

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

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**Court of Appeals**  
*of the*  
**State of New York**

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KAREN GRAVANO,

*Plaintiff-Appellant,*

– against –

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

*Defendants-Respondents.*

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**BRIEF FOR DEFENDANTS-RESPONDENTS**

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Date Completed: May 31, 2017

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## **CORPORATE DISCLOSURE STATEMENT**

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

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

Dated: May 31, 2017  
New York, New York

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

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Defendants-Respondents Take-Two Interactive Software, Inc. and its subsidiary Rockstar Games, Inc. (together, “Take-Two”) respectfully request that the Court affirm the decision below dismissing this case. Plaintiff-Appellant Karen Gravano has sued for the purported violation of her right of publicity under Section 51 of the New York Civil Rights Law (“Section 51”). The Appellate Division properly dismissed the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), and based on documentary evidence, pursuant to CPLR § 3211(a)(1).

### **PRELIMINARY STATEMENT**

Take-Two’s celebrated video game “Grand Theft Auto V (“GTAV”) takes place in a fictional universe of parody that does not contain any literal representation of the real world or of any real people. Ms. Gravano claims that a fictional character in GTAV resembles her. The claim of resemblance is baseless and, even more fundamentally, so is the legal claim. GTAV, an expressive work challenged here for its creative content, is absolutely protected against Section 51 claims regardless of any resemblance between Ms. Gravano and the fictional character. Ms. Gravano’s claim fails for the same core reasons that similar claims always have failed in this State:

*On its face, Section 51 only applies to the actual use of a plaintiff’s “name, portrait, picture or voice” – not the claim here, which is that a fictional character*

*is recognizable as the plaintiff.* The fictional “Antonia Bottino” character at issue here simply does not use Ms. Gravano’s “name, portrait, picture or voice” as the plain language of Section 51 requires. This issue easily was decided by the Appellate Division as a matter of law under well-settled New York precedent, and this Court should readily affirm.

*Section 51 only reaches “advertising purposes” or “trade” purposes – not creative content in expressive works such as novels, books, movies, television shows, songs, or, here, video games.* Even if Ms. Gravano’s name, portrait, picture or voice had been used in GTAV (which they were not), such use in the creative content of an expressive work is not “advertising” or “trade.” That is the plain meaning of the statute. It also is the clear rule followed for decades by the courts of New York that have dismissed claims just like this one. GTAV plainly is an expressive work and its content plainly is creative. GTAV essentially is an interactive movie that consists of over 100 hours of on-screen gameplay rich with a lengthy and involved plot, dialogue, animated sequences, still-image visual artworks, and music. The particular portion of the game about which Ms. Gravano complains – a gameplay sequence called “Burial” – is itself clearly creative content. As the Appellate Division correctly held, the creative and expressive purpose of GTAV’s content alone fully supports dismissal.

*Constitutional free speech considerations strongly support affirming the dismissal.* The protection of First Amendment interests, and of New York’s own constitutional free speech clause, is a key purpose of Section 51. GTAV is an expressive work, the use complained of is for creative purposes, and that use fits squarely within these constitutional protections. Just as the U.S. Supreme Court has held that video games deserve full constitutional free speech protections, so too should this Court.

New York is the creative capital of the world. This case presents an important opportunity to reaffirm New York’s bedrock tradition of protecting creative works against right of publicity claims. Ms. Gravano asks this Court to abandon that tradition of protection. Such a holding would have a far-ranging impact on a wide variety of creative content in expressive works, including plays, movies, television, books, art, and paintings. The plain language and purpose of Section 51, decades of precedent, and constitutional free speech values all point to affirmance.

### **QUESTIONS PRESENTED**

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

This Court should answer in the affirmative.

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

This Court should answer in the affirmative.

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

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

## **BACKGROUND**

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

#### **A. The Fictional World Of The Game**

GTAV was released to the public on September 17, 2013 for use on PlayStation 3 and Xbox 360 video game consoles. *See* Am. Compl. ¶ 7 (R. 16); Affidavit of Jeff Rosa (Mar. 17, 2014) ("Rosa Aff.") ¶ 2 (R. 90).

GTAV is set in the U.S. state of "San Andreas," a satirical parody of California, and takes place in and around the city of "Los Santos," a satirical

parody of Los Angeles. *Id.* ¶ 6 (R. 91). The game includes a wide range of creative content, including animated sequences, still images, music, a complex plot, and numerous subplots.<sup>1</sup>

The story of GTAV is experienced essentially like an interactive movie. The player controls one of three main characters, changing characters at various times to experience different parts of the story. *See id.* ¶ 9 (R. 92). The characters all are complicated men: Michael is an affluent retired bank robber in witness protection; Trevor is Michael’s violent former partner; and Franklin is a small-time hood looking to get out of the gang life, who becomes like a second son to Michael.

The player navigates his or her chosen character through various missions in the Los Santos area as the story unfolds. GTAV is an “open world” video game, meaning that players can explore Los Santos and San Andreas as they wish, or they may follow the main story missions. *Id.* ¶ 6 (R. 91). As the GTAV guide explains,

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<sup>1</sup> Exhibit 4 to the Rosa Affidavit (R. 130) is a book-length guide to GTAV, which makes it possible to review the game content without electronic means. The guide “provides a detailed written description of various aspects of GTAV [and] accurately describes the content of GTAV.” Rosa Aff. ¶ 5 (R. 91). The record also contains the actual video game on a disk, *id.* Ex. 1 (R. 94), and a DVD of the gameplay sequence at issue here. *Id.* Ex. 3 (R. 129). Take-Two is loaning a gaming console to the Clerk’s Office, to facilitate the Court’s review of the game disk exhibit. A promotional trailer giving an overview of the game’s features also is available online at this link: <https://www.youtube.com/watch?v=N-xHcvug3WI&t=204s>. A trailer introducing the main character Michael is available online at this link: <https://www.youtube.com/watch?v=HqZXw5M6qQY>. Both of these trailers are made up of content captured from the game.

[a]t many points in the game multiple mission contact points appear on the map, sometimes even for the same protagonist. In these situations, you can play the missions in any order without missing out on any other missions by doing so.

*Id.* Ex. 4 (R. 130) at 57. There are approximately 80 main story missions, over 60 optional “random events,” and other on-screen activities totaling over 100 hours of gameplay. *Id.* ¶ 7 (R. 91-92).

Nothing in GTAV is a literal representation of the real world. Rather, virtually everything in the game is a parody. No real place names are used. No real celebrities or other real people are named. No real brands or logos are used. There are parody equivalents of Apple, Twitter, and other businesses, and a parody version of “50 Shades of Grey.”<sup>2</sup> The characters drink “Sprunk,” not Sprite; eat at “Taco Bomb,” not Taco Bell; watch “Weasel News,” not Fox News; and use a social media site called “LifeInvader,” not Facebook.<sup>3</sup>

The game also has its own complex geography. Los Santos is made up of fictional neighborhoods that evoke real-life counterparts. For example, “Pillbox

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<sup>2</sup> Chris Suellentrop, *Grand Theft Auto V Is a Return to the Comedy of Violence*, N.Y. TIMES (Sep. 16, 2013), available at <http://www.nytimes.com/2013/09/17/arts/video-games/grand-theft-auto-v-is-a-return-to-the-comedy-of-violence.html?mcubz=1>.

<sup>3</sup> Wendy Parish, *GTA V parodies real-life brands, including KFC, Sprite*, MARKETING DIVE (Oct. 15, 2013), available at <http://www.marketingdive.com/news/gta-v-parodies-real-life-brands-including-kfc-sprite/181822/>.

Hill” in the game evokes the Bunker Hill area of Los Angeles, while “Vinewood” in the game evokes Hollywood. Familiar California landmarks are evoked by in-game versions. For example, the “Los Santos Tower” evokes Los Angeles’ iconic U.S. Bank Tower, “Del Perro Pier” evokes the famous Santa Monica pier, and “Maze Bank Arena” evokes the famous Los Angeles Coliseum where the 1932 and 1984 Summer Olympics were held. *See Rosa Aff. Ex. 4 (R. 130) at 18-19.*

### **B. The Plot Of The “Burial” Random Event**

Ms. Gravano is suing over the fictional character “Antonia Bottino,” who appears in a “random event” within GTAV called “Burial.” “Random events” are brief optional missions, with plots, animated action, dialogue, and sound and visual effects, that players can choose to engage in or ignore. The “Burial” random event is triggered if the player comes upon two men by the side of the road preparing to bury a woman alive. The player can choose to engage in the “Burial” random event by killing the two men and rescuing the woman – “Antonia Bottino” – who then asks the player’s character drive her to a safe place in “Vinewood Hills.” *Id.* ¶ 8 (R. 92). While they are driving, the “Bottino” character tells her rescuer about her life. She says she is the daughter of a mobster named “Sammy ‘Sonny’ Bottino,” who was active in the “Gambetti” crime family. *Id.*; *Am. Compl.* ¶ 16 (R. 17). The player’s character drops “Bottino” at a highway overlook in

Vinewood Hills, drives off, and there the random event ends. “Burial” lasts approximately seven minutes. Rosa Aff. ¶ 8 (R. 92).<sup>4</sup>

The screenshot below at left shows the player’s character as he rescues “Antonia Bottino” from the kidnappers. The screenshot below at right shows the player’s character untying Ms. “Bottino” and helping her to her feet.



**(Rosa Aff. Ex. 3) (R. 129)**



**(Rosa Aff. Ex. 3) (R. 129)**

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

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<sup>4</sup> “[T]he player can experience ‘Burial’ in four different ways, depending on which character the player is controlling when the ‘random event’ occurs. The dialogue for ‘Antonia Bottino’ is the same in all four versions but the dialogue for the player characters is slightly different, reflecting their different personalities.” Rosa Aff. ¶ 10 (R. 92).

both gives you tremendous freedom to explore an astonishingly well-realised world and tells a story that's gripping, thrilling, and darkly comic. . . . [GTAV] is not only a preposterously enjoyable video game, but also an intelligent and sharp-tongued satire of contemporary America.<sup>5</sup>

The Amended Complaint alleges in purely conclusory terms that GTAV uses Ms. Gravano's "portrait," "voice," and "life story." Am. Compl. ¶¶ 9, 10, 14 (R. 16, 17). The thrust of the allegations, to be clear, is *not* that the "Bottino" character is a literal depiction of Ms. Gravano. Nor is there, or could there be, any claim that GTAV uses Ms. Gravano's actual name, portrait, picture, or voice. Indeed, GTAV does not include any portrait or picture of Ms. Gravano. Rosa Aff. ¶ 11 (R. 93). Rather, Ms. Gravano complains that she and the fictional "Bottino" character have certain things in common: both of their fathers were Mafia lieutenants who then testified for the government, and they both use the phrase "the life," a common euphemism for being in the Mafia. Am. Compl. ¶¶ 17, 22 (R. 17); Gravano Aff. ¶¶ 11-14 (R.133).

The core plotline of "Burial" has no resemblance to anything that Ms. Gravano alleges about her own life. For example, unlike the "Bottino" character, Ms. Gravano never was kidnapped, threatened with being buried alive, or rescued

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<sup>5</sup> Keza MacDonald, *Grand Theft Auto V Review: Grand in Every Sense*, IGN (Sept. 16, 2013) (hereinafter "MacDonald"), available at <http://www.ign.com/articles/2013/09/16/grand-theft-auto-v-review>.

in the process by a passing stranger. Also unlike the “Bottino” character, Ms. Gravano appeared on a reality television show called “Mob Wives”; the Bottino character, in contrast, tells her rescuer that she was offered a place on a (fictional) reality show called “Wise Bitches” but did *not* participate. Rosa Aff. Ex. 3 (R. 129).

## II. SECTION 51 OF THE NEW YORK CIVIL RIGHTS LAW

Section 51 provides in relevant part:

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 [in Section 50] 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[.]

N.Y. Civil Rights Law § 51 (emphasis added).

The Legislature enacted Section 51 in direct response to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) – a case in which the defendant used the plaintiff’s picture, without authorization, in traditional commercial advertising. The defendant in *Roberson* created 25,000 copies of lithographic print advertisements for flour. These advertisements included photographs of the plaintiff without her permission. This Court reluctantly concluded that Ms. Roberson had no claim under New York law as it then stood. *Id.* at 556.

“The Legislature responded [to *Roberson*] by enacting the Nation’s first statutory right to privacy, now codified as sections 50 and 51 of the Civil Rights Law.” *Howell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 123 (1993); *Foster v. Svenson*, 128 A.D.3d 150, 155, (1st Dep’t 2015) (“Public outcry over the perceived unfairness of *Roberson* led to a rapid response by the New York State Legislature.”).

Given that Section 51 has its roots in a case about traditional advertising, and the plain language limits the statute’s scope to purposes of “advertising” or “trade,” courts in New York always have interpreted Section 51 narrowly to apply to such traditional commercial purposes – but not to works that have broader social purposes, such as expressive works and journalistic works. As this Court put it in *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433 (1982), Section 51

was drafted narrowly to encompass only the commercial use of an individual’s name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*.

*Id.* at 439 (emphasis added); *Messenger v. Gruner + Jahr Print. & Publ’g*, 94 N.Y.2d 436, 441 (2000) (“recognizing the Legislature’s pointed objective in enacting Sections 50 and 51, we have underscored that the statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the

name, portrait or picture of a living person” (citation and quotation marks omitted)).

### III. THE APPELLATE DIVISION’S DISMISSAL OF THIS CASE

In dismissing the Amended Complaint, the Appellate Division, First Department reversed a cursory decision by the Supreme Court (Kenney, J.) that sustained the complaint. Mar. 11, 2016 Order (R. 6-7). That decision did not even mention or discuss the New York rule that expressive works and their creative content are absolutely protected against Section 51 claims. Instead, the Supreme Court mistakenly held that the degree of resemblance between Ms. Gravano and the fictional “Bottino” character was an issue of fact. *Id.*<sup>6</sup>

The five-justice panel of the Appellate Division unanimously held that Ms. Gravano’s Section 51 claim failed for two independent statutory reasons. *Gravano v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776 (1st Dep’t 2016).

*First*, the panel held that Ms. Gravano’s claim “must fail because defendants did not use [plaintiff’s] ‘name, portrait, or picture,’” as Section 51 requires. *Id.* at 777 (quoting *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep’t 2001)) (alteration in original). The panel further held: “Despite Gravano’s contention

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

that the video game depicts her, defendants never referred to Gravano by name or used her actual name in the video game, never used Gravano herself as an actor for the video game, and never used a photograph of her.” *Id.*

*Second*, the panel held:

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

*Id.* (emphasis added).<sup>7</sup> The panel noted that GTAV’s “unique story, characters, dialogue, and environment, combined with the player’s ability to choose how to proceed in the game, render[ed] it a work of fiction and satire,” and thus GTAV and its creative content were absolutely protected against Ms. Gravano’s Section 51 claim. *Id.*

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<sup>7</sup> The Appellate Division’s reference to “plaintiffs” in the plural reflects that the court considered and dismissed two Section 51 cases in the same opinion: both the *Gravano* case that is the subject of this appeal, and a similar case brought by Lindsay Lohan, which is the subject of a separate appeal currently pending before this Court. *Lohan v. Take-Two Interactive Software, Inc. et al.*, APL-2017-00028. Like the *Gravano* complaint, the *Lohan* complaint originally was sustained by Justice Kenney, then dismissed by the Appellate Division. Take-Two is today also submitting a separate brief in *Lohan*.

## ARGUMENT

### **I. GTAV DOES NOT USE MS. GRAVANO’S “NAME, PORTRAIT, PICTURE OR VOICE” AS THE STATUTE REQUIRES**

The Appellate Division correctly dismissed this case on the ground that, as a matter of law, Take-Two did not use Ms. Gravano’s “name, portrait, picture or voice” as the plain language of Section 51 requires. 142 A.D.3d at 777. This is confirmed by a simple review of the game content. This Court can and should affirm on the same basis.

Whatever elements of commonality Ms. Gravano may see between herself and the fictional “Bottino” character are legally irrelevant. As a matter of law, Take-Two simply did not use any of the statutorily protected elements: “name, portrait, picture or voice.” “Antonia Bottino” is an animated fictional character; the character is not named Karen Gravano, nor is it a “portrait” or “picture” of Ms. Gravano. As for voice, the “Antonia Bottino” character undisputedly does not use Ms. Gravano’s voice. *See Rosa Aff.* ¶ 11 (R. 93).<sup>8</sup>

In short, the complaint here simply does not describe a statutory violation. Even when generously read, all the complaint alleged was that the fictional “Bottino” character evoked Ms. Gravano. But it has long been the law of this State that evocation or suggestion is not enough, as this Court and others have made

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<sup>8</sup> The Amended Complaint included nothing more than conclusory allegations that Take-Two used Ms. Gravano’s “voice.” *Am. Compl.* ¶¶ 9, 10, 26 (R. 16, 18). This is self-evidently not a literal reference to Ms. Gravano’s actual voice.

clear. There can be no Section 51 claim absent an actual use of “name, portrait, picture or voice.” See *Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47 (1st Dep’t 1977) (fictional characters in the movie *Dog Day Afternoon*, a popular movie inspired by a real-life bank robbery, could not give rise to a cause of action under Section 51 where statutory elements not used in movie), *aff’d*, 43 N.Y.2d 858 (1978).

This is so even if the Court assumes that audiences, in their minds, draw a straight line from the fictional characters to the real-world plaintiffs on whom the characters allegedly are based. *Id.* (dismissing Section 51 claim where statutory elements were not used, even if it were “clear that the plaintiffs were actually being depicted therein”); *Toscani v. Hersey*, 271 A.D. 445, 448 (1st Dep’t 1946) (Section 51 “was not intended to give a living person a cause of action for damages based on the mere portrayal of acts and events concerning a person designated fictitiously in a novel or play merely because the actual experiences of the living person had been similar to the acts and events so narrated”).

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

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

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

Ms. Gravano's contention that GTAV tells her "life story" (Gravano Br. at 4; Am. Compl. ¶¶ 9, 10, 14 (R. 16, 17)) is both incorrect and, even if accepted, irrelevant under the law. Ms. Gravano does not allege that she ever was kidnapped, threatened with being buried alive, or rescued in the process by a passing stranger – the central events that happen to the "Bottino" character in GTAV. In any event, life stories simply are not covered by Section 51 – only, as the words of the statute say, the use of "name, portrait, picture or voice." *Toscani*, 271 A.D. at 448; *Mother v. The Walt Disney Co.*, No. 103662/2012, 2013 WL 497173, at \*2 (Sup. Ct. N.Y. Cnty. Feb. 6, 2013) (quoting *Toscani* and dismissing, at the pleading stage, a Section 51 claim that alleged "a veritable similitude of plaintiff's actual life experiences" between the plaintiff and the character played by Whoopi Goldberg character in *Sister Act*).

A bill recently introduced in the New York Senate to amend Section 51 confirms just how narrow the current statute is. *See* S05857, Reg. Sess. 2017-2018

(N.Y. 2017). The proposed amendment is backed by the actors' union and would extend Section 51 protection to "persona," "image," "likeness," "distinctive appearance," "gestures," and "mannerisms." These are the very elements Ms. Gravano alleges Take-Two used here. There could be no plainer recognition that these elements are not protected under the current statute.

Because Ms. Gravano's name, portrait, picture, or voice as a matter of law are not found in GTAV, the unanimous dismissal should be affirmed.

## **II. CREATIVE CONTENT IN EXPRESSIVE WORKS LIKE GTAV IS ABSOLUTELY PROTECTED BECAUSE IT IS NOT FOR PURPOSES OF "ADVERTISING" OR "TRADE" AS THE STATUTE REQUIRES**

The Appellate Division also correctly dismissed Ms. Gravano's complaint because GTAV is an expressive work and its creative content is not "advertising" or "trade." Works such as GTAV simply are not covered by the statute, as a matter of law. The highly creative character of GTAV's world of satire, parody, action, and adventure is beyond question. *See pp. 4-7, supra* (describing game content as a whole). The "Burial" gameplay sequence exemplifies the game's creative character. *See pp. 7-10, supra* (describing "Burial"). The determination of the game content's creative character is an entirely proper function for the Court, as a matter of law, at the pleading stage.

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

This case is part of a genre of Section 51 cases that might be called the “hey, that’s me” claim: plaintiffs point to fictional characters in creative works and claim to see an undue resemblance. Such complaints long have failed as a matter of law at the motion to dismiss stage. This one properly has failed too.

For example, in *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452 (1st Dep’t 1965), *aff’d*, 15 N.Y.2d 940 (1965), the plaintiffs – the University of Notre Dame and its then-president, Father Theodore Hesburgh – challenged a novel and a motion picture that they claimed fictionalized them without their authorization. The Father Hesburgh character in the movie was named “Father Ryan.” The Appellate Division rejected the Section 51 claim as a matter of law, at the motion to dismiss stage, noting that creative works, unlike “trade” or “advertising,” are “no ordinary subject of commerce.” *Id.* at 457 (citations and quotation marks omitted). This Court summarily affirmed. 15 N.Y.2d 940.

Likewise, in *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dep’t 1993), the plaintiff sued the author of the award-winning play “Six Degrees of Separation.” The play was inspired by a real-life criminal scam where the plaintiff Hampton had fooled wealthy Manhattanites by pretending to be the son of actor Sidney Poitier. The main character in the play plainly was a fictionalized version of plaintiff

Hampton. The claim failed on a motion to dismiss, with the court holding that “works of fiction and satire do not fall within the narrow scope of the statutory phrases ‘advertising’ and ‘trade.’” This Court denied leave to appeal. 82 N.Y.2d 659 (1993); *see also* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 117 at 853 (5th ed. 1984) (“Nor is there any liability [under the right of publicity] when the plaintiff’s character, occupation and the general outline of his career, with many incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.”).

Another notable “hey, that’s me” claim failed at the motion to dismiss stage in *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep’t 2001). The plaintiff claimed that the character of “George Costanza” in the television show “Seinfeld” was based on him. The plaintiff and the fictional character were both named Costanza, and the plaintiff’s personal travails were alleged to resemble those of the fictional “George Costanza” character. The complaint was dismissed at the pleading stage, and the Appellate Division affirmed. As the court stated flatly, “works of fiction do not fall within the narrow scope of the statutory definitions of ‘advertising’ or ‘trade.’” *Id.* (emphasis added). That proposition correctly states the law, and it controls here.

*Toscani v. Hersey*, 271 A.D. 445, 448 (1st Dep’t 1946) further illustrates just how well settled is the New York rule that exempts creative works from right of

publicity claims. Plaintiff contended that he was the real-world basis for the main character in author John Hersey's World War II novel "A Bell for Adano," and in Hersey's play of the same name. The Appellate Division rejected the claim at the motion to dismiss stage. As the court explained,

Section 51 was not intended to give a living person a cause of action for damages based on the mere portrayal of acts and events concerning a person designated *fictitiously in a novel or play* merely because the actual experiences of the living person had been similar to the acts and events so narrated.

*Id.* (emphasis added).

This body of precedent is remarkably consistent and long-running. The rule is crystal clear: a plaintiff's allegation that fictional characters resemble or evoke her simply does not state a claim in New York. The fundamental issue is not the degree of factual resemblance, or the lack thereof, between the appearances or life stories of the fictional characters as compared to the real-life plaintiffs. Rather, the issue simply is whether the plaintiff is complaining about a character in an expressive work. GTAV plainly is such a work. Even accepting Ms. Gravano's strained suggestion that the fictional "Bottino" character at issue here somehow evokes her – no matter how close the similarities – her Section 51 claim still fails as a matter of law.

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

As forms of media have evolved over the years, the absolute legal protection for expressive works and their creative content against Section 51 claims has been consistent. Video games simply take their place in line as the latest form of creative content to come under New York's umbrella of absolute legal protection.

Movie content has been protected. *See Univ. of Notre Dame*, 22 A.D.2d 452; *Krupnik v. NBC Universal, Inc.*, No. 103249/10, 2010 WL 9013658 (Sup. Ct., N.Y. Cnty. Jun. 29, 2010) (dismissing Section 51 claim challenging use of actual photograph of plaintiff in the movie "Couples Retreat"). Content in novels likewise has been protected (*Toscani*); as have plays (*Toscani, Hampton*), television shows (*Costanza*); songs (*Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013)), paintings (*Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep't 2003) (affirming dismissal of Section 51 challenge to an oil painting)), and photographs (*Foster; Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002) (granting motion to dismiss)). Both artistic images of a plaintiff (the painting in *Altbach*) and literal images (the photographs in *Hoepker, Foster*, and *Krupnik*) have been deemed equally protected.

Regardless of medium, the common denominator is this: if the plaintiff is suing over creative content in an expressive work, then the Section 51 claim fails on a motion to dismiss. The Appellate Division here thus appropriately concluded

that the video game GTAV merits the same absolute protection as the forms of media that came before it. 142 A.D.3d at 777 (citing *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011)).

In *Brown*, the U.S. Supreme Court squarely held that video games are entitled to the same First Amendment protected status as older cultural formats: “Like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” *Brown*, 564 U.S. at 790. The Supreme Court applied First Amendment protection even to video games that might be considered “offensively violent,” noting that “parental oversight” is appropriate, but governmental restrictions on such content are not. *Id.* at 794, 804. This Court likewise can easily conclude that video games fit comfortably within New York’s tradition of absolute protection for expressive works and their creative content.

**C. The Protection Of Creative Content Applies At The Motion To Dismiss Stage, Sparing Content Creators From Costly Discovery**

New York courts for decades have dismissed Section 51 claims on motions to dismiss, based on the court’s own review of the creative work at issue. That is exactly what the Appellate Division did here.

For example, in *Notre Dame*, a case involving a challenge to a novel and a film, the Appellate Division dismissed the plaintiff's Section 51 claim after it "read the book, which [was] incorporated as an exhibit to the complaint, and at the request of the parties viewed a special showing of the moving picture." 22 A.D.2d at 455 (emphasis added). Courts review the content of challenged works as a matter of course at the motion to dismiss stage, and they readily conclude based on their own review that the challenged content is creative and thus the work is fully protected. *See, e.g., Lohan*, 924 F. Supp. 2d at 454 (granting motion to dismiss Section 51 case based on a song, because music is "a form of expression and communication"); *Altbach*, 302 A.D.2d 655 (oil painting); *Costanza*, 279 A.D.2d 255 (television show *Seinfeld*); *Hampton*, 195 A.D.2d 366 (play "Six Degrees of Separation"); *Krupnik*, 2010 WL 9013658 (movie "Couples Retreat").

The Appellate Division's order thus was procedurally and legally correct: it determined as a matter of law that the content of GTAV was creative and not "advertising" or "trade," and dismissed Ms. Gravano's complaint. As the Appellate Division in *Notre Dame* explained in an opinion affirmed by this Court, the judiciary's job is not to pass judgment on the artistic merit of the particular creative work, but simply to determine whether the work is creative in nature.

It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.

22 A.D. 2d. at 458 (citation and quotation marks omitted), *aff'd*, 15 N.Y.2d 940 (1965). Once the determination is made in a Section 51 case that the challenged work is a form of creative expression, dismissal follows.

The content of GTAV properly was considered below on two separate procedural grounds – (i) because the game content was incorporated by reference into the Amended Complaint, and (ii) because it was placed into the record by Take-Two via affidavit. *See Bello v. Cablevision Sys. Corp.*, 185 A.D.2d 262, 263 (2d Dep’t 1992) (“We assess the complaint in light of the evidentiary material submitted in conjunction with the CPLR § 3211 motion, as well as that appended to the complaint itself.”); *Deer Consumer Prods., Inc. v. Little*, No. 650823/2011, 2011 WL 4346674, at \*4 (Sup. Ct., N.Y. Cnty. Aug. 31, 2011) (“[I]t is undisputed that the Court, on a CPLR § 3211(a)(1) or (a)(7) dismissal motion, may consider documents referred to in a Complaint”); 6A CARMODY-WAIT 2D, CYCOLPEDIA OF NEW YORK PRACTICE WITH FORMS, § 38:161 (2016) (“[O]n a motion to dismiss the complaint for failure to state a cause of action, the court is not limited to a

consideration of the pleading itself, but may consider extrinsic matters submitted by the parties in disposing of the motion.”).

The New York rule compelling dismissal of these types of claims at the pleading stage is not just mandated by the plain language and history of Section 51 and by the ample body of precedent. Dismissal also is sound policy, protecting the rich tradition of cultural works that use real people for the creative purpose of inspiring fictional characters. To cite just one current example of this rich tradition, “Six Degrees of Separation” – the play held protected against a Section 51 claim in *Hampton* – has been nominated for a 2017 Tony Award for Best Revival of a Play. It is promoted by the producers as being “[i]nspired by a true story.”<sup>9</sup> The examples of cultural works that use real-world figures for creative purposes are legion.<sup>10</sup>

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<sup>9</sup> <http://www.sixdegreesbroadway.com/> (last visited May 30, 2017); *see also* Alex Witchel, *The Life of Fakery and Delusion In John Guare's 'Six Degrees'*, N.Y. TIMES (Jun. 21, 1990) (“[a]udiences leave wondering where the facts stop and Mr. Guare’s imagination begins”), *available at* <http://www.nytimes.com/1990/06/21/theater/the-life-of-fakery-and-delusion-in-john-guare-s-six-degrees.html>.

<sup>10</sup> *See, e.g.*, Erin Blakemore, *How Hearst Tried to Stop 'Citizen Kane'*, SMITHSONIAN (Mar. 30, 2016) (legendary movie a “thinly veiled portrait” of William Randolph Hearst), *available at* <http://www.smithsonianmag.com/smart-news/how-hearst-tried-stop-citizen-kane-180958602/#kCkzicqu9rSYp9q5.99>; Jason Hughes, *'The Good Wife' Creators Explain Inspiration Behind Pilot Slap on 'The Writers' Room'*, The Wrap (May 25, 2014) (popular television show inspired by multiple cases of male politicians who brought their wives to press conferences where they

Dismissal at the pleading stage not only protects these creative works, and incentivizes their creation – it also spares content creators from costly and unnecessary discovery. *See* CPLR § 3214(b) (automatic stay of discovery while motion to dismiss under CPLR § 3211 is pending). New York’s absolute protection for creative works controls here, and rightly so.

### **III. CONSTITUTIONAL FREE SPEECH VALUES SUPPORT THE STATUTORY GROUNDS FOR DISMISSAL**

Affirmance of the dismissal is fully supported on purely statutory grounds, for the reasons discussed in sections I and II above. Constitutional free speech concerns provide strong additional support for this result.

The Legislature drafted Section 51 “with the First Amendment in mind,” (*Foster*, 128 A.D.3d at 156), and courts have relied on this when granting motions to dismiss claims against creative content in expressive works. *Lohan*, 924 F. Supp. 2d at 454 (“Courts interpreting [Section 51] have concluded that ‘pure First Amendment speech in the form of artistic expression . . . deserves full protection, even against [another individual’s] statutorily-protected privacy interests” (citation

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discussed their own personal misconduct), *available at* <http://www.thewrap.com/the-good-wife-creators-explain-inspiration-behind-pilot-slap-on-the-writers-room-video/>; Jeanie Riess, *Ten Famed Literary Figures Based on Real-Life People*, SMITHSONIAN (Sep. 12, 2012) (noting real-life referents for fictional characters including Robinson Crusoe and Dorian Gray), *available at* <http://www.smithsonianmag.com/arts-culture/ten-famed-literary-figures-based-on-real-life-people-35379298/#i8sVPDhpMJ5m8PZR.99>.

omitted)); *see also Altbach*, 302 A.D.2d at 657 (affirming dismissal of a Section 51 claim because the works at issue were “artistic expressions – specifically a caricature and parody of plaintiff in his public role as a town justice – that are entitled to protection under the First Amendment and excepted from New York’s privacy protections”); *Hoepker*, 200 F. Supp. 2d at 349 (“New York courts have taken the position in the right of privacy context that art is speech, and, accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy.”). This Court should do the same here.

These are the same First Amendment principles that long have underpinned this Court’s jurisprudence on the “newsworthiness” exception to Section 51, which recognizes that publications concerning newsworthy events or matters of public interest are not for purposes of “advertising” or “trade.” As this Court has explained, “[t]he exception reflects Federal and State constitutional concerns for free dissemination of news and other matters of interest to the public.” *Stephano v. News Publ’n*, 64 N.Y.2d 174, 184 (1984). The principles behind the “newsworthiness” exception are not meant literally to protect works of journalism (although those have indeed been held exempt). *See Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115 (N.Y. 1993). Rather, these principles extend to “many other forms of First Amendment speech, protecting literary and artistic expression from

the reach of the statutory tort of invasion of privacy.” *Foster*, 128 A.D. 3d at 156 (citing *Notre Dame*, 22 A.D.2d at 456).

First Amendment considerations thus strongly support affirmance of the dismissal here. The GTAV creative content is part of an expressive work of fiction – filled with dialogue, character, plot, music and other classic elements of protected expression. As the U.S. Supreme Court has made clear, video games generally fall within First Amendment protections because they communicate ideas “[l]ike the protected books, plays, and movies that preceded them.” *Brown*, 564 U.S. at 790. The interactive character of the gameplay adds to its constitutionally protected character. *Id.* (“features distinctive to the [video game] medium (such as the player’s interaction with the virtual world)” add to video games’ First Amendment protected status).

As *Brown* aptly further held, “whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” *Id.* (internal citation and quotation marks omitted). These First Amendment factors support dismissal whether one agrees with the video game critics who have embraced GTAV, MacDonald, *supra* 9 n.5, or one has other cultural preferences. *Id.* (“Under our Constitution, esthetic and moral judgments about art and literature . . . are for the

individual to make, not for the Government to decree, even with the mandate or approval of a majority.”) (internal citation and quotation marks omitted).

The New York State Constitution supports affirmance here at least as strongly as the First Amendment. N.Y. Const. Art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”). New York, as

a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution . . . [which] reflect[s] the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment.

*Immuno, A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (holding, in defamation context, that the protections of Article I, Section 8 of New York State’s constitution can exceed federal First Amendment protections).

To be clear, the Appellate Division here did not hold that the First Amendment “bar[s] all right of privacy claims involving video games,” as Ms. Gravano mistakenly contends (Gravano Br. at 21), and the Court need not reach this issue to affirm. The record and the law, however, would fully support this Court in relying on First Amendment considerations to confirm why the plain language of Section 51 requires dismissal.

For these reasons, constitutional free speech concerns provide powerful support for the Appellate Division’s interpretation of Section 51 in this case. Both the First Amendment and the New York Constitution support the statutory limitation of “advertising purposes” and “trade” purposes to exclude expressive works and their creative content, as well as the construction of “name, portrait, picture or voice” to exclude digital “avatars” like the fictional character “Antonia Bottino.”

#### **IV. MS. GRAVANO CONCEDES THE LAW DOES NOT SUPPORT HER CLAIM**

Eliminating all doubt that settled New York law compels affirmance, Ms. Gravano explicitly requests “a change in the law.” Gravano Br. at 29, 31. To support this request Ms. Gravano cites the U.S. Supreme Court’s progress from *Plessy v. Ferguson*, 163 U.S. 537 (1896), to *Brown v. Board of Education*, 347 U.S. 483 (1954). No response to these citations seems necessary.

Ms. Gravano also cites the dissent in *Toscani*, ignoring that the *majority* opinion in *Toscani* – protecting a creative work against a “hey, that’s me” Section 51 claim just like Ms. Gravano’s – has been cited with approval for more than 70 years. *See Hampton v. Guare*, No. 17869, 1992 WL 117448, at \*3 (N.Y. Sup. Ct. Apr. 29, 1992), *aff’d*, 195 A.D.2d 366 (1st Dep’t 1993); *Wojtowicz*, 58 A.D.2d at 47, *aff’d*, 43 N.Y.2d 858 (1978); *Notre Dame*, 22 A.D. 2d. at 455, *aff’d.*, 15 N.Y.2d 940; *Mother*, 2013 WL 497173, at \*2; *People ex rel. Maggio v. Charles*

*Scribner's Sons*, 205 Misc. 818, 821 (N.Y. City Ct. 1954). *Toscani* plainly and accurately states the controlling law of this State.

This Court has declined past invitations similar to Ms. Gravano's to change the law. *See, e.g., Hampton*, 82 N.Y.2d 659 (1993) (denying motion for leave to appeal). Simply put, "*New York courts have repeatedly ruled that use of a person's likeness in movies or other entertainment media [. . .] does not constitute use for advertising or purposes of trade, and [is] not actionable under section 51[.]*" *Krupnick*, 2010 WL 9013658, at \*6 (emphasis added) (quoting *Costanza*, 279 A.D.2d 255, 255; *Hampton*, 195 A.D.2d 366). This Court should stay the course.

Ms. Gravano's remaining arguments are to no avail. No New York court ever has applied a "predominance [sic] purpose test" (Gravano Br. at 18) to determine whether the creative content of an expressive work constitutes an "advertising" or "trade" purpose under Section 51. Even if there were some test of predominance, GTAV would pass with flying colors as it is *only* a creative work and has no advertising component.

Ms. Gravano cites *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78 (2d Cir. 2006) (Gravano Br. at 15), but that case involved a motion for a preliminary injunction concerning the enforcement of a city ordinance against street vendors. It had nothing to do with Section 51.

The cases involving “invented biographies” to which Ms. Gravano cites in passing are not relevant here. *See* Gravano Br. at 33-34, citing *Binns v. Vitagraph Co.*, 210 N.Y. 51 (1913); *Spahn v. Messner, Inc.*, 18 N.Y.2d 324, 327 (1966); *Porco v. Lifetime Entm’t Servs., LLC*, 147 A.D.3d 1253 (3d Dep’t 2017). Those cases occupy a seldom-visited corner of right of publicity law involving the use of the plaintiff’s real name in what are held out to be recitations of true events, but are substantially fictionalized. Here, there is neither any use of Ms. Gravano’s name, nor is there any suggestion to the public that real events are being depicted. GTAV obviously is not a biography, nor does it claim to be.

The cases Ms. Gravano cites from the Third, Seventh, or Ninth Federal Circuits (Gravano Br. at 25-31) arise under other states’ laws. Ms. Gravano concedes that they carry no weight in New York. *Id.* at 31. These cases simply reflect that other courts have adopted different tests than New York for assessing right of publicity claims under very different facts (*i.e.*, sports simulation games that use real athletes playing their sports). *See, e.g., Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (applying the transformative use test under New Jersey law to a sports simulation game without an expressive story); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (applying the transformative use test under California law to a sports simulation game without an expressive story); *Parks v. LaFace Records*, 329 F.3d 437 (6th

Cir. 2003) (applying *Rogers* test under Michigan law to a song using Rosa Parks' name). They provide no reason for New York to revisit its own rule.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the dismissal of the Amended Complaint, in its entirety and with prejudice.

Dated: May 31, 2017  
New York, New York

Respectfully submitted,

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

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

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Dated: May 31, 2017

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