

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

PHOEBE JONAS,

Plaintiff,

—against—

BAYER CORPORATION and BAYER U.S. LLC,
d/b/a PHILLIPS’,

Defendants.

Index No. 155925/2018

Hon. Andrea Masley

Motion Sequence: 1

Date Returnable: November 30, 2018

**DEFENDANTS’ SUPPLEMENTAL MEMORANDUM
OF LAW IN SUPPORT OF MOTION TO DISMISS**

**ARNOLD & PORTER
KAYE SCHOLER LLP**
Paul C. Llewellyn
Rebecca A. Beyer
250 West 55th Street
New York, NY 10019-9710
T: 212.836.7828
F: 212.836.6463
paul.llewellyn@arnoldporter.com
rebecca.beyer@arnoldporter.com

Attorneys for Defendants

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
I. THE <i>LOHAN</i> COURT CLEARLY DECLINED TO RULE ON THE FIRST AMENDMENT ISSUE, AND DID NOT TIE ITS DECISION IN ANY WAY TO FIRST AMENDMENT CONSIDERATIONS.....	4
II. <i>LOHAN</i> IS NOT FACTUALLY DISTINGUISHABLE IN ANY WAY.....	6
III. THERE IS NO NEED TO CONVERT THE PENDING MOTION TO ONE UNDER CPLR 3211(c), BECAUSE THE COURT CAN LOOK AT THE UNDISPUTED IMAGES IN THE RECORDS AND CONCLUDE, AS THE <i>LOHAN</i> COURT DID, THAT DISMISSAL UNDER 3211(a)(7) IS WARRANTED.....	9
IV. THE “REASONABLE JUROR” ARGUMENT ASSERTED BY PLAINTIFF IS IRRELEVANT (AND INCORRECT) IN LIGHT OF THE COURT OF APPEALS’ TREATMENT OF THE AVATAR IMAGES IN <i>LOHAN</i> , WHICH ARE AT LEAST AS DETAILED AS THE BOBBLEHEAD AT ISSUE HERE.	12
CONCLUSION.....	12

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Dean v. Cameron</i> , 53 F. Supp. 3d 641 (S.D.N.Y. 2014)	10
<i>Lohan v. Take-Two Interactive Software, Inc.</i> , 31 N.Y.3d 111 (N.Y. 2018)	<i>passim</i>
<i>Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.</i> , 602 F.3d 57 (2d Cir. 2010)	10

Statutes

Civil Rights Law Section 51	<i>passim</i>
-----------------------------------	---------------

Other Authorities

CPLR 3211	4, 6
CPLR 3211(c)	9
J. Thomas McCarthy, <i>The Rights of Publicity and Privacy</i> § 3:12 (2d ed. 2018)	11

PRELIMINARY STATEMENT

At oral argument on October 30, 2018, the Court directed Plaintiff to submit a supplemental brief to address a single topic—the video game images at issue in the *Lohan* case. A review of those images – which, tellingly, are not presented or even discussed in Plaintiff’s supplemental brief – confirms, contrary to Plaintiff’s assertion at oral argument, that the Court of Appeals’ holding in *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 122-23 (N.Y. 2018) was not premised on the images being insufficiently clear or detailed:



Lohan v. Take-Two Interactive Software, Inc., Index No. 156443-2014 (N.Y. Sup.) Doc. No. 50 (Affidavit of Jeff Rosa) (“Rosa Affidavit”), Exs. 6, 7.¹ To the contrary, it is apparent that *Lohan* involved images that could be identifiable as a person; however, there was simply no basis to conclude that they were capable of being identified *as the plaintiff*, because they shared only

¹ The Rosa Affidavit, the complaint in *Lohan*, and other papers submitted to the trial court in that case, 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.

generic similarities and no “particular identifying physical characteristics” with the plaintiff’s physical appearance. *Lohan*, 31 N.Y.3d at 123. For that reason, the Court of Appeals held that the claim should be dismissed. *Lohan*’s clear holding is that, unless an accused image shares particular identifying physical characteristics with a plaintiff such that it is capable of being identified as the plaintiff, a complaint under Section 51 fails to state a claim for relief.

Plaintiff’s supplemental submission does not attempt to argue that the *Lohan* images were less detailed than the appearance of the bobblehead at issue here, or even discuss the images at all—despite the fact that those images, discussed at oral argument, were the sole basis for leave to file a supplemental submission. Rather than follow the Court’s direction, Plaintiff has submitted an 18 page “supplemental” brief that essentially reargues the entire motion, including many of the same incorrect assertions and baseless arguments that were already made in Plaintiff’s opposition brief. This supplemental brief should be stricken as beyond the scope of the limited topic on which additional briefing was requested.

Even if the Court considers the brief, however, Plaintiff wholly fails to demonstrate that this case is any different from *Lohan*, that the bobblehead at issue here is any different than the images at issue in *Lohan*, or that the outcome here should be any different, for the reasons set forth in Defendants’ prior briefs and below. Although Plaintiff spends a surprising number of pages trying to argue that *Lohan* did not hold what it clearly held, at the end of the day, it is obvious that *Lohan* dismissed as a matter of law a claim that is factually indistinguishable from the claim here. As discussed below, whatever the legal standard applied in *Lohan* for dismissal of a claim where the image is not capable of being identified as a plaintiff, it is clear that the instant claim does not even approach that line: Plaintiff relies entirely on highly generic features and on matters beyond the physical appearance of the image at issue, and (despite four

opportunities to do so) has yet to identify a single physical characteristic of the accused bobblehead that would allow the Court to conclude that the bobblehead is capable of being identified as the Plaintiff.

As Defendants have previously noted, Plaintiff failed even to provide images of herself and the bobblehead in the Complaint in this action, for the obvious reason that she does not want any side-by-side comparison to be made; but under *Lohan*, it is wholly appropriate for the Court to make this comparison. At oral argument, Plaintiff's counsel took the astonishing position that on a motion to dismiss, with undisputed images of the Plaintiff and the accused bobblehead, the Court could *never* determine as a matter of law that the bobblehead is not "capable of being identified as the plaintiff" (to use *Lohan*'s phrase)—even if, as the Court itself posited, the images at issue were a woman with light hair, on the one hand, and a man with dark hair, on the other hand. Not only is that position untenable on its face, but it is flatly contradicted by *Lohan*. If it were the rule, an advertiser such as Bayer—which concededly owns all rights in the Phillips' Lady character—could never have a new actor play a role previously performed by another actor without facing the risk of litigation through to summary judgment or trial. Nor is there any merit to Plaintiff's new position that the Court of Appeals supposedly created a new constitutional-based "gatekeeper" rule without telling anyone that it was doing so, or telling anyone what the rule is. The Court of Appeals in *Lohan* plainly chose to *not* decide the constitutional issue, and applied standard Section 51 law without any supposed exceptions for video games, for a lack of "nexus," for First Amendment concerns, or otherwise. Application of *Lohan* here is wholly appropriate, and considerations of judicial economy dictate that the Defendants should not be put through the burden and expense of discovery and ongoing litigation in this case.

I. THE *LOHAN* COURT CLEARLY DECLINED TO RULE ON THE FIRST AMENDMENT ISSUE, AND DID NOT TIE ITS DECISION IN ANY WAY TO FIRST AMENDMENT CONSIDERATIONS.

Plaintiff argues at length that *Lohan* did not change the CPLR 3211 standards applicable to Section 51 cases or “decide[] any argument that the CPLR no longer applies to Section 51 cases.” (Plaintiff’s Supplemental Memorandum (“Pl. Supp.”) at 4). Defendants here, of course, make no such argument. To the contrary, the Court of Appeals in *Lohan* made clear that it was applying standard Section 51 law to the claims at issue there, and held—citing established authority—that before a factfinder can decide whether an image constitutes a portrait, there must be “a basis for it to conclude that the person depicted ‘is capable of being identified from the advertisement alone’ as plaintiff.” *Lohan*, 31 N.Y.3d at 122 (quoting *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 384 (N.Y. 1984)). Finding that the avatar at issue was merely a “generic artistic depiction” without “any particular identifying physical characteristics,” the Court thus held that it was not capable of being identified as plaintiff Lohan and affirmed the dismissal. *Id.* at 122-23. Despite Plaintiff’s strained arguments to the contrary, Defendants here merely submit that the Court should apply the same standard to the Section 51 claim in this case, which, as shown in our prior moving submissions and below, is factually indistinguishable from *Lohan*.²

Despite the Court’s clear direction that supplemental submissions were supposed to address the images from *Lohan* that were referred to at oral argument, Plaintiff’s supplemental

² In an apparent attempt to minimize the significance of *Lohan*, Plaintiff argues that no court has cited *Lohan* since that case was decided on March 29, 2018. This is meaningless: Defendants’ research revealed *no* substantive New York state or federal court decisions citing Civil Rights Law Section 51 since *Lohan* was decided, except for one federal decision granting a motion for summary judgment where plaintiff failed to plead any element of the claim.

brief devotes no less than *seven pages*—nearly half of the brief—to argue that *Lohan*, both at the trial court and on appeal, turned on First Amendment principals, which it did not. Thus, Plaintiff purports to describe a litigation focused on whether the video game avatar at issue constituted a creative work such that it would receive First Amendment protection, argues that the Court of Appeals adopted a “strict gatekeeping role” (Pl. Supp. 10) because of these constitutional concerns, and asserts that the argument that Lindsay Lohan was not identifiable from the images at issue was “only [the] third point” in defendant’s motion to dismiss. (Pl. Supp. at n.4).

Plaintiff’s counsel therefore suggests that *Lohan* did not apply the “general rule” (Pl. Supp. at 11) applicable to Section 51 cases. This is flatly incorrect, as it is clear from *Lohan* that the Court of Appeals chose to *not* decide the First Amendment issue, and did not establish any exception for video games. (Defendants’ reply brief (“Def. Rep.”) at 8 and n.2). Rather, the Court of Appeals clearly applied ordinary Section 51 law—quoting well-established precedent about Section 51’s identifiability requirement—and expressly “d[id] not address plaintiff’s remaining contention with respect to” the First Amendment issue. *Lohan*, 31 N.Y.3d at 123.

Accordingly, contrary to counsel’s strained interpretation, the Court of Appeals did not declare a “Lindsay Lohan exception” or a “video game exception” or any modification of the regular rules to be applied in that particular case. Nor did the Court of Appeals say that it had a gatekeeper function when First Amendment rights were asserted that was any different than the Court’s normal role as a gatekeeper—and Plaintiff’s assertion here that it did is based not on anything in the Court of Appeals’ decision, but rather on the imagination of Plaintiff’s counsel. Rather, what the Court of Appeals plainly did was *avoid* deciding a constitutional issue unnecessarily, as is customary. Thus, it declined to address the First Amendment issue, looked at the images of the video game avatar, and articulated and applied standard Section 51 law and

CPLR 3211, holding, as a matter of law, that Ms. Lohan failed to state a claim for relief. In Plaintiff's telling, the Court of Appeals *said* that it was not deciding the constitutional issue, but then supposedly created a new constitutional-based rule *without telling anyone that it was doing so*, or telling anyone what the rule is. Obviously, that is not what *Lohan* did.

II. **LOHAN IS NOT FACTUALLY DISTINGUISHABLE IN ANY WAY**

Two-thirds of the way through their supplemental brief (and still with no discussion of the *Lohan* avatar images that was the entire reason for a supplemental brief), Plaintiff again tries to argue that *Lohan* is factually distinguishable, repeating the same meritless arguments that were made in the opposition brief and that Defendants rebutted in their reply brief.

Thus, Plaintiff argues once again that Ms. Lohan had no prior connection to the defendants in that case, that she was not referred to in the video game, and that her name and photograph were not used in the game. She then argues that Plaintiff here appeared as the Phillips' Lady in some earlier commercials and that Plaintiff's image was briefly used as a placeholder on Defendants' website. As Defendants demonstrated in our moving and reply briefs, however, and as discussed at oral argument: (1) Ms. Jonas' name and photograph are *not* used in the bobblehead ad; (2) it is settled law that the Court should only consider whether the plaintiff is recognizable *from the challenged ad itself*, and not from extraneous matter; and (3) on the face of the complaint, the alleged brief use of a placeholder image was resolved between the parties prior to litigation, and in all events was not part of the challenged ad itself. *See* Defendants' moving brief ("Def. Mem.") at 9-10; Def. Rep. at 9-12. What is more, Plaintiff's repeated reliance on the fact that she previously played the Phillips' Lady is tantamount to a claim that she has rights in that character, which Defendants have established (and Plaintiff's

counsel has agreed) *she does not*. See Def. Mem. at 15-16; Def. Rep. at 9.³

Plaintiff contends that these supposed factual distinctions require the court to deviate from the holding of *Lohan*. For example, Plaintiff asks the Court to “analyze . . . the instant case differently than the Court of Appeals analyzed *Lohan*” (Pl. Supp. at 12) because Plaintiff previously appeared in the Phillips’ Lady commercials and her image was briefly used as a placeholder. Not only are these allegations irrelevant, as demonstrated above, but they in fact mirror the allegations made in *Lohan*. There, the plaintiff had in fact alleged that the defendants used her name in an advertisement before the release of the video game. See *Lohan v. Take-Two Interactive Software, Inc.*, Index No. 156443-2014 (N.Y. Sup.) Doc. No. 46 (Amended Verified Complaint) (“*Lohan* Compl.”) ¶ 26 (“Defendant(s) announced to the general public the Plaintiff’s name in the media in association with advertising a ‘Lindsay Lohan look-a-like side mission’ . . . without the lawful consent of the Plaintiff . . .”; *id.* ¶ 70 (“It is unequivocal that the Plaintiff was the intended referent in the GTA V game by . . . specifically announcing the Plaintiff’s name in the media as a ‘Lindsay Lohan look-a-like side mission’ at least two months before the release of the game purely to promote and hype the game to attract sales of the Defendants’ video game.”). Plaintiff’s attempt to distinguish *Lohan* thus fails.

Beyond that, Plaintiff simply argues that *Lohan* purportedly is distinguishable because the plaintiff in *Lohan* relied not only on the avatar’s physical appearance but also on her mannerisms and persona, and because Plaintiff here alleges, *ipse dixit*, that the bobblehead looks like Ms. Jonas (see, e.g., Pl. Supp. at 13). To begin with, it is patently unclear how Lindsay

³ Although counsel conceded at oral argument that plaintiff owns no rights in the character, they continue to argue, even now and without any basis in fact or law, that she somehow owns “goodwill” arising from her performance of that role. See Pl. Supp. at 12.

Lohan's reliance on mannerisms and persona is any different than Ms. Jonas's reliance on her prior performance as the Phillips' Lady—both relate to matter beyond the physical characteristics of the image, which is all that is relevant. What is clear is that Plaintiff does not now argue that the images in *Lohan* were less detailed or “identifiable” than the bobblehead image here (again, the issue that was the primary reason for supplemental briefing). Nor could she, because it is evident that the images in *Lohan* were at least as detailed as the bobblehead at issue here:



The Court of Appeals' concern in *Lohan* plainly was *not* that the images were insufficiently clear or detailed. Indeed, it is apparent from the images above that the Court of Appeals considered images that could be identifiable as a specific individual; there was simply no basis to conclude that they were recognizable *as the plaintiff*, as the law requires, because they only shared generic similarities with the plaintiff and no distinguishing features. That is, the images, though clearly depicting a person, lacked “any particular identifying physical characteristics” that could make them identifiable as Ms. Lohan herself. *Lohan*, 31 N.Y.3d at 123.

Moreover, the plaintiff in *Lohan* at least attempted to articulate some similarities between her own appearance and the avatar (although the Court of Appeals held that such generic

similarities were not sufficient to withstand a motion to dismiss). Here, in contrast, *Plaintiff has yet to identify a single particular identifying physical characteristic* shared by herself and the bobblehead that purportedly renders the bobblehead recognizable as Ms. Jonas—not in the complaint, or the opposition brief, or at oral argument, or in plaintiff’s voluminous supplemental brief. In the face of Defendants’ showing that the bobblehead and Ms. Jonas share no particular identifying physical characteristics, Plaintiff is again silent, yet asserts that the Court has no choice but to permit full litigation of the claim. The logical conclusion of Plaintiff’s position would effectively give any actor potential rights in a character they previously played, upon threat of the expense and burden of litigation, regardless of the absence of any distinguishing characteristics in the image at issue.⁴

III. THERE IS NO NEED TO CONVERT THE PENDING MOTION TO ONE UNDER CPLR 3211(c), BECAUSE THE COURT CAN LOOK AT THE UNDISPUTED IMAGES IN THE RECORDS AND CONCLUDE, AS THE *LOHAN* COURT DID, THAT DISMISSAL UNDER 3211(a)(7) IS WARRANTED

Plaintiff next asserts that Defendants, by submitting affidavits and pictures, have asked the Court to convert the instant motion to dismiss into a motion for summary judgment under CPLR 3211(c). (Pl. Supp. at 14-15). However, as Defendants previously demonstrated, the photographic evidence here is not only undisputed, but also falls squarely within the definition of documentary evidence. *See, e.g.*, Def. Rep. at 2-3. More to the point, although Plaintiff’s counsel asserts the need for full discovery (Pl. Supp. at 16), the Court can look at the undisputed photographs in the record and conclude, as a matter of law, that dismissal is warranted under

⁴ Astonishingly, and wholly inconsistently with *Lohan*, Plaintiff’s counsel asserted at oral argument that the Court could *never* determine as a matter of law that the bobblehead is not “capable of being identified as the plaintiff,” even if the images at issue were, for example, a light-haired woman and a dark-haired man.

Lohan. As in *Lohan*, no discovery is needed—nor would discovery be helpful—to determine what the Plaintiff or the bobblehead look like, where the photographs and images in the record already demonstrate that the bobblehead is not identifiable as the Plaintiff. Indeed, in analogous situations involving copyright claims, courts routinely make a side-by-side comparison of the material at issue to decide, on motions to dismiss and without the need for discovery, the issue of substantial similarity under copyright law.⁵

By looking at the images at issue, the Court would not be converting the instant motion to one for summary judgment, nor would it be depriving Plaintiff of the opportunity for relevant discovery. Nowhere does Plaintiff dispute that the images and photographs in the record are accurate representations of Plaintiff and the bobblehead. Plaintiff did not include images of herself and the bobblehead in the complaint, presumably because she does not want any side-by-side comparison to be made, but where a party does not dispute matter offered on a motion to dismiss, the Court may freely presume its accuracy. *See, e.g., Lohan*, 31 N.Y.3d at 123 n.2 (dismissing plaintiff’s claim that defendants had misappropriated her voice where plaintiff did not dispute the fact, alleged in defendants’ affidavit, that her voice had not been used).

⁵ *See, e.g., Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (“In copyright infringement actions, the works themselves supersede and control contrary descriptions of them. When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because what is required is only a visual comparison of the works.”) (internal citations and quotations omitted); *Dean v. Cameron*, 53 F. Supp. 3d 641 (S.D.N.Y. 2014) (granting motion to dismiss, court compared the plaintiff’s paintings with stills from the defendants’ movie to hold that there was no substantial similarity between the protectable elements);.

Therefore, this Court can consider the undisputed images in the record—just as the Court of Appeals did in *Lohan*—and dismiss the complaint without converting the motion to one for summary judgment. Plaintiff’s argument to the contrary is a transparent attempt to drag the Defendants and the Court into protracted discovery and litigation on facially meritless claims. Mere speculation about what a fishing expedition might uncover can be no substitute for proffering a basis at the pleading stage for the proposition that the accused image is identifiable as Plaintiff.

Nor is there any merit to Plaintiff’s assertion that that the Court should not grant this Motion because she has “several witnesses [] willing to submit affidavits” on her behalf.” (Pl. Supp. at 16). Indeed, the complaint in *Lohan* contained essentially identical allegations. *See Lohan* Compl. ¶ 69 (“Multiple people in the general public have reached out to the Plaintiff believing the character was the Plaintiff . . .”). There, as here, mere allegations that a few individuals purportedly recognized the plaintiff cannot save a claim where the images in the record clearly demonstrate that the plaintiff is not identifiable as required by law.⁶

⁶ To hold otherwise would allow meritless claims to advance to discovery and trial. As the leading treatise on the matter acknowledges, “There must be some ‘de minimis’ rule to filter or screen out the frivolous cases where only the plaintiff and a few sympathetic relatives and friends can see any connection between defendant’s use and plaintiff. Otherwise, non-celebrities who see some vague resemblance between themselves and a professional model in an advertisement would have a claim. Similarly, celebrities may be overly sensitive to only vague resemblances between a professional model or computer generated character and themselves.” J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 3:12 (2d ed. 2018).

IV. THE “REASONABLE JUROR” ARGUMENT ASSERTED BY PLAINTIFF IS IRRELEVANT (AND INCORRECT) IN LIGHT OF THE COURT OF APPEALS’ TREATMENT OF THE AVATAR IMAGES IN *LOHAN*, WHICH ARE AT LEAST AS DETAILED AS THE BOBBLEHEAD AT ISSUE HERE.

Finally, Plaintiff’s counsel argues that the Court should deny Defendants’ Motion because “it cannot be determined, as a matter of law, that the Bobblehead is not recognizable as Plaintiff.” (Pl. Supp. at 17). Plaintiff yet again ignores the fact that such a determination is *precisely* what the *Lohan* decision dictates. As demonstrated above and at oral arguments, the bobblehead at issue here is at least as detailed as the images that the Court of Appeals considered in *Lohan*. The Court of Appeals looked at those images, and determined *as a matter of law* that, because of the absence of particular identifying physical characteristics shared by the plaintiff and the avatar, the plaintiff simply was not identifiable. Because the bobblehead at most shares only a few generic similarities with Plaintiff, no “reasonable juror” could conclude that the bobblehead is capable of being identified as Plaintiff as required under settled New York law.

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants’ moving and reply briefs and at oral argument, the Complaint should be dismissed in its entirety with prejudice.

Dated: New York, New York
November 20, 2018

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By: /Paul C Llewellyn/

Paul C. Llewellyn
Rebecca A. Beyer
250 West 55th Street
New York, NY 10019-9710
T: 212.836.7828
F: 212.836.6463
paul.llewellyn@arnoldporter.com
rebecca.beyer@arnoldporter.com

Attorney for Defendants