 6). The Supreme Court also denied Take-Two’s motion for lack of personal jurisdiction with respect to Rockstar North, because Ms. Lohan provided a webpage that listed offices “located in the United Kingdom, Canada, and the United States, including New York.” *Id.*⁶

B. The Appellate Division’s Order

The Appellate Division heard argument in *Lohan* and *Gravano* on the same day and disposed of both cases in a single, unanimous order. The five-justice

⁶ Justice Kenney recently was reassigned from the Supreme Court to the Civil Court. See Stephen Rex Brown, *Manhattan judge who called Newser ‘wiseass’ hit with demotion*, N.Y. DAILY NEWS (May 15, 2017), available at <http://www.nydailynews.com/new-york/manhattan/manhattan-judge-called-newser-wiseass-hit-demotion-article-1.3168855>.

panel held that both Ms. Lohan's and Ms. Gravano's Section 51 claims failed for two independent statutory reasons. *Lohan v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776 (1st Dep't 2016).

First, the panel held that Ms. Lohan's claim "must fail because defendants did not use [plaintiff's] 'name, portrait, or picture,'" as Section 51 requires. *Id.* at 777 (quoting *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't 2001)) (alteration in original). The panel further held that, "[a]s to Lohan's claim that an avatar in the video game is she and that her image is used in various images [i.e., the transition screen artworks], defendants also never referred to Lohan by name or used her actual name in the video game, never used Lohan herself as an actor for the video game, and never used a photograph of Lohan." *Id.*

Second, the panel held:

Even if we accept plaintiffs' contentions that the video game depictions are close enough to be considered representations of the respective plaintiffs, plaintiffs' claims should be dismissed because this video game does not fall under the statutory definitions of "advertising" or "trade."

Id. at 777 (emphasis added). The panel noted that GTAV's "unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render[ed] it a work of fiction and satire," and thus GTAV was absolutely protected against Ms. Lohan's Section 51 claim. *Id.* The panel also held that the use of GTAV content (*i.e.*, the "Beach Weather" and

“Stop and Frisk” artworks) in advertising or promotion of GTAV is protected against Section 51 claims, just as the game itself is protected. *Id.* at 778.

The panel did not reach the limitations or jurisdiction issues, stating that “[i]n view of the foregoing, it is unnecessary to address defendants’ remaining grounds for dismissal.” *Id.*

ARGUMENT

I. MS. LOHAN’S CLAIM REGARDING THE TRANSITION SCREEN ARTWORKS IS TIME-BARRED

As an initial matter, the Court need not even reach the merits of Ms. Lohan’s claim regarding the transition screen artworks because the claim is untimely. The applicable statute of limitations is one year. *See* CPLR § 215(3). The transition screen artworks first were published, and extensively distributed, ahead of GTAV itself to promote the game “Beach Weather” was published on or about October 30, 2012, and “Stop and Frisk” was published on or about November 1, 2012. *See* Rosa Aff. Ex. 8 (R. 75); Kagan Aff. Ex. 9 (R. 124). The original complaint in this matter, however, was not filed until July 1, 2014 – over one year later. Summons & Compl. (R. 7-15).

There is no merit to Ms. Lohan’s theory that the limitations clock re-started when the two artworks later were “re-published,” as part of the GTAV game itself, on September 17, 2013. *See* Am. Compl. ¶ 74-75 (R. 29).

Initially, it should be noted that the Supreme Court incorrectly shifted to Take-Two the burden to prove that the republication exception does *not* apply. Given that Take-Two made a proper evidentiary submission showing the claim to be untimely (R. 6), the burden sits with Ms. Lohan:

[A defendant's] burden does not include an obligation . . . to negate any or all exceptions that might apply to the statutory period. Instead, the burden shifts to [the plaintiff] to aver evidentiary facts establishing that the case at hand falls within such exceptions.

Hoosac Valley Farmers Exch., Inc. v. AG Assets, Inc., 168 A.D.2d 822, 823 (3d Dep't 1990).

In any event, the grounds for the republication exception clearly are not satisfied here. New York follows the “single publication” rule for right of publicity claims. *See Nussenzweig v. diCorcia*, 9 N.Y.3d 184, 188 (2007). This means that a right of publicity claim accrues on the date the challenged material is first published – in this case, October 30, 2012 for “Beach Weather” and November 1, 2012 for “Stop and Frisk”. Under the republication exception, a subsequent publication of the challenged material only re-starts the limitations clock if it “(1) is intended for and reaches a new audience, or (2) materially changes or modifies the original.” *Bondar v. LASplash Cosmetics*, No. 12 Civ. 1417(SAS), 2012 WL 6150859, at *8 (S.D.N.Y. 2012) (Section 51 claim dismissed

as time-barred when only “minor alterations” were made; granting judgment on the pleadings) (internal quotations and citation omitted).

The Amended Complaint includes no allegations that could support either prong of the republication exception. As for the “new audience” prong, the entire thrust of the complaint is that “Beach Weather” and “Stop and Frisk” were originally released for the express purpose of promoting GTAV to the very same people who would later play it. *See, e.g.*, Am. Compl. ¶ 83 (R. 30). As for the “material change” prong, there undisputedly were no material changes to the content of “Beach Weather” or “Stop and Frisk” from their first release as stand-alone artworks through their release as part of GTAV. *See Rosa Aff. Exs. 5-9 (R.72-79); Kagan Aff. Ex. 9 (R. 124).* The Amended Complaint did not allege otherwise.

Accordingly, dismissal of the Amended Complaint as to “Beach Weather” and “Stop and Frisk” should be affirmed on the additional grounds that Ms. Lohan’s claims are time-barred. Dismissal on limitations grounds is appropriate even though the Appellate Division chose not to reach this issue. *See 5 N.Y. JUR. 2D Appellate Review § 791* (“The court of appeals, like any appellate court in New York is not confined to the grounds stated by the court below for its decision but may sustain a judgment or order on grounds other than those assigned by the lower court.”); *see, e.g., Ryan v. Feeney & Sheehan Bldg. Co.*, 238 N.Y. 43, 44 (1924)

(“While the judgment in this case must be affirmed, we prefer to place our decision on other grounds than those stated by the Appellate Division.”). Dismissal on limitations grounds thus is expressly permitted at this stage without discovery. CPLR § 3211(a)(5); *Costanza*, 255-56 (dismissing Section 51 claim as time-barred at the pleading stage).

II. GTAV DOES NOT USE MS. LOHAN’S “NAME, PORTRAIT, PICTURE OR VOICE” AS THE STATUTE REQUIRES

The Appellate Division correctly dismissed this case on the ground that, as a matter of law, Take-Two did not use Ms. Lohan’s “name, portrait, picture or voice” as the plain language of Section 51 requires. *Lohan*, 142 A.D.2d at 777; *see also* *Lohan Br.* at 11 (“If defendant does not use plaintiff’s ‘name, portrait, picture or voice’, clearly there is no sustainable claim under the statute.”). This is confirmed by a simple review of the game content. This Court can and should affirm on the same basis.

Ms. Lohan herself concedes that these three distinct characters are not literal depictions of her. *Lohan Br.* at 24. In any event, whatever elements of commonality Ms. Lohan may see between herself and the fictional characters are legally irrelevant. As a matter of law, Take-Two simply did not use any of the statutorily protected elements: “name, portrait, picture or voice.” “Lacey Jonas” is an animated fictional character; the character is not named Lindsay Lohan, nor is it

a “portrait” or “picture” of Ms. Lohan. The same is true of the two different women in “Beach Weather” and “Stop and Frisk.” As for “voice,” the characters in “Beach Weather” and “Stop and Frisk” do not speak at all. The “Lacey Jonas” character does speak, but undisputedly does not use Ms. Lohan’s voice. *See Rosa Aff.* ¶ 15 (R. 66).⁷

In short, the complaint here simply does not describe a statutory violation. Even when generously read, all the complaint alleged was that the fictional GTAV characters evoked Ms. Lohan. But it has long been the law of this State that evocation or suggestion is not enough, as this Court and others have made clear. There can be no Section 51 claim absent an actual use of “name, portrait, picture or voice.” *See Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47 (1st Dep’t 1977) (fictional characters in the movie *Dog Day Afternoon*, a popular movie inspired by a real-life bank robbery, could not give rise to a cause of action under Section 51 where statutory elements not used in movie), *aff’d*, 43 N.Y.2d 858 (1978).

This is so even if the Court assumes that audiences, in their minds, draw a straight line from the fictional characters to the real-world plaintiffs on whom the characters allegedly are based. *Id.* (dismissing Section 51 claim where statutory

⁷ The conclusory allegation of the complaint is that the character uses Ms. Lohan’s “voice and accent,” Am. Compl. ¶ 38 (R. 24) – *i.e.*, that “Lacey Jonas” sounds like Ms. Lohan, not that Ms. Lohan literally spoke the character’s dialogue.

elements were not used, even if it were “clear that the plaintiffs were actually being depicted therein”); *Toscani v. Hersey*, 271 A.D. 445, 448 (1st Dep’t 1946) (Section 51 “was not intended to give a living person a cause of action for damages based on the mere portrayal of acts and events concerning a person designated fictitiously in a novel or play merely because the actual experiences of the living person had been similar to the acts and events so narrated”).

In *Wojtowicz*, this Court credited the allegations that the book and movie at issue

do not purport to be historical or documentary accounts of newsworthy interest but which are nonetheless represented as true and accurate stories [and that] defendants for commercial advantage have portrayed plaintiffs in sufficiently detailed accuracy of physical characteristics and activities as to result in their effective identification.

43 N.Y.2d at 860. The Court still affirmed dismissal of the complaint because none of the statutorily protected elements were used.

Ms. Lohan’s claim similarly fails, and it cannot be saved by allegations that these fictional characters act, look, dress or sound like her. Many Hollywood figures do. Take-Two is legally entitled to poke fun at them all.

The New York state cases on which Ms. Lohan relies have no application here. She relies on cases that upheld Section 51 claims against advertisements that were simply that – *i.e.*, commercial promotions unrelated to an expressive work.

Those cases also confirm that reproduction of a plaintiff's actual identity, not an evocation or suggestion, is the correct legal test. See *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379 (1984) (magazine advertisement for Au Naturel – a product used to fight cellulite – used actual photographs of the plaintiffs); *Onassis v. Christian Dior-NY Inc.*, 122 Misc. 2d 603, 612-13 (Sup. Ct. N.Y. Cnty. 1984) (magazine advertising campaign for Christian Dior clothing line used a look-alike model to create the “illusion” that the plaintiff had actually posed for, and agreed to appear in, the challenged ad); *Loftus v. Greenwich Lithographing Co.*, 192 A.D. 251 (1st Dep’t 1920) (defendant advertised a movie with an actual photograph of the plaintiff that was unrelated to the film being advertised).

The federal district court decisions in *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) and *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) also do not support Ms. Lohan’s position. In *Allen*, actor Woody Allen asserted a Section 51 claim based on the use of a look-alike actor in what was undisputedly an advertisement rather than a creative work. The court ultimately did not rule on the Section 51 claim and resolved the case on Lanham Act grounds. In *Ali*, the court sustained a Section 51 claim based on a pornographic magazine’s publication of a realistic, “full frontal nude drawing” of boxer Muhammad Ali with exaggerated genitalia. 447 F. Supp. at 729. The court did not even consider the threshold question of whether the drawing was an expressive work. *Id.* at 727. *Ali*

is recognized as an “aberration” that was wrongly decided. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 n.23 and accompanying text (2009). *Ali* never has been cited by any New York court to uphold a Section 51 claim against a creative work of fiction and satire.

A bill recently introduced in the New York Senate to amend Section 51 confirms just how narrow the current statute is. *See* S05857, Reg. Sess. 2017-2018 (N.Y. 2017). The proposed amendment is backed by the actors’ union and would extend Section 51 protection to “persona,” “image,” “likeness,” “distinctive appearance,” “gestures,” and “mannerisms.” These are the very elements Ms. Lohan alleged Take-Two used here. There could be no plainer recognition that the elements on which Ms. Lohan relies are not protected under the current statute.

Because Ms. Lohan’s name, portrait, picture or voice are not found in GTAV, dismissal should be affirmed.

III. CREATIVE CONTENT IN EXPRESSIVE WORKS LIKE GTAV IS ABSOLUTELY PROTECTED, BECAUSE IT IS NOT FOR PURPOSES OF “ADVERTISING” OR “TRADE” AS THE STATUTE REQUIRES

The Appellate Division also correctly dismissed Ms. Lohan’s complaint because GTAV is an expressive work and its creative content is not “advertising” or “trade.” Works such as GTAV simply are not covered by the statute, as a matter of law. Take-Two’s *Gravano* brief describes the history of Section 51 and how narrowly courts have construed it for decades. Take-Two *Gravano* Br. at 10-12.

The highly creative character of GTAV's world of satire, parody, action and adventure is beyond question. *See* Take-Two *Gravano* Br. at 4-7 (describing game content as a whole). The "Escape Paparazzi" gameplay sequence exemplifies the game's creative character. *See* pp. 5-8, *supra* (describing Escape Paparazzi). So too do the "Beach Weather" and "Stop and Frisk" transition screen artworks. *See* pp. 9-12, *supra* (describing same). The determination of the game content's creative character is an entirely proper function for the Court, as a matter of law, at the pleading stage.

A. Expressive Works Like GTAV Are Absolutely Protected, Even When the Works Allegedly Depict Or Evoke Real People

As described in Take-Two's *Gravano* brief, complaints like Ms. Lohan's long have failed as a matter of law at the motion to dismiss stage. *See* Take-Two *Gravano* Br. at 17-20. This one properly was dismissed too.

In addition to the cases cited in Take-Two's *Gravano* brief at pp. 18-20, another illustrative decision rejecting a Section 51 claim against an expressive work arose from a case brought by Ms. Lohan herself. *See Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013). Ms. Lohan sued the rapper Pitbull over a song lyric that used her actual name: "So I'm tiptoen', to keep flowin'/I got it locked up

like Lindsay Lohan.” *Id.* at 451.⁸ The song, “Give Me Everything,” was a “popular song of an international reputation and exert[ed] a great influence throughout [the] United States, and other countries, and in the television, entertainment business and field of communication as well.” *Id.* The court took it as a given that the song was “created and distributed for the purpose of making a profit[.]” Yet the court dismissed Ms. Lohan’s claim at the pleading stage for the same reason that the Appellate Division dismissed her claim here: because creative content in expressive works simply does not fall within the statutory definitions of “advertising purposes” or “trade” purposes. *Id.* at 455.

As described in Take-Two’s *Gravano* brief, the New York rule is clear: a plaintiff’s allegation that fictional characters resemble or evoke her simply does not state a claim in New York. *See Take-Two Gravano Br.* at 20. Even accepting Ms. Lohan’s strained suggestion that each of the three very different fictional characters at issue here somehow evoke her, her claim still fails as a matter of law, no matter how close the similarities.

⁸ The lyric referred to multiple incidents in which Ms. Lohan has been arrested. *See* Josh Grossberg, *Lindsay Lohan: A Timeline of All Her Arrests (and Boy, There Are a Lot of ‘Em)*, E! NEWS (Nov. 29, 2012), *available at* <http://www.eonline.com/news/367020/lindsay-lohan-a-timeline-of-all-her-arrests-and-boy-there-are-a-lot-of-em>.

B. The Content of GTAV Fits Squarely Within The New York Rule Of Absolute Protection

The absolute legal protection for expressive works and their creative content against Section 51 claims has been consistent from movies to novels, plays, television shows, songs, paintings and photographs. *See Take-Two Gravano Br.* at 21-22. Video games simply take their place in line as the latest form of expressive content to come under New York’s umbrella of absolute legal protection.

All but admitting that the creative content in “Escape Paparazzi” is absolutely protected, Ms. Lohan tries to carve out the transition screen artworks by suggesting that the applicable test is whether a character or image is “subject to player manipulation.” *Lohan Br.* at 8. That proposed test is made from whole cloth; nothing in the case law supports it. It also ignores that the transition screen artworks are an essential part of the overall creative experience of playing GTAV. *See pp. 11-14, supra* (describing how transition screens introduce the player to the visual world of Los Santos and provide important gameplay information).

Moreover, the transition screen artworks are creative works in and of themselves and fully protected on that separate basis. *See pp. 9-10, supra*. Visual artworks that were not subject to manipulation by their audiences have been protected without hesitation by New York courts. *See Foster v. Svenson*, 128 A.D.3d 150 (2015); *Altbach v. Kulon*, 302 A.D.2d 655 (3d. Dep’t. 2003); *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2013) (each granting a motion to

dismiss a Section 51 claim against a visual artwork). “Beach Weather” and “Stop and Frisk” thus would be exempt from Section 51 claims as independent works of art even if they had no connection to GTAV.

For all these reasons, “Beach Weather” and “Stop and Frisk” are fully protected, just as “Escape Paparazzi” is fully protected.

C. The Use Of GTAV’s Creative Content To Promote The Work Itself Also Is Absolutely Protected

Ms. Lohan concedes that creative works of fiction are not “advertising” or “trade” under Section 51. *See* Lohan Br. at 20 (“fiction and satire are ordinarily not improper ‘advertising’ or ‘trade’ under the statute”); *id.* at 30 (“fiction and satire are ordinarily exempt from the statute”). Moreover, Ms. Lohan cannot credibly deny that the content about which she complains is creative and is part of an expressive work, and she does not do so. Instead, she argues that the commercial promotion of GTAV falls outside the exemption. *Id.* at 18, 25. The argument lacks any merit, and should be rejected.

The alleged use of “Beach Weather” and “Stop and Frisk” outside of the gameplay context, whether on game packaging, on billboards, or even on the game disk itself, also is entirely protected. It is well-settled that the use of creative content from an expressive work to promote that work is itself fully protected. *See Foster*, 128 A.D.3d at 160 (affirming dismissal of Section 51 claim: “Since the

images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with the promotion of the art work was permitted.”); *Costanza*, 279 A.D. 2d at 255 (affirming dismissal of Section 51 claim where “[t]he alleged ‘commercial’ use of the [fictional] character in advertising was incidental or ancillary to the permitted use [in the creative work being advertised]” (internal citations omitted)).

Hoepker, 200 F. Supp. at 340, confirms that the advertising usage of the transition screen artworks here cannot support a Section 51 claim. In *Hoepker*, the defendant used images of the plaintiff without his consent in an art exhibit and also used those images to advertise the exhibit in brochures, newsletters and billboards – some of the same forms of advertising usage alleged here. The court held that all uses of the plaintiff’s images, including the advertisements, were protected from Section 51 claims. Even though the purpose of the advertisements was “to increase patronage of the museum and the exhibit,” those uses were fully protected because they were “related to the protected exhibition of [the artwork] itself.” *Id.* at 351. That principle is equally applicable here and protects the alleged uses of GTAV content for promotional purposes.

The protection for advertising uses of creative content is not just settled law but good sense. Advertising is central to business success, and for-profit works

come squarely within New York’s rule of protection for expressive works under Section 51. As this Court has explained,

[a] contrary rule [i.e., excluding for-profit creative works from the rule that creative works are protected] would unreasonably and unrealistically limit the exception to nonprofit or purely altruistic organizations.

Stephano v. News Publ’n, 64 N.Y.2d 174, 185 (1984); *see also* 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 (2009) (“courts generally acknowledge that commercial exploitation [in violation of the right of publicity] means something other than the mere gain that comes from selling more issues of the publication”). New York courts have not hesitated to protect creative works that have enjoyed enormous commercial success such as the *Seinfeld* television show, against Section 51 claims. *See Costanza*, 279 A.D.2d 255; David K. Li, *Seinfeld rakes in \$2.7 bil*, N.Y POST (June 7, 2010) (show earned \$2.7 billion in its first 12 years of reruns, making it “the most profitable 30 minutes in TV history”).⁹

Ms. Lohan further argues that the concept of an “advertisement in disguise” somehow saves her claim (Lohan Br. at 32), but the argument fails for two reasons.

First and foremost, nothing here was disguised or is alleged to have been disguised. There is no allegation that GTAV actually is a promotion for something else. The game as a whole is plainly an actual creative work; each of “Escape

⁹ Available at <http://nypost.com/2010/06/07/einfeld-rakes-in-2-7-bil/>.

Paparazzi,” “Beach Weather” and “Stop and Frisk” plainly are creative elements of the game. *See* pp. 5-11, *supra* (describing creative character of game and of these elements).

Second, the cases that address “advertisements in disguise” involved, as Ms. Lohan herself admits, “invented biographies” of the plaintiffs (*id.* at 20) – that is, works that held themselves out as realistic factual depictions, not as creative works of fiction. These cases – *Spahn v. Messner, Inc.*, 18 N.Y.2d 324, 327 (1966) and *Binns v. Vitagraph Co.*, 210 N.Y. 51 (1913) – occupy a seldom-visited corner of right of publicity law. Since *Binns* and *Spahn* were decided, this Court never has cited them to uphold a Section 51 claim against an expressive work.

There is no basis for extending *Binns* and *Spahn* to this very different case. Each case involved the use of the plaintiff’s real name in apparent factual recitations of true events. As this Court confirmed in *Messenger v. Gruner + Jahr Print. & Publ’g*, 94 N.Y.2d 436, 446 (2000), *Spahn* and *Binns* applied where “defendants invented biographies of plaintiffs’ lives,” so that “the substantially fictional works at issue were nothing more than attempts to trade on the persona of Warren Spahn or John Binns.” *Id.* Here, there was no use of Ms. Lohan’s name,

nor was there any suggestion to the public that real events are being depicted.

GTAV obviously is not a biography, nor does it claim to be.¹⁰

Ms. Lohan's invocation of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) – a copyright case that addressed the affirmative defense of fair use – is entirely irrelevant to Section 51. It has never been relied upon by a New York court in a Section 51 case, and Ms. Lohan's argument that GTAV cannot be defended as parody based on *Campbell* (Lohan Br. at 10 n.2, 32) makes little sense. A simple review of GTAV's overall content confirms that both the game as a whole and the particular elements challenged here are a form of commentary poking fun at many aspects of modern life and popular culture. *See* Kagan Aff. Ex. 4 (R. 112) (quoting a review of GTAV stating that GTAV is "a game that is able to make a sublime parody of today's society, taking advantage of all the excesses and insanities to which the world is slowly getting used.").

IV. CONSTITUTIONAL FREE SPEECH VALUES SUPPORT THE STATUTORY GROUNDS FOR DISMISSAL

For the same reasons discussed in Take-Two's *Gravano* brief, constitutional free speech concerns provide strong additional support for this result. *See* Take-Two *Gravano* Br. at 26-30. Although the Appellate Division here did not reach

¹⁰ Likewise, the recent decision in *Porco v. Lifetime Entm't Servs., LLC*, 147 A.D.3d 1253, 1253, 1255 (3d Dep't 2017), involving an allegedly fictionalized biographical film, falls into the same inapplicable corner of the law.

any holding with respect to the First Amendment, constitutional free speech concerns provide powerful support for the Appellate Division’s interpretation of Section 51 in this case. Both the First Amendment of the Federal Constitution and Article I, Section 8 of the New York Constitution apply. *Id.* Both support the statutory limitation of “advertising purposes” and “trade” purposes to exclude expressive works and their creative content, as well as the construction of “name, portrait, picture or voice” to exclude digital avatars like the fictional character “Lacey Jonas” and the “Beach Weather” and “Stop and Frisk” artworks.

V. ROCKSTAR NORTH IS NOT SUBJECT TO PERSONAL JURISDICTION

Defendant-Respondent Rockstar North is a foreign corporation incorporated under the laws of the United Kingdom with its principal place of business in Edinburgh, Scotland. Rosa Aff. ¶ 16 (R. 66). It is not authorized to do business in New York, does not do business in New York and does not have an office in New York. *Id.* Rockstar North has not “purposefully avail[ed] itself of the privilege of conducting activities within [New York],” and the claims in this case do not arise from any such activities by it. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007) (alteration in original) (internal quotation and citations omitted); *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981). Accordingly, the claims against Rockstar North independently may be dismissed for lack of *in personam* jurisdiction. *See* CPLR § 302(a)(1).

The Amended Complaint does not include a single non-conclusory factual allegation that Rockstar North conducts business in New York or that Rockstar North has any connection to this case. In the courts below, Ms. Lohan submitted a corporate webpage that refers to offices in the United Kingdom, Canada and the United States. Opp. Aff. Ex. G (R. 253). It is evident, however, from even a cursory review of the webpage that those offices belong to separate and distinct entities in the Rockstar Games corporate family (*e.g.*, Rockstar NYC in New York City, Rockstar San Diego in San Diego, California, etc.), while Rockstar North’s own presence is limited to Scotland. *Id.* (Rockstar North is “[p]art of the Rockstar family since 1999 and [is] based out of modern, spacious, purpose-built studios in the heart of Edinburgh [. . .].”). There are no factual allegations or evidence in the record to the contrary.

Ms. Lohan’s suggestion below that jurisdictional discovery should be granted is baseless. She provides no reason to believe that discovery will yield any evidence to support jurisdiction. *See Benefits by Design Corp. v. Contractor Mgmt. Servs.*, 75 A.D.3d 826, 830 (3d Dep’t 2010) (“to obtain [jurisdictional discovery] plaintiffs are required to demonstrate that they have made a sufficient start, and shown their position not to be frivolous” (citation and quotation marks omitted)); *see also Leonard v. Gateway II, LLC*, 68 A.D.3d 408, 410 (1st Dept. 2009) (“Plaintiff’s assertion that discovery is necessary in order to oppose

defendants' motion is based on nothing more than unsubstantiated hope of discovering something relevant to her claims, and is an insufficient reason to deny the motion.""). Fishing expeditions to support jurisdiction are disfavored, *id.*, and none is justified here.

CONCLUSION

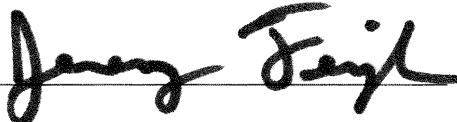
For the foregoing reasons, this Court should affirm the Appellate Division, First Department's dismissal of the Amended Complaint in its entirety, with prejudice.

Dated: May 31, 2017
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: _____



Jeremy Feigelson
Jared I. Kagan
Alexandra P. Swain

919 Third Avenue
New York, New York 10022
(212) 909-6000
jfeigelson@debevoise.com
jikagan@debevoise.com
apswain@debevoise.com

*Attorneys for Defendants-Respondents
Take-Two Interactive Software, Inc., Rockstar
Games, Inc., and Rockstar North*

**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 7,550 words.

Dated: May 31, 2017

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

*Attorneys for Defendants-
Respondents Take-Two Interactive
Software, Inc., Rockstar Games, Inc.,
and Rockstar North*