

To Be Argued By:
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Court of Appeals
STATE OF NEW YORK

KAREN GRAVANO,

Plaintiff-Appellant,

—against—

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

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to NY CPLR §§ 5602(a) and 5611 because the underlying action originated in the Supreme Court of the State of New York, New York County, and the Appellate Decision, which reversed an order denying dismissal of the underlying amended complaint in its entirety, is an order which finally determines the action and which is not appealable as of right and this Court has granted leave to appeal. See CIV. PRAC. L. & R. 5602(a)(1)(i), 5611.

QUESTIONS PRESENTED

Whether the trial Court properly found that the Plaintiff's cause of action met the liberal pleading standard sufficient to overcome a motion to dismiss for failing to state a claim under CPLR 3211 of which was reversed by the Appellate Division?

The Appellate Division ruled in the negative, and Plaintiff contends that this ruling was erroneous.

Whether the First Amendment bars all right of privacy claims involving video games under New York's Civil Rights Law Sections 50 and 51?

The Appellate Division ruled in the positive, and Plaintiff contends that this ruling was erroneous.

SUMMARY OF ARGUMENT

The Appellate Division held in this case that a person asserting a right to privacy violation under Civil Rights Law § 51 is not entitled to recovery despite pleading that their portrait was used in a video game and even if it was used it is protected by the First Amendment. The Court cited a case in which the State of California passed a content based governmental restriction on expression law regarding the violent nature of video games. This is an astonishing holding, without precedent, because it is a case of first impression with respect to video games and the right to privacy which completely ignores the current advancement of law in the third seventh and ninth circuits. The Supreme Court denied cert. in the ninth circuit case which leaves the decision in effect. This case will have a chilling affect that will impact the right to privacy for every entertainer and athlete if not reversed.

Gravano commenced this action in the Supreme Court, New York County, by the filing of a Verified Complaint on February 24, 2014 and on February 25, 2014 served the Verified Complaint asserting claims that her right to privacy was violated under the New York Civil Rights Law § 51. Gravano filed an Amended Verified Complaint of March 28, 2014 and served the Amended Verified Complaint on March 28, 2014. On March 11, 2016, the Supreme Court denied Defendant's motion to dismiss the complaint

pursuant to NY CPLR § 3211.

On March 15, 2016 Gravano filed a Notice of Entry. On March 16, 2016, Defendant filed a timely notice of appeal from the Denial of Dismissal Order to the Supreme Court of the State of New York, Appellate Division, First Judicial Department. After briefing and oral argument, the First Department issued the Appellate Decision on September 1, 2016. Gravano was electronically served with Notice of Entry of the Appellate Decision on September 1, 2016. Accordingly, Gravano's timely filed a motion to this Court for leave which was granted. The Defendants' motion to dismiss Ms. Gravano's Verified Amended Complaint was properly denied by the motion Court and improperly granted by the appellate court.

STATEMENT OF FACTS

Gravano is a reality television personality that is a known international celebrity. She relies on her celebrity as a source of income. Grand Theft Auto V ("GTA V") is a video game that is premised on violence and criminal activity. The video game rewards the players with "money and points" for killing people and committing an assortment of crimes. The Defendants used Ms. Gravano's portrait in violation of Section 51, which the lower court found that there were fact questions requiring trial.

Defendants created, marketed, sold and profited in excess of \$1 billion in sales, on GTA V, a video game that includes the unlawful use of Ms. Gravano's portrait. The Defendant set out and succeeded in using her portrait, voice in conjunction with her life story, and recognized television and book quotations in the video game, without obtaining her consent, entirely for their pecuniary benefit. In an effort to use Gravano's portrait without her permission and the fact that certain parts of her life are a matter of public record, they created a character identical to Ms. Gravano. In the GTA V video games that are the subject to this action, the Defendants could have varied details of the "Antonia Bottino" characters life or given her different physical features. Defendants chose not to. Instead, they consciously chose to use the portrait, voice and the actual words of Ms. Gravano in its video game to which they have used the First Amendment defense as a guise for their illegal conduct.

Ms. Gravano seeks to be compensated for the illegal use of her portrait, voice and words. She seeks punitive damages from Defendants for their failure to obtain her permission to use her portrait, voice and likeness in GTA V. Ms. Gravano's Verified Amended Complaint is governed by New York law and properly stated a cause of action as the motion court held.

Gravano's Amended Verified Complaint and her accompanying Affidavit in her Opposition to Defendant's motion to dismiss specifically assert a proper claim under the New York Civil Rights Law § 51. Gravano Aff.¹. Her Affidavit states specific facts, discussed in detail below, that exemplify how Defendants used her portrait, voice and likeness in GTA V. Thomas Farinella, by accompanying Affirmation, supports that there is a good faith, reasonable basis in the law for the claims under N.Y. Civ. Rights Law §§ 50 and 51 due to the misappropriation of Ms. Gravano's portrait, picture and voice.

Attached to Ms. Gravano's Affidavit is a picture of her and the character Defendants created using her portrait, picture, voice and likeness. Gravano Aff.² In October, 2013, shortly after the release of GTA V, Ms. Gravano began receiving "tweets" on her Twitter account from members of the public who believed the character in GTA V was her. *Id.* In addition to random members of the public, her friends and family thought the character was her. *Id.* ¶ 5.

¹ "Gravano Aff." refers to The Affidavit of Karen Gravano, Plaintiff, in Opposition to Motion, sworn to April 29, 2014 and Exhibits attached thereto.

² It should be noted that nothing the Defendants submitted refutes that Ms. Gravano was the basis or that the Anotonio Bottino character wasn't based on her portrait and likeness.

Ms. Gravano has become identified in the public by using the phrase “in the life.” *Id.* ¶ 13. In her book, a New York Times “Best Seller,” she quotes “in the life” various times throughout, excerpts of which have been submitted to this Court. Gravano Aff. ¶ 13. Specific references are made to statements in Ms. Gravano’s book throughout the GTA V video game. *Id.* ¶¶ 13, 17, 20. Furthermore, she was featured in an article with the phrase “the life” as the headline. *Id.* ¶ 14.

GTA V was released to the public as a video game for PlayStation and Xbox 360 consoles in September 2013. This game is set in the U.S. state wherein a portion of the game entitled “Burial” use Gravano’s portrait to represent a character they named “Antonia Bottino.” The purpose of the mission is free Ms. Gravano from being buried alive. Ms. Gravano and the public believe this character is an exact portrait of Karen Gravano and it is a question that can only be answered by the trier of fact. The Defendants concede that the random event is approximately seven minutes long. Br. at 6. Accordingly, that amounts to approximately twenty-one minutes of game time. Regardless, it does not matter if the character appeared for one second it is still a violation of the New York Civil Rights Law § 51.

ARGUMENT

I. The Appellate Division Erred because the amended complaint met the liberal pleading standard sufficient to overcome a motion to dismiss for failing to state a claim under the CPLR 3211

A. Standard of Review

The Plaintiff's pleadings "shall be liberally constructed [and] defects shall be ignored if a substantial right of a party is not prejudiced." *See*, CPLR 3026. If from the four corners of the complaint factual allegation are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 (2002).

In a recent decision in the Third Department where the Court was dealing with similar issues as the issues presented in this case, *Porco v. Lifetime Entertainment Servs., LLC*, 147 AD3d 1253 [3rd Dept 2017], the Court reaffirmed the long held standard of review for a motion to dismiss, stating,

"On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory."

The Appellate Division failed to follow this standard. This is evident because the Appellate Division did not address the Motion Court's analysis

of the sufficiency of the pleading which led the Motion Court to conclude, “that the plaintiff has alleged causes of action alleging a violation of the right to privacy pursuant to the New York City Civil Rights Law section 50 and 51.

Defendants moved to dismiss the Amended Complaint on the basis that (1) “a defense is founded upon documentary evidence” under CPLR 3211(a)(1) and (2) that “the pleading fails to state a cause of action,” under Rule 3211(a)(7). Br. at 9. The former is frivolous, as Defendants have not submitted “documentary evidence” that resolves all factual issues as a matter of law and completely disposes of plaintiff’s claim. Moreover, Plaintiff’s claims are valid and supported by non-conclusory allegations in the Amended Complaint, which must be accepted as true on this motion to dismiss.

B. The Appellate Division Erred in reversing the Motion Courts decision because the Defendants have not submitted documentary evidence that resolves all factual issues as a matter of law

Defendants’ submissions do not justify dismissal because the materials submitted do not constitute “documentary evidence” within the meaning of CPLR 3211(a)(1) and, in any event, do not conclusively establish any defense to Plaintiffs’ claims as a matter of law. “A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the ‘documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” *Fontanetta v. Doe 1*, 73 A.D.3d 78, 83-84 (2d Dep’t 2010)(citations

omitted); *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007). “[I]f the court does not find [the movants’] submissions ‘documentary,’ it will have to deny the motion.” *Fontanetta*, 73 A.D.3d at 84 (quoting SEIGEL PRACTICE AND COMMENTARIES, CPLR 3211:10, at 22). Judicial records, mortgages, deeds, contracts, and other papers “the contents of which are ‘essentially undeniable,’” may qualify as documentary evidence. *Id.* at 84-85 (citation omitted). Types of written materials that do not qualify as documentary evidence include “affidavits,” “deposition and trial testimony,” “letters, summaries and opinions” and “e-mails.” *Id.* at 85-87 (collecting cases).

The materials Defendants submit in support of their motion do not begin to approach the standard for documentary evidence that could support dismissal under Rule 3211(a)(1).³ They seek to rely primarily on the Affirmation of Stephanie L. Gal, an associate at Defendants law firm, the Affidavit of Jeff Rosa, Vice President of Quality Assurance for Rockstar Games, Inc., and the Exhibits attached thereto. Gal Aff.; Rosa Aff. An affidavit and an affirmation of interested parties cannot sustain dismissal under the Rule because “affidavits [and affirmations] submitted by a defendant do not constitute documentary evidence upon which a proponent of

³ Defendants’ materials consist almost entirely of material that do not constitute documentary evidence for purposes of Rule 3211(a)(1): affidavits and affirmations (Gale Aff.; Rosa Aff.; Exhibits).

dismissal can rely.” *Crepin v. Fogarty*, 59 A.D.3d 837, 837 (3d Dep’t 2009)(citations omitted). See also *Fontanetta*, 73 A.D.3d at 86 (same). Attached to the Gale Affirmation are frivolous exhibits such as magazine articles that acclaim the GTA V video game and dozens of pre-suit emails and letters, which are not relevant to the issues of this case. Similarly, the Rosa Affidavit includes the GTA V game, DVD, transcript and book. It states nothing other than the fact that “GTA V does not include any character named Karen Gravano.” Rosa Aff. ¶ 11. The Defendants “documentary evidence,” “i.e., the actual content of GTA V” can not resolve any factual issues, as a matter of law, to conclusively dismiss Ms. Gravano’s claim of the Defendants wrongful misappropriation of her portrait, voice and likeness. Defendants’ 3211(a)(1) motion must, therefore, be denied.⁴

There have been two recent cases that discuss the central issues in this case.⁵ The first is *Nolan v. Getty Images (US)*, No. 158540/13, 2014 WL 912254 (NY Cty Sup. Ct. March 6, 2014). In *Nolan v. Getty Images*, the

⁴ Even if the motion to dismiss was converted to a motion for summary judgment, due to the submission of materials extrinsic to the Complaint, there are genuine issues of material fact that would defeat Defendants’ motion on [at least the first cause of action]. Here, the parties have not been given notice that conversion will occur, as required by CPLR Rule 3211(c), and the Court should decline any invitation to convert since the case is “in its earliest stages, and no discovery has been had.” *SPI Comms. v. WTZA-TV Assocs. Ltd. P’ship*, 229 A.D.2d 644, 645 (3rd Dep’t 1996).

⁵ The second case is *Porco v Lifetime Entertainment Servs., LLC*, 147 AD3d 1253 [3rd Dept 2017] discussed below.

Supreme Court denied Defendant's motion to dismiss, which alleged the same argument relied on by the Defendant in this case, stating:

"In support of its motion, Getty makes the following arguments. The complaint fails to state a cause of action because displaying and licensing a photograph are, as a matter of law, not advertising or trade uses under Civil Rights Law §§ 50 and 51, and any other interpretation contravenes the First Amendment... The complaint pleads a single cause of action for violating Civil Rights Law §§ 50 and 51 by using Nolan's image for trade or advertising purposes absent any written consent." *Id.* at *2.

The Court further stated,

"Getty claims that the portion of Civil Right Law § 51 in bold above immunizes it from liability. However, by the terms of the statute, for Getty's sale of the photograph to be lawful, the "use" of the photograph by the end-user must be "lawful under this article." *Id.* at *3.

The most compelling portion of the court's decision came when the court explained that the New York Constitution does not offer heightened protection for commercial speech and the statute does not define the meaning of trade and advertising purposes explaining,

"Also 'contrary to plaintiff's contention, the New York State Constitution does not afford heightened free speech protections to commercial speech.' Written consent is explicitly required by the statute. The statute does not furnish any definition of trade or advertising purposes. However, it has been noted that the statute serves 'to protect the sentiments, thoughts and feelings of individuals,' the Court sustained a Civil Rights Law § 51 complaint alleging that plaintiffs picture and likeness were made available on the Internet. Displaying plaintiff's image on the defendant's website, available for use on a world-wide basis, necessarily was concurrently available within New York State. Therefore, for the purposes of a motion to

dismiss, plaintiff's assertion of a website's accessibility sufficiently meets the required statutory element of use within New York State." (internal citations omitted)(emphasis added). *Id.* at *4-5.

The Court further opined in it's decision,

"In this case; whether Nolan is a model, whether in fact a written release was signed by Nolan, whether Civil Rights Law §§ 50 and 51 required Getty to investigate the existence of a release signed by Nolan, whether the First Amendment protects Getty's exploitation of Nolan's image without Nolan's written permission, whether Getty's conduct qualifies as use of the image for either advertising or trade purposes, and whether Getty is able by agreement to shift to the end-user and the photographer the burden of obtaining Nolan's written consent, all must await further development of the facts, either by way of summary judgment or trial....Accepting the complaint's allegations as true and according plaintiff the benefit of every favorable inference, plaintiff's complaint sufficiently states a cause of action. Accordingly, it is ORDERED that the motion to dismiss is denied..." (internal citations omitted). *Id.* at *5.

While there are distinguishing facts in *Nolan* than the case at bar the underlining applicable law relied on in *Nolan* is indistinguishable from this case. The Court held that the motion to dismiss was denied because the issues raised in Getty's motion to dismiss including the First Amendment argument and "whether Getty's conduct qualifies as use of the image for either advertising or trade purposes...must await further development of the facts, either by way of summary judgment or trial." *Id.*

In the instant case the motion court found, based on the Amended Complaint and opposition to Defendant-Appellants motion to dismiss, the

“images in question” [this finding satisfies the first prong of the statute]⁶

were factually disputed and it is up to the trier of fact to make a determination, saying:

“The “documents” relied upon by movants [Defendant-Appellant], to assert that the images in question are not those of the plaintiff, is vehemently and factually contested by the plaintiff. These factual disputes require a determination by the trier of 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.... 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 the plaintiff...”⁷

As in the Nolan decision the motion court determined that the Amended Complaint stated a cause of action, and was further supported by the opposition to defendant-appellants motion to dismiss. Therefore, warranting the denial of defendants motion to dismiss. The appellate court failed to consider the Nolan case despite the fact that the case is an undisturbed decision in the First Department. The appellate court should have sent this case back to the trial court in accordance with Nolan. The appellate court failed to consider the lower court’s clear finding that, the “New York

⁶ The statue has three prongs which have been satisfied to the extent the plaintiff has stated a cause of action. The three prongs are: (i) use of a persons name, portrait, picture, voice or in this case image (ii) within New York, (iii) for the purpose of advertising or trade, the third prong is satisfied.

⁷ Excerpt from the Decision and Order of the Supreme Court, Hon. Joan M. Kenney, dated March 14, 2016.

Constitution does not offer heightened protection for commercial speech and the statute does not define the meaning of trade and advertising purposes explaining” and thus their decision to should be reversed. *Id.*

C. Under New York’s Civil Rights Law Section 51, a creative Work whose primary purpose is commercial is subject to a right of Publicity claim

The appellate court decided that the First Amendment requires that Defendants’ speech is immune because it is a “creative work,” despite its overtly commercial nature and use of Ms. Gravano's portrait, voice, and likeness in the sale of video games. Consideration of the First Amendment compels no direct result in this case. The United States Supreme Court held that video games are protected when the state or federal government enacts a new law imposing restrictions and labeling requirements on the sale or rental of “violent video games to minors.” *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2732-33 (2011).

The proper context of the case must be flushed out. In *Brown*, the State of California passed a content-based governmental restriction on video games because the State “claimed that “interactive” video games present special problems, in that the player participates in the violent action on screen and determines its outcome attempted to limit expression of speech regarding

video games.” *Id.* The Supreme Court rejected the state action as being over-and-under-inclusive and that the statute wasn’t narrowly drawn.

The Supreme Court did not intend to give a free pass to allow for a person’s portrait, picture or voice to be used without their consent. More important, such rights “are not absolute and states may recognize the right of publicity to a degree consistent with the First Amendment.” *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1271 (9th Cir. 2013) (holding that the defendants video game had no First Amendment defense against the right of publicity claims (emphasis added))(citing *Zacchini v. Scripps-Howard Broad.Co.*, 433 U.S. 562, 574-575 (1977) (parallel citations omitted)). New York adheres to the U.S. Supreme Court’s assertion in *Zacchini v. Scripps-Howard* that state regulation of commercial misappropriation is reasonable; it “protects his proprietary interest in the profitability of his public reputation or persona.” *Ali v. Playgirl, Inc.*, 477 F.Supp. 723, 728 (S.D.N.Y. 1987). Consequently, First Amendment protection is not absolute.

Rather than giving creative works a “presumptive constitutional protection, there must be a factual determination of whether the items served a predominantly expressive purpose or were mere commercial products.” *Mastro v. City of New York*, 435 F.3d 78, 93 (2006). Thus, to determine

whether a defendant's creative expression is entitled to First Amendment protection the New York Courts have applied a predominance test that resembles California's public interest exemption in so far as it considers the public's interest in and benefit from the presentation of the information.

New York Courts ask whether the portrayal in question "predominantly serves an expressive purpose." *Id.* at 91. A video game does not enjoy complete immunity from actions for right of publicity because it contains artistic elements. All games contain artistic elements. It goes without saying that there is art in the graphics, design, functions, and ability of a player to engage in the virtual world. The presence of some artistic functionality is not the sine qua non of complete protection under the First Amendment. Otherwise, there would be no place for the right of publicity to exist.

Here, the primary purpose of the inclusion of Plaintiff is to aid in the sale of video games. Defendants made their commercial purpose clear in the boastful manner that GTA V "reach[ed] \$1 billion in sales in just three days." Br. at 1-2; Gal Aff. ¶ 13. Defendants represent that the essence of GTA V is to place players in a virtual world as close to reality as possible. Without stepping into the shoes of a player and engaging in significant aspects of the real world that form the illusion of reality -- i.e. nationally/internationally known Karen Gravano's persona, the game has no attraction. The game is not

meant to be an artistic expression but rather an imitation of the world. The use of Ms. Gravano's portrait and likeness furthers Defendants creation of a virtual reality intended to "model Los Angeles, California." Br. at 4-5; Rosa Aff. ¶ 6; Exhibit 1. Defendants do not allege otherwise. They claim it is a "fictional" city. *Id.* Yet Defendants affirm how the game embodies popular culture, it is "today's great expectations." App. at 11⁸. Therefore, it is perfectly clear that the use of Ms. Gravano's detailed image, her persona, her likeness, even her facial structure, is what provides the player with the reason to play the game, and concomitantly fuels the profits to Defendants and the appellate court ignored these considerations.⁹ This story allows the player to save the real daughter of a real-world mob boss from being buried alive. Thus, in this respect, it is incorporation of plaintiff's person, as a reference to the real world that provides the attraction to buy the game from Take-Two.

The defendant's argued and the appellate court agreed that, "creative works are categorically not 'advertising' or 'trade' purposes within the meaning of Section 51." App. at 10. They reference cases then go on to state that "there can be no doubt that GTA V is a creative work, just like the books,

⁸ "App." Refers to the Defendant-Appellants Brief submitted on appeal March 21, 2016.

⁹ This is simply not a question of the Plaintiff claiming, "Hey that's me!" The Plaintiff provided Exhibits from Twitter and the Affidavit's of Edwin Sullivan and Isys Shah, independent third parties who believed the character Anotonio Bottino to be the Plaintiff.

plays, movies and photographs that decades of precedent have protected.” *Id.* However, this is not a book, play, movie or photograph. It is a video game that is primarily a commercial product and not afforded absolute protection as a creative work.

The relevant part of the statute provides:

“for advertising or trade purposes”

N.Y. CPLR § 51. Contrary to the appellate court’s decision, the plain language of the statute states nothing about “works of fiction or satire,” and video games are not afforded absolute protection under the First Amendment. New York uses a predominance purpose test to determine whether creative works fall under First Amendment protection and, as established above, it is clear that Defendants primary purpose is commercial. The public does not benefit from the information presented through this video game, if anything, it is allowing the public to do immoral things in a virtual landscape. In GTA V, the most recent installment of the video game series, players are able to engage in heinous acts such as murdering jurors, pick up a prostitute and beat or kill her after, even torture a person with a vast selection of instruments.

Defendants’ cases do not apply to the issue in this case. The cases used to support Defendants incorrect understanding of the law relate to photographs, paintings, movies and books. They illustrate exactly how Ms.

Gravano's claims are dissimilar and dismissal is not warranted. Defendants authority, in part, comes from the following:

- *Foster v. Svenson*, 12 A.D.3d 150, 156-60 (1st Dep't 2015) (art work is Protected by the First Amendment affirming dismissal of Section 51 claim based on Photographs) "Indeed, plaintiffs concede on appeal that defendant, a renowned fine arts photographer, assembled the photographs into an exhibit that was shown in a public forum, an art gallery. 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" *Id.* at 160.
- *Costanza v. Seinfeld*, 29 A.D.2d 255, 256 (1st Dep't 2001) (the plaintiff brought an action under section 51 solely for the similarities in his last name, in a television show over a decade old)("There, not only was there one similarity between the character and the plaintiff, the action was time-barred over a decade.") *Id.* at 255.¹⁰
- *Krupnik v. NBC Universal, Inc.*, No. 103249/10, 2010 WL 901365 , at 1 (Sup. Ct., N.Y. Cnty. Jun. 29, 2010)(stating that "Plaintiff was paid in connection with the photograph, and executed a release that not only permits the use of her image for any and all purposes, including commercial uses, but expressly waives any claims for misappropriation of the right of privacy or publicity, and for defamation.")

Additionally, *University of Notre Dame Du Lac* (quoted in *Hampton*), and *Altbach, supra*, referenced by Defendants to support their contention that

¹⁰ It should be noted that the Plaintiff in *Costanza* asserted, "the fictional character George Costanza in the television program "Seinfeld" is based upon him. In the show, George Costanza is a long-time friend of the lead character, Jerry Seinfeld. He is constantly having problems with poor employment situations, disastrous romantic relationships, conflict with his parents and general self-absorption." It should be pointed out that these similarities can probably be identified with any number of people in the general public at large. These are not specific and unique characteristics and are quite distinguishable as those proven in this case.

artistic works are not “advertising” or “trade” within the meaning of Section 51, both set forth the “threshold [inquiry] shaped by a consistent line of cases.” *University of Notre Dame Du Lac v. Twentieth Century–Fox Film Corp.*, 22 A.D.2d 452, 456 (1st Dep’t 1965). This inquiry is whether there is any basis to infer the plaintiff endorsed or is associated with the subject of the case. The cases explain:

- *University of Notre Dame Du Lac v. Twentieth Century–Fox Film Corp.*, 22 A.D.2d 452, 456-7 (Holding that the film does not use plaintiff’s name, portrait or picture which is the statutory test of identification laid out in *Toscani*) (“The only critique we are permitted to make is a threshold one shaped by a consistent line of cases. It is this: Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction or that the real Notre Dame is in some way associated with its fabrication or presentation? In our judgment there is none whatever. They know they are not seeing or reading about real Notre Dame happenings or actual Notre Dame characters; and there is nothing the text or film from which they could reasonably infer ‘connection or benefit to the institution’”)(emphasis added).
- *Altbach v. Kulon*, 302 A.D.2d 655, 58,55 (3d Dep’t 2003) (“Since defendant’s flyers identified plaintiff as the subject of the caricature and cannot reasonably be read to assert that plaintiff endorsed or recommended either the painting or defendant’s gallery, we find that Supreme Court’s reasoning concerning the flyers’ use of the painting leads inexorably to the conclusion that their use of his name and photograph also is exempt from the proscriptions of Civil Rights Law §§ 50 and 51”)(“flyers identified plaintiff as subject of caricature and cannot reasonably be read to assert that plaintiff endorsed or recommended painting or defendant’s gallery.”)

These cases turned out the way they did because no reasonable person could

find the plaintiff's endorsing the end product. The result is not the case with Ms. Gravano. After GTA V came out with the character based on her the public all believed Ms. Gravano was associated with GTA V. Her claims under Section 51 are clearly warranted and Defendants violated her right to privacy creating the inference she is endorsing and associated with their commercial product. Accordingly, the appellate court erred in deciding that the that Gravano's claim should be dismissed because it is not "trade" or "advertising" under Section 51 as it is flawed and their decision should be reversed.

II. The First Amendment does not bar all right of privacy claims involving video games under New York's Civil Rights Law Section 51

This is a case of first impression regarding the New York Civil Rights Law and video games. The appellate division ruled that Ms. Gravano's right of publicity claims in a video game must fail because of constitutional free speech concerns. Their support comes from cases that fail to acknowledge the issue at hand—whether GTA V, a video game, is fully protected under the First Amendment. As discussed above their support comes from irrelevant cases. These cases support Ms. Gravano's argument that video games are not fully protected under the First Amendment which the appellate court ignored.

In Defendant's supporting case, *Server*, supra, video games are specifically addressed as being unprotected:

- *Foster v. Svenson*, 12 A.D.3d 150, 150 ("To give absolute protection to all expressive works would be to eliminate the statutory right of privacy.")
- *Sarver v. Chartier*, Nos. 11-569 6, 12-55429, 2016 WL 625362 (9th Cir. Feb. 1, 2016) ("We, however, have interpreted *Zacchini* to uphold the right of publicity in a variety of contexts where the defendant appropriates the economic value that the plaintiff has built in an identity or performance. For example, in *Hilton v. Hallmark Cards*, we held that Paris Hilton could pursue a right of publicity claim for Hallmark's use of her image and catch phrase ("that's hot") from her television show in one of its greeting card. In doing so, we suggested that 'merely merchandising a celebrity's image without that person's consent, the prevention of which is the core of the right of publicity, is not protected by the First Amendment'. Similarly, in *Keller v. Electronic Arts, Inc.*, we upheld an action by a college football player who sought to prevent the use of his likeness in EA's video game. see also Davis v. Elec. Arts, Inc., (upholding right of publicity action challenging EA's use of professional football player likenesses in a video game). We noted that the video game "literally recreates [the football player] in the very setting in which he has achieved renown," Keller, and interferes with his ability "to capitalize on his athletic success," which took "talent and years of hard work on the football field" to build.') (internal citations omitted) (emphasis added).

A. The First Amendment does not afford video games an absolute protection against right of Publicity claims

Defendants cannot use the First Amendment to shield their misappropriation of Ms. Gravano's portrait and likeness. Just like the player in *Keller*, Ms. Gravano has worked on her image as a public figure and the

Defendants have interfered with her ability to capitalize on this success which the appellate court has failed to consider.

The main argument Defendants made and the appellate court found is rooted in the contention that the video game Grand Theft Auto V is a creative work protected by the First Amendment. This point is flawed because the New York Supreme Court addressed this very issue in *Nolan v. Getty Images*.

The defense that GTA V is a “creative work” is nothing but a veil to shield Defendants illegal, egregious conduct. The purpose of GTA V is not to be form of creative expression but a profitable commercial video game. This should not invoke the Constitutional protections of free speech embodied in the First Amendment. Defendants used Ms. Gravano’s portrait and likeness without her consent.

B. The Appellate Division’s order that video games are absolutely Exempt from the right of Publicity under the First Amendment disregards recent New York precedent and persuasive decisions in other states

New York courts have never explicitly recognized a non-statutory right of publicity. *Wojtowicz v. Delacorte Press*, 58 A.D.2d 45 (1st Dep’t 1977). However, the United States Court of Appeals for the Second Circuit, in construing New York law, found that the so-called right of publicity did, in fact, exist independent of the statutory right of privacy. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, 868 (1953). “The right of publicity

guarantees celebrities the exclusive right to control and profit from the commercial marketing of their own valuable likeness.” *Id.* at 868.

The United States Supreme Court has stated that the State’s interest in the protection of the right of publicity “is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 563 (1977) (parallel citations omitted) (noting that because plaintiff’s identity was clearly recognizable and the conclusion was made by the public defendant created a false impression that the plaintiff was associated with the defendant.).

The Court of Appeals has said, “Any civil right not unlawful in itself nor against public policy, that has acquired pecuniary value, becomes a property right that is entitled to protection as such. The courts have frequently exercised this right. They have never refused to do so when the facts show that the failure to exercise equitable jurisdiction would permit unfair competition in trade or in any manner pertaining to a property right.” *Fisher v. Star Co., Inc.*, 231 N.Y. 414, 428 (1921) (parallel citations omitted) (emphasis added).

1. Ninth Circuit Law

As discussed above, of great significance, the Ninth Circuit has made it clear that video games using an individual's likeness are not afforded First Amendment protection, contrary to Defendants repetitive assertions. The most recent decision is *Davis v. Electronic Arts, Inc.*, 755 F.3d 1172 (9th Cir. 2015). In *Davis*, the panel affirmed the district court's denial of Electronic Arts Inc.'s motion to strike a complaint, brought by former professional football players alleging unauthorized use of their likenesses in the video game series Madden NFL, as a strategic lawsuit against public participation (SLAPP) under California's anti-SLAPP statute. The panel rejected Electronic Arts' argument that its use of former players' likenesses was protected under the First Amendment as "incidental use." In addition, the panel held that Electronic Arts' use of the former players' likenesses was not incidental because it was central to Electronic Arts' main commercial purpose: to create a realistic virtual simulation of football games involving current and former National Football League teams.

Further, the Ninth Circuit held that a video game developers use of the likeness of college athletes in its video games is not protected by the First Amendment and therefore the players right-of-publicity claims against developer were not barred. *In re NCAA Student-Athlete Name & Likeness*

Licensing Litigation, 724 F.3d 1268, 1271 (9th Cir. 2013). The Court used the “transformative use test” and states that there “at least five factors to consider in determining whether a work is sufficiently transformative to obtain First Amendment protection.” *Id.* at 1274 (parallel citations omitted). These include protection “so long as the expression is ‘something other than the likeness of the celebrity,’” “‘the quality of the artistic contribution’, a court should conduct an inquiry ‘whether the literal and imitative or the creative elements predominate the work,’” similar to New York’s predominant purpose analysis, “whether ‘the marketability and economic value of the challenged work derive primarily of the fame of the celebrity depicted,’” and “‘lastly... ‘when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit her or her fame,’” “the work is not transformative.” *Id.* at 1274 (parallel citations omitted) (emphasis added).

2. Third Circuit Law

The court *In Re NCAA* noted “*Keller* [*In re NCAA Student-Athlete Name & Likeness Licensing Litigation*] is simply [*Hart*] incarnated in California” because the facts were the same and the court in *Hart* looked to the transformative use test in California *Id.* at 1278; *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir.2013) (nothing that the right-of-publicity laws are

“strikingly similar... and protect similar interests” in New Jersey and California)(holding that the transformative use test is the proper analytical framework to apply to cases such as the one at bar”). The defendants in that case argued that the *Rogers* test should be applied, and the court disagreed stating “we considered a claim by a strip club owner that video game Rock Star incorporated its club logo into the games virtual depiction of East Los Angeles... we held that Rock Star’s use of the logo was protected by the First Amendment... we extended the Rogers test slightly... [however] we disagree that the Rogers test should be imported wholesale to right-of-publicity claims.” *Id.* at 1280; *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (emphasis added). This is the exact case Defendants used to support their original argument and as the Supreme Court correctly asserts it is not the right place to be applied. The court explained that “the right of publicity protects the celebrity not the consumer.” *Id.* at 1281. The claim is that the defendants “appropriated, without permission and without compensation” and rejected the *Rogers* test “in favor of a flexible case-by-case approach that takes into account the celebrities interest in retaining his or her publicity and the public’s interest in free expression. Therefore, we decline [defendants] invitation to extend the *Rogers* test to right-of-publicity claims.” *Id.* at 1281-1282.

3. Seventh Circuit Law

In, *Jordan v. Jewel Food Stores, Inc.*, 83 F.Supp.3d 761, (N.D.Ill. Mar. 12, 2015), the Court highlighted the Seventh Circuit's opinion and addressed whether Jewel's ad qualified as commercial-speech under the First Amendment, as well as the Seventh Circuit's explicit denial to address whether "the Supreme Court's commercial-speech doctrine should be used to define the 'commercial element' of Jordan's IRPA... and other claims. In fact, the court expressed doubt that the First Amendment commercial speech doctrine governed the scope of the 'commercial' element of those claims." *Jordan* at 7 (emphasis added). The Court went on to note that the parties had not briefed the meaning of the "commercial" element of Jordan's claims "to the extent to which the scope [of the state laws] is coextensive with the Supreme Court's constitutional commercial speech doctrine." *Id.*

The *Jordan* decision stresses very important rules applicable to this case. It noted how Illinois courts also look to the interpretation given to analogous statutes enacted by other states, as the Plaintiff has asked the court to do in this case. Moreover, it explained that the "central legal question of 'the extent to which the scope of the... state laws... is coextensive with the Supreme Court's constitutional commercial-speech doctrine.'" *Jordan* at 9.

Jordan also filed a similar suit against another grocery chain, Dominick's, for the same conduct. The *Jordan* court footnotes that the Dominick case "bears a strong resemblance both in substance and brevity to the initial brief in this case..." *Id.* at FN1. In that case, on August 21, 2015, the federal jury decided that Dominick's will have to pay Michael Jordan \$8.9 million for the unauthorized use of his image in a 2009 Sports Illustrated ad.

In the case at bar, the Plaintiff claims that the Defendant's "creative work" defense is not applicable under New York law principles or the First Amendment and respectfully asks The Court that *Jordan* is used as supplemental authority to support this claim for the reasons set forth below.

Similar to the elements applicable in *Jordan* "to prevail on a statutory right of privacy claim pursuant to the New York Civil Rights Law, a plaintiff must prove '(1) use of plaintiff's name, portrait, picture or voice; (2) for the purposes of advertising or trade; (3) without consent ; and (4) within the state of New York.'" (internal citations omitted). As the *Jordan* court explained, the commercial element of the statute should not be governed by First Amendment principles and the parties are required to provide the meaning of the element in dispute, here whether GTAV falls within the "trade" or "advertising" element. The Defendant's only support for their claim that works of art or fiction are not within the scope of the statute is citing cases

that are factually distinct from the case at bar. They go on explain that “these cases come out the way they do, not simply because of the plain language of the statute, but also because of constitutional free speech concerns.” *Id.* at 15. This is incorrect as both the *Jordan* case and the Plaintiff illustrated.

Although the Defendant’s believe their speech is immune because it is a “creative work,” despite it’s overtly commercial nature, the Plaintiff has made it clear that defense is inapplicable here. The Plaintiff explained that, although a videogame involves both fictional and artistic elements, “New York courts have determined that “rather than giving creative works a ‘presumptive constitutional protection, there must be a factual determination of whether the items served a predominantly expressive purpose or were mere commercial products.’” As further noted, the primary purpose of the game is commercial, as the Defendant’s boastfully state how the videogame made over \$1 billion in sales in just three days.

The Defendant’s have not shown “the extent to which the scope of the ... state laws... is coextensive with the Supreme Court’s commercial-speech doctrine” as required by the *Jordan* court. *Jordan* at 9. The Plaintiff has met this burden by not only providing New York case law but also a recent Supreme Court case (among various other cases), that deals directly with video games “holding that defendants video game had no first amendment

defense against the right of publicity claims.” Moreover, Plaintiff has shown how the Third, Ninth and Seventh Circuits have made recent developments in this area of the law, in favor of the Plaintiff, as recommended in *Jordan* for statutory interpretation.

This Court should consider the Third Circuit, Seventh Circuit and Ninth Circuit law as supplemental authority in this case. It effectively addresses and resolves two issues in the case at bar, namely, that GTAV is not entitled to First Amendment protection nor is it an expressive work of fiction, excused from liability under the New York Civil Rights Law §51.

Although they are not binding these recent cases in the Third, Seventh and Ninth Circuits are persuasive and should be taken into consideration due to the recent developments of the law.

The statute, which is the subject of this action, was not intended to be read narrowly. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 281 (1959)(citations omitted)(A statute of this kind is not ‘to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words.’ It is ‘not an alien intruder in the house of the common law, but a guest to be welcomed as a new and powerful aid in the accomplishment of its appointed task for accommodating the law to social needs.” (quoting *Lahiri v. Daily Mirror*, 162

Misc. 776, 779, 295 N.Y.S. 382, 385 (1937)). As the court said as early as 1937 the statute would have to “accommodate the law to social needs.” *Id* at 385. That time has come. This statute was enacted before video games, before reality television, and before the rise of the vast technology of today. Defendants have distributed the GTA V game nationally and internationally, therefore, Ms. Gravano was harmed in New York.

There is good faith basis for a change in the law since Judge Dore’s dissent in *Toscani v. Hershey*:

“The language of the statute is in the disjunctive... The Court of Appeals construing the meaning of this statute has expressly held that a picture is not necessarily a photograph ‘but includes any representation of such person.’ [(citations omitted)] This does not mean... that it may be a violation of the statute for a writer to base a novel or play on events that occurred in the life of any living person. Basing that novel or play on certain events is one thing. Reproducing or portraying in fiction or trade purposes a living person... without his consent is quite another.” (emphasis added)

Toscani v. Hersey, 271 A.D. 445, 449 (1st Dep’t 1946). Such has been the case in the landmark decisions such as *Plessy v. Ferguson*, the dissent which became the majority in *Brown v. Board of Education*. History has shown dissents become law. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education*, 347 U.S. 438 (1954). Supreme Court justice Ruth Bader Ginsberg gave a lecture on “the role of dissenting opinions” in which she stated “describing the external impact of dissenting opinions, chief justice

Hughes famously said; ‘A dissent in a court of last resort is an appeal... to the intelligence to a future day, when a future decision may possibly correct the error in to which the dissenting judge believes the court to have been betrayed.’” This new day for the right of publicity has come.

Furthermore, Justice Jesse W. Carter wrote an article about dissenting opinions in which he opened the article by writing “the right to dissent is the essence of democracy- the will to dissent is an effective safeguard against all judicial lethargy- the effect of a dissent is the essence of progress.” The time to progress the right of publicity is now. Justice Dore’s dissent is analogous to Ms. Gravano’s case. There are many reasons for a dissenting opinion. In this case, the dissent in *Toscani* provides that a good faith basis for a change in the law has been ripe since Judge Dore wrote it in 1945.

In the recent Appellate Division, Third Department, Porco v. Lifetime Entertainment Servs., LLC, 147 AD3d 1253 [3rd Dept 2017] the Court accommodated “the law to social needs” by expanding the analysis of the newsworthy exception as it was set forth in Spahn v Julian Messenger, Inc., 21 NY2d at 129, holding,

“A work may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception to the statutory right of privacy. The fact that a film revolves around a true occurrence, such as a rescue of passengers from a shipwreck, does not invoke the newsworthiness exception in the

event that the entire account remains mainly a product of the imagination.”

This expansion of the law should be applied to the fictional use of a celebrity in a video game. As in *Porco*, where the work revolves around a "true occurrence" but is still riddle with fiction it is not covered by the newsworthy exception. Further, this is a case of first impression as stated in *Porco*.

In *Porco*, the Court noted that the Court of Appeals passed on the issue of "whether extending liability in the aforementioned manner violated constitutional protections of freedom of speech and has found no such violation." *Porco* solidifies the decision in *Binns* and *Spahn*, where “the Courts concluded that the substantially fictional works at issue were nothing more than attempts to trade on the persona of Warren Spahn and John Binns.....Indeed, in his brief to this Court, Arrington cited *Binns* for the proposition that “fiction” was actionable under sections 50 and 51,” which is applicable and should be the standard in this case. *Id.*

CONCLUSION

Ms. Gravano has stated the elements of a right of privacy claim pursuant to New York Section 51. Defendants violated her right of privacy, namely, Defendants created a character with the portrait of Ms. Gravano, without her consent, in the *GTA V* video game that was distributed

internationally for profit. She has pleaded specific facts that support her claim. The video game is not meant to be an artistic expression but rather an fictional imitation of the world and the New York Constitution does not offer heightened protection for commercial speech. Defendants have not submitted any evidence or properly plead any defense to her claims to resolve all factual issues as a matter of law. Accordingly, the Order issued by the Appellate Division dismissing this case should be reversed.

Dated: April 14, 2017
New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas A. Farinella', written over a horizontal line.

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 8,471 words.

Dated: April 14, 2017
New York, New York

Respectfully submitted,

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