To Be Argued By:
THOMAS A. FARINELLA
Time Requested: 30 Minutes

APL-2017-00027
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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Take-Two Interactive Software, Inc. and Rockstar Games, Inc. ("Respondents'") argument in opposition can be reduced to the following proposition: the First Amendment bars an individual from asserting a claim under New York law in all cases involving video games, irrespective of their commercial nature. This is a case of first impression under New York Civil Right Law, Sections 50 and 51 ("N.Y. Civil Rights Law," or the "N.Y. Statute"). Although this is the Court's first right to privacy/publicity case involving a video game, multiple jurisdictions have permitted individuals to proceed on claims under statutes nearly identical to the New York State statute at issue in this case and have created balancing tests for making such determinations.

Karen Gravano ("Ms. Gravano") is a reality television personality and an international celebrity. Ms. Gravano starred in a television show that had over three million viewers and she has millions of loyal fans. She relies on her celebrity as a source of income. Grand Theft Auto V ("GTA V") is a video game premised on a potpourri of criminal activity, which has no informative value. The video game rewards the gamer[1] with money or points for killing people and committing crimes

[1] A "gamer" is one who plays video games.

while offering up an assortment of weapons from a knife to an RPG[2] to assist gamers in causing their own personal mayhem.

In or about September and October 2013, much to Ms. Gravano's surprise, multiple gamer-fans contacted her via Tweeter. These fans sent Ms. Gravano Tweets informing her that her likeness was being used as a character in the new game Grand Theft Auto V video game. *See* Am. Compl. ¶ ¶ 5-8 (R. 132); (R. 143-144). It was obvious to Ms. Gravano's fans, who watched her weekly television show for years and were therefore intimately familiar with her, that the game's character, Antonia Bottino ("Bottino"), was Ms. Gravano.

Ms. Gravano's claim is predicated on New York Civil Rights Law Section 51, which states, in pertinent part, that Section 51 applies to the use[3] of Plaintiff's "name, portrait, picture or voice." *See* N.Y. Civil Rights Law § 51.

The trial court held that pursuant to N.Y. Civil Rights Law § 51, Respondents used her portrait and likeness without her consent are questions of fact warranting a trial.

In overturning the trial Court, the Appellate Division decision ignored clearly established law when it failed to consider that the Ms. Gravano's Complaint adequately articulates claims, under N.Y. Civil Rights Law § 51, that her portrait

[2] An "RPG" is a portable, shoulder-launched, anti-tank weapon that fires explosive warheads."
[3] The word "use" as it is described by the statute does not mean *actual* use, which the Respondents have deliberately misstated in an attempt to deceive this Court. *See* Respondents' Br. at 1.

and likeness were used without her consent as a character in the video game. The Appellate Division further stated that even if the Court determined that Antonia Bottino was in fact Ms. Gravano, the case would still be dismissed because Ms. Gravano failed to establish the advertising or trade prong of the N.Y. Civil Rights Law § 51. Respectfully, however, the Appellate Division's conclusion is wrong.

Additionally, the Appellate Division determined that the video game falls outside the parameters of N.Y. Civil Rights Law § 51 because it is a work of fiction and/or satire, which provides the Respondents with absolute protection under the First Amendment. In so ruling, the Appellate Division predominantly relied on a California case pertaining to a governmental restriction passed by the California Legislature, which placed content-based restrictions on the creation of a violent video game in an attempt to thwart the game's production. Plaintiff-Appellant respectfully submits that this case is irrelevant and that the Appellate Division's conclusion was improper.

In short, as discussed further herein, N.Y. Civil Rights Law § 51 does not provide a blanket exemption for works of fiction and/or satire. Indeed, here, in order for Respondents' to prove that the GTA V is a parody, Respondents would be forced to concede that the Antonia Bottino character is in fact a parody of Ms. Gravano, thereby undermining their argument. Respondents cannot have it both not ways.

The Respondents argue, in sum and substance, that "[t]he core plotline of 'Burial' has no resemblance to anything that Ms. Gravano alleges about her own life." (Respondents Br. at 9). Nevertheless, Ms. Gravano alleges that the Respondents' have used her portrait and likeness without her consent, in violation of N.Y. Civil Rights Law § 51, and that the core elements of Antonia Bottino's character including, but not limited to, her appearance and character-specific dialogue, mirror Ms. Gravano's own unique character traits, which are well known to millions of people worldwide.

Ms. Gravano's adequately alleges violations under N.Y. Civil Rights Law § 51 insofar as the Respondents' have utilized a substantial fictionalization of her portrait and likeness without her consent. Indeed, Respondents concede that the N.Y. Statute "*was drafted to narrowly encompass only the commercial use of an individual's name or likeness and no more.*" *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433 (1982) (Respondents Br. at 11) (Emphasis supplied by Respondents). That is precisely what has happened in this case.

ARGUMENT

I. Ms. Gravano's Allegations That Respondents Used Her "Name, Portrait, Picture or Voice" Without Her Consent are Sufficient to Satisfy the Requirements of N.Y. Civil Rights Law § 51.

Although the Appellate Division acknowledged that Ms. Gravano's Complaint alleges that Respondents utilized her portrait and likeness without her consent in

violation of N.Y. Civil Rights Law § 51, the Court failed to provide any further analysis. Specifically, the Court stated that "[d]espite Gravano's contention 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, and never used a photograph of her." (R. 186).

The Plaintiff-Appellant respectfully contends that the Appellate Division's conclusion is based on an improper interpretation of N.Y. Civil Rights Law § 51 insofar as the Statute authorizes causes of action predicated on the commercial use of an individual's portrait and/or likeness without that individual's consent. *See e.g. Ali v. Playgirl, Inc.*, 447 F.Supp 723 (1978) (in defining a portrait, "the Civil Rights Law is not restricted to actual photographs, but comprises any representations which are recognizable as likeness of the complaining individual.").

Here, Ms. Gravano has explicitly plead, *inter alia*, that the Respondents used her picture, portrait and likeness without her consent in violation of N.Y. Civil Rights Law § 51 *See* Am. Compl. ¶ ¶ 8-27 (R. 16-18) (R. 26). Further, in opposition to Respondents' motion to dismiss, Ms. Gravano demonstrated, through affidavits and exhibits, that Respondents' violation is based on more than just an evocation or suggestion that the character, Antonia Bottino, is intended to replicate her. Ms. Gravano provided Tweets from her fans, who are intimately familiar with her, and

members of the general public, all of whom believed that the so-called Antonia Bottino was actually Ms. Gravano. Among the affidavits submitted by Ms. Gravano were two non-party witness affidavits stating, in sum and substance, that they believed Ms. Gravano was the character depicted in the game as Antonia Bottino. Ms. Gravano also included excerpts from her book, *Mob Daughter: The Mafia, Sammy "The Bull" Gravano, and Me!*, and a New York Times article detailing her book, which further proved that Antonia Bottino was in fact Ms. Gravano. *See* Gravano Aff. (R.131-138); (R.139-144); (R.172-178); (R.145-150).

The Respondents, in a blatant attempt to deceive the Court, assert that Ms. Gravano's case should have been dismissed because, "there can be no Section 51 claim absent ***actual*** use of "name, portrait, picture or voice." Significantly, Respondents improperly cite to a case, *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858 (1978), that does not in any way stand for this proposition. Thus, Respondents' argument is misleading because neither the *actual* language of *Wajtowicz* nor the *actual* wording of the N.Y. Statute include the word **"**actual." *See Id.*; *see also* N.Y. Civil Rights Law § 51.

Respondents also use the support of a recent case, where the plaintiff claimed the character in the popular movie "Sister Act" incorporated aspects of her life. *Mother v. Walt Disney Co.*, 2013 WL 497173 (N.Y. Cnty. Feb. 6, 2013). In *Mother*, the plaintiff was not a known celebrity or public personality, unlike Ms. Gravano, yet the Respondents here argue that "just as the plaintiff did in Mother, Ms. Gravano

pleads a fictional character incorporated aspects of her life." Br. at 11. The plaintiff in *Mother* did not claim that "defendants used her 'name, portrait, picture or voice,' but rather that the movies and Broadway production [based on the action] are 'veritable similitude of plaintiff's actual experiences as a Nun.'" Id. at 1*. Ms. Gravano is claiming that the Respondents used her portrait and likeness, and that the character's story is not "similar to her life experiences," but rather her exact life story taken from excerpts of her book, magazine article, television show, and over all public persona.

In *Mother*, the court and Defendants in their argument, refer to *Toscani v. Hershey*, 271 A.D. 445 (1st Dep't 1946) in holding that section 51 "was not intended to give a living person a cause of action… merely because the actual experiences of the living person had been similar to the acts and events so narrated." Id. at 448. The actual experiences are not similar—they are Ms. Gravano's life story accompanied by a character with her portrait. It goes well beyond Respondents attempts to discredit her claims. Moreover, as the dissent in Toscani stated:

> 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.

Id. at 449 (emphasis added).

The defense that GTA V is a "creative work" is nothing but a veil to shield Defendants unlawful use of Ms. Gravano's likeness in the GTA V. The purpose of GTA V is not to be form of creative expression, but rather a profitable commercial video game. This should not invoke the Constitutional protections of free speech embodied in the First Amendment. Simply, Respondents used Ms. Gravano's portrait and likeness without her consent.

Respondents further argue that based on the cases *Toscani v. Hersey* and *Mother v. The Walt Disney Co.*, Ms. Gravano fails to adequately state a statutory violation. This is simply not true and Ms. Gravano's case is plainly distinguishable from both of these cases.

The Court in *Toscani v. Hersey*, 271 A.D. 445 (1946), clearly stated:

> We do not place any such construction on the statement found in the opinion in the Binns case, supra, nor upon the statute itself. Considered in the light of the facts involved in the Binns case, supra, and the questions that were being discussed, the statement relied on was merely a holding that where the name of a living person is used in advertising for trade purposes, coupled with a picture of a person represented to be a likeness of that named person, there has been a violation of the statute, even though the person posing for the picture was not in fact the person named. But, in the present case, no living person was

> named, and no picture or other similar likeness of anybody was used.

(*Id*.).

Here, unlike both *Toscani* and *Mother*, Ms. Gravano explicitly alleges that her picture, portrait and likeness were used without her consent.

Respondents further argue that, "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 GTA V." (Respondents Br. at 16). Despite Respondents' argument, the "Burial Sequence" constitutes a substantial fictionalization of Ms. Gravano's likeness under the New York Civil Rights Law Section 51. Simply stated, Ms. Gravano has alleged the use of her portrait and likeness and that the core elements of Antonia Bottino's character are unique to her. This constitutes a violation of N.Y. Civil Rights Law § 51. Thus, the Court should, reverse the First Department's decision.

II. Video Games Are Not Absolutely Protected Under New York Law Because the Newsworthy and/or Public Interest Exceptions are Inapplicable When They are Merely an Incidental Aspect to the Predominantly Commercial Purpose of the Game; Video Games are Considered Advertising and/or Trade in Such Instances.

The Appellate Division improperly overturned the Trial Court insofar as GTA V does not fall within the newsworthiness exception; this video game does, however, "fall under the statutory definitions of 'advertising' or 'trade.'" *See* N.Y. Civil Rights Law § 51. The Appellate Division's dismissal of the case failed to consider an

undisturbed New York County Supreme Court case, which is analogous to this case, *Nolan v. Getty Images (US), Inc.* 2014 WL 912254 (N.Y. Cty. 2014). The *Nolan* decision stands for the proposition that in order for the Respondents here to use Ms. Gravano's portrait and likeness, the "use" must be lawful and the questions of whether the First Amendment permits such use, and whether Ms. Gravano's portrait and likeness was used for "advertising or trade purposes, "must await further development of the facts..." *Nolan v Getty Images (US), Inc.*, 2014 NY Slip Op 30564[U] [Sup Ct, NY County (2014).

This was the exact reasoning used by the Second Circuit Court of Appeals in a recent case brought in the Southern District of New York, *Titan Sports, Inc. v. Comics World Corp.*, in which the Court concluded that the determination of whether a particular work is distributed for the "purposes of trade and not entitled to first amendment protection is genuine issue of material fact," is to be considered by the trier of fact. *Titan Sports, Inc. v Comics World Corp.*, 870 F2d 85 [2d Cir 1989]. Thus, Ms. Gravano is entitled to a jury trial in order to determine whether Respondents utilized her portrait and likeness without her consent in violation of N.Y. Civil Rights Law § 51.

A. Video Games Are Not Worthy of Absolute Protection When They Depict Or Evoke Real People And Their Use Is Merely A Guise To Promote Sales

N.Y. Civil Rights Law § 51 does not define the purpose of trade. Therefore, Respondents' "hey that's me" argument is nothing more than a rouse to distract the Court from the genuineness of Ms. Gravano's claim and to promote the creation and/or implementation of a rule that simply does not—and should not—exist. *See* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 117 at 852 (5th ed. 1984) ("Thus in New York, as well as in many other states, there are a great many decisions in which the plaintiff has recovered when his name or picture or other likeness, has been used without his consent to advertise the defendant's product, or to accompany an article sold, to add luster to the name of a corporation, or for other business purposes. The statute in New York and the others patterned after it are limited by their terms to uses for advertising or for 'purpose of trade.")

Because the cases relied on by Respondents to further its bogus "hey that's me genre" theory are dissimilar to Ms. Gravano's case, the Appellate Division's dismissal was erroneous. Respondents' authority, in pertinent part, comes from the following:

- *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 in the text or film from which they could reasonably infer 'connection or benefit to the institution'")(emphasis added).

- *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.

It should be noted that the Plaintiff in *Costanza* asserted that "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." 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, therefore, quite distinguishable from the clearly established facts of this case.

New York courts have gone to great lengths to protect the right of privacy. Decisions concerning the issue of what constitutes a "portrait or picture" provide great examples of this broad interpretation. Indeed, "portrait or picture" is not limited to photographs "but generally comprises those representations which are recognizable as likeness of the complaining individual." *Negri v. Schering Corp.*, 333 F.Supp. 101, 104 (S.D.N.Y 1971). Imitations of a person's face intended to

portray the impression that the picture is that of such person may constitute use of a "picture or portrait," so as to bring a claim of commercialization of the person within the ambit of Sections 50 and 51. *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984). A "clearly recognizable" image of an individual constitutes a "portrait or picture." *Ali v. Playgirl*, Inc., *supra*, at 726. Additionally, the term "portrait or picture" has been so broadly defined that it includes any representation of a plaintiff, whether two-or three dimensional, including mannequins and sculptures that reflect the plaintiff's features. *See Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 310 (N.Y. 1984).

In, *Ali* the individual in the picture, whom plaintiff alleged was intended to depict him, had "recognizable features of plaintiff" such as the "cheekbones, broad nose, wide brown eyes, distinctive smile and cropped black hair." *Id*. at 726. "The identification of the individual is further implied by an accompanying verse that was used to identify him in the public mind." *Id.* at 727 (emphasis added). The Court held that "the picture is a dramatization, an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional… bit of doggerel." Id.

Here, Respondents allege that the Antonia Bottino character has "no particular resemblance [to Ms. Gravano] beyond both being female and having brown hair." Br at 13, FN 3. Here, similar to *Ali*, in addition to being a female with brown hair, the

character has the same eye color, cheekbones and facial structure as Ms. Gravano. Additionally, here, similar to *Ali*, the identification of Ms. Gravano is further proven by Antonia Bottino's use of the phrase "in the life," which Ms. Gravano states repeatedly throughout her book and in the international television show "Mob Wives," and which is prominently exhibited on the cover of the magazine in which she was featured. Gravano Aff. ¶¶ 13, 14, 21; Exhibits E, F, and H, respectively. Ms. Gravano has consistently used this phrase, which is well known to her fans and the public mind. Thus, Ms. Gravano's fans all believe that Antonia Bottino is intended to depict her. Shah Aff. ¶¶ 4-8; Sullivan Aff. ¶¶ 5,6,9,10. (R. 172-178).

B. The Content In GTA V Serves No Informational Value and is Therefore Not Entitled To Protection Under The Newsworthy Exception

The Respondents argue that "regardless of the medium, the common denominator is this: if the plaintiff is suing over creative content in an expressive work, then the section 51 claims fails on a motion to dismiss." (Respondents Br. at 21). There is no case law in New York that has concluded that the creative content in video games is an expressive artwork in the context of Section 51 of the New York Civil Rights law other than the decision that is the subject of this appeal.

Additionally, Respondents' argument is flawed insofar as it illogically suggests that video game makers have the unfettered discretion to infringe upon the privacy of a anyone they want and to further use this person's identity, vis-à-vis their portrait

and likeness, for profit in direct violation of N.Y. Civil Rights Law § 51, under the guise of "free speech." The Respondents improperly seek to use so-called free speech for the purely commercial purpose of exploiting Ms. Gravano's likenesses for their own pecuniary gain. This is improper and is in contravention of the prevailing case law on this very issue from the Second Circuit and other jurisdictions.

In *Forster v. Svenson,* the Court held that "to give absolute protection to all expressive works would be to eliminate the statutory right of privacy.") *Foster v. Svenson*, 12 A.D.3d 150, 150. The Court further opined, "that the Court of Appeals has not been confronted with the issue of whether works of art fall outside the ambit of the privacy statute." *Id.*

Additionally, the Court noted that there is a newsworthy and public concern exception:

> "the newsworthy and public concern exemption does not apply where the unauthorized images appear in the media under the guise of news items, solely to promote sales; such advertisement in disguise is commercial use deserving no protection from the privacy statute (see e.g. Beverley v. Choices Women's Med. Ctr., 78 N.Y.2d 745, 751–755, 579 N.Y.S.2d 637, 587 N.E.2d 275 [1991] [non-media defendant who produced and distributed a calendar to promote its medical center that included a picture of plaintiff not entitled to protection of newsworthy and public concern exception based on theme of women's progress where calendar was clearly designed to advertise the medical center]; cf. Stephano v. News Group Publs., Inc., 64 N.Y.2d 174, 185, 485 N.Y.S.2d 220, 474 N.E.2d

> 580 [1984] [model for article on men's fashion not entitled to protection of Civil Rights Law § 51 where photo was also used in column containing information on where to buy new and unusual products])."

(*Id.*).

C. Because GTA V Falls Outside The Newsworthiness Exception The Issues Raised In The Complaint Are To Be Determined By The Trier Of Fact

The Courts have held that a plaintiff may survive a motion to dismiss or summary judgment in a case where they have alleged that their portrait and likeness were used without their consent because the use of the portrait and likeness for "purpose of trade" is a "genuine issue of material fact. *See e.g., Titan Sports, Inc. v Comics World Corp.*, 870 F2d 85 [2d Cir 1989].

GTA V's illegal use of Ms. Gravano portrait and likeness falls outside the newsworthiness exception because the exception does not extend to the intentional commercialization of a celebrities personality. The Court in Titan, further explained:

> " In applying section 51, a court must be ever mindful of the inherent tension between the protection of an individual's right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter in whatever form it takes. However, as the New York Court of Appeals has recognized, "while one who is a public figure or is presently newsworthy may be the [**8] proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news

> or information." Gautier v. Pro-Football, Inc., 304 N.Y. 354, 359, 107 N.E.2d 485 (1952); see also Brinkley, 438 N.Y.S.2d at 1008 ("A public figure does not, however, surrender all right to privacy. Although his privacy is necessarily limited by the newsworthiness of his activities, he retains the 'independent right to have [his] personality, even if newsworthy, free from commercial exploitation at the hands of another.'" (quoting Booth v. Curtis Publishing Co., 15 A.D.2d 343, 351, 223 N.Y.S.2d 737, 745 (1st Dep't), aff'd , 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812 (1962))."

In the recent Appellate Division, Third Department case, *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. Here, as in *Porco*, where the work revolves around a "true occurrence" with elements of fiction interposed throughout, it is not covered by the newsworthy exception. Further, here, as in *Porco*, this is a case of first impression.

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 decisions 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 applied by the Court in this case. *Id.*

III. The First Amendment Does Not Afford Video Games An Absolute Protection Against Right of Publicity Claims

Plaintiff-Appellant has consistently demonstrated that New York case law does not provide an absolute protection for cases involving decided works of art. The Ninth Circuit has extended this theory to include video games, holding that such rights "are not absolute and states may recognize the right of publicity to a degree consistent with the First Amendment;" *see also 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*, which concludes

that a state's regulation of commercial misappropriation is reasonable; *i.e.*, 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, despite Respondents' argument to the contrary, First Amendment protections are not absolute. Indeed, rather than giving creative works[4] 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).

IV. GTA V Is Not Absolutely Protected By The First Amendment Because The Content Is Commercial Speech; Therefore, The Law Supports Ms. Gravano's Claim

The Appellate Division incorrectly relied on *Brown v. Entertainment Merchants Assn.*, deciding that the video games in the context of a civil case involving the New York Civil Rights Law is applicable. (R.156). Respondents contend that the First Amendment requires its speech to be immune from civil causes of action because it is a purportedly a "creative work," despite its overtly commercial nature and use of Ms. Gravano's portrait, voice, and likeness without her permission in the sale of video games.

[4]Assuming, *arguendo*, that video games are perceived as "creative works;" because such a determination has not yet been reached by a N.Y. Court.

Consideration of the First Amendment compels no direct result in this case. It did, however, compel the finding "video games qualify for First Amendment protection," where they are the subject of a "content-based governmental restriction on expression." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2732-33 (2011). Therefore, *Brown* is irrelevant in the context of this case. 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 Respondents' repeated assertions.

The most recent decision analyzing this proposition 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 a former professional football player alleging that the company used his likeness without his consent in the video game series Madden NFL, where the plaintiff brought 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 developer's 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 concluded 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). In making such determinations, a court should conduct an inquiry into "whether the literal and imitative or the creative elements predominate the work." *Id.* This is similar to New York's predominant purpose analysis, in sum and substance, assesses:

> 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)

(*Id*.).

The law supports Ms. Gravano's claim and Respondents' contention that she requests, "a change in the law" is patently false. The Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts §130.1(c)(1) state, in pertinent part:

> For purposes of this Part, conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.

(*Id.*).

Ms. Gravano respectfully submits that the facts of this case support a reasonable argument for extension, modification or reversal of existing law. Specifically, Ms. Gravano has implores this Court to accept Justice Dore's dissent in *Toscani, inter alia*.

CONCLUSION

Ms. Gravano has adequately stated the elements of a right of privacy claim pursuant to CPLR § 3211 and N.Y. Civil Rights Law § 51. Respondents have violated Ms. Gravano's right to privacy; namely, Respondents created a character, Antonia Bottino, which is a clear parody of Ms. Gravano, without her consent in and distributed the video game internationally for profit in violation of N.Y. Civil Rights Law § 51. Ms. Gravano has pleaded specific facts that support her claim. The video game is not meant to be an artistic expression; rather, as Respondents admits, the game is unequivocally intended to be a fictional parody of the real world, which is not offered heightened protection for commercial speech under the New York Constitution. Respondents have not submitted any evidence that adequately dismisses, nor have they properly plead any defense to Ms. Gravano's claims, that resolves all factual issues as a matter of law.

Accordingly, the Order issued by the Appellate Division dismissing this case should be reversed.

Dated: June 15, 2017
New York, New York

Respectfully submitted,

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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 5,536 words.

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Respectfully submitted,

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