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

LINDSAY LOHAN, Plaintiff, - against - TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, ROCKSTAR GAMES, INC. and ROCKSTAR NORTH, Defendants.	Index No. 156443/2014 Return Date: September 9, 2014 Motion Sequence 001

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND FOR SANCTIONS

DEBEVOISE & PLIMPTON LLP
Bruce P. Keller
Jeremy Feigelson
Jared I. Kagan
919 Third Avenue
New York, New York 10022
(212) 909-6000
bpkeller@debevoise.com
jfeigels@debevoise.com
jikagan@debevoise.com

Counsel for Defendants

August 20, 2014

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Defendants Take-Two Interactive Software, Inc. and its subsidiaries Rockstar Games, Inc. and Rockstar North (together "Take-Two") move to dismiss with prejudice the Verified Complaint of Plaintiff Lindsay Lohan (a) for failure to state a cause of action, pursuant to sections 3211(a)(1) and (a)(7) of the New York Civil Practice Law & Rules ("CPLR"), and (b) because the complaint is time-barred, pursuant to section 3211(a)(5) of the CPLR. Defendant Rockstar North, a U.K. company, moves separately to dismiss all claims against it for lack of personal jurisdiction, pursuant to CPLR section 3211(a)(8). Take-Two also seeks sanctions, pursuant to section 130-1.1(a) of title 22 of the New York Codes, Rules and Regulations ("NYCRR") and section 8303-a of the CPLR, because this action is frivolous.[1]

PRELIMINARY STATEMENT

Lindsay Lohan complains that her image and persona have been wrongfully used by Take-Two in the video game Grand Theft Auto V, but her claim is so legally meritless that it lacks any good-faith basis and can only have been filed for publicity purposes. This is not the first time she has misused the legal system in this way: Just last year, Ms. Lohan lost a similar case against the rapper Pitbull for lyrics referring to her arrest and incarceration. The court hearing that case dismissed Ms. Lohan's suit because creative works are absolutely protected against these types of claims. This Court should do the same, and summarily dismiss Ms. Lohan's complaint. Given this case's utter lack of

[1] The Complaint also names "Rockstar Games" as a defendant. However, there is no "Rockstar Games" entity separate and apart from Rockstar Games, Inc.

merit and Ms. Lohan's history of misusing the legal system, Take-Two respectfully requests that this Court also impose fees and sanctions against Ms. Lohan and her counsel.

GTAV is a fictional work set in a huge virtual landscape that parodies Los Angeles, California and its environs. Leading commentators have praised GTAV for confirming that "video games are *the* defining popular art form of the 21st century," Affirmation of Jared I. Kagan (Aug. 20, 2014) ("Kagan Aff.") Ex. 5 (*Time Magazine* review website entitled "Grand Theft Auto Is Today's Great Expectations") (emphasis in original), and for depicting "an immense, parodic vision of Southern California . . . a contemporary one that evokes and satirizes the anxieties of 21st-century life." *Id*. Ex. 6 (*The New York Times* review entitled "Grand Theft Auto V Is a Return to the Comedy of Violence").

Ms. Lohan claims that a minor fictional character in GTAV named "Lacey Jonas" violates her publicity rights under section 51 of the New York Civil Rights Law. The Jonas character is a young starlet chased by photographers in a brief "random event" in GTAV called "Escape Paparazzi." Ms. Lohan also claims that her publicity rights are violated by two transition screen artworks that appear to players of GTAV while the game code is loading into the gaming console's memory. The transition screen artworks, entitled "Beach Weather" and "Stop and Frisk," are visual artworks that depict two different young blond women. According to the Complaint, the Jonas character purportedly uses Ms. Lohan's voice and portrait, and depicts "identical events" to her own life, while the transition screen artworks purportedly use Ms. Lohan's image and

"outfits." These claims have absolutely no support in New York law or in the actual content of GTAV.

As the decision against Ms. Lohan in the Pitbull case, makes clear, even if there was any resemblance between Ms. Lohan and the GTAV characters (which there is not), a creative work like GTAV simply cannot give rise to a right of publicity claim. *See Lohan v. Perez*, 924 F. Supp. 2d 447 (S.D.N.Y. 2013). Ms. Lohan's claim in *Perez* was summarily dismissed based on the unbroken line of cases holding that no Section 51 cause of action can be stated against ***any*** form of artistic expression. As Ms. Lohan's claim failed in *Perez*, so too must her claim fail here:

- Any purported resemblances between the plot of a fictional work like GTAV and the life of a real person are not actionable as a matter of law. Nothing that Ms. Lohan points to in GTAV actually utilizes her name, voice, or likeness, which are the only elements that Section 51 protects.

- Even if there was any resemblance to Ms. Lohan or her life story (which there is not), as a matter of law the Lacey Jonas "random event" and the two transition screen artworks in GTAV cannot violate Section 51 because (1) the First Amendment bars such claims, and (2) artistic works are not "advertising" or "trade" as the plain language of Section 51 requires. *Perez*, 924 F. Supp. 2d at 454-55.

- The one-year statute of limitations, CPLR § 215(3), bars Ms. Lohan's claims to the extent they are based on her allegation that Take-Two publicly announced that GTAV would include "a Lindsay Lohan look-alike side mission." Compl. ¶ 34. It appears that Ms. Lohan is referring to the personal opinion of a blogger (not a statement by Take-Two) that was posted a year and a day before suit was filed. Likewise, any claim based on the two GTAV transition screen artworks is also time-barred: "Beach Weather" and "Stop and Frisk" were released to the public almost two years before the Complaint was filed.

- Defendant Rockstar North is not subject to personal jurisdiction because it is incorporated in the United Kingdom and has no ties to New York or this case.

Even had Ms. Lohan not lost the *Perez* case last year, this case would be frivolous because the principles on which *Perez* relied are so well-settled. The Complaint is a bad-faith filing and abuse of the court system and should be dismissed. Moreover, Ms. Lohan and her counsel should be required to make Take-Two whole for the expense of defending this frivolous case.

FACTUAL BACKGROUND

1. Materials Before The Court.

Ms. Lohan's Complaint is attached as Exhibit 1 to the accompanying Kagan Affirmation. The Complaint references an Exhibit A, but no such exhibit was filed with the Court or served on Take-Two with the original delivery of the Complaint. Ms. Lohan's counsel later provided a copy of Exhibit A by separate letter. It is attached to the Kagan Affirmation as Exhibit 2. It includes cropped low-quality images of the two transition screen artworks, and a cropped low-quality photo of Ms. Lohan in a bikini. High-quality images of the two transition screen artworks, and the photo of Ms. Lohan in a bikini are attached as Exhibits 7 and 9 to the Affidavit of Jeff Rosa (Aug. 20, 2014) ("Rosa Aff.") and Exhibit 3 to the Kagan Affirmation, respectively.

With this motion, Take-Two also submits images of and video copies of the brief segments of GTAV at issue here, *i.e.*, the transition screens and the Lacey Jonas "random event." Rosa Aff. Exs. 2, 5, 6. Also provided with this motion is a publicly available strategy guide that summarizes and illustrates the content of GTAV. *Id.* Ex. 3. The back cover of this guide has been used by plaintiff as part of Exhibit A to the Complaint.

Take-Two also is providing the Court with a complete copy of the actual GTAV game (*id.* Ex. 1); a copy of the Internet posting in which a third-party blogger referred to a "Lindsay Lohan look-alike" (Kagan Aff. Ex. 7); and a number of news articles that illustrate the dates certain materials at issue in the case became available to the public (*id.* Ex. 8; Rosa Aff. Ex. 8).

The court may dismiss the Complaint based on these materials because, on a motion to dismiss pursuant to CPLR 3211(a)(1) or (7), "it is undisputed that the Court . . . may consider documents referred to in a Complaint" (*Deer Consumer Prods., Inc. v. Little*, No. 650823/2011, 2011 WL 4346674, at *4 (Sup. Ct., N.Y. Cnty. Aug. 31, 2011)) as well as "those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." *Lore v. N.Y. Racing Ass'n Inc.*, No. 007686-04, 2006 WL 1408419, at *2 (Sup. Ct., Nassau Cnty. May 23, 2006) (internal quotation omitted); 6A CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS, § 38:161 (2011) ("on 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 content of GTAV (Rosa Aff. Exs. 1, 2, 4, 5) is obviously incorporated into the allegations of the Complaint (*see, e.g.*, Compl. ¶¶ 18, 21–23, 25–30 (invoking content of GTAV)), and thus should be considered on this motion. The materials contained in Exhibits 7 and 8 to the Kagan Affirmation and Exhibit 8 to the Rosa Affidavit (blog post

and articles concerning characters in GTA V) also are appropriately considered on the statute of limitations issue. *See* 7 Jack B. Weinstein, Harold L. Korn, and Arthur R. Miller, NEW YORK CIVIL PRACTICE § 3211.06 at 32-38 (2d ed. 2014) (Section 3211(a)(5) "includes the most common defenses founded upon documentary evidence," such as limitations, while Section 3211(a)(1) provides generally for consideration of documentary evidence).

2. Grand Theft Auto V.

GTAV was released to the public on September 17, 2013 for use on the PlayStation 3 and Xbox 360 video game consoles. *See* Compl. ¶ 13; Rosa Aff. ¶ 2. The fictional story that comprises GTAV is set in the U.S. state of "San Andreas" (a parody of California) and takes place in and around the city of Los Santos (a parody of Los Angeles). *See* Rosa Aff. ¶ 4 & Ex. 1. GTAV is an "open world" video game, allowing each player to freely explore its virtual environment and choose to experience (or not) hundreds of "missions," "random events," and activities. *Id.* ¶¶ 5, 6. GTAV depicts a stinging parody of California culture through its fictional locations, characters, and consumer products.

GTAV tells the story of three complicated men—Michael De Santa, Franklin Clinton, and Trevor Philips—all pursuing their particular version of the American Dream. *See id.* ¶ 7. The main storyline runs about 50 hours and consists of approximately 80 missions. *Id.* ¶ 6. There are also over 100 hours of additional gameplay available, including over 60 random events and dozens of activities. *Id.* At various times, players can choose to control Michael, Trevor, or Franklin. *Id.* ¶ 7. These

characters have unique, well-defined abilities and personalities: Michael is a reformed criminal living in witness protection who is forced back into crime by a serious misstep; Franklin is a young ambitious "repo man" who strikes up an unlikely friendship with Michael; and Trevor is Michael's former-partner who remains a dangerous criminal. *Id*.

3. The Lacey Jonas Character.

One of the fictional random events in GTAV is entitled "Escape Paparazzi." The random event begins if the player's character stumbles upon the character Lacey Jonas hiding in an alleyway. *Id.* ¶ 8. There are four different versions of the random event, depending on whether the player is controlling Michael, Franklin, or Trevor, but the content of the random event is essentially the same in all four. *Id.* ¶ 7. Should the player encounter the optional random event and choose to participate, the character must evade the paparazzi and drive Jonas home. *Id*. ¶ 8. Jonas states the paparazzi are chasing her because she is a "really famous" actress, and expresses surprise that the player does not recognize her. *Id*. During the drive, the player's character may recognize Jonas as the star of romantic comedies and a cheerleader dance-off movie. *Id.* The Jonas character is programmed to make a variety of random statements to the player's character during the drive to her home. Among them are that she is an "actress slash singer" and the "voice of a generation." *Id*. The Escape Paparazzi random event takes about five minutes to complete. *Id.*

The Complaint alleges, in conclusory terms, that GTAV uses Ms. Lohan's "portrait" and "voice" for its "character(s)" (Compl. ¶¶ 23, 29). An actual review of the game contents referenced in the Complaint, however, confirms that Lindsay Lohan's

voice is not used, and that she is not visually depicted or mentioned by name. Rosa Aff. ¶ 14. Other than being a young blond woman, the Lacey Jonas character does not physically resemble Ms. Lohan. *Compare* Rosa Aff. Ex. 4 (images of the Lacey Jones character) *with* Kagan Aff. Ex. 4 (comparison of images of Lacey Jonas and images of Ms. Lohan taken in 2013). Tellingly, Ms. Lohan failed to attach any images of the Jonas character as exhibits to her Complaint.

The Complaint also alleges, again in conclusory terms, that GTAV uses "identical events to [Ms. Lohan's] life." Compl. ¶ 29. The portrayal of a Hollywood figure being chased by paparazzi, of course, is hardly unique to Ms. Lohan. She also alleges that GTAV features a hotel similar to the Hotel Chateau Marmont of West Hollywood, where she once resided. *Id.* ¶ 27. This allegation underscores the thinness of Ms. Lohan's claims: GTAV is a parody of Los Angeles, so it is unsurprising that it features similar buildings; even so, the Lacey Jonas character states that she lives in a home on Whispymound Drive in the "Hills," not in a hotel. Rosa Aff. ¶¶ 4, 8.

4. <u>The Alleged Announcement That GTAV Contained "A Lindsay Lohan Look-Alike</u>."

The Complaint also alleges that, on or about June 30, 2013, "Defendants announced the Plaintiff's name in association with a look-alike side mission." Compl. ¶¶ 17, 19, 34. No copy of any such statement is appended to the Complaint. Nor is it alleged that any such statement was made by Defendants at any time after June 30, 2013. Although the Complaint does not attach a copy, this allegation clearly refers to a statement in the public record published on June 30, 2013, where a third-party blogger –

not Take-Two – expressed his opinion that GTAV included "a Lindsay Lohan look-alike." *See* Chema Salazar, "Grand Theft Auto 5 Customization, Economy, and First Side Mission!" (June 30, 2013) (http://digitoll.wordpress.com/2013/06/30/grand-theft-auto-5-customization-economy-and-first-side-mission) (copy attached as Kagan Aff. Ex. 7).

5. The Two Transition Screen Artworks.

Ms. Lohan claims her rights are infringed by two pieces of visual artwork in GTAV. *See* Complaint ¶ 21-26 (alleging in conclusory terms that Take-Two used multiple "portraits" of Plaintiff); Complaint Ex. A. One of these visual artworks, titled "Beach Weather," is a rendering of a woman in a bikini taking a "selfie" photograph while making a peace or "V" sign (the "V" sign is a visual reference to the title of Grand Theft Auto V). Rosa Aff. ¶¶ 10, 11 & Ex. 7. The other visual artwork, "Stop and Frisk," depicts a woman leaning over a car while being frisked. *Id*. ¶ 10, 13 & Ex. 9. In addition to appearing in GTAV's transition screens, a cropped version of Beach Weather appears on the game's cover, and both images were used to illustrate GTAV in many ways, including on magazine covers, in news articles, on websites, and on posters. *Id*. ¶¶ 11, 13.

These two pieces of visual artwork have several elements in common. First, both were released to the public on or about November 1, 2012, a year and eight months before this lawsuit. *Id*. Ex. 8; Kagan Aff. Ex. 8. Second, both have been widely distributed and reprinted since they were first released both by the media and fans of the game. Kagan Aff. Exs. 10 and 11 (Google search results showing widespread public

discussion of Beach Weather and Stop and Frisk). Third, both are creative works, developed for use in the game to evoke the look and feel of GTAV. Rosa. Aff. ¶ 10. Fourth, the Complaint does not actually allege that either of the characters in these artworks has ever been identified by Take-Two as Lindsay Lohan. Fifth, a simple visual comparison reveals that, other than being young blond women, the characters in Beach Weather and Stop and Frisk bear no particular resemblance to each other or to the Lacey Jonas character. Nor do any of those three GTAV characters resemble Ms. Lohan, although, remarkably, Ms. Lohan claims that she is recognizable as all three of these distinctly different women. Compl. ¶¶ 17-18, 21-26.

ARGUMENT

Dismissal is required under section 3211(a)(7) of the CPLR for failure to state a cause of action under section 3211(a)(1), based upon documentary evidence, *i.e.*, the actual content of GTAV; and under section 3211(a)(5), because the Complaint is time-barred. None of these defects can be cured, making dismissal with prejudice appropriate. *See Abakporo v. Daily News*, 102 A.D.3d 815, 817 (2d Dep't 2013) (affirming dismissal of claim under N.Y. Civ. Rights Law Sections 50 and 51, and denying leave to replead because plaintiff's proposed repleading was "palpably insufficient as a matter of law and [] totally devoid of merit"). As to defendant Rockstar North, dismissal also is required pursuant to section 3211(a)(8) of the CPLR for lack of personal jurisdiction.

I. Ms. Lohan Has No Right Of Publicity Claim Under New York Law And The First Amendment.

A. Take-Two's Creative Works Do Not Constitute Advertising Or Trade Under Section 51 Of The Civil Rights Law.

Section 51 of the Civil Rights Law 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).[2]

Works of fiction like GTAV cannot constitute "trade" or "advertising" within the meaning of the statute. Visual artworks like Beach Weather and Stop and Frisk are equally protected. Works of fiction or art are categories that are mutually exclusive of "advertising" or "trade" purposes under the Civil Rights Law:

- *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't 2001) (dismissing complaint asserting Section 50-51 claims based on allegations that defendants used plaintiff's name, likeness and persona to create a character for the television program *Seinfeld* because "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade'").

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[2] Section 50 of the Civil Rights Law, though cited in the Complaint along with Section 51, does not provide a private right of action. Rather, it authorizes criminal prosecution for unauthorized use by the appropriate authorities, and is inapplicable here. *See Mother v. The Walt Disney Co.*, No. 103662/2012, 2013 WL 497173, at *2 (Trial Order) (Sup. Ct., N.Y. Cnty. Feb. 6, 2013); N.Y. Civ. Rights Law § 50 (making it a misdemeanor to use a person's name, portrait or picture without consent for purposes of trade or advertising).

- *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dep't 1993) (award-winning play, "Six Degrees of Separation," which was indeed inspired by a criminal scam involving the plaintiff, could not give rise to Section 50-51 claims because "works of fiction and satire do not fall within 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 challenge to use of a picture of plaintiff in the movie *Couples Retreat* because "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 are not actionable under section 51[.]").

- *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002) (dismissing Section 50-51 challenge to museum artwork that included plaintiff's image, and to gift shop items that featured the artwork, because "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 [Section 51]").

- *Altbach v. Kulon,* 302 A.D.2d 655, 657 (3d Dep't 2003) (dismissing Section 51 challenge to an oil painting that caricatured a judge because "artistic expressions—specifically a caricature and parody of plaintiff in his public role as a town justice—[] are entitled to protection under the First Amendment and excepted from [Section 51]").

The court's analysis in *Perez* rejecting Ms. Lohan's claims in that case is directly on point here: Artistic works, including those "created and distributed for the purpose of making a profit," simply do not fall within Section 51. 924 F. Supp. 2d at 455. Ms. Lohan's claims as they relate to GTAV's Lacey Jonas, Beach Weather, and Stop and Frisk fail as a matter of law for that reason.

B. The First Amendment Is An Absolute Bar To The Complaint.

The right of publicity claim also fails in light of constitutional free-speech guarantees. It is well-settled that expressive works such as video games are fully protected under the First Amendment. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct.

2729, 2732-33 (2011) (striking down as unconstitutional state law that restricted sales of video games); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008) (recognizing First Amendment protection for an earlier version of Grand Theft Auto in context of Lanham Act claim). Similarly, works of visual art, such as the transition screen artworks, are "unquestionably shielded" under the First Amendment. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).

New York courts repeatedly have held that First Amendment considerations forbid imposing right of publicity liability against creative works of art. *See, e.g., Altbach*, 302 A.D.2d at 657; *Hoepker,* 200 F. Supp. 2d at 349. Ms. Lohan is well aware of this bar to her complaint: only eighteen months ago the court in *Perez* ruled against her in a similar case, noting that "[c]ourts 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.'" 924 F. Supp. 2d at 454 (alteration in original). That principle fully supports dismissal here, just as it did in *Perez*.

C. There Is No Use Of Ms. Lohan's "Name, Portrait, Picture Or Voice" As Required By The Statute.

Ms. Lohan's Section 51 claim also fails because she does not and cannot properly plead the core element of any claim under the statute – namely, that Take-Two used her name, portrait, picture, or voice. *See* N.Y. Civ. Rights Law § 51; *Stern v. Delphi Internet*

Svcs. Corp., 165 Misc.2d 21, 23 (Sup. Ct., N.Y. Cnty. 1995) (listing elements) (citing *Cohen v. Herbal Concepts Inc.*, 63 N.Y.2d 379, 383 (1984)).

The Complaint contains only the rote assertion that Ms. Lohan's "portrait" and "voice" are included in GTAV. Compl. ¶¶ 22-23. These allegations are completely contradicted by the actual game content. As clearly indicated by the video capture and other exhibits submitted by Take-Two, GTAV does ***not*** use Ms. Lohan's "name, portrait, picture or voice" in the Lacey Jonas mission, Beach Weather artwork, or Stop and Frisk artwork. Rosa Aff. Exs. 1, 2, 3, 4, 5, 6, 7, 9. Other than all being young blond women, there is no resemblance between Ms. Lohan and the characters depicted in the Lacey Jonas event, Beach Weather artwork, and Stop and Frisk artwork. *Compare* Rosa Aff. Ex. 4, 7, 9 (images of characters) and Kagan Aff. Ex. 4 (images of Ms. Lohan).

The contradictions between the conclusory allegations of the Complaint and the actual content of defendants' works of art require dismissal for failure to state a cause of action. *See Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996) ("allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible ***or flatly contradicted by documentary evidence***," are neither presumed to be true nor accorded every favorable inference) (emphasis added); *see also Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269 (1st Dep't 2005) ("Factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence."). These contradictions are not issues for discovery, but grounds for immediate dismissal. *See Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47 (1st Dep't 1977) (dismissing Section 51 claim based on fictionalized versions of plaintiffs in the

movie *Dog Day* Afternoon "because the motion picture and books do not utilize the name, portrait or picture of any plaintiff").

D. New York Law Does Not Recognize Right Of Publicity Claims Based On Life Story.

Unable to plead truthfully that her name, likeness or voice actually appears in GTAV, Ms. Lohan claims that GTAV is actionable because the Escape Paparazzi random event depicts "identical events" to her own life. *See* Compl. ¶¶ 29-30. Setting aside that there is nothing uniquely identifiable to Ms. Lohan about being chased by the paparazzi, this claim is without any basis in New York law. Life story is simply not a protected concept under the plain language of Section 51 or under the many cases construing it.

Every time a plaintiff like Ms. Lohan has argued that a work of entertainment is actionable under Section 51 because the work features a character based on his or her life story, the claim has been dismissed as a matter of law. This is true even where – very unlike this matter – multiple specific aspects of the fictional character's story were claimed to resemble the plaintiff's unique experiences. In *Mother v. The Walt Disney Co.*, the plaintiff claimed that a character in the popular movie and Broadway show "Sister Act" incorporated specific unique aspects of her life. 2013 WL 297173, at *1. The court explicitly assumed the life story assertions to be true, but nonetheless dismissed the Section 51 claim because the right of publicity simply does not apply to any creative work. *Id*. at *3.

Mother held this result was compelled by the principle established as far back as *Toscani v. Hersey*, 271 A.D. 445 (1st Dep't 1946), where the plaintiff claimed that a

fictional character in the book and play "A Bell for Adano" incorporated aspects of his life. *Id*. at 446. In *Toscani*, the Appellate Division reversed the trial court's denial of a motion to dismiss, holding that the claim should have been rejected at the motion to dismiss stage because 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. at 448 (emphasis added); *Hampton*, 195 A.D.2d at 366 (dismissing claim under Section 51 because allegations that award-winning play "Six Degrees of Separation" – which was indeed inspired by the plaintiff – included details of plaintiff's life story were insufficient to state a claim); *Wojtowicz*, 58 A.D.2d at 47 (fictionalized versions of plaintiffs in the movie *Dog Day Afternoon* could not give rise to a cause of action under Sections 50 and 51 where their names, portraits or pictures were not used even if "clear that the plaintiffs were actually being depicted therein"). This well-settled principle confirms that the Complaint should be dismissed.

II. The Complaint Is Time-Barred.

Ms. Lohan's Complaint also fails as a matter of law because she did not bring her claims within the one-year statute of limitations as defined by section 215(3) of the CPLR. As to the Lacey Jonas character, Ms. Lohan alleges that "Defendants announced the Plaintiff's name in association with a look-alike side mission" Compl. ¶¶ 17, 19, 34. No documentary support for that assertion is attached to the Complaint, but the public record indicates that this was the opinion of a third-party blogger, not a statement by

Take-Two. *See* pp. 8-9, *supra*. Even accepting as true the unsupported allegation that the statement was made by Take-Two and reported by the blogger, the announcement was made at least as early as June 30, 2013 – a year and a day before the Complaint was filed. Similarly, the Beach Weather and Stop and Frisk artworks were released on or about November 1, 2012, a year and eight months before the Complaint. Rosa Affidavit Ex. 8; Kagan Aff. Ex. 8.

Under section 215(3) of the CPLR, however, a right of publicity claim must be commenced within one year. Even if Ms. Lohan had a valid claim under the law, she filed her suit too late. *See, e.g.*, *Nussenzweig v. diCorcia*, 9 N.Y.3d 184 (2007) (right of publicity claim accrues on the date the offending material is first published). The Complaint should be dismissed as untimely.

III. Defendant Rockstar North Is Not Subject To Personal Jurisdiction.

Defendant Rockstar North (alleged to be both a domestic corporation and a foreign one, Compl. ¶¶ 7, 11) is actually a foreign corporation incorporated under the laws of the United Kingdom with a principal place of business in Edinburgh, Scotland. Rosa Aff. ¶ 15. Rockstar North is not authorized to do business in New York, does not do business in New York, and does not have an office in New York. *Id.* Thus, under CPLR section 302(a)(1), this Court does not have *in personam* jurisdiction over Rockstar North because Rockstar North does not "in person or through an agent . . . transact[] any business within the state." Rockstar North has not "purposefully avail[ed] itself of the privilege of conducting activities within [New York]," and the claim here does not arise

from any such activities by Rockstar North. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007) (alteration in original); *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981).

Dismissal of all claims against Rockstar North thus is proper under CPLR section 3211(a)(8) because Ms. Lohan has not alleged, and cannot supply, any facts establishing personal jurisdiction. On this motion to dismiss, the Court may rely upon the sworn affidavit to the contrary. *See, e.g., Rabizzadeh v. Nagel Auktionen GmbH & Co. KG*, No. 12929/09, 2010 WL 2670791 (Sup. Ct., Nassau Cnty. July 6, 2010) (holding New York court lacked personal jurisdiction over German auction house based in part on defendant's affidavit establishing defendant's foreign existence and business, coupled with plaintiff's insufficient evidence on the issue).

IV. Sanctions Are In Order.

The Complaint fits squarely within New York's definition of a frivolous case: It is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 22 NYCRR § 130-1.1(c)(1); *see also* CPLR § 8303-a(c)(ii) (a claim is frivolous if "commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law"). Ms. Lohan and her counsel's conduct supports an award against both of them. *See* 22 NYCRR § 130-1.1(a), (b) (courts may award "any party . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct"; award may be imposed "against either an attorney or a party to the litigation or against both").

Sanctions are particularly appropriate because Ms. Lohan has been on notice of exactly why her claim is frivolous. First, her loss in *Perez* was an unequivocal judicial statement that she cannot bring right of publicity claims based on creative works – even a work that actually uses her name. 924 F. Supp. 2d at 451. Second, having become aware of the Complaint from press coverage after it was filed but before it was served, Take-Two gave Ms. Lohan and her counsel specific and detailed notice of the reasons why any pursuit of this litigation would be meritless. Take-Two urged Ms. Lohan's counsel not to serve the Complaint but rather to withdraw it. *See* Kagan Aff. Ex. 9 (email from Take-Two internal counsel to Ms. Lohan's counsel, dated July 8, 2014).

Ms. Lohan proceeded to serve the Complaint anyway, supporting the case for sanctions against her and her counsel. *See One Beacon Ins. Co. v. Bloch*, 298 A.D.2d 522, 523-24 (2d Dep't 2002) (awarding sanctions pursuant to 22 NYCRR § 130-1.1 where "the appellant and its attorneys should have known better than to pursue this appeal in abject disregard of controlling authority squarely on point"); *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 and his counsel "fail[ed] to discontinue the action after being specifically advised by defendant's attorney that the claim was baseless."). Although the *Perez* Court declined to impose sanctions, 924 F. Supp. 2d at 457-58, this Court should not be so generous when Ms. Lohan has pursued the same baseless theory in a second case less than a year later.

CONCLUSION

For all of the reasons stated above, the Complaint should be dismissed in its entirety with prejudice, Plaintiff and her counsel should be sanctioned, and Defendants should be awarded their costs and fees.

Dated: August 20, 2014
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: /s/ Jeremy Feigelson

Bruce P. Keller
Jeremy Feigelson
Jared I. Kagan

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

Counsel for Defendants