TO BE ARGUED BY:
FRANK A. DELLE DONNE, ESQ.
TIME REQUESTED: 20 MINUTES

APL-2017-00028

State of New York
Court of Appeals

LINDSAY LOHAN,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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Supreme Court, New York County, Index No. 156443/14

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QUESTIONS FOR REVIEW

Whether a celebrity plaintiff alleges a sustainable cause of action under New York Civil Rights Law sections 50 and 51 when a defendant without consent uses a reasonably recognizable still image digital drawing portrait within the video game as a transition screen still image between game sets not subject to player manipulation not to tell a fictional story but made intentionally and specifically for use on the game's packaging, promotional billboards and game transition screens wholly for advertising or trade purposes.[1]

In reversing the Supreme Court, the First Department ruled in the negative which plaintiff-appellant contends was error.

JURISIDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal pursuant to CPLR § 5602(a)1(i). The March 11, 2016 Supreme Court New York County Order denying defendants' pre-Answer dismissal motion is at R 5-6. The September 1, 2016 Appellate Division Order reversing the Supreme Court is at R 3a-7a. The November 29, 2016 Appellate Division Order denying reargument and leave to appeal is attached as Exhibit C to plaintiff-appellant's Motion for Leave to Appeal

[1] This is the identical Question for Review submitted in plaintiff-appellant's Motion for Leave to Appeal to the Court of Appeals dated December 28, 2016 at pages 4-5, and is the basis for plaintiff-appellant's Opposition both in the Supreme Court (R 211-232) and in the First Department as demonstrated by the First Department's Order dated September 1, 2016 (R 3a-7a).

to the Court of Appeals dated December 28, 2016. The Court of Appeals granted leave to appeal on February 16, 2017. (R 2a).

STATEMENT OF THE CASE

This action was filed by plaintiff-appellant Lindsay Lohan for defendants-appellants' violation of her right of privacy under §§ 50 and 51 of the New York Civil Rights Law. Ms. Lohan filed a Summons and Verified Complaint on July 1, 2014 (R 7-15) alleging that defendants-respondents Take-Two Interactive Software, Inc., Rockstar Games, Inc. and Rockstar North are related entities releasing the video game Grand Theft Auto V (hereafter GTAV) using her recognizable celebrity image, portrait and persona (R 34-37, 38-46, 54-59) without her consent for improper advertising or trade purposes of their video game GTAV released to consumers on September 17, 2013. (R 38, 54). All the defendants-respondents (hereafter GTAV) were properly served in or about July 18, 2014 to July 22, 2014 and the Affidavits of Service are at R 239-246. An Amended Complaint (R 17-59) was filed on October 8, 2014 pursuant to CPLR 3025(a).

The Amended Complaint alleges that GTAV knowingly misappropriated Ms. Lohan's image, portrait, voice and persona without her consent on the game discs, websites, posters, and billboard advertising (R 17-18) purely for improper commercial purposes in violation of New York Civil Rights Law §§ 50 and 51 (R

25). The Amended Complaint alleges that GTAV used three portraits in violation of the statute. First is a still image arrest pose known as "Stop and Frisk" (R 23-24, 34-37). Second is a still image bikini shot known as "Beach Weather" (R 25-26, 38-43). Third is a video game avatar called "Lacey Jonas" in a game mission called "Escape Paparazzi" (R 27-28) using a replica of Ms. Lohan's voice copying biographical references to actual events in Ms. Lohan's life. "Stop and Frisk" appears on game disc 2 (R 34), the back cover of the Game Guide (R 250), on posters sold on GTAV's website (R 248), and on a still transition screen while the actual game components are loading (R 65, 73, 99). "Beach Weather" appears on game disc 1 (R 38), billboards (R 54-58), the disc cover jacket (R 249), and on a still transition screen while the actual game components are loading (R 65, 73). The Amended Complaint also alleges that unrelated reputable media writers such as Sarah Miller and others have reached out to Ms. Lohan believing the game character images are her creating consumer confusion in the market place. (R 28, 44-47).

Rather than interpose an Answer, on November 12, 2014 GTAV moved to dismiss the Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7). On March 11, 2016 the Supreme Court held in relevant part as follows. (R 5-6).

> The application to dismiss, pursuant to CPLR 3211 (a)(1), is denied. The "documents" relied upon by movants, to assert that the images in question are not those of the plaintiff, is vehemently and factually contested by the plaintiff. These

> factual disputes requires a determination by the trier of the facts and said documents cannot, at this juncture, support an application to dismiss based on the self-serving statements that the images are not those of the plaintiff's. (R 5).
>
> The application seeking dismissal for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is denied. When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v. Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of plaintiff *(Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]). . . . (R 5).
>
> In this case, plaintiff has alleged cause(s) of action alleging a violation of a right to privacy pursuant to New York Civil Rights Law section 50 and 51. . . . (R 6).
>
> Accordingly, It is ORDERED that the within pre-answer motion to dismiss, including the application for sanctions, is denied; . . . (R 6).

On March 16, 2016, GTAV filed a Notice of Appeal quickly followed by its opening Brief and Record improperly leaving out their Reply filed in the Supreme Court which Ms. Lohan included in a Supplemental Record. Notably, in GTAV's Reply in the Supreme Court GTAV argued as follows. (R 267).

> Similarly, there is no dispute that the Beach Weather and Stop and Frisk artworks were released a year and eight month before

> the original complaint was filed. *Id.* There is also no dispute that they were widely used in many different formats related to publicizing GTAV, including posters and advertisements at least twelve months before the original complaint was filed. (R 267).

On September 1, 2016, the Appellate Division First Department reversed (R 3a-7a) the Supreme Court and dismissed the Amended Complaint holding as follows.

> As to Lohan's claim that an avatar in the video game is she and that her image is used in various images, 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 *(see Costanza* at 255).
>
> 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" (see *Costanza* at 255, citing *Hampton* v *Guare,* 195 AD2d 366, 366 [1st Dept *1993], lv denied* 82 NY2d 659 [1993] [stating that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'"]; *see generally Brown v Entertainment Merchants Assn.,* 564 US 786, 790 [2011] ["(l)ike the protected books, plays, and movies that preceded them, video games communicate ideas . . ." and deserve First Amendment protection]). This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire.
>
> Further, Lohan's claim that her image was used in advertising materials for the video game should also be dismissed. The images are not of Lohan herself, but merely the avatar in the game that Lohan claims is a depiction of her (see *Costanza* at 255 [the "use of the character in advertising was incidental or

ancillary to the permitted use[,]" and therefore was not commercial]).

The First Department erred in holding that this video game does not fall under the narrow scope of the statutory definitions of "advertising" and "trade" simply because it is fiction and satire in that (1) Ms. Lohan reasonably alleges it is her portrait and voice used without consent as an "advertisement in disguise" in violation of the statute which GTAV has not demonstrated otherwise, (2) the alleged celebrity portrait still image digital drawings ("Stop and Frisk" and "Beach Weather") are used only as a transition screens between game sets not subject to player manipulation made intentionally and specifically for use on the game's packaging and billboards wholly for advertising or trade purposes, (3) "invented fictional biographies that are nothing more than an attempt to trade on the persona" are proscribed by the statute as explained in Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000), and (4) parody/satire by definition require comment on the original Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-581, 114 S. Ct. 1164, 1172 (1994) which GTAV specifically denies at R 104 that the images and voice resemble or mimic Ms. Lohan thereby waiving such a defense or exception.

ARGUMENT

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction under CPLR 3026 and the facts as alleged in the complaint must be accepted as true giving plaintiff the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory. Sokol v. Leader, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153, 155 (2nd Dept. 2010), Porco v. Lifetime Entertainment, 147 A.D.3d 1253, 47 N.Y.S.3d 768 (3rd Dept. 2017). A motion to dismiss pursuant to CPLR 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it. Sokol v. Leader, 74 A.D.3d 1180, 1182, 904 N.Y.S.2d 153, 156 (2nd Dept. 2010), Porco v. Lifetime Entertainment, 147 A.D.3d 1253, 47 N.Y.S.3d 768 (3rd Dept. 2017). Because Ms. Lohan's Amended Complaint reasonably and properly alleges (R 21-32) with additional though unnecessary verification from independent third party sources (R 44-46) that the non-moving and non-speaking portrait digital drawings (R 34-37, 38-46, 54-59, 248, 250, 44-46) that GTAV uses for its internet (R 248) and billboard (R 54-57) "advertising" and on the product itself for "trade" (R 34, 38) is Lindsay Lohan's portrait (R 44-46) and because the "Lacey Jonas" avatar (R 122) is an "invented fictional biography nothing more than an attempt to trade on the persona" plainly proscribed

by the statute, the Supreme Court Order denying GTAV's motion to dismiss the Amended Complaint was correct and the First Department in reversing now conflicts with the established precedent of this Court and the other Appellate Division Departments.

POINT I

THE AMENDED COMPLAINT ALLEGES A SUSTAINABLE CAUSE OF ACTION THAT GTAV'S UNAUTHORIZED DELIBERATE USE OF MS. LOHAN'S RECOGNIZABLE IMAGE ON BILLBOARDS AND DISC PACKAGING SOLELY TO ADVERTISE AND PROMOTE THEIR VIDEO GAME VIOLATES NEW YORK CIVIL RIGHTS LAW § 51.

The First Department erred in reversing the Supreme Court and dismissing the Amended Complaint because a defendant's intent to use a celebrity still image on billboards, posters and on the game packaging solely to advertise and promote the video game violates New York Civil Rights Law §§ 50 and 51 because: (1) "Beach Weather" and "Stop and Frisk are simply an "advertisement in disguise having no "real relationship to the content" of playing the game as explained in Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Arrington v. New York Times, 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 944 (1982) as these still images appear only on transition screens and have nothing to do with playing the video game because these two still images are not subject to player manipulation (R 65, 73, 99); and (2) the digital avatar "Lacey Jonas", voice

reproduction and story is an "invented fictional biography that is nothing more than an attempt to trade on Ms. Lohan's persona" specifically proscribed by the statute as explained in Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and reargued* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967).

Otherwise, anybody can produce a video game or a novel with a portrait drawing reasonably recognizable as Bill Gates on the cover and on billboards and title it "White Collar Computer Theft Online" even if the work does not tell a real biography story or make a satirical/parody comment. Portrait is defined in the dictionary as painting, drawing, photograph or engraving and has been consistently held since the statute's enactment to include reasonable representations such as drawings or actor impersonators in pictures. Pictures include photographs, drawings and movies as picture is often used to describe movies- *i.e.* Oscar for Best Picture. The First Department applying its "fictional character" Costanza exception to this circumstance conflicts with Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) and its progeny because the two still images (R 65, 73, 99) cannot be manipulated by the player to have a "real relationship in

playing the game" and are an "advertisement in disguise" [2] and the "Lacey Jonas" avatar is an "invented fictional biography to trade on the persona" as explained in Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Arrington and Binns/Spahn. The First Department's decision broadly applying its "fiction and satire" exception to these very different facts also conflicts with the Third Department's recent decision in Porco v. Lifetime Entertainment, 147 A.D.3d 1253, 47 N.Y.S.3d 768 (3rd Dept. 2017).

As properly and reasonably alleged, GTAV's deliberate unauthorized appropriation of Ms. Lohan's recognizable images on billboards, posters, buses, bus stops, buildings, game packaging and on websites was exclusively for "advertising or trade" to improperly promote the video game in violation of the statute (R 54-58, 248, 249-250). The First Amendment does not shield GTAV's prohibited use of the recognizable celebrity images in this circumstance as the still images are not protected speech regarding matters of fiction, news, public interest or transformative parody/satire art, but rather are knowingly designed specifically for advertising or trade purposes in violation of New York Civil Rights Law §§ 50 and 51.

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[2] GTAV has essentially waived any First Amendment defense under the newsworthy, public interest and parody/satire exception to the statute as parody/satire by definition require comment on the original Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-581, 114 S. Ct. 1164, 1172 (1994) which GTAV specifically denies at R 104 that the images, avatar and voice resemble or mimic Ms. Lohan or that she is at least in part a target of any expressive content the game may have.

New York Civil Rights Law §§ 50 and 51 provide in relevant part as follows.

§ 50. Right of privacy

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Portrait, Picture or Voice

If defendant does not use plaintiff's "name, portrait, picture or voice", clearly there is no sustainable claim under the statute. Wojtowicz v. Delacorte Press, 58 A.D.2d 45, 46-47, 395 N.Y.S.2d 205, 206-207 (1st Dept. 1977) *affd* 43 N.Y.2d 858, 403 N.Y.S.2d 218 (1978). In Wojtowicz, defendant allegedly violated the statute when defendant's book and movie averred in a scene to the wife of the

Al Pacino bank robber character in "Dog Day Afternoon". Though the plaintiff was identifiable as the character in the book through "sufficiently detailed accuracy of physical characteristics and activities as to result in her effective identification", it was undisputed that plaintiff's name, portrait or picture was not used in the book or movie and there is no right of publicity in New York. Wojtowicz v. Delacorte Press, 43 N.Y.2d 858, 860, 403 N.Y.S.2d 218, 219 (1978). In other words, though the actor may or may not have looked like plaintiff, the statutory requirement was not satisfied because defendant changed her name and plaintiff did not argue that the actor looked like her sufficient to be a "recognizable likeness" of plaintiff to satisfy the statutory requirement of "picture or portrait".

It is well settled that the phrase "portrait or picture" as used in the statute is not restricted to actual photographs of the actual plaintiff, but generally comprise those representations which are a recognizable likeness of plaintiff. In Binns v. Vitagraph Co., 210 N.Y. 51 (1913), plaintiff was a telegraphy operator on a steamship that hit another steamship at sea where he used that then new technology to call ashore and to another ship for help which defendant used actors and scenery to replicate the events while photographs were taken of the actor impersonators to create a series of picture films to be exhibited for profit in the then new moving picture machines. All of the picture series taken of plaintiff's impersonator were related to the actual news story except the last series which had no connection to

the actual news story, but were used to entertain by exaggerating plaintiff's movements which was no part of the actual news story. Binns v. Vitagraph Co., 210 N.Y. 51, 57-58 (1913). The Court of Appeals, in holding that the last series of pictures not relating to the actual news story violated the statute, specifically held as follows.

> A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person. The picture represented by the defendant to be a true picture of the plaintiff and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff. The defendant is in no position to say that the picture does not represent the plaintiff or that it was an actual picture of a person made up to look like and impersonate the plaintiff.

Similarly in Ali v. Playgirl, 447 F. Supp. 723, 726 (SDNY 1978) the statutory definition of "portrait" is satisfied by a cartoon titled "Mystery Man" depicting a nude black man seated in the corner of a boxing ring with the cartoon making further reference using the phrase "the Greatest" in the cartoon notes. Ali v. Playgirl, 447 F. Supp. 723, 726-727 (SDNY 1978). The Southern District citing well established case law held that in order for the statute to be displaced, the unauthorized use of the image must be in connection with an item of news or otherwise be newsworthy as a matter of public interest. Ali v. Playgirl, 447 F. Supp. 723, 727 (SDNY 1978).

Similarly, in Allen v. National Video, 610 F. Supp. 612, 617-618 (SDNY 1985) and Kennedy Onassis v. Christian Dior N.Y., 122 Misc. 2d 603, 604, 472

N.Y.S.2d 254, 256 (Sup. NY 1984) look-a-like models of Woody Allen and Jacqueline Kennedy Onassis were used to make photographs used for advertising or trade purposes in magazines without consent. Both cases held that an exact duplication of the subject is not required, but it is the overall impression that counts, and such use of the likeness and image even in a sketch, cartoon or drawing that serves no other purpose other than to represent the plaintiff must give rise to a cause of action under the statute because it amounts to an appropriation of another's likeness for commercial advantage without consent. Allen v. National Video, 610 F. Supp. 612, 622-623 (SDNY 1985), Kennedy Onassis v. Christian Dior N.Y., 122 Misc. 2d 603, 614, 472 N.Y.S.2d 254, 262 (Sup. NY 1984), see also Loftus v. Greenwich Lithographing Co., 192 A.D. 251, 182 N.Y.S. 428 (1st Dept. 1920). Whether a portrait or picture presents a recognizable likeness is ordinarily one for the jury, but may be decided as a matter of law if that conclusion is unavoidable. Allen v. National Video, 610 F. Supp. 612, 623-624 (SDNY 1985).

In Cohen v. Herbal Concepts, 62 N.Y.2d 379, 381-382, 482 N.Y.S.2d 457, 458 (1984), defendants in order to promote a cosmetic product in a magazine used a picture of a mother and her child depicting their backs while standing naked in a shallow stream in Woodstock where their faces and identities were not visible in the photograph. The Court of Appeals held that "portrait or picture" within the statute includes *reproductions of plaintiff either artistically or by photograph* used

without consent for commercial purposes so long as the image presents a recognizable likeness of the plaintiff. Cohen v. Herbal Concepts, 62 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 459 (1984). Before a jury may be permitted to decide the issue regarding a summary judgment motion, plaintiff must satisfy the court that the person in the photograph is capable of being identified from the advertisement alone and that plaintiff has been so identified. Cohen v. Herbal Concepts, 62 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 459 (1984). As the faces were not visible in the picture, the identifying features the Court of Appeals used were hair, bone structure, body contours, stature and posture as well as an affidavit from the mother's husband that he recognized plaintiffs in the photograph while leafing through a magazine. Cohen v. Herbal Concepts, 62 N.Y.2d 379, 385, 482 N.Y.S.2d 457, 460 (1984). The Cohen Court held that the photograph reveals sufficiently an identifiable likeness to withstand defendants' summary judgment motion as the question is generally a jury question. Cohen v. Herbal Concepts, 62 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 459 (1984).[3]

Regarding artistic reproductions of voice, though older cases do in fact hold that voice imitation was not actionable under the statute (Maxwell v. N.W. Ayer, 159 Misc. 2d 454, 457, 605 N.Y.S.2d 174, 176 (Sup. NY 1993)), the statute was

[3] To the extent the "Stop and Frisk" (R 34, 35, 65, 73, 79, 248, 250)" and "Beach Weather" (R 38, 39, 44-46, 65, 73, 75) digital drawing still images used only in the game in transition screens and the "Lacey Jonas" avatar (R 27-28) are reasonably recognizable as Ms. Lohan in looks or in voice respectively, they can be a "picture", "portrait" or "voice" under the statute as they are here as reasonably alleged in the Amended Complaint (R 17-60).

specifically amended in 1995 to include "voice". As "artistic reproductions" of "portrait" or "picture" are actionable under the statute as held in all of the case law, "artistic reproductions" of "voice" should be actionable under the statute if the voice is a "recognizable likeness" under the Cohen and Binns analysis. Also, the now sustainable "voice" sound alike claim under the 1995 amendment are obviously probative on the other two still images and the avatar claims. Tin Pan Apple v. Miller Brewing Co., 737 F. Supp. 826, 838 (SDNY 1990).

Advertising or Trade

The statute is to be narrowly construed strictly limited to nonconsensual commercial appropriations as opposed to news, public interest matters and transformative art such as parody/satire which are excluded from the statute's reach of prohibited "advertising" or "trade". Messenger v. Gruner, 94 N.Y.2d 436, 441-442, 706 N.Y.S.2d 52, 55 (2000). In Arrington v. New York Times, 55 N.Y.2d 433, 449 N.Y.S.2d 941 (1982), defendant NY Times without plaintiff's consent was allowed to publish his photograph depicting him as a young black male Wall Street financial analyst while walking down the street with an article entitled "The Black Middle Class: Making It" arguing that "this group has been growing more removed from its less fortunate brethren." Arrington v. New York Times, 55 N.Y.2d 433, 437-438, 449 N.Y.S.2d 941, 942 (1982). The Arrington

Court in effectively outlining the history of the statute and describing it as "drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more" held as follows.

> Moreover, this narrow reading of the statutory provisions has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy for purposes of "advertising" or "trade" and, on the other, the values our State and Federal Constitutions bespeak in the area of free speech and free press. Thus, we not too long ago reiterated that "'[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute unless it has no real relationship to the article or unless the article is an advertisement in disguise'" (*Murray v New York Mag. Co.*, 27 NY2d 406, 409 [magazine cover photograph illustrating a feature story], quoting from *Dallesandro v Holt & Co.*, 4 AD2d 470, 471, app dsmd 7 NY2d 735). Arrington v. New York Times, 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 944 (1982).

Because the article dealt with the circumstances and tensions regarding mobility of a certain societal group, clearly it relates to "public interest" and is a term to be "freely defined" and the author does not state that plaintiff adopted his editorial views which was plaintiff's problem with the article. Accordingly, the Arrington Court held, "But this disagreement cannot extend the compass of sections 50 and 51 for, in such matters, it would be unwise for us to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is agreement with views expressed on a social

issue." Arrington v. New York Times, 55 N.Y.2d 433, 441, 449 N.Y.S.2d 941, 944-945 (1982). In other words, the article and the photograph are not used for purposes of advertisement or trade as prohibited by the statute because they are not an "advertisement in disguise", but rather they are plainly opinion dealing with a matter of public interest. Interestingly, the Arrington Court did sustain a cause of action under the statute against both the defendant photographer Gorgoni snapping the picture and his agent defendant named Contact for selling it to defendant NY Times because both that sale was not connected with the article's publishing removing the "public interest" Free Speech immunity, and it commercialized the photograph in furtherance of trade in violation of the statute. Arrington v. New York Times, 55 N.Y.2d 433, 442-443, 449 N.Y.S.2d 941, 945-946 (1982). The key distinction to determine whether it is Free Speech news, public interest or transformative art such as parody is whether the work is meant to express something or whether it is an *"advertisement in disguise"* having *"no real relationship"* to expression used solely for the purposes of "advertising" or "trade" in violation of the statute. It is worth noting that a recognizable celebrity image on a billboard promoting a game product then printing the image on the discs and momentarily flashing the still image on a transition screen having nothing to do with actually playing the video game must heavily weigh in favor of "advertising or trade purpose" in violation of the statute as opposed to the newsworthy and

public interest exception. The key phrase in Arrington is "advertisement in disguise" having "no real relationship".

In addition to the newsworthy/public interest exception to the statute, New York Courts have consistently held there is an exception for parody and satire sometimes also called the fiction exception by the First Department. University of Notre Dame v. Twentieth Century- Fox, 22 A.D.2d 452, 455, 256 N.Y.S.2d 301, 304-305 (1st Dept. 1965) *affd* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965). In Notre Dame the burlesque style novel and movie involved the mythical king of the Moslem faith and ruler of the Arab country Fawzia who had a son that was denied a roster spot on the football team and was determined to get even so he demanded that the United States arrange a game between Notre Dame and his team in Fawzia in exchange for the lease of an air base which game was eventually won by a female player entering the game at the last minute carried across the goal line by an oil gusher erupting on the field. University of Notre Dame v. Twentieth Century-Fox, 22 A.D.2d 452, 454-455, 256 N.Y.S.2d 301, 303-305 (1st Dept. 1965) *affd* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965). Because University president plaintiff Father Hesburg's name was only mentioned for a fleeting moment on 3 pages in the book and not on its covers and because nobody could possibly be intended to be deceived by the circumstances in which the names were used, the First Department held this use to be parody and satire outside the reach of improper

"advertising" or "trade". University of Notre Dame v. Twentieth Century- Fox, 22 A.D.2d 452, 455-456, 256 N.Y.S.2d 301, 304-305 (1st Dept. 1965) *affd* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965). This parody and satire exception to the statute has later been called the "fiction and satire" exception by the First Department in Hampton v. Guare, 195 A.D.2d 366, 600 N.Y.S.2d 57, 58 (1st Dept. 1993). Isolated or fleeting and incidental uses of a person's name or image in a work of fiction even if unauthorized, are insufficient to establish an invasion of privacy claim under University of Notre Dame v. Twentieth Century- Fox, 22 A.D.2d 452, 454, 256 N.Y.S.2d 301, 304 (1st Dept. 1965), but if defendant's use of the image is directly related to defendant's primary purpose of commercialization, the incidental or isolated exception does not apply. Schoeman v. Agon Sports, 816 N.Y.S.2d 701 (Sup. Nassau 2006).

Though fiction and satire are ordinarily not improper "advertising" or "trade" under the statute, it is well settled that when "the substantially fictional works at issue are nothing more than attempts to trade on the persona" of plaintiff, such "invented biographies" do not fulfill the purposes of the newsworthy exception. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). The

Messenger Court explained the differences between the Arrington line of cases where the image used is connected to newsworthiness[4], as opposed to cases such as Spahn and Binns where use of the image is nothing more than an attempt to trade on plaintiff's persona. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000). In Spahn v. Messner, Inc., 18 N.Y.2d 324, 328-329, 274 N.Y.S.2d 877, 879-880 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967), the defendant's publication used a famous baseball player's "persona" with dramatization, imagined dialogue, manipulated chronologies and fictionalized events. This Court[5] held as follows.

> That is not to say, however, that his "personality" may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography.

In other words, though a novel or work of fiction may contain a fleeting reference to an actual person and not violate the statute, if defendant's primary purpose in using plaintiff's image is for commercial exploitation, the statute is violated. For example, if manipulated facts about a celebrity like Madonna were made that she was a Notre Dame graduate on those 3 pages in the book with nothing further and her portrait drawing was put on that book cover, the fleeting

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[4] The Arrington test of the newsworthiness/public interest exception is having a "having a real relationship" and not "an advertisement in disguise".

[5] Spahn v. Messner, Inc., 18 N.Y.2d 324, 328-329, 274 N.Y.S.2d 877, 879-880 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967).

use, newsworthy or fiction/parody exceptions do not apply and the statute is violated even though the entire book is a parody or satire as long as Madonna is not a target of the parody or satire. In other words, use of her portrait on the book cover is an advertisement in disguise having no real relationship to whatever point the author is trying to make because it is Madonna- nothing more- and is just an attempt to trade on her persona.[6]

When the courts define parody and satire, the underlying principal is that plaintiff must be the target of the parody or satire in whole or in part such that the image is not plaintiff any more, but is transformed into something else. In the copyright infringement case Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-581, 114 S. Ct. 1164, 1172 (1994), 2 Live Crew's song "Pretty Woman" using literary and musical techniques is alleged to have infringed on the song "Oh, Pretty Woman" sung by Roy Orbison. The Supreme Court held that parody needs to mimic an original to make its point having some claim to use the creation of its victim's imagination, whereas satire can stand on its own and so it requires justification for the very act of borrowing. In other words, to be a fair use the parody must conjure up the original Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 588, 114 S. Ct. at 1176, and in the case of satire the original must at least be

[6] Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and reargued* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967).

partly the target of the satire. Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 597, 114 S. Ct. at 1180, see also People v. Golb, 102 A.D.3d 601, 602, 960 N.Y.S.2d 66, 67 (1st Dept. 2013) *affd* 23 N.Y.3d 455, 991 N.Y.S.2d 792 (2014) *cert denied* 135 S. Ct. 1009 (2015). Either way, the original is needed.[7]

The statutory exceptions for newsworthiness and matters of public interest have developed in the lower courts to include artistic expression including parody and satire. In Foster v. Svenson, 128 A.D.3d 150, 153-154, 7 N.Y.S.3d 96, 98-99 (1st Dept. 2015) a critically acclaimed photographer secretly took photographs of non-famous people living without drapes in a glass facade NYC apartment building creating a photographic exhibit called "The Neighbors" one of which was an unknown topless little girl's back dancing in her tiara looking like a cherub which through media coverage the subjects learned that they were the people in the photographs as the address in the building was revealed on the "Today Show" and despite defendant's professed efforts to obscure his subject's identity the little girl was identifiable in one of the photographs. Because the photographs conveyed more than just an advertising or trade purpose the First Department affirmed that the prohibitions of §§ 50 and 51 of the privacy statute do not apply to newsworthy matters, public concern matters and matters of artistic expression because

[7] GTAV specifically denies at R 104 that the two still images and the avatar and voice resemble, mimic or target Ms. Lohan thereby waiving a parody and satire defense as a permissible use outside the reach of the statute.

"dissemination or publication is not deemed strictly for the purpose of advertising or trade within the meaning of the privacy statute" and such "exemption has been applied to many types of artistic expressions, including literature, movies and theater, it logically follows that it should be applied equally to other modes of artistic expression." Foster v. Svenson, 128 A.D.3d 150, 156-157, 7 N.Y.S.3d 96, 100-101 (1st Dept. 2015). In other words, Foster says the photographs of ordinary people made by a renowned photographer for an art exhibition were behind the reach of the statute because they were connected to an art exhibition and a public interest newsworthy event as such matters of news, public interest and artistic expression (including parody/satire and fiction that is not a disguised attempt to trade on a persona) are not "strictly for the purpose of advertising or trade within the meaning of the statute." However, if the defendant in Foster also owned a flour company and now put Foster's picture on mass produced flour boxes, clearly the statute is violated as improper use for the purposes of "advertising" or "trade". The distinction between a photograph made by a renowned photographer for an art exhibition and a video game mass produced with a massive marketing plan to do nothing other than make money is obvious.

The rules established from these cases are that (1) a *portrait, picture* or *voice* under the New York statute include a digital drawing or other moving video avatar image including a voice reproduction that don't have to be exact depictions as long

as they are a recognizable likeness of plaintiff, (2) whether the image is a recognizable likeness of plaintiff is generally a jury question, and (3) the statutory exceptions for news, public interest or artistic expression such as parody or satire that are not considered "advertising" or "trade" do not apply when the alleged use is an advertisement in disguise or merely an attempt to trade on a plaintiff's persona.[8]

It is worth noting that the starting point is considering whether a recognizable celebrity image reasonably alleged to be plaintiff on billboards and other advertising wholly promoting a video game product weighs in favor of "advertising or trade purpose" in violation of the statute as opposed to Free Speech news, public interest matters or transformative art such as parody or satire beyond the reach of the statute.[9] The key phrase in Arrington is "advertisement in

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[8] Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and reargued* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). The Messenger Court explained the differences between the Arrington line of cases where the image used is connected to newsworthiness, as opposed to cases such as Spahn and Binns where use of the image is nothing more than an attempt to trade on plaintiff's persona. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000).

[9] GTAV argued below that because a video game is media like a book it is absolutely protected by the First Amendment to print whatever it wants. That is not the standard as the Supreme Court has held, "Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "'Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression'". Florida Bar v. Went For It, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375 (1995). The Supreme Court has also held that advertisers cannot escape liability simply by including references to public issues

disguise" and in Messenger "invented biographies nothing more than attempts to trade on plaintiff's persona."

A. The First Department Erred in Holding that "Portrait" or "Picture" Does Not Include A Reasonably Recognizable Digital Image

The First Department erred as to what is a "portrait" or "picture" under the statute in holding as follows. (R 5a-6a).

> Lohan's respective causes of action under Civil Rights Law § 51 "must fail because defendants did not use [plaintiffs'] 'name, portrait, or picture'" (see *Costanza v Seinfeld, 279 AD2d 255, 255* [1st Dept 2001], citing *Wojtowicz v Delacorte Press*, 43 NY2d 858, 860 [1978]).

If defendant does not use plaintiff's "name, portrait, picture or voice", clearly there is no sustainable claim under the statute. Wojtowicz v. Delacorte Press, 58 A.D.2d 45, 46-47, 395 N.Y.S.2d 205, 206-207 (1st Dept. 1977) *affd* 43 N.Y.2d 858, 403 N.Y.S.2d 218 (1978). In Wojtowicz v. Delacorte Press, 43 N.Y.2d 858, 860, 403 N.Y.S.2d 218, 219 (1978), though the "Dog Day Afternoon" actress may or may not have looked like plaintiff, the statutory requirement was

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because advertisements referencing a product with an economic motive is strong support that the speech is commercial speech notwithstanding the fact that the product is linked to a public debate. Bolger v. Youngs Drug Products, 463 U.S. 60, 65-68, 103 S. Ct. 2875, 2879-2881 (1983). That being said, the Messenger Court's analysis passes muster regarding "advertisement in disguise" or "intentional fictional biography merely to trade on plaintiff's persona" as the New York statute was drafted with the First Amendment in mind which the newsworthy, public interest and transformative art exceptions including parody and satire, keep the statute consistent with the First Amendment. Foster v. Svenson, 128 A.D.3d 150, 155-157, 7 N.Y.S.3d 96, 100-101 (1st Dept. 2015).

not satisfied because defendant changed her name and she did not argue that the actor looked like her sufficient to be a "recognizable likeness" of her to satisfy the statutory requirement of "picture or portrait". It has been long well settled that the phrase "portrait or picture" as used in the statute is not restricted to actual photographs of the actual plaintiff, but generally comprise those representations which are a recognizable likeness of plaintiff. Remember in Binns v. Vitagraph Co., 210 N.Y. 51 (1913), defendant used actors and scenery to replicate the events while photographs were taken of the actor impersonators to create a series of picture films to be exhibited for profit in the then new moving picture machines. The Court of Appeals in holding that the last series of pictures not relating to the actual news story violated the statute specifically held as follows.

> A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person. The picture represented by the defendant to be a true picture of the plaintiff and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff. The defendant is in no position to say that the picture does not represent the plaintiff or that it was an actual picture of a person made up to look like and impersonate the plaintiff.

Similarly, in Cohen v. Herbal Concepts, 62 N.Y.2d 379, 381-382, 482 N.Y.S.2d 457, 458 (1984), the Court of Appeals held that "portrait or picture" within the statute includes *reproductions of plaintiff either artistically or by photograph* used without consent for commercial purposes so long as the image presents a recognizable likeness of the plaintiff which is generally a jury question.

Cohen v. Herbal Concepts, 62 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 459 (1984). 1984). All of the case law is consistent that "portrait" or "picture" includes drawings and other artistic representations recognizable as plaintiff. Ali v. Playgirl, 447 F. Supp. 723, 726-727 (SDNY 1978), Allen v. National Video, 610 F. Supp. 612, 617-623 (SDNY 1985), Kennedy Onassis v. Christian Dior N.Y., 122 Misc. 2d 603, 604-614, 472 N.Y.S.2d 254, 256-262 (Sup. NY 1984), Loftus v. Greenwich Lithographing Co., 192 A.D. 251, 182 N.Y.S. 428 (1st Dept. 1920).

In the case at bar, the "Stop and Frisk" (R 34, 35, 65, 73, 79, 248, 250) and "Beach Weather" (R 38, 39, 44-46, 65, 73, 75) digital drawing still images used only in the game in transition screens and the "Lacey Jonas" avatar (R 27-28) are a "recognizable likeness" of Ms. Lohan in looks or in voice respectively, and are a "picture", "portrait" or "voice" under the statute as alleged in the Amended Complaint (R 17-60, 44-46, 251-252). As the First Department applied the incorrect standard for "portrait" or "picture" and did not even address "voice" under the current version of the statute and Ms. Lohan demonstrates that the allegations in her Amended Complaint that GTAV knowingly used these images and voice[10] reproductions intending them to be depictions of her, she alleges a

[10] Regarding artistic reproductions of voice, though older cases do in fact hold that voice imitation was not actionable under the statute (Maxwell v. N.W. Ayer, 159 Misc. 2d 454, 457, 605 N.Y.S.2d 174, 176 (Sup. NY 1993)), the statute was specifically amended in 1995 to include "voice". As "artistic reproductions" of "portrait" or "picture" are actionable under the statute as held in all of the case law, "artistic reproductions" of "voice" should be actionable under the statute if the voice is a "recognizable likeness" under the Cohen and Binns analysis. Also, the

sustainable cause of action under the statute regarding "portrait", "picture" and "voice" as there is at the very least a question of fact as to whether the image and voice reproductions are a "recognizable likeness" of Ms. Lohan. Accordingly, the First Department erred as a matter of law in holding that the two digital drawings used on the discs and in advertising and the avatar in the video game cannot be a "portrait, picture or voice" under the statute.

B. The First Department Erred in Holding that the Depictions Do Not Fall Under the Statutory Definition of "Advertising" or "Trade".

The First Department erred in applying its Notre Dame fiction and satire exception to the statute in this circumstance. The First Department held as follows. (R 6a).

> 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" (*see Costanza* at 255, citing *Hampton v Guare*, 195 AD2d 366, 366, 600 N.Y.S.2d 57 [1st Dept 1993], *lv denied* 82 NY2d 659, 625 N.E.2d 590, 605 N.Y.S.2d 5 [1993] [stating that "works of fiction and satire do not fall within the narrow scope of the statutory phrases advertising' and trade'"]; *see generally Brown v Entertainment Merchants Assn.*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 [2011] ["(l)ike the protected books, plays, and movies that preceded them, video games communicate ideas . . ." and

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now sustainable "voice" sound alike claim under the 1995 amendment are obviously probative on the other two still images and the avatar claims. Tin Pan Apple v. Miller Brewing Co., 737 F. Supp. 826, 838 (SDNY 1990).

> deserve First Amendment protection]). This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire.

Remember, because University president plaintiff Father Hesburg's name was only mentioned for a fleeting moment on 3 pages and not on the book covers and because nobody could possibly be intended to be deceived by the circumstances in which the names were used in that case, the First Department held this use to be parody and satire outside the reach of improper "advertising" or "trade". University of Notre Dame v. Twentieth Century-Fox, 22 A.D.2d 452, 455-456, 256 N.Y.S.2d 301, 304-305 (1st Dept. 1965) *affd* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965). This parody and satire exception to the statute has later been called the "fiction and satire" exception by the First Department in Hampton v. Guare, 195 A.D.2d 366, 600 N.Y.S.2d 57, 58 (1st Dept. 1993).

Though fiction and satire are ordinarily exempt from the statute, when "the substantially fictional works at issue are nothing more than attempts to trade on the persona" of plaintiff, such "invented biographies" do not fulfill the purposes of the newsworthy exception. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). There are important differences between the Arrington line of cases

where the image used is connected to a Free Speech exception such as newsworthiness, as opposed to cases such as Spahn and Binns where use of the image is nothing more than an attempt to trade on plaintiff's persona. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000). In Spahn v. Messner, Inc., 18 N.Y.2d 324, 328-329, 274 N.Y.S.2d 877, 879-880 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967), this Court held that a defendant's publication using a baseball player's "persona" with dramatization, imagined dialogue, manipulated chronologies and fictionalized events in that circumstance did not fit in either the newsworthy exception or the fiction exception to the statute. Spahn v. Messner, Inc., 18 N.Y.2d 324, 328-329, 274 N.Y.S.2d 877, 879-880 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967).

Regarding the parody/satire exception to the statute which the First Department also calls the "fiction and satire" exception, the Supreme Court has held that to be a fair use the parody must conjure up the original Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 588, 114 S. Ct. at 1176, and in the case of satire the original must at least be partly the target of the satire. Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 597, 114 S. Ct. at 1180, see also People v. Golb, 102 A.D.3d 601, 602, 960 N.Y.S.2d 66, 67 (1st Dept. 2013) *affd* 23 N.Y.3d 455, 991

N.Y.S.2d 792 (2014) *cert denied* 135 S. Ct. 1009 (2015) Either way, the original is needed.

In the case at bar, GTAV specifically denies at R 104 that the two still images ("Beach Weather and "Stop and Frisk") and the avatar ("Lacey Jonas") and voice resemble, mimic or target Ms. Lohan thereby waiving a parody and satire defense. Because GTAV has argued the images and voice are not meant to be Ms. Lohan impersonations as there is "no resemblance" (R 104), GTAV has waived or has at least not met their burden on any parody or satire exemption because they argued Ms. Lohan was not the target of the images negating a required element for a parody or satire under Campbell. As Ms. Lohan must be given the benefit of every reasonable inference that can be drawn on this pre-Answer 3211(a)(7) motion to dismiss (Porco v. Lifetime Entertainment, 147 A.D.3d 1253, 47 N.Y.S.3d 768 (3rd Dept. 2017)), the Amended Complaint alleges a sustainable cause of action under the statute that GTAV is an "invented biography to trade on plaintiff's persona" or "an advertisement in disguise" outside the statutory exceptions as articulated in the case law. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). Because Ms. Lohan has reasonably alleged

that these images were "knowingly used for advertising and trade and in violation of the statute", because GTAV cannot make a parody and satire of something they argue is not meant to be Ms. Lohan, and because GTAV has submitted nothing let alone met their burden in demonstrating that the game makers did not "knowingly use these images only for the purposes of advertising or trade", the First Department erred in holding as a matter of law that the depictions do not fall under the statutory definition of "advertising" or "trade".

C. The First Department Erred in Holding that the Player's Ability to Choose How to Proceed in the Game Is Relevant in Determining Whether GTAV is Fiction and Satire.

The First Department's reliance on the player's ability to choose how to proceed in the game as a factor of whether the game fits within the First Department's work of "fiction and satire" exception to the statute is error as a matter of law because what the consumer does with the game when it is taken home is irrelevant as to whether the "portrait, picture or voice" is improper "advertising" or "trade" in violation of the statute. In other words, any form of media such as a book or digital video in any format can be changed at home by the consumer. For example, a consumer can take a book home, draw or color on the cover, take pages out and add new ones in changing the story, and if the book is in a digital format Adobe Pro can edit text and pictures can be "Photo Shopped" to

something else. There is no end to what a consumer can do with any media in their homes including "to choose how to proceed in the game" (R 7a) and it is simply irrelevant to determine whether a defendant has violated the New York statute as improper "advertising" or "trade". The courts that have considered this issue in terms of video games agree that the video game in its original form as purchased should be controlling because when a consumer makes major changes to an item to a point where it no longer is a "recognizable likeness" of plaintiff, plaintiff's likeness is not transformed into something else, it simply ceases to be no longer qualifying as a use of plaintiff's identity as it relates to how the defendant uses plaintiff's identity in producing and marketing its video game. Hart v. Electronic Arts, 717 F.3d 141, 168-169 (3rd Cir. 2013).

In the case at bar, the First Department's reliance on the player's ability to choose how to proceed in the game as a factor of whether the game fits within the First Department's work of "fiction and satire" exception to the statute is error as a matter of law because what the consumer does with the game when it is taken home is irrelevant as to whether defendant uses the "portrait, picture or voice" for improper "advertising" or "trade" in violation of the statute. Both "Stop and Frisk" and "Beach Weather" are still images which cannot be manipulated by the game player and they have nothing to do with playing the video game as they appear only as a still image transition screen while the game components are loading on

the computer. "Beach Weather" (R 25-26, 38-39) appears on game disc 1 (R 38), billboards (R 54-58), the disc cover jacket (R 249), and on a still transition screen (R 65, 73, 99). "Stop and Frisk" (R 23-24, 34-37) appears on game disc 2 (R 34), the back cover of the Game Guide (R 250), on posters sold on GTAV's website (R 248), and on a still transition screen (R 65, 73, 99). The First Department using the player's ability to manipulate these two images is plain error in determining "fiction and satire" as a matter of law because the player does not have an "ability to choose how to proceed in the game" (R 7a) with "Stop and Frisk" and "Beach Weather" because these are both still images and should be considered separately from the avatar "Lacey Jonas". In other words, "Beach Weather" and "Stop and Frisk" are an "advertisement in disguise having no real relationship" to playing the game because they have nothing to do with playing the game. As it is alleged that both of these still images have in fact been recognized as Ms. Lohan and that GTAV knowingly used them in violation of the statute, GTAV's pre-Answer motion to dismiss the Amended Complaint regarding these two still images must be denied as in Porco v. Lifetime Entertainment, 147 A.D.3d 1253, 47 N.Y.S.3d 768 (3rd Dept. 2017) because Ms. Lohan must be given the benefit of every reasonable inference.

Regarding the "Lacey Jonas" avatar which can be manipulated by the video game player and is part of playing the video game, whether the player can tell the

cab driver to make a left or a right or to go down a different street does nothing to change the Binns/Spahn "invented biography to trade on plaintiff's persona" to force fit it into the First Department's interpretation of the "fiction and satire" exception. Messenger v. Gruner, 94 N.Y.2d 436, 446, 706 N.Y.S.2d 52, 58 (2000) citing Binns v. Vitagraph Co., 210 N.Y. 51 (1913) and Spahn v. Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966) *vacated* 387 U.S. 239, 87 S. Ct. 1706 (1967) *adhered to on remand and rearg* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). It is irrelevant as to what the consumer does with GTAV in their home in determining whether defendants' use of the images in producing and marketing the product violates the statute as improper "advertising" or "trade". Moreover, the First Department did not even consider the avatar's voice which further demonstrates error as the statute was amended in 1995 to include "voice" and "voice" is probative on the other claims. Maxwell v. N.W. Ayer, 159 Misc. 2d 454, 457, 605 N.Y.S.2d 174, 176 (Sup. NY 1993), Tin Pan Apple v. Miller Brewing Co., 737 F. Supp. 826, 838 (SDNY 1990). Finally, if there is no permitted use as argued *supra*, the advertising using the images cannot be incidental or ancillary to a permitted as the First Department erred in holding (R 7a).

It violates the statute to use Madonna's portrait on the cover of the Notre Dame book, it violates the statute to use a Bill Gates' portrait on the cover of a novel titled "White Collar Theft Online", and it violates the statute to use Ms.

Lohan's digital portrait and voice in the two still images and in the avatar, respectively. As it is reasonably alleged that this is nothing more than an "advertisement in disguise" "attempting to trade on Ms. Lohan's persona" under Messenger and giving Ms. Lohan the benefit of every reasonable inference as in Porco, GTAV's pre-Answer motion to dismiss the Amended Complaint is meritless.