

**STATE OF NEW YORK
COURT OF APPEALS**

LINDSAY LOHAN,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

APL-2017-00028

New York County Clerk's Index No.
156443/14

**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Samuel M. Bayard, dated December 18, 2017, the Motion Picture Association of America, Inc. and Home Box Office, Inc. (collectively "Proposed Amici") will move this Court at 20 Eagle Street, Albany, New York, on January 8, 2018, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule of Practice 500.23 of this Court, granting Proposed Amici leave to file a brief as amici curiae in support of Defendants-Respondents in the above-captioned action, and for such other and further relief as the Court may deem just and proper in the circumstances.

Dated: New York, NY
December 18, 2017

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@dwt.com

Attorneys for Proposed Amici Curiae

Of Counsel:

Kelli L. Sager
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
kellisager@dwt.com

To: Jeremy Feigelson
Jared I. Kagan
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
jfeigelson@debevoise.com
jikagan@debevoise.com

Attorneys for Defendants-Respondents

Robert O. Pritchard
The Pritchard Law Firm
30 Wall Street, 8th Floor
New York, New York 10007
(212) 859-5027
rop@pritchardlawfirm-nyc.com
Attorneys for Plaintiff-Appellant

Attorneys for Plaintiff-Appellant

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**AFFIRMATION OF SAMUEL M. BAYARD
IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

Samuel M. Bayard, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalties of perjury as follows:

1. I am a partner at the law firm of Davis Wright Tremaine LLP. I submit this affirmation in support of the Motion of the Motion Picture Association of America, Inc. ("MPAA") and Home Box Office, Inc. ("HBO") (collectively, "Proposed Amici") for leave to file a brief as amici curiae in support of Defendants-Respondents in the above-captioned action.

2. Attached as Exhibit A is a copy of the brief that Amici wish to submit to the Court (the "Amici Brief" or "Brief"). The MPAA and HBO have duly authorized me to submit this Brief on their behalf.

3. The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The members of MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. These members and their affiliates are leading producers and distributors of audiovisual entertainment in the theatrical, television and DVD/home video markets.

4. HBO is a New York-based company that provides HBO and Cinemax branded television services to more than 134 million subscribers worldwide. HBO produces and licenses critically acclaimed HBO original programming to television networks in over 150 countries, including series, mini-series and films, which often take viewers behind the scenes of some of the most important events in recent history.

5. Proposed Amici often have appeared as amici curiae in cases involving claims that potentially implicate the exercise of First Amendment rights, including cases involving misappropriation and right-of-publicity claims that purport to arise from the use of a plaintiff's name and/or likeness in expressive works.

6. Motion picture studios and television companies like Proposed Amici,

as well as independent filmmakers, producers, directors, and screenwriters, often are the targets of lawsuits by individuals who either are depicted in biographical or historical feature films and television programs – sometimes called “biopics,” “docudramas,” or “historical dramas” – or claim to have been the inspiration for a fictional character in a fictional story.¹ Even where the claims are found to be without merit (as they typically are), the litigation can be protracted and expensive.

7. If this Court adopts the expansive view of the scope of New York Civil Rights Law §§ 50-51 urged by Appellant Lindsay Lohan, valuable speech could be chilled, because every person who is referenced in a film or television program – or who claims to have been the inspiration for a fictional character in that work – could use the threat of expensive litigation to demand payment.

8. Pursuant to Rule 500.23 of the Rules of Practice of this Court, I respectfully submit that, because Amici have substantial experience and expertise in the production and distribution of fictional films and television shows that tell stories about, are inspired by, or merely are evocative of, real people and events, the MPAA and HBO are in a position to identify law and arguments that might otherwise escape the Court’s consideration and to provide information that would be of assistance to the Court. Accordingly, the Brief presents law and arguments

¹ Moreover, HBO, members of the MPAA, and others involved in the creation and distribution of motion pictures and television programs receive many threatened claims for every lawsuit that is actually filed.


that draw on Amici's unique perspectives as participants in the film and television industry.

9. Counsel for Defendants-Respondents has consented to the filing of the Proposed Amici Brief.

10. On December 5, 2017 and December 12, 2017, I emailed Robert O. Pritchard, counsel for Plaintiff-Appellant Lohan, and asked him if Lohan would consent to the filing of the Proposed Amici Brief. Mr. Pritchard did not respond to my emails.

11. For all these reasons, I respectfully request that this Court grant the instant motion in all respects and that the MPAA and HBO be given leave to file the Proposed Amici Brief in this appeal.

Dated: New York, NY
December 18, 2017



Samuel M. Bayard

EXHIBIT A

Court of Appeals
STATE OF NEW YORK

LINDSAY LOHAN,

Plaintiff-Appellant,

—against—

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

Defendants-Respondents.

**BRIEF FOR *AMICI CURIAE* THE MOTION PICTURE
ASSOCIATION OF AMERICA, INC. AND HOME BOX OFFICE, INC.
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

Of Counsel:

KELLI L. SAGER
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

ROBERT D. BALIN
SAMUEL M. BAYARD
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas,
21st Floor
New York, New York 10020
Telephone: (212) 489-8230
Facsimile: (212) 489-8340

*Attorneys for Amici Curiae
The Motion Picture Association of
America, Inc. and Home Box
Office, Inc.*

December 18, 2017

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Defendants-Respondents.

APL-2017-00028

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**CORPORATE DISCLOSURE STATEMENT OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

Pursuant to Section 500.1(f) of the Court of Appeals Rules of Practice, the undersigned counsel for Amicus Curiae the Motion Picture Association of America, Inc. certifies that it a not-for-profit trade association that does not issue any stock, and it has the following subsidiaries and affiliates:

Motion Picture Association – Canada

Sixteen Hundred Eye Street Corp.

Motion Picture Association

Motion Picture Association – International

Copyright Collective of Canada

Australian Screen Association

Hong Kong International Screen Association, Ltd.

New Zealand Screen Association Limited

MPA Korea, Ltd.

Motion Picture Association – America Latina

Dated: December 18, 2017

Respectfully submitted,



By: Robert D. Balin

Samuel M. Bayard

DAVIS WRIGHT TREMAINE LLP

1251 Avenue of the Americas

21st Floor

New York, NY 10020

(212) 489-8230

robbalin@dwt.com

samuelbayard@dwt.com

Attorneys for Amici Curiae

Of Counsel:

Kelli L. Sager

DAVIS WRIGHT TREMAINE LLP

865 S. Figueroa Street, Suite 2400

Los Angeles, California 90017-2566

(213) 633-6800

kellisager@dwt.com

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**CORPORATE DISCLOSURE STATEMENT OF
HOME BOX OFFICE, INC.**

Pursuant to Section 500.1(f) of the Court of Appeals Rules of Practice, the undersigned counsel for Amicus Curiae Home Box Office, Inc. certifies that its ultimate parent company is Time Warner Inc., a publicly traded company.

Dated: December 18, 2017

Respectfully submitted,


By: Robert D. Balin
Samuel M. Bayard
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@dwt.com

Attorneys for Amici Curiae

Of Counsel:

Kelli L. Sager
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
kellisager@dwt.com

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Motion Picture Association of America, Inc. (“MPAA”) and Home Box Office, Inc. (“HBO”).¹ HBO and the members of the MPAA regularly produce, broadcast, and distribute constitutionally protected films and television programs in New York and elsewhere. This case presents issues of substantial importance to Amici because filmmakers and television producers routinely create movies and television shows that tell stories about – or are inspired by – real people and events, whether in fact-based, semi-fictional, or fictional works. In doing so, they rely on the First Amendment and on longstanding New York precedent – applied by the First Department in the decision below – holding that movies, television shows, plays, and other expressive works do not constitute “advertising” or “trade” under New York Civil Rights Law §§ 50-51 (“Section 51”). Amici incorporate by reference the arguments set forth in their brief in the companion case on appeal, Gravano v. Take-Two Interactive Software, Inc., APL-2017-00027, and submit this brief to address additional issues raised by Appellant Lindsay Lohan’s appeal.

¹ A description of Amici is included in the Affirmation of Samuel Bayard in support of this Brief, ¶¶ 3-4.

SUMMARY OF ARGUMENT

Appellant Lindsay Lohan claims that three different fictional characters in the video game “Grand Theft Auto V” (“GTAV5”) appropriate her “portrait” or “picture” under Section 51. According to Lohan, because different avatars are depicted either in generic clothing, with accessories that she has sported (a fedora, a bikini, a cell phone), making hand gestures that she has made (a peace sign), or as sharing vague life experiences with her (being famous and getting chased by paparazzi), the content of the video game violates her rights under Section 51 and entitles her to substantial damages.

Assuming, for the sake of argument, that these depictions of a fictional character in GTAV5 are Lohan’s “portrait” or “picture” (a dubious proposition), the First Department properly dismissed her Section 51 claim on the grounds that the alleged use of her portrait or picture in an expressive work – whether it is a movie, television show, play, or video game – is not “advertising” or “trade” within the narrow scope of Section 51. As explained in Amici’s brief in Gravano v. Take-Two Interactive Software, Inc., APL-2017-00027, the First Amendment’s broad protection for free speech and press does not permit the kind of monopolization of expression about real people or events claimed by Lohan. To the contrary, modern First Amendment jurisprudence requires such content-based restriction on expressive speech to survive strict scrutiny, a rigorous test that Lohan

clearly could not meet. To avoid the grave constitutional questions that would arise if Section 51 were applied to expressive works, and in keeping with Article 1, Section 8 of the New York Constitution's expansive protection for freedom of speech, this Court should affirm the First Department's ruling that expressive works of fiction, satire, and art do not constitute "advertising" or "trade" under Section 51.

In addition to their brief in Gravano, Amici submit this separate brief to address four issues raised in Lohan's appeal, each of which has the potential to significantly impact filmmakers, television producers, and other creators of expressive works.

First, Amici urge this Court to reject Lohan's argument that GTAV5 incorporates her "recognizable likenesses" to the extent her claim arises from an alleged use of generalized, non-unique aspects of Lohan's life story, personality, or style, including generic clothing, accessories, and hand gestures. Permitting a Section 51 claim to arise from ubiquitous personal characteristics or experiences like the ones Lohan identifies would dramatically limit expression, and the frivolous and expensive litigation that would result – or even the risk of such litigation – would chill content creators.

Second, Amici respectfully submit that this Court should narrowly construe the limits on expression for "advertisements in disguise," or uses that have "no real

relationship” to the content of expressive works. The artistic freedom of screenwriters, television producers, and other creators of expressive works should not be threatened by the kind of conclusory second-guessing of artistic choices that Lohan engages in on this appeal.

Third, Amici urge this Court to affirm New York’s longstanding rule protecting advertising about the content of expressive works. As a practical matter, the constitutional rights that protect movies, television shows, and other expressive works would have little value if creators and distributors were barred from advertising those works or conveying information to the public about the works’ content.

Fourth, Lohan’s argument that the “Lacy Jonas” character is a “fictional biography” under the Binns and Spahn line of cases should be rejected. These fact-specific decisions have no application here: GTAV5 does not hold itself out as a true account of events in Lohan’s life, or even mention her name. Moreover, Binns and Spahn are inconsistent with modern First Amendment jurisprudence, which requires strict scrutiny of content-based restrictions on speech rather than the less demanding tests applied in those cases.

For all these reasons, and for the reasons set forth in the Amici’s Proposed Brief in Gravano v. Take-Two Interactive Software, Inc., APL-2017-00027, Amici

urge that the First Department’s decision dismissing Lohan’s Amended Complaint be affirmed.

ARGUMENT

I. SECTION 51 DOES NOT APPLY TO THE EVOCATION OF A CELEBRITY’S STYLE, PERSONALITY, OR LIFE EXPERIENCES IN AN EXPRESSIVE WORK.

Filmmakers, television producers, and other content creators have long relied on New York law’s narrow construction of Section 51, which applies only to the unauthorized use of a plaintiff’s “name, portrait, picture or voice.” N.Y. CIV. RIGHTS LAW § 51. For decades, this straightforward language has been interpreted as excluding Section 51 claims by individuals asserting that an expressive work used aspects of their “life story” without permission. See, e.g., Wojtowicz v. Delacorte Press, 43 N.Y.2d 858, 860 (1978) (affirming dismissal of Section 51 claim brought by wife and children of real-life bank robber whose story was depicted in feature film “Dog Day Afternoon,” even though they could be effectively identified, because the movie did not use their “name, portrait, or picture”); 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”); Waters v. Moore, 70 Misc.2d 372, 375,

(Sup. Ct. Nassau Cty. 1972) (depiction of the plaintiff's character under a fictitious name in the motion picture "The French Connection" failed to state a Section 51 claim, even though the plaintiff's "identity [could] be ascertained from his involvement with the actual event [depicted in the movie] or by reference to external sources").

Consistent with this logic and the plain meaning of the statutory language, Section 51 does not extend to mere evocations of an individual's personality or style. See, e.g., Lombardo v. Doyle Dane & Birnbach, 58 A.D.2d 620, 622 (2d Dep't 1977) (orchestra conductor could not recover under Section 51 for recognizable depiction in commercial of plaintiff's style of conducting "Auld Lang Syne" in New Year's Eve setting; "it is clear that the Civil Rights Law is to be strictly construed and is not to be applied so as to prohibit the portrayal of an individual's personality or style of performance") (emphasis added); Burck v. Mars, Inc., 571 F. Supp. 2d 446, 451-54 (S.D.N.Y. 2008) (applying New York law) (no Section 51 claim was stated for dressing a character in the plaintiff's "signature outfit").

Despite this clear law, Lohan bases her Section 51 claim largely on alleged uses of her personality and style, including hand gestures, fashion choices, and

poses.² As a matter of statutory construction, the plain language of Section 51 forecloses this theory. In addition, important policy considerations support this Court's rejection of Lohan's attempt to dramatically expand Section 51 to include these kinds of intangible elements.³

First, permitting recovery under Lohan's expansive theory of "persona" would be inimical to freedom of expression. Celebrities are an important part of our society's cultural vocabulary. Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125, 128 (1993) (noting that celebrity images are "important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation"). Recognizing something akin to

² Much of Lohan's argument that the "Beach Weather" and "Stop and Frisk" transition screen images are "recognizable likenesses" of her is based on the claim that GTAV5 depicts female avatars wearing clothing (a fedora, a bikini), holding accessories (sunglasses, a cell phone), or making gestures (a peace sign) that Lohan claims she has worn, held, or made in the past. See Amended Verified Complaint ¶¶ 30-35, 45-47, Exhibit A-1, Exhibit B-1, Record at 23-26, 34-37, 38-43. Amici agree with the First Department's conclusion that the avatars in the "Beach Weather" and "Stop and Frisk" transition screens do not constitute a "portrait" or "picture" of Lohan. Amici urge this Court similarly to hold that the terms "portrait" and "picture" in Section 51 do not encompass aspects of a particular celebrity's personality or style, or extend to the use of generic articles of clothing, fashion accessories, and commonplace hand gestures in connection with fictional characters or imagery.

³ Even if GTAV5 could be viewed as incorporating Lohan's likeness (which it cannot), this kind of use in a purely expressive work should not be actionable for the reasons discussed in Amici's brief in Gravano.

monopoly “ownership” in a celebrity’s choice of clothing, accessories, or gestures would shrink that cultural vocabulary, dramatically limiting the raw materials available to create new works. Furthermore, such a theory also could significantly limit the freedom creators have to intentionally evoke aspects of a celebrity’s personality or style in satire or humorous criticism, whether directed specifically at the celebrity or at our culture’s obsession with fame more generally.

For example, the routine mockery of celebrities and celebrity culture on shows like “Southpark” and “Family Guy” could be inhibited if this Court permits Lohan’s claims to go forward. Thinly-veiled send-ups of famous people, like that of Anna Wintour in “The Devil Wears Prada,” or Bill Clinton in “Primary Colors,” likewise could be subject to claims if Lohan’s theory is adopted.

Second, the prospect of tort liability from use of such intangible elements of an individual’s personality and style in an expressive work would create significant uncertainty for filmmakers, television producers, and other storytellers, who would face the very real prospect of frivolous litigation by celebrities (or even private individuals) claiming that their personas had been used. Content creators would have to consider whether the use of stock characters or ubiquitous props – including commonplace items like cell phones, bikinis, sunglasses, and fedoras – could trigger Section 51 claims.

As a result, filmmakers might avoid portraying a “sexy rock star” character out of fear of a lawsuit by Justin Timberlake, Rod Stewart, Robert Plant, or even Elvis’s estate.⁴ Under Lohan’s expansive view, Cameron Crowe’s “Almost Famous” could have faced claims because its fictional rock band (and front man) incorporated elements of Led Zeppelin, the Allman Brothers Band, the Eagles, and Lynyrd Skynyrd.⁵ Similarly, filmmakers might fear that including a “blond bombshell” character in a motion picture would risk a suit by a host of actresses, including Lohan, Patricia Arquette, Sharon Stone, and the estate of Marilyn Monroe.⁶ Indeed, if an actress were permitted to claim a monopoly right in the depiction of a blonde bombshell in a bikini, countless movies and television shows could run afoul of Section 51, including “Baywatch,” “Blue Crush,” “And God Created Woman,” and even “Beach Blanket Bingo” and “Gidget.”

⁴ Although Section 51 does not apply posthumously, proponents of strong publicity rights have introduced bills in the New York legislature attempting to create a posthumous right in New York, so far unsuccessfully. See Assembly Bill A08155 (2017).

⁵ See Anthony Bozza, A Boy’s Life (in Sex, Drugs and Rock & Roll), Rolling Stone, Oct. 12, 2000, at <http://www.rollingstone.com/movies/features/a-boys-life-in-sex-drugs-and-rock-roll-20001012>.

⁶ The risk of multiple claims over a single character is not hypothetical. It is not uncommon for more than one individual to claim that he or she is the “real” person upon which a fictional character is based. For example, two different plaintiffs – both with the first name “Michael” – unsuccessfully sued Fox Television for its fictional television series “Burn Notice,” which featured an ex-spy named “Michael Westen,” each claiming that the character was based on him. Terry v. Fox Group, No. BC478450 (Los Angeles Superior Ct. 2012); Bertsch v. Rupert Murdoch, et al., No. 3:2012cv05129 (W.D. Wash. Jan. 11, 2012).

Lohan's own Complaint illustrates the ubiquitous nature of the blonde bombshell persona she relies on. In Exhibit F to her Amended Complaint, Lohan includes a screenshot of Google Images search results for "Lindsay Lohan GTA 5."⁷ The Google search results include not only images of Lohan, but also a series of images comparing the "Beach Weather" avatar to actress and model Kate Upton, based on a photo that appeared in Sports Illustrated's 2012 swimsuit edition.⁸ The juxtaposition of Upton's photo from Sports Illustrated and the "Beach Weather" image suggests that the GTAV5 avatar resembles Upton at least as much (if not more) than it resembles Lohan.⁹ One can only speculate about how many other blonde bombshells in a bikini also might exhibit this "persona."

Permitting Lohan's claims to proceed to discovery based on the alleged use of her "blond bombshell" persona or common items like a bikini, sunglasses, a cellphone, and a peace sign not only would chill valuable speech, but would expose the film and television industry to a plethora of frivolous claims based on minor aspects of an individual's personality.

⁷ Amended Verified Complaint, Exhibit F, Record at 59.

⁸ The photo of Upton that Internet users compare to the "Beach Weather" avatar is available online at Sports Illustrated's website, at <https://www.si.com/swimsuit-2012/photos/2012/02/14/kate-upton-model-2012-sports-illustrated-swimsuit-edition-si-com>.

⁹ Amended Verified Complaint, Exhibit F, Record at 59.

II. THIS COURT SHOULD NARROWLY CONSTRUE THE “ADVERTISEMENT IN DISGUISE” AND “NO REAL RELATIONSHIP” DOCTRINES TO PROTECT THE CREATIVE FREEDOM OF FILMMAKERS, TELEVISION PRODUCERS, AND OTHER CONTENT CREATORS.

Lohan acknowledges that expressive works of art, fiction, and satire generally are not actionable under Section 51. Appellant’s Brief at 19-20, 23-24, 30. Nonetheless, she argues that the alleged use of her image in the “Beach Weather” and “Stop and Frisk” transition screens are “advertisements in disguise” that have “no real relationship” to the content of the video game because they are static images that “are not subject to player manipulation.” *Id.* at 8; see also id. at 6, 18. This argument attempts to blur the longstanding distinction – recognized under the First Amendment and the laws of New York and other states – between expressive works and advertising for commercial products.

This Court repeatedly has made clear that the “no real relationship” standard only may be used to strip an expressive work of protection in extreme circumstances, where the alleged use of a plaintiff’s name or likeness has no relevance whatsoever to the underlying expressive work. See, e.g., Finger v. Omni Publications Int’l, Ltd., 77 N.Y.2d 138, 142-43 (1990) (photograph of large family had real relationship to article about a research project relating to caffeine-aided fertilization even though the plaintiffs “never participated in the caffeine-enhanced reproductive research”); Arrington v. New York Times Co., 55 N.Y.2d 433, 441,

(1982) (photograph of African-American man on street had real relationship to article about the “black middle class” despite the plaintiff’s contention that he lacked any “legitimate connection” to the conception of class presented in the article); Murray v. New York Magazine Co., 27 N.Y.2d 406, 408-09 (1971) (photograph of man attending St. Patrick’s day parade had real relationship to article on contemporary attitudes of Irish-Americans in New York City, even though he was not of Irish descent).

This strict limitation on the “no real relationship” test in New York courts is consistent with the federal courts’ application of the First Amendment to right-of-publicity and Lanham Act claims, which protects the use of a celebrity’s name or likeness in expressive works unless it has “no artistic relevance” or is “wholly unrelated” to the underlying work, or the use is “explicitly misleading.” Rogers v. Grimaldi, 875 F.2d 994, 1000, 1004 (2d Cir. 1989).

For example, in E.S.S. Entertainment 2000 v. Rock Star Videos, 547 F.3d 1095 (9th Cir. 2008), the Ninth Circuit held that the First Amendment barred a Lanham Act claim based on the use of the plaintiff’s trademark in a video game that created a cartoon-style parody of East Los Angeles. The court noted that “only the use of a trademark with ‘no artistic relevance to the underlying work whatsoever’” forfeits First Amendment protection. Id. at 1100 (internal quotation marks omitted). As the panel explained, “the level of relevance merely must be

above zero.” Id. See also Romantics v. Activision Publishing, Inc., 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008) (applying Rogers test to “Guitar Hero” video game and holding that use of plaintiffs’ song was not “‘wholly unrelated’ to the content of the work” because “the purpose of the [g]ame is to allow players to pretend they are in a rock band”). These cases are consistent with the Restatement, which provides that use of person’s identity “in news reporting, commentary, entertainment, works of fiction, or nonfiction” are not actionable unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” Restatement (Third) of Unfair Competition § 47 & cmt. c.

Lohan asserts that the “Beach Weather” and “Stop and Frisk” transitions screens have “nothing to do with playing the video game” because they are “still images” and “are not subject to player manipulation.” Appellant’s Brief at 8; see also id. at 18. This argument is akin to saying that opening credits, set decoration, wardrobe, and other elements of production design in motion pictures have “nothing to do with” the viewer’s experience of a movie, just because they may not directly advance the plot or character development of a film. But these elements contribute to the movie-viewing experience, and filmmakers display great creativity in deploying them – whether striving for realism in every minute detail, imagining historical settings and new worlds, conveying symbols, or generating desired moods. In recognition of the considerable creativity that goes into

designing and executing these kinds of elements, the Academy of Motion Picture Arts and Sciences, the Television Academy, and the American Theatre Wing annually award Oscars, Emmys, and Tonys for excellence in production design, set decoration, costume design, and makeup and hairstyling, among other categories.

Moreover, the type of artistic second-guessing that Lohan advocates could result in litigation whenever celebrity names or likenesses are tangentially invoked in films and television shows, whether through cameos, cultural references and allusions, “macguffins,”¹⁰ or other minor plot points. Filmmakers and television producers routinely use such literary devices, and these references and cameos are plainly “related” to the content of the expressive works in which they appear. For example:

- In “Men in Black,” the filmmakers used a running joke suggesting that various celebrities, including Danny DeVito, Newt Gingrich, Sylvester Stallone, Dennis Rodman, and Elvis, were aliens.
- The HBO series “The Newsroom” used real-world news stories, featuring prominent people from current events, as backdrops for the

¹⁰ A “macguffin” is an “object, event, or character in film or story that serves to set and keep the plot in motion despite usu[ally] lacking intrinsic importance” TCA Television Corp. v. McCollum, 839 F.3d 168, 182 (2d Cir. 2016), cert. denied, 137 S. Ct. 2175 (2017) (quoting Merriam–Webster's Collegiate Dictionary 744 (11th ed. 2003)).

dramatic action taking place between the staff of a fictional news program.

- The Netflix series “Master of None” built a recent episode around various characters wanting to see a fictional movie called “Death Castle” that was described as starring Nicolas Cage, Emma Watson, and Tyrese Gibson.

The First Amendment protects the freedom of content creators to make these kinds of artistic choices. This Court’s narrow construction of the “no real relationship” test should do the same.

The “advertisement in disguise” exception likewise should be limited to the unusual situations where the supposed expressive or editorial content is transparently a veiled advertisement for some other product or service, not an expressive work marketed to the public for its own sake. For example, in Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 409, 416 (9th Cir. 1996), the Ninth Circuit upheld right-of-publicity claims against the use of a basketball player’s name in a “trivia” quiz contained in the body of a car commercial, even though the quiz itself arguably was editorial in nature. Id. at 409, 416. Similarly, in Beverley v. Choices Women’s Med. Ctr., 78 N.Y.2d 745, 749, 752–53 (1991), this Court upheld a Section 51 claim based on the use of the plaintiff’s image in a calendar on the history of the women’s movement, relying in part on the “advertisement in

disguise” rationale, because the calendar served as advertising for the defendant’s medical services. Id. Here, unlike those cases, GTAV5 itself plainly is not an “advertisement in disguise” for some other product or service. It is a creative work marketed to the public for its own sake, just like movies and television programs.

For decades, filmmakers and television producers have relied on the clear distinction between expressive works and advertising content as a way of predicting when speech is protected from misappropriation and right-of-publicity claims. Lohan’s conclusory arguments that the alleged use of her image in the video game is really “advertising,” if accepted, would undermine the bedrock distinction between commercial and non-commercial speech and cast a pall over content creators of all kinds.

III. FILMMAKERS, TELEVISION PRODUCERS, AND OTHER CONTENT CREATORS RELY ON NEW YORK LAW AND THE FIRST AMENDMENT TO PROTECT ADVERTISING ABOUT THE CONTENT OF THEIR EXPRESSIVE WORKS.

Under well-established First Amendment principles and New York law, distributors of expressive works are protected from misappropriation and right-of-publicity claims based on advertising and promotion about the content of those works. For more than fifty years, New York courts “have recognized an exception to Section 51 for the ‘incidental’ use in ads or other promotional items of material that ‘prove[s] [the] worth and illustrates [the] content’ of the works being advertised.” Groden v. Random House, Inc., 61 F.3d 1045, 1049 (2d Cir. 1995)

(applying New York law) (quoting Booth v. Curtis Publ'g Co., 15 A.D.2d 343, 349 (1st Dep't), aff'd, 11 N.Y.2d 907 (1962)). Accord Booth, 15 A.D.2d at 344-45, 349-350 (1st Dep't 1962) (use of actress's photo from edition of Holiday magazine in advertising for Holiday in the New Yorker and Advertising Age did not violate Section 51; an "advertisement for the periodical itself, illustrating the quality and content of the periodical" was protected); Altbach v. Kulon, 302 A.D.2d 655, 658 (3d Dep't 2003) ("there is a well-recognized exception for works of art and 'advertising that is undertaken in connection with a use protected by the First Amendment'").¹¹

Although this "incidental" or "ancillary" use exception was developed initially in the context of newsworthy books and periodicals, New York courts have extended it to advertising for other expressive works. See Altbach, 302 A.D.2d at 655-56, 658-59 (reproduction of satirical painting of Town Justice along with photograph of him on flyers for the defendant's art gallery was exempt from liability under Section 51); Hoepker v. Kruger, 200 F. Supp. 2d 340, 350-51 (S.D.N.Y. 2002) (applying New York law) (advertising for museum exhibit that

¹¹ See also Velez v. VV Publishing Corp., 135 A.D.2d 47, 49 (1st Dep't 1988) (reproduction of Village Voice cover featuring plaintiff's likeness in advertising was not actionable because original use was protected editorial use); Namath v. Sports Illustrated, 48 A.D.2d 487, 488-89 (1st Dep't 1975) (use of Joe Namath's photograph from Sports Illustrated in ads soliciting magazine subscriptions for Sports Illustrated was a protected ancillary or incidental use), aff'd, 39 N.Y.2d 897 (1976).

reproduced plaintiff's image in collage artwork was exempt from Section 51 liability; "[a]lthough the ancillary use exception was first developed in the context of advertisements for books and periodicals, it applies equally well here to advertising undertaken by the Whitney to promote the Kruger Exhibit").

This interpretation of New York law is consistent with cases from other jurisdictions holding that advertising about constitutionally protected expressive works is not actionable under right-of-publicity and commercial misappropriation torts. See, e.g., Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 873, 603 P.2d 454, 462 (1979) (Bird, C.J., concurring) (because the First Amendment protected the use of Rudolph Valentino's name and likeness in fictionalized biographical film, "the use of [Valentino's] identity in advertisements for the film is similarly not actionable");¹² Cher v. Forum International, Ltd., 692 F.2d 634, 639 (9th Cir 1982) ("[c]onstitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication"); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118 (N.D. Cal. 2002) (plaintiff did not state a right of publicity claim based on defendants' use of her image in the program "Bands on the Run" or in billboards and other

¹² Although written as a concurrence, the California Supreme Court subsequently noted that Chief Justice Bird's opinion "commanded the support of the majority of the court" because her opinion was joined or endorsed by three other Justices on the seven-member court. Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 396 n.7, 21 P.3d 797, 803 (2001).

promotional material because the entertainment program and the advertisements for it were protected by the First Amendment); Lane v. Random House, Inc., 985 F. Supp. 141, 147-48 (D.D.C. 1995) (use of plaintiff's photograph in New York Times advertisement for author's book criticizing conspiracy theories, including plaintiff's theories, was not actionable because the advertisement was incidental to protected discussion of plaintiff in the book). The Restatement concurs, noting that the term "for purposes of trade" does not include "advertising incidental to" works of entertainment or fiction. Restatement (Third) of Unfair Competition § 47 (emphasis added).

The rationale for this national consensus is sound. As a practical matter, the right to create constitutionally protected expressive works like movies, television shows, and other expressive works would be an empty shell if content creators could not advertise those works or convey information about their content to the public. See Guglielmi, 25 Cal.3d at 873, 603 P.2d at 462 (Bird, C.J., concurring) ("[i]t would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise").

This reasoning is consistent with cases holding that First Amendment protection is not diminished merely because an expressive work is sold for a profit. See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them

from being a form of expression whose liberty is safeguarded by the First Amendment”); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (noting that it is “beyond serious dispute” that the sale of speech alone does not render it “commercial” for purposes of the First Amendment); see also Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing, 94 N.Y.2d 436, 442 (2000) (“the fact that a publication may have used a person's name or likeness ‘solely or primarily to increase the circulation’ of a newsworthy article – and thus to increase profits – does not mean that the name or likeness has been used for trade purposes within the meaning of the statute.”).

No rationale exists for applying a different approach simply because a celebrity plaintiff allegedly is referenced only briefly in the underlying creative work. As discussed above, movies and television programs commonly use cameos, cultural allusions, and minor plot points involving celebrities for a variety of artistic reasons, both serious and entertaining. Filmmakers and television producers legitimately use these literary devices in advertising and promotion of their expressive works. New York law and the First Amendment protect their right to do so, without second-guessing by celebrities who object to their portrayal (or their mere evocation) in an expressive work.

IV. THE ALLEGED USE OF ELEMENTS OF LOHAN'S PERSONALITY OR LIFE STORY DOES NOT CREATE AN "INVENTED FICTIONAL BIOGRAPHY."

Lohan argues that the "Lacy Jonas" character represents an "invented fictional biography" of her, relying on Binns v. Vitagraph Company of America, 210 N.Y. 51 (1913), and Spahn v. Julian Messner, Inc., 18 N.Y. 2d 324 (1966), vacated, 387 U.S. 239 (1967), adhered to on remand, 21 N.Y.2d 124 (1967). Appellant's Brief at 6, 7, 9, 36. That argument cannot withstand scrutiny.

First, Lohan's claim bears no factual resemblance to the circumstances in Binns and Spahn. In both those cases, the challenged works identified the plaintiffs by name, and were represented as being biographical. See Binns, 210 N.Y. at 51 (challenged films had titles such as "John R. Binns the Wireless Operator in his Cabin Aboard the S. S. Republic" and "Jack Binns and his Good American Smile"); Spahn, 18 N.Y.2d at 327 (characterizing the work at issue as an "unauthorized publication of a fictitious biography of [the plaintiff's] life"); see also Messenger, 94 N.Y.2d at 446 (noting that the Binns and Spahn "defendants invented biographies of plaintiffs' lives").¹³ In contrast, GTAV5 is wholly

¹³ See also Hicks v. Casablanca Records, 464 F. Supp. 426, 432 (S.D.N.Y. 1978) ("In essence, the Court in Spahn stressed the fact that the lower court had found that the defendant had engaged in deliberate falsifications of the circumstances surrounding the life of plaintiff and that such falsifications, which the reader might accept as true, were capable of presenting plaintiff in a false light.").

fictional, and it does not use Lohan’s name or purport to convey any information about her.

Second, it is unlikely that Binns and Spahn could withstand First Amendment scrutiny under modern constitutional principles. As set forth more fully in Amici’s brief in Gravano, the First Amendment places strict limitations on content-based restrictions on speech, defined as regulations that cannot be “justified without reference to the content of the regulated speech.” Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (citation and quotes omitted). Recent Supreme Court decisions have made clear that content-based restrictions on expressive speech – like Section 51 – are subject to strict scrutiny, except in a few “historic and traditional categories,” including obscenity, incitement, fraud, defamation, and fighting words. See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2543-44 (2012) (holding that a federal statute that prohibited making false statements about military honors was unconstitutional); United States v. Stevens, 559 U.S. 460, 468 (2010) (holding that a federal statute banning depictions of animal cruelty was unconstitutional). Section 51 claims do not fall within these narrow categories.¹⁴

¹⁴ For many years, the Supreme Court applied a less protective constitutional standard to commercial speech (i.e., speech that proposes a commercial transaction), that focused on whether the speech regulation at issue was “narrowly drawn” to a “substantial interest.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557, 564-65 (1980). More recently, the Court has signaled that commercial speech also may be subject to strict scrutiny, at least when “the government creates a regulation of speech because of disagreement with

Under strict scrutiny, “[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015). See also Matal v. Tam, 137 S. Ct. 1744, 1765-66 (2017) (slip op. at 2) (Kennedy, J., concurring) (plurality opinion) (“[t]he First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination.”) (quoting Reed, 135 S. Ct. at 2230). As explained in Amici’s brief in Gravano, because the New York legislature enacted Section 51 to protect against the use of an individual’s name or likeness in advertising for products,¹⁵ which is not implicated by the use of a plaintiff’s name or likeness in a purely expressive work, there is no sufficiently compelling government interest to weigh against the public’s significant interest in free expression.

This conclusion holds true regardless of whether an expressive work is fact-based or “fictionalized.” See Joseph Burstyn, 343 U.S. at 501-502 (noting that

the message it conveys.” Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011) (citation omitted). Commercial speech doctrines, however, should have no application here because GTAV5 is an expressive work.

¹⁵ See Howell v. N.Y. Post Co., Inc., 81 N.Y.2d 115, 123 (1993) (noting that the New York legislature enacted Section 51 in direct response to this Court’s decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902)). Roberson involved the use of the plaintiff’s photograph on mass-distributed lithographic print advertisements for flour. 171 N.Y. at 542.

“[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform”); Winters v. New York, 333 U.S. 507, 510 (1948) (both entertainment and news are fully protected by the First Amendment because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right”); Guglielmi, 25 Cal.3d at 867-68, 603 P.2d at 459 (Bird, C.J., concurring) (“works of fiction are constitutionally protected in the same manner as political treatises and topical news stories,” and thus “no distinction may be drawn in this context between fictional and factual accounts of Valentino’s life”).

Neither Binns nor Spahn applied a First Amendment strict scrutiny analysis to the content-based regulations on expressive speech at issue in those cases.¹⁶ Nor can they be reconciled with the overwhelming weight of authority from both New York and other jurisdictions protecting movies, books, and other creative fictional works from misappropriation and right-of-publicity claims. See Amici Brief, Gravano v. Take-Two Interactive Software, Inc., APL-2017-00027, at 8-12, 19-

¹⁶ In Spahn, this Court addressed the application of the New York Times actual malice standard to the facts of Spahn’s case, based on the Supreme Court’s then-recent decision in Time, Inc. v. Hill, 385 U.S. 374 (1967). But Time treated the New York “fictionalization” line of cases as false light claims, and held only that recovery under this theory was constitutionally permitted if actual malice were proven. Id. at 387-90. Subsequent Court of Appeals decisions have made clear that New York does not recognize a claim for false light invasion of privacy. Messenger, 94 N.Y.2d at 448; Howell, 81 N.Y.2d at 123-24.

21.¹⁷ New York courts long have held that Article 1, Section 8 of the New York Constitution is more expansive than the First Amendment, and that the courts of this State have a “consistent tradition ... of providing the broadest possible protection” to media activities. O’Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 529 (1988). For Binns and Spahn to extend less protection to movies, television shows, and other fictional expressive works than courts have recognized in other jurisdictions interpreting the First Amendment would threaten New York’s status as a bastion of media freedom, and would generate significant uncertainty for all content creators.

CONCLUSION

For the reasons stated above and in Amici’s Brief in the companion appeal, Gravano v. Take-Two Interactive Software, Inc., APL-2017-00027, Amici respectfully submit that this Court should affirm the First Department’s order dismissing Lohan’s Amended Complaint.

¹⁷ As explained more fully in Amici’s brief in Gravano, New York cases after Binns and Spahn have held that fictional works of entertainment and artwork are categorically excluded from Section 51 because they do not constitute a use in “advertising” or “trade” within the meaning of that statute. As construed by Messenger, the Binns and Spahn line of cases address only the narrow question of whether fictionalization can deprive a work of the protection of the newsworthiness exception under Section 51. See Messenger, 94 N.Y.2d at 446, (“Thus, under Binns and Spahn, an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.”).

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Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@dwt.com

Attorneys for Amici Curiae

Of Counsel:
Kelli L. Sager
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
kellisager@dwt.com

CERTIFICATION

I certify, pursuant to Court of Appeals Rule 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statements, the table of contents, the table of cases and authorities required by Rule 500.13(a), and any addendum containing material required by Rule 500.1(h), is 6076 words.



By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@dwt.com

Attorneys for Amici Curiae

Of Counsel:

Kelli L. Sager
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
kellisager@dwt.com