

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

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PHOEBE JONAS,	: Index No.: 155925/2018
	:
Plaintiff,	: Hon. Andrea Masley
	:
-against-	: Motion Seq. No. 1
	: Date Returnable:
BAYER CORPORATION and BAYER U.S. LLC,	: November 30, 2018
d/b/a PHILLIPS',	:
	:
Defendant.	:
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**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS****MINTZ & GOLD LLP**

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Plaintiff Phoebe Jonas (“Plaintiff” or “Ms. Jonas”), by and through her attorneys Mintz & Gold LLP, respectfully submits this supplemental brief in further opposition to the motion of Defendants Bayer Corporation and Bayer U.S. LLC, d/b/a Phillips’ (together, “Defendants” or “Bayer”) to dismiss the Complaint pursuant to CPLR 3211 (the “Motion”).

PRELIMINARY STATEMENT

In an effort to avoid liability for their egregious misappropriation of Plaintiff’s likeness to advertise their products, Defendants have filed a premature Motion to dismiss this action before Plaintiff even has an opportunity for discovery. In their Motion, Defendants improperly ask this Court to decide, as a matter of law, what is fundamentally a question of fact – whether the Bobblehead in Defendants’ commercial is recognizable as Plaintiff, such that Plaintiff has stated a claim under Civil Rights Law § 51 (“Section 51”). In support of the Motion, Defendants purportedly rely on *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111 (2018) (“Lohan”). But Defendants’ reliance on the Court of Appeals decision in that case is flawed.

Defendants like *Lohan* because of its result—the dismissal of the plaintiff’s Section 51 claim—and because of what they interpret as the Court of Appeals’ willingness to abandon well-established principles under the CPLR. But the Court of Appeals in *Lohan* neither addressed, analyzed, nor decided that it was ignoring or fundamentally changing the standards under the CPLR for cases under Section 51, as Defendants seem to contend. *Lohan* was not litigated as a typical Section 51 case because the key question on appeal was whether the alleged portraits were used for “advertising” or “trade” purposes—a necessary element of a Section 51 claim—or whether they were creative works of art not covered by the statute. That question is not at issue in the instant case because the Bobblehead commercial unequivocally satisfies the “advertising” element of Section 51. Thus, the underlying premise that led the defendants to appeal the trial

court's decision in *Lohan* was an argument that Defendants in this case are not even making.

Because the alleged portraits in *Lohan* were arguably creative works, the defendants in *Lohan* also argued that the images were protected from Section 51 claims by the First Amendment. Thus, the analysis of the Court of Appeals in *Lohan* was further complicated by First Amendment considerations. Those issues do not exist in this case either. And if those critical differences were not enough, there are also numerous factual distinctions between *Lohan* and the instant case. Perhaps most important, the plaintiff in *Lohan* had no connection to the video game, whereas here, Ms. Jonas appeared in Defendants' commercials for more than two years, and Defendants' website had a screenshot of Plaintiff from those commercials as the "click-through" image for the new commercial featuring the Bobblehead replica of Plaintiff.

In sum, Defendants' argument proves too much. They ignore critical differences between *Lohan* and the instant action – differences that make the *Lohan* decision inapplicable here. For all these reasons, *Lohan* is distinguishable from the instant case and therefore is not controlling. Accordingly, the Court of Appeals' decision in *Lohan*—finding that the images were not recognizable as the plaintiff as a matter of law—should not guide the Court's analysis in deciding Defendants' Motion in the instant action. Defendants' Motion should be denied.

ARGUMENT¹

During oral argument on their Motion, Defendants submitted to the Court a copy of a document filed with the trial court in *Lohan*. See *Lohan*, Supreme Court, N.Y. Cnty., Index No. 156443/2014, Dkt. 50. Included in the document were images from the Grand Theft Auto V

¹ For a complete description of the facts and Plaintiff's arguments in opposition to the Motion, Plaintiff refers the Court to its Opposition Brief ("Opposition" or "Opp."), Dkt. No. 26.

video game (“GTAV”), on which the plaintiff’s claim in *Lohan* was based – specifically, the Lacey Jonas avatar and the “Beach Weather” and “Stop and Frisk” transition images.

Defendants had not previously submitted this document, despite having two prior opportunities to do so in their original Motion papers and in their Reply. Accordingly, Your Honor granted Plaintiff’s request to file a supplemental brief to respond to Defendants’ late submission and to clarify Plaintiff’s argument that *Lohan*, 31 N.Y.3d 111—the case upon which Defendants’ Motion primarily relies—did not alter the standard rules under the CPLR and does not control the instant action.

I. THE COURT OF APPEALS IN *LOHAN* DID NOT CHANGE THE CPLR 3211 STANDARDS APPLICABLE TO SECTION 51 CLAIMS

A motion to dismiss on documentary evidence under CPLR 3211(a)(1) cannot be granted unless the defendants’ submission “utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 426 (2002). Affidavits are testimonial in nature and do not constitute documentary evidence. *Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 432 (1st Dep’t 2014). Further, it is a fundamental principle of law that, on a motion to dismiss under 3211(a)(7), a court must “accept the facts [] alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Defendant bears the burden on such a motion and if there exist any material factual disputes, the motion must be denied. *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 318 (1995). Additionally, although a Court may, under certain circumstances where factual evidence has been submitted, convert a CPLR 3211(a) motion to dismiss to a motion for summary judgment under CPLR 3211(c), the procedure requires that the plaintiff be provided

adequate notice and sufficient opportunity to submit factual evidence to oppose the motion.

CPLR 3211(c).

Despite these basic tenets, the Court of Appeals in *Lohan* determined that the alleged portraits in GTAV were not recognizable as the plaintiff as a matter of law, and thus dismissed the case. There do not appear to be any reported cases citing *Lohan* since the Court of Appeals issued the decision in March 2018.² Thus, the instant action appears to be the first case in which the Court has an opportunity to interpret and give meaning to the decision in *Lohan*.

Purportedly relying on *Lohan*, Defendants ask the Court to ignore the definition of documentary evidence under CPLR 3211(a)(1) and reverse the burden-shifting framework provided under the CPLR. They want the Court to interpret *Lohan* as fundamentally changing the application of the CPLR, such that documentary evidence need not absolutely refute a claim, such that courts decide issues of fact rather than juries, and such that motions to dismiss are decided on factual issues rather than legal ones. To that end, Defendants somehow argue that the Court of Appeals' decision in *Lohan* signaled a seismic shift in the application of the CPLR with respect to Section 51 cases. Defendants are wrong.

The parties in *Lohan* did not question whether the standards applicable to CPLR 3211(a)(1) and CPLR 3211(a)(7)—the provisions upon which the defendants in that case based their motion to dismiss—apply in Section 51 cases. Further, in reaching its decision, the Court of Appeals in *Lohan* neither addressed, analyzed, nor decided any argument that the CPLR no longer applies to Section 51 cases. Indeed, nothing in the *Lohan* decision changes the rules or standards for documentary evidence under CPLR 3211(a)(1), failure to state a claim under CPLR

² The only exception is *Gravano v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 988 (2018), *Lohan*'s companion case, which the Court of Appeals decided on the same day as *Lohan*.

3211(a)(7), or converting a motion to dismiss to a motion for summary judgment under CPLR 3211(c). To the contrary, the Court of Appeals expressly recognized the “deferential rules germane to a motion to dismiss” under CPLR 3211(a)(1) and (a)(7) and acknowledged the general rule in a Section 51 claim that “[w]hether an image or avatar is a ‘portrait’ because it presents a ‘recognizable likeness’ typically is a question for a trier of fact.” *Lohan*, 31 N.Y.3d at 122 (2018) (quoting *Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 384 (1984)) (emphasis added). Moreover, the Court of Appeals in *Lohan* never even mentioned CPLR 3211(c). Thus, despite Defendants’ arguments to the contrary, there is no reason to believe that the Court of Appeals intended to abolish legislatively enacted provisions of the CPLR by judicial fiat.

The reason the Court of Appeals decided *Lohan* as it did—dismissing the plaintiff’s claim as a matter of law based on a seemingly factual question—is because, as explained in more detail below, *Lohan* was not a typical Section 51 case. As such, the Court of Appeals’ analysis in *Lohan* is inapplicable to the instant case and the Court should not adopt its reasoning.

II. BECAUSE THE CLAIM IN *LOHAN* WAS PREMISED ON ARGUABLY CREATIVE WORKS, RULING ON THE MOTION TO DISMISS REQUIRED CONSIDERATION OF COMPLEX ISSUES THAT ARE NOT PRESENT HERE

A cursory review of the decision in *Lohan* might lead a reader to agree with Defendants and conclude that the Court of Appeals ignored or fundamentally changed the applicable standards under the CPLR. However, a thorough examination of *Lohan*, the path it took to reach the Court of Appeals, and the arguments presented by the parties at each stage of the case provides a complete and more accurate picture of the *Lohan* decision and demonstrates that it is inapplicable to the instant case.

At the trial court, the *Lohan* defendants’ primary argument on their motion to dismiss focused on the nature of the alleged portraits in GTAV. *See Lohan*, Index No. 156443/2014,

Dkt. No. 49.³ Specifically, the defendants argued that the avatar and “Beach Weather” and “Stop and Frisk” images appearing in the video game were artistic creative works and therefore could not support a claim under Section 51.⁴

In order to state a viable Section 51 claim, the alleged portrait must have been used by the defendant “for advertising purposes or for the purposes of trade.” Section 51. Courts have long held that creative works of art do not constitute “advertising” or “trade” and therefore the use of an individual’s likeness in such a work does not support a Section 51 claim. *See, e.g., Foster v. Svenson*, 128 A.D.3d 150, 156-60 (1st Dep’t 2015) (“works of art fall outside the prohibition of

³ The briefs submitted by the parties at the trial and appellate court levels in *Lohan* are rather voluminous. Accordingly, Plaintiff has not included them in this supplemental submission. The briefs submitted to the trial court are available on the New York State Unified Court System’s Electronic Filing website, at <https://iapps.courts.state.ny.us/nyscef/CaseSearch>, Case No. 156443/2014. The briefs submitted to the Appellate Division, First Department are not available online, but can be obtained in digital form from the record room at the Appellate Division, First Department, 27 Madison Avenue, New York, NY 10010. The parties’ briefs and amicus briefs submitted to, as well as the transcript from the oral argument before, the Court of Appeals are available on the New York Court of Appeals Court-Pass website, at www.nycourts.gov/ctapps/courtpass/Public_search.aspx. Plaintiff is prepared to provide all of the briefs and the transcript upon which she relies, if the Court so requests.

⁴ Although the defendants in *Lohan* included in their motion papers the argument that the alleged portraits were not recognizable as the plaintiff, that was only their third point – it was not the central premise of their motion.

the privacy statute”); *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep’t 2001) (“works of fiction do not fall within the narrow scope of the statutory definition of ‘advertising or ‘trade’”).

It is well-settled that, in addition to not satisfying the “advertising” and “trade” purposes element of Section 51, creative and expressive works of art are fully protected against such claims by the First Amendment. In *Foster v. Svenson*, the Appellate Division, First Department, affirmed dismissal of a Section 51 claim arising out of a series of photographs appearing in the gallery exhibition of a fine art photographer, noting that “the images themselves constitute the work of art, and art work is protected by the First Amendment[.]” *Foster*, 128 A.D.3d at 160. The United States District Court for the Eastern District of New York reached a similar conclusion in *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013) (“*Perez*”). In *Perez*, a lawsuit Lindsay Lohan filed only three years before filing her GTAV-based suit, she alleged that a musician violated Section 51 by referencing her name in the lyrics to a hit song. *See Perez*, 924 F. Supp. 2d at 451. The district court in *Perez* dismissed the case for failure to state a claim, 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.” *Id.* at 454 (internal citation omitted). To this end, the “advertising” and “trade” element of a Section 51 claim “reflect[s] a careful balance of a person’s right to privacy against the public’s right to a free flow of ideas” under the First Amendment. *Foster*, 128 A.D.3d at 156, 161.

The defendants relied on these principles in their motion to dismiss, arguing that the images in GTAV were artistic works and thus the plaintiff had not satisfied the elements of a Section 51 claim. *Lohan*, Index No. 156443/2014, Dkt. No. 49. In denying the defendants’ motion, however, the trial court did not address the argument that the GTAV images constituted

creative works of art and thus were not “advertising” or “trade.” *See Lohan*, Index No. 156443/2014, Dkt. No. 90. In fact, nowhere in the trial court’s opinion is that issue even referenced. *See id.* Thus, when the defendants appealed the trial court’s decision to the First Department, Appellate Division, they focused almost exclusively on their principal argument – the one that the trial court had ignored. Indeed, the parties’ submissions to the Appellate Division in *Lohan* focused squarely on the question whether the transition screen artwork in GTAV was creative work protected under New York law and the First Amendment (as the defendants argued), or whether the images were merely added to the video game as “advertisement in disguise” and thus not protected (as the plaintiff contended). The briefs barely even addressed the question whether the alleged portrait was recognizable as the plaintiff.⁵ In fact, in their reply brief submitted to the Appellate Division, the defendants in *Lohan* contended that the portrait question was essentially irrelevant. Specifically, the defendants argued:

Given the rules of absolute protection [of creative works from Section 51 claims], any similarity in appearance between Ms. Lohan and the GTAV characters, in either the gameplay or in the transition screen artworks, is irrelevant. Simply put, the issue is not whether or how closely the plaintiff resembles any of the challenged characters, but whether GTAV is a protected creative work. A proper analysis begins and ends with the conclusion that it is. Even a literal image of a plaintiff is immune from a Section 51 claim when used in a creative work.

Lohan Defendants’ Reply to App. Div., First Dep’t at 11.

Recognizing the import of the argument the *Lohan* defendants were making, the Appellate Division reversed the trial court and dismissed the plaintiff’s complaint. In reaching its decision, the Appellate Division concluded:

⁵ In the *Lohan* defendants’ brief on appeal to the Appellate Division, the issue whether the images were recognizable as the plaintiff was relegated to merely a single footnote.

Even if we accept plaintiffs' contentions that the video game depictions are close enough to be considered representations of the respective plaintiffs, plaintiffs' claims should be dismissed because this video game does not fall under the statutory definitions of "advertising" or "trade" . . . This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire.

Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776, 777 (1st Dep't 2016) (internal citations omitted).⁶

Following dismissal of her claim by the First Department, Lindsay Lohan sought leave to the Court of Appeals, which request was granted. In the briefs submitted to the Court of Appeals, the parties again focused on the question whether the alleged portraits in GTAV were "advertising in disguise" that would support a Section 51 claim, or whether they were creative works subject to protection. Thus, when it came time for oral argument, the judges on the Court of Appeals were keenly aware of the policy implications that their decision could have on the balance between, on the one hand, privacy rights under Section 51 and, on the other, free speech protections under the First Amendment. *See Foster*, 128 A.D.3d at 156, 161 (noting the "careful balance" between the right of privacy under Section 51 and First Amendment protections of

⁶ The Appellate Division also dismissed Lohan's claims based on the GTAV avatar, finding that an avatar cannot support a Section 51 claim. *Gravano*, 142 A.D.3d at 778. The Court of Appeals subsequently reaffirmed prior decisions that a graphical representation of a person in a video game or like media, such as an avatar, may support such a claim. *See Lohan*, 31 N.Y.3d at 121. Accordingly, it is beyond dispute that a Bobblehead can satisfy the portrait element of a Section 51 claim.

creative works of art). Much of the oral argument focused on this issue.⁷ If the Court of Appeals held that the GTAV images were not creative works (or held that the question raised an issue of fact) and permitted the case to proceed, such a decision could be construed as curtailing the protection afforded creative works under the First Amendment. On the other hand, if the Court of Appeals held that the transition images were creative work as a matter of law and dismissed the action on that basis, it could be seen as severely limiting the scope of Section 51 of the Civil Rights Law and undermining the right to privacy codified therein.

The defendants in *Lohan* contended during oral argument before the Court of Appeals that the Court's "gatekeeping function becomes all the more important because of the First Amendment concerns in any work of art." *Lohan v. Take-Two Interactive Software, Inc.*, Oral Argument before the Court of Appeals, Feb. 7, 2018, at 38:8-11. Apparently recognizing the validity of that argument, the Court of Appeals adopted a strict gatekeeping role and dismissed Lohan's claim. But rather than venturing into the quagmire of First Amendment and "creative work" issues and potentially upsetting the balance between Section 51 and the First Amendment, the Court of Appeals dismissed the claim on the ground that the images were not recognizable as the plaintiff. To that end, the Court of Appeals was able to sidestep the First Amendment issue. *See Lohan*, 31 N.Y.3d at 123 ("In view of our determination, we do not address plaintiff's remaining contention with respect to the "advertising" and "trade" elements of [Section 51].").

Accordingly, permeating throughout all the arguments before the Court of Appeals in *Lohan* was the question whether Section 51 even applied or whether First Amendment concerns

⁷ As noted in footnote 3, *supra*, if the Court wishes to review the briefs submitted to, and the transcript of the oral argument before, the Court of Appeals, Plaintiff is prepared to provide these documents.

should impact the analysis. As the defendants in *Lohan* argued, a court's gatekeeping function is much more important in the context of a Section 51 case that has the potential to limit First Amendment rights than in a case where such concerns are non-existent. Thus, in *Lohan*, the Court of Appeals decided that it needed to act as a gatekeeper. Defendants here seek to rely on *Lohan* for the proposition that a court should take on this gatekeeping role and decide factual questions in every Section 51 case, thereby changing the entire structure and burden-shifting scheme under the CPLR. But Defendants' argument proves too much. The gatekeeping role the Court of Appeals played in *Lohan* was only a function of the dispute over the question whether Section 51 applied and the concomitant First Amendment concerns. Ultimately, the Court of Appeals seemingly ducked that issue in *Lohan*, choosing to say nothing on it, and simply concluding based on the record before it that the alleged portrait was not recognizable as the plaintiff. But the Court of Appeals did not make any broad pronouncement; it simply addressed the specific facts in that case.

In the instant action, unlike the artwork in *Lohan*, the Bobblehead commercial obviously is not a creative work, but rather falls squarely within the "advertising" and "trade" purposes element of Section 51. Thus, in deciding Defendants' Motion in this case, the Court does not face the same First Amendment policy concerns that the Court of Appeals struggled with in *Lohan*. As such, the Court in the instant action need not adhere to the strict gatekeeping function that the Court of Appeals felt constrained to adopt in that case. There is no reason to interpret the Court of Appeals decision in *Lohan* as establishing a legal principle that extends to all Section 51 claims.

In short, the Court should not adopt the analysis used by the Court of Appeals in *Lohan*, but rather should comply with the general rule that whether a portrait is a recognizable likeness is

a question of fact for the jury. Defendants' Motion should be denied, and the case should proceed to discovery.

III. *LOHAN* IS FACTUALLY DISTINGUISHABLE

In addition to the procedural and legal distinctions between *Lohan* and the instant case that make the reasoning and conclusion in *Lohan* inapplicable here, *Lohan* is factually distinguishable from the case at bar. As Plaintiff argued in her Opposition, one of the key factual distinctions between *Lohan* and the instant case is that Lindsay Lohan had no prior connection to GTAV, whereas Plaintiff in this case has a lengthy relationship with Defendants and their commercials. Opp. at 10-11. In *Lohan*, it was "undisputed that defendants did not refer to [Lohan] in GTAV, did not use her name in GTAV, and did not use a photograph of her in that game," 31 N.Y.3d at 123 – a fact that was critical to the Court's conclusion that the alleged portraits in the video game were not recognizable as the plaintiff. Here, in contrast, Plaintiff appeared as the Phillips Lady in Defendants' national advertising campaign for more than two years; she was recognizable as the Phillips Lady to Defendants' customers and the public generally; and Defendants had on their website a screenshot of Plaintiff from a prior commercial for Phillips products that seamlessly transitioned to the commercial featuring the Bobblehead replica of Plaintiff, advertising those same products. Complaint (Dkt. No. 1) ("Compl."), ¶¶ 8-12, 16. This distinction demands that the Court analyze Defendants' Motion in the instant case differently than the Court of Appeals analyzed *Lohan*.

Another important distinction between the instant case and *Lohan* is the nature of the alleged portraits. In the instant action, Plaintiff alleges that Defendants created the Bobblehead replica of Plaintiff in order to exploit the goodwill Plaintiff had developed with customers, to maintain brand continuity, and to continue the successful advertising campaign without

compensating Ms. Jonas. The Bobblehead in Defendants’ commercials looks like, and is recognizable to Phillips brand customers and the general public as, Ms. Jonas. In *Lohan*, however, Lindsay Lohan did not limit her allegations and argument to the appearance of the individual, herself, in the image. Instead, Lohan alleged that the defendants also misappropriated her likeness by creating an image reflecting purportedly similar mannerisms, persona, poses, and clothing – traits which, courts have repeatedly held, are not protected under Section 51. *See, generally, Lohan*, Index No. 156443/2014, Dkt. No. 46 (“Lohan Am. Compl.”). For example, the plaintiff in *Lohan* alleged that the “Beach Weather” image in GTAV misappropriated what Lohan referred to as her “peace sign” pose. *Lohan Am. Compl.*, ¶¶ 45-46. But, as the defendants in *Lohan* correctly argued to the trial court, the peace sign is “a ubiquitous element of history and popular culture that is clearly not uniquely associated with the [p]laintiff.” *Lohan*, Index No. 156443/2014, Dkt. No. 49 (emphasis in original). Similarly, plaintiff pointed to the clothing worn by the alleged portraits in the “Beach Weather” and “Stop and Frisk” GTAV images, arguing that the alleged portraits’ ensembles—the bathing suit, necklaces, denim jeans, white shirt, and fedora hat—evoked her image. *Lohan Am. Compl.*, ¶¶ 30, 33, 35. A Section 51 claim, however, cannot be based on the allegation that the alleged portrait wears a similar costume or clothing. *See Burck v. Mars, Inc.*, 571 F.Supp.2d 446 (S.D.N.Y. 2008). Lohan further argued that “well known elements of her life story are contained in the [avatar] in the game,” *Lohan*, Index No. 156443/2014, Dkt. No. 79 at 20, and that the “Escape From Paparazzi” random event, in which the GTAV avatar participated, was based on “identical events” in her own life. *Lohan Am. Compl.* ¶ 65. But case law is clear that neither an individual experience nor an entire life story is protected under Section 51. *See Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47 (1st Dep’t 1977); *Mother v. The Walt Disney Co.*, No. 103662/2012, 2013 WL

497173, at *1 (Sup. Ct., N.Y. Cnty. Feb. 6, 2013). Each of these allegations and arguments weakened Lohan's Section 51 claim. Those flaws do not exist in the instant action, where the Complaint alleges simply that the Bobblehead is a replica of, and is therefore recognizable as, Ms. Jonas.

Lohan's claim was further weakened by her contention that three different alleged portraits—the avatar and “Beach Weather” and “Stop and Frisk” images—all were recognizable as her, *see* Lohan Am. Compl. ¶¶ 28, 45, 58, even though the alleged portraits arguably have different features and appear to depict different people. *See Lohan*, Index No. 156443/2014, Dkt. No. 50 (Aff. of Jeff Rosa), Exs. 4, 7, & 9. Here, in contrast, the Complaint identifies only one portrait – the Bobblehead replica of Ms. Jonas from Defendants' commercials. Plaintiff's Complaint in the instant action therefore does not suffer from the ill-defined, imprecise, slapdash nature of the claims asserted in *Lohan*.

For all of these reasons, *Lohan* is factually distinguishable from the instant case and the Court of Appeals' reasoning in *Lohan* is not controlling here.

IV. IF THE COURT INTENDS TO DECIDE DEFENDANTS' MOTION ON FACTUAL GROUNDS UNDER CPLR 3211(C), PLAINTIFF SHOULD HAVE THE OPPORTUNITY TO PRESENT EVIDENCE TO CREATE A FULL RECORD AND REFUTE DEFENDANTS' SUBMISSIONS

By relying on rebuttable affidavits and other documents that neither “utterly refute” nor “conclusively establish[] a defense” to Plaintiff's claim, *see Goshen*, 98 N.Y.2d at 326, and by requesting that the Court compare the features of the Bobblehead and Ms. Jonas, Defendants are effectively asking this Court to convert their Motion to dismiss to a motion for summary judgment under CPLR 3211(c). Deciding such a motion, however, would be premature at this stage of the proceeding where there has been no notice provided to Plaintiff of the potential CPLR 3211(c) conversion, no opportunity for Plaintiff to submit factual evidence into the record

to refute Defendants' submissions, and no disclosure of potentially relevant evidence exclusively within Defendants' possession.

Before a Court may convert a motion to dismiss to a motion for summary judgment under CPLR 3211(c), the Court must provide adequate notice to the parties and grant both parties the opportunity to present the evidence in their favor on potentially disputed factual issues. The statute expressly provides:

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

CPLR 3211(c) (emphasis added). Where a court, *sua sponte*, treats a motion to dismiss as one for summary judgment without giving proper notice to the plaintiff, it “deprive[s] plaintiff of the ‘opportunity to make an appropriate record’ and thus thwart[s] the very purpose of CPLR 3211(c).” *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508 (1988) (quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976)). A motion for summary judgment requires that the plaintiff be notified sufficiently in advance so that she has the opportunity to make a complete record and present any evidence that could be considered on potentially disputed material issues of fact. *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007); *Fedele v. Qualified Personal Residence Trust of Doris Rosen Margett*, 137 A.D.3d 965, 967 (2d Dep’t 2016). As noted in Section I, *supra*, the Court of Appeals never even mentioned CPLR 3211(c) in its decision in *Lohan*, so there is no basis in that case for changing the well-established standard.

Here, Plaintiff has not had the opportunity to submit factual evidence supporting her claim and in opposition to Defendants' fact-based arguments. As Plaintiff noted in her

Opposition, several witnesses are willing to submit affidavits stating that they saw the Bobblehead commercial and recognized the Bobblehead as Plaintiff. Opp. at 13, n.5. However, Defendants styled their Motion as a CPLR 3211 motion to dismiss—rather than a motion for summary judgment—and therefore Plaintiff chose to present legal arguments rather than factual evidence. Plaintiff should not be penalized for complying with the CPLR provision that Defendants purportedly rely on in their Motion. The inherently factual dispute at the heart of Defendants’ Motion—whether the Bobblehead is recognizable as Ms. Jonas—should be decided by a jury, and only after an opportunity for full discovery. *See Brathwaite v. Frankel*, 98 A.D.3d 444, 445 (1st Dep’t 2012) (permitting disclosure after finding trial court erred by treating motion to dismiss as motion for summary judgment where the plaintiff did not “deliberately chart[] a summary judgment course” and disputed issues of fact existed). Accordingly, Plaintiff respectfully urges the Court not to rule on the fact-intensive question raised by Defendants at this stage of the proceeding, but rather to deny Defendants’ Motion as premature and permit Plaintiff to seek disclosure.

If the Court holds Defendants’ Motion in abeyance so that Plaintiff may submit evidence to refute Defendants’ factual submissions, but nevertheless denies Plaintiff the ability to obtain disclosure from Defendants, the Court would be deciding the Motion on an incomplete record. Documents and information exclusively within Defendants’ possession are likely to provide the strongest evidence that the Bobblehead was, in fact, modeled after Ms. Jonas. For example, if Defendants and their advertising agency communicated by e-mail concerning their preferred look for the Bobblehead, such communications could either confirm or disprove the affidavits submitted by Defendants averring that the Bobblehead was modeled after a random employee of the advertising agency, rather than Plaintiff. Such potentially dispositive evidence, however, is

not accessible to Plaintiff without the benefit of disclosure. Where facts in opposition to a motion for summary judgment “may exist but lie in the exclusive knowledge of the moving party,” the motion should be denied. *Republic Nat. Bank of New York v. Luis Winston, Inc.*, 107 A.D.2d 581, 582 (1st Dep’t 1985).

Thus, the Court should deny Defendants’ Motion and allow the parties to proceed to disclosure. To the extent the Court intends to rule on the factual question whether the Bobblehead constitutes a “portrait” under Section 51 without allowing Plaintiff to seek disclosure from Defendants, Plaintiff should—at a minimum—have a full opportunity to present the factual evidence within her possession that refutes Defendants’ factual submissions.

V. A REASONABLE JUROR COULD CONCLUDE THAT THE BOBBLEHEAD IS RECOGNIZABLE AS PLAINTIFF, AND THEREFORE DEFENDANTS’ MOTION MUST BE DENIED

Your Honor should not decide whether the Bobblehead is recognizable as Plaintiff based only on the sparse record currently before the Court. Instead, the Court should adhere to the long-established rules of the CPLR and deny Defendants’ Motion on the ground that the question is inherently factual, and permit the parties to proceed to discovery. Nevertheless, in the event the Court decides that it is going to rule on Defendants’ Motion without the benefit of a full record, Defendants’ Motion should still be denied because it cannot be determined, as a matter of law, that the Bobblehead is not recognizable as Plaintiff.

A reasonable juror could conclude that the Bobblehead is recognizable as Ms. Jonas. Indeed, Plaintiff learned about the Bobblehead commercial precisely because someone saw the Bobblehead and recognized it as her. Thus, even if the Court were to engage in the comparative analysis Defendants contend the Court of Appeals used in *Lohan*—which the Court should not, for all the reasons set forth above—the Court should conclude that the Bobblehead and Plaintiff

look sufficiently alike to survive a motion to dismiss. This is a fundamental question of fact and the Court should not preclude Ms. Jonas from at least having the opportunity to obtain disclosure from Defendants.

CONCLUSION

For all the foregoing reasons, the reasons set forth in Plaintiff's Opposition, and the reasons presented during the October 30, 2018 oral argument before the Court, the Court should deny Defendants' motion to dismiss.

Dated: New York, New York
November 13, 2018

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I hereby certify, pursuant to 22 NYCRR § 202.70(g)(17), that the total number of words in the foregoing Plaintiff's Supplemental Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss, inclusive of point headings and footnotes and exclusive of the cover page, table of contents, table of authorities, signature block, and this Statement, is 5,577.

Dated: November 13, 2018
New York, New York