SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KAREN GRAVANO, Plaintiff, - against - TAKE-TWO INTERACTIVE SOFTWARE, INC. and ROCKSTAR GAMES, Defendants.	Index No. 151633/2014 Assigned to Judge Joan M. Kenney IAS Part 8 Return Date: May 6, 2014 Motion Sequence 002

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND FOR SANCTIONS

DEBEVOISE & PLIMPTON LLP
Jeremy Feigelson
Jared I. Kagan
Stephanie L. Gal
919 Third Avenue
New York, New York 10022
(212) 909-6000
jfeigelson@debevoise.com
jikagan@debevoise.com
slgal@debevoise.com

Counsel for Defendants

May 5, 2014

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Defendants Take-Two Interactive Software, Inc. and its subsidiary Rockstar Games, Inc. (together "Take-Two") submit this reply in support of their motion to dismiss the Amended Complaint and for sanctions.

ARGUMENT

I. Ms. Gravano Cannot State A Right Of Publicity Claim Under Section 51 Of The New York Civil Rights Law

A. Creative Works Of Fiction And Satire Like GTAV Are Categorically Protected Against Section 51 Claims

Ms. Gravano cannot state a cause of action because Section 51 is limited, on its face, to the use of a person's "name, portrait, picture or voice" for purposes of "trade" or "advertising." Decades of case law make crystal-clear that creative works of fiction and satire like GTAV are neither "trade" nor "advertising" within the meaning of the statute and cannot form the basis for right of publicity claims under New York law. *See* Defendants' opening brief ("Def. Br.") at 9-12. This mandates dismissal, because Ms. Gravano has failed to state a claim as a matter of law.

GTAV is a creative and expressive work, widely acclaimed as such (Def. Br. at 1-2, 10), and its full content is properly before the Court. Even a cursory review of GTAV readily confirms that it is indeed a highly creative work of fiction and social satire. New York courts routinely dismiss Section 51 claims like this one based on their review of the work in dispute. *See, e.g.*, *Sondik v. Kimmel*, No. 30176/10, 2011 WL 6381452, at *4-5 (Sup. Ct., N.Y. Cnty. Dec. 15, 2011) (dismissing Section 51 claim based on court's review of DVD of challenged television show, submitted by defendant in support of its motion). Ms. Gravano's argument that this case somehow falls outside

section 3211(a)(1) of the CPLR (Pl. Br. at 8-11) is simply incorrect.[1] It is black letter law that, in cases challenging the content of a work, the work itself is documentary evidence and thus properly considered under section 3211(a)(1). *See, e.g.*, *Silvercorp Metals Inc. v. Anthion Mgt. LLC*, 36 Misc. 3d 1231(A), at *9-10 (Sup. Ct., N.Y. Cnty. Aug. 16, 2012) (dismissing defamation claim under CPLR 3211(a)(1) "considering the letters and postings" at issue).

Dismissal at this stage, based solely on a review of GTAV, also is warranted based on First Amendment principles. Def. Br. at 10. Ms. Gravano again misunderstands the argument by contending that the First Amendment, on its own, does not absolutely immunize GTAV. Pl. Br. at 11-12. Take-Two has not argued this, but rather made the point that Section 51 incorporates constitutional concerns – reinforcing that, under New York statutory law, right of publicity claims cannot proceed against expressive works. Def. Br. at 10. There can be no doubt that First Amendment protections apply here: as Ms. Gravano acknowledges (Pl. Br. at 11), the U.S. Supreme Court also has recognized the protection accorded to video games like GTAV under the First Amendment.

That GTAV is sold to customers is completely consistent with its protected status under Section 51. Ms. Gravano again is simply incorrect when she argues (Pl. Br. at 12-13) that GTAV is stripped of its legal and constitutional protections because it is sold

[1] Plaintiff filed two versions of her opposition brief, the first version with page numbers and the second without. Defendants have assumed that the later-filed version is controlling. References in this brief to "Pl. Br. at __" are to the unpaginated version based on our count of the pages.

for profit. *See* 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 (2009) ("courts generally acknowledge that commercial exploitation [in violation of the right of publicity] means something other than the mere gain that comes from selling more issues of the publication in which plaintiff's name or likeness is used"). For-profit artistic works consistently have been recognized ***not*** to be "trade" or "advertising" under Section 51. Examples include:

- *Lohan v. Perez*, 924 F. Supp. 2d 447, 455 (E.D.N.Y. 2013) (dismissing Section 51 claim regarding pop song; "The fact that the Song was presumably created and distributed for the purpose of making a profit does not mean that plaintiff's name was used for 'advertising' or 'purposes of trade' within the meaning of the New York Civil Rights Law.")

- *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980) (dismissing Section 51 challenge to use of photographs in a for-profit magazine called *Celebrity Skin*; "it is well established that simple use in a magazine that is published and sold for profit does not constitute a use for advertising or trade sufficient to make out an actionable [Section 51] claim, even if its manner of use and placement was designed to sell the article so that it might be paid for and read") (internal quotation marks omitted)

- *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dep't 1993) (dismissing Section 51 claim because commercially successful Broadway show, *Six Degrees of Separation*, falls outside the "narrow scope of the statutory phrases 'advertising' and 'trade'")

- *Krupnik v. NBC Universal, Inc.*, No. 103249/10, 2010 WL 9013658, at *6 (Sup. Ct., N.Y. Cnty. June 29, 2010) (dismissing Section 51 claim because major motion picture *Couples Retreat* did not constitute use for "trade" or "advertising" purposes)

GTAV is just as protected as the music, magazines, books, plays and movies – all sold for profit – in these cases. To take just one famous example, few creative works have made more money than the television show *Seinfeld*, but its commercial

characteristics were no impediment to dismissal of a Section 51 claim. *See Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't 2001) (dismissing Section 51 claim because *Seinfeld* is a "work[ ] of fiction [that] do[es] not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade'"); David K. Li, *$einfeld rakes in $2.7 bil*, NEW YORK POST (June 7, 2010) (show earned $2.7 billion in its first 12 years of reruns, making it "the most profitable 30 minutes in TV history"), *available at* http://nypost.com/2010/06/07/einfeld-rakes-in-2-7-bil/. Ms. Gravano's argument that GTAV is a form of "trade" or "advertising" because of its commercial success is completely wrong.

The cases Ms. Gravano cites to support her argument that GTAV is "trade" or "advertising" under Section 51 do not actually stand for that proposition. None of these cases discusses – let alone applies – the narrow scope of Section 51 or its application to an expressive work. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (motion to strike a complaint under California's anti-SLAPP statute); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78 (2d Cir. 2006) (motion for a preliminary injunction concerning the enforcement of a city ordinance against street vendors).

Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978), the only case Ms. Gravano cites in which a Section 51 claim was upheld, is well-recognized as being an "aberration" limited to its extreme facts. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 n.23 and accompanying text. In *Ali,* the court sustained boxer Muhammad Ali's claim over a realistic, full color, full- page, "full frontal nude drawing" of himself, with

exaggerated genitalia, in a pornographic magazine. *Ali*, 447 F. Supp. at 729. The court in *Ali* never discussed, let alone applied, the settled rule that exempts artistic works of fiction or satire from Section 51 claims. Instead it accepted without question that the magazine was a "trade" purpose under Section 51, and focused *only* on whether the "newsworthiness" exception to Section 51 liability applied. *Id*. at 727. Not a single New York court has cited *Ali* as support for upholding a Section 51 claim against a creative work of fiction or satire.

B. Ms. Gravano's Other Arguments Lack Merit

1. Ms. Gravano Concedes That "Life Story" Rights Are Not At Issue

Ms. Gravano's repeated assertions that GTAV used her "life story," *see, e.g.*, Am. Compl. ¶¶ 14-22, cannot give rise to a claim given that "life story" is not a protected concept under Section 51. Def. Br. at 14; *see, e.g.*, *Toscani v. Hersey*, 271 A.D. 445, 448 (1st Dep't 1946) (Section 51 does not give rise to a claim against a work of fiction "merely because the actual experiences of the living person had been similar to the acts and events so narrated"). Unsurprisingly, Ms. Gravano now concedes that she is not attempting to assert "life story" rights. Pl. Br. at 18. The continued references to "life story" in her opposition papers (*see*, *e.g.*, Pl. Br. at 14 (claiming "Antonia Bottino" character's story is Ms. Gravano's "exact life story"), *id*. at 17, 19), are legally irrelevant in light of the clear New York law that "life story" rights are not cognizable and her own concession that she is not trying to assert such rights.

2. Ms. Gravano Has No Basis For Invoking New Jersey Or California Law, Or For Demanding Wholesale Changes To New York Law

New York's choice-of-law principles clearly dictate the application of New York law, notwithstanding Ms. Gravano amending her complaint to add claims under New Jersey and California law. (Def. Br. at 14-17).

The arguments in Ms. Gravano's response are not easy to understand and address. She does not address the choice of law issues she raised in her own Amended Complaint, and admits without reservation that ***New York law*** controls. Pl. Br. at 2, 15. She appears to be contending, however, that this court nonetheless should use New Jersey and California law as grounds for changing the law in New York by adopting a broad common-law right of publicity that would encompass her claim. *Id*. at 2-3, 20-22.

Whatever argument Ms. Gravano might intend, she pleads no basis for invoking out-of-state law and fails to address the choice of law issue in any way. Therefore, it stands undisputed that New York law must be applied in this case. Her attempt to rely on New Jersey and California cases (*id*. at 20-22) must be rejected, since those cases do not involve Section 51 and New York law controls.

Ms. Gravano's request that the court change New York's law in order to encompass these facts acknowledges that she has no claim under Section 51. It also defies decades of precedent to the contrary. Ms. Gravano concedes, "New York courts have ***never*** explicitly recognized a non-statutory right of publicity," Pl. Br. at 19 (emphasis added). This understates the situation significantly. Not only have New York courts never explicitly recognized a common-law right, ***they have explicitly declared that***

a non-statutory right of publicity does not exist. *See Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441 (2000) ("New York does not recognize a common-law right of privacy."); *Stephano v. News Group Publ'ns, Inc.*, 64 N.Y.2d 174, 183 (1984) ("Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity."); *Hampton*, 195 A.D.2d at 366 ("There is no common-law right to privacy in this State, only the remedy created by Civil Rights Law §§ 50 and 51.").

The 68-year-old dissent in *Toscani* relied on by Ms. Gravano (Pl. Br. at 19-20) is just that – a dissent, not controlling law. Other than her own self-interest, Ms. Gravano's complaint presents no reason to overturn decades of this state's law. That law is well-settled and appropriately protective of creative expression, whether in the form of video games or the many other types of works that have been deemed immune under Section 51.

3. GTAV Does Not Use Ms. Gravano's Name, Picture, Portrait Or Voice

Because GTAV is categorically protected against a Section 51 claim for the reasons noted in part I.A above, the Court need not consider whether the basic elements of a Section 51 claim – i.e., the use of the plaintiff's "name, portrait, picture or voice" – have been adequately pled. Should the Court reach that question, however, it can conclude, as a matter of law, that they have not been.

First, there is no allegation in the Amended Complaint that GTAV uses either Ms. Gravano's name or voice. A review of GTAV, as summarized in Mr. Rosa's affidavit for the court's convenience, will confirm that her name and voice are not used. Affidavit of Jeff Rosa (March 17, 2014) ¶ 11.

Second, even if the visual depiction of the "Bottino" character closely resembled Ms. Gravano (which it does not), the "Bottino" character would still be a caricature or parody that departs in key respects from what any literal depiction of Ms. Gravano or her life would include. Accordingly, the digitally animated "Bottino" character is not a "portrait" or "picture" of Ms. Gravano within the meaning of Section 51. *See Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep't 2003) ("the publication of the painting with a copy of plaintiff's photograph constitutes a caricature and parody that are exempt from the provisions of the Civil Rights Law"). To cite just a few examples: Ms. Gravano and "Bottino" have different body types and facial features (Affirmation of Stephanie L. Gal (April 17, 2014) ("Gal Aff.") Ex. D (appended picture); Affirmation of Edwin Sullivan (April 29, 2014) ¶ 7 (fan refers to depiction of "Bottino" as "a thinner version" of Ms. Gravano)), and the major event befalling "Bottino" – being kidnapped and nearly buried alive – undisputedly is not an element of Ms. Gravano's life.[2]

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[2] That "Bottino" is a digitally animated fictional character, not a literal depiction of Ms. Gravano, is a dispositive difference under Section 51, as Ms. Gravano's own cited cases confirm. In *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 382 (1984), and in *Negri v. Schering Corp.*, 333 F. Supp. 101, 104 (S.D.N.Y. 1971), the defendants used actual photographs of the plaintiffs in advertisements. In *Onassis v. Christian Dior-N.Y., Inc.*, 122 Misc. 2d 603, 612-13 (Sup. Ct., N.Y. Cnty. 1984), the defendant found a woman who looked exactly like Jacqueline Onassis, posed her in a photograph among actual celebrities for an advertisement, and thus created the

The parody nature of the character reinforces GTAV's status as creative and expressive work, and therefore protected under Section 51. To be clear, there is no need to reach these points of comparison at all given the categorical protection for creative works – but if the Court does consider the comparison, it favors dismissal.

II. Sanctions Are Appropriate

Section 51's protection of creative works is clear, and has been repeatedly explained to Ms. Gravano and her counsel by Take-Two. That explanation was first provided before the filing of the original complaint. Def. Br. at 17-19.[3] Take-Two then moved to dismiss, providing through its motion papers still another explanation. Ms. Gravano's response was to persist in the form of an amended complaint, adding the California and New Jersey claims without any apparent consideration of the choice of law principles that obviously barred them.

This is exactly the type of conduct that warrants sanctions. *Mitchell v. Herald Co.*, 137 A.D.2d 213, 219 (4th Dep't 1988) (remitting frivolous action to trial court for determination of costs and reasonable fees pursuant to CPLR § 8303-a where plaintiff

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"illusion" that Mrs. Onassis herself had actually posed for, and agreed to appear in, the challenged ad. In contrast, Take-Two neither uses a photograph nor other literal images of Ms. Gravano, and the digitally created "Bottino" character does not give the "illusion" that Ms. Gravano herself actually appears in the game.

[3] The suggestion that Take-Two breached confidentiality by providing the parties' pre-suit correspondence to the Court (Pl. Br. at 6-7) is incorrect. Take-Two invited Ms. Gravano's counsel to provide a ***draft complaint*** or similar document for confidential review. Gal Aff. Ex. E (email from Jeremy Feigelson to Thomas Farinella, dated January 23, 2014, 10:08 pm). Ms. Gravano's counsel never provided any such document and no confidence was breached.

and his counsel "fail[ed] to discontinue the action after being specifically advised by defendant's attorney that the claim was baseless."); *Bennett v. Towers*, No. 600049/14, 982 N.Y.S.2d 843, at *7 (Sup. Ct., Nassau Cnty. Mar. 13, 2014) ("The refusal to recognize the inherent weakness of plaintiffs' action and to continue to press forward notwithstanding [defendants' offer to withdraw the motion to dismiss and for sanctions in exchange for plaintiffs' withdrawal of the action], after he was in possession of their motion papers, supports a sanction.").

CONCLUSION

For the reasons stated above, the Amended Complaint should be dismissed in its entirety with prejudice and Defendants should be awarded sanctions, costs and fees.

Dated: May 5, 2014
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: */s/ Jeremy Feigelson*

Jeremy Feigelson
Jared I. Kagan
Stephanie L. Gal

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

Counsel for Defendants