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Superior Court of California
County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk
By P. Horton, Deputy

NOREIGA V. ACTIVISION/BLIZZARD, Inc., et al.
BC 551747
October 27, 2014

ORDER ON DEFENDANTS' SPECIAL MOTION TO STRIKE

On July 15, 2014, plaintiff Manuel Noriega filed his unverified complaint for damages, setting forth three causes of action: (1) a violation of Civil Code 3344; (2) unjust enrichment; and (3) unfair business practices.

Noriega's complaint alleges that he currently resides in Panama. The complaint further contends that defendants: (1) designed, created, advertised and sold the popular video game "Call of Duty: Black Ops II;" (2) "engaged in the blatant misuse, unlawful exploitation and misappropriation of plaintiff's image and likeness for economic gain;" (3) portrayed plaintiff as an antagonist and as the culprit of numerous fictional heinous crimes; and (4) damaged "his reputation."

In response, defendants filed their Special Motion to Strike, pursuant to CCP 425.16. Defendants' Motion asserts that the video game at issue constitutes protected expression on matters of public interest and that plaintiff cannot establish a probability that he will prevail on any of his claims. Defendants supported their Motion with a Request for Judicial Notice and several declarations.¹

Plaintiff's Opposition is supported by his own declaration and one from his counsel.

During oral argument on October 16, 2014, plaintiff's counsel conceded that the complaint's second cause of action was in fact a remedy and should be dismissed. Plaintiff's counsel next conceded that defendants have met the first prong of the anti-slapp statute, *i.e.*, defendants' video game constitutes protected speech. *See, e.g., Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). As a result, the burden shifts to plaintiff to demonstrate a probability of prevailing on his claim. *Id.*

Plaintiff claims that the burden placed upon him at this juncture is relatively low. Relying on language from *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1026 (2011), plaintiff argues that he needs only to show that his case has "minimal merit." But the

¹ Plaintiff filed no objection to defendants' evidence. The Court grants defendants' Request for Judicial Notice.

“minimal merit” phrase must be read in conjunction with other language in *No Doubt*, *i.e.*, in considering the second prong of the anti-slapp analysis, the trial court must consider “the pleadings and evidentiary submissions of both plaintiff and defendant.” *Id.* at 1026. “In addition, the trial court must also consider all available defenses to the claims, including constitutional defenses.” *Id.*

No Doubt was a case with some similarities to the instant controversy. There, plaintiff was a rock band which had a licensing agreement with Activision. Relying on Civil Code 3344 and Business & Professions Code 17200, the band alleged that Activision used the likenesses of its members in objectionable ways outside that licensing agreement. Activision then filed a special motion to strike pursuant to CCP 425.16, which was denied by the trial court. The Court of Appeal affirmed.

As to the “probability of success” prong, the Court of Appeal was faced with the same argument that Activision raises in the instant case, *i.e.*, “that the First Amendment provides a complete defense to the claim.” *Id.* at 1029. Relying on the “transformative use” defense established by *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal 4th 387 (2001), the Court of Appeal noted that the “inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.” *No Doubt* at 1030-31.

Further informing the Court of Appeal’s analysis in *No Doubt* was the Supreme Court’s decision in *Winter v. DC Comics*, 30 Cal. 4th 881 (2003). In that case, the Supreme Court stated that it is important to determine whether the depictions are “distorted for purposes of lampoon, parody, or caricature” and whether the depictions are part of “a larger story, which is itself quite expressive.” *Id.* at 890. As for economic considerations, *Winter* teaches that “the question is whether the work is transformative, not how it is marketed. If the work is sufficiently transformative to receive legal protection, ‘it is of no moment that the advertisements may have increased the profitability of the work.’” *Id.* at 891.²

² See also *Comedy III Productions, supra* at 407 (“Does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If the question is answered in the negative, then there would generally be no actionable right of publicity. When the work comes principally from some source other than the fame of the celebrity - from the creativity, skill and reputation of the artist - it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.”).

In ultimately concluding that Activision's use of No Doubt's likenesses was not transformative, the Court of Appeal found it significant that the band "posed for motion-capture photography to enable Activision to reproduce their likenesses, movements, and sound with precision. Activision intentionally used these literal reproductions so that players could chose to 'be' the No Doubt rock stars." *Id.* at 1033. It was also significant that "Activision's use of lifelike depictions of No Doubt performing songs is motivated by the commercial interest in using the band's fame to market Band Hero, because it encourages the band's sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt. Thus, insofar as the depiction of No Doubt is concerned, the graphics and other background content of the game are secondary, and the expressive elements of the game remain 'manifestly subordinated to the overall goal of creating a conventional portrait of [No Doubt] so as to commercially exploit its fame.'" *Id.* at 1035.

Thirty-five years ago, in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860 (1979), Justice Bird provided a thoughtful analysis of the tension between a public figure's right of publicity and the First Amendment right of free expression:

"Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction." *Id.* at 869.

In applying these standards to the evidence presented here, this Court concludes that Noreiga's right of publicity is outweighed by defendants' First Amendment right to free expression.

A brief summary of defendants' uncontroverted evidence conclusively shows that Noriega is a notorious public figure, perhaps one of the more notable historical figures of the 1980's. *See, e.g., Guglielmi, supra* at 869 (observing that Valentino's life and career are part of the history of the era).

As a General in the Panamanian army and later, as the Dictator of Panama, Noriega controlled all elements of the Panamanian government, including those essential to the protection of drug trafficking and money laundering. Noriega actively worked with the Medellin cocaine

cartel. He also was involved in the arms business, including shipping weapons to the Sandinistas in Nicaragua and to rebels in El Salvador.

In 1987, pro-Noriega mobs attacked the U.S. Embassy, and the U.S. then cut off economic and military aid to Panama. On February 5, 1988, federal grand juries in Miami and Tampa, Florida indicted Noriega on numerous counts of drug trafficking. Noriega turned to Cuba, Nicaragua and Libya for economic and military assistance.

After Noriega overturned the election results in his country in 1989, President Bush became even more concerned about the safety of U.S. citizens in Panama and potential interference with the Panama Canal. On December 15, 1989, the Panama National Assembly passed a resolution that a state of war existed with the United States and Noriega named himself the "Maximum Leader." On December 17, 1989, Operation Just Cause began with U.S. Special Operations Forces attacking key installations in Panama. On December 19, 1989, President Bush spoke in a televised address to the nation, describing the actions of Noriega and explaining Operation Just Cause.

As they looked for Noriega, U.S. forces searched two of his residences. Among other things, it was reported that they found pictures of Hitler, an extensive pornography collection, a "witches diary," over \$8 million, lists of bank accounts in Switzerland and the Cayman Islands and three diplomatic passports.

In fear of advancing U.S. forces, Noriega fled to the papal Nunciatura in Panama. Secretary of State Baker negotiated with the Papal Nuncio and later, with the Vatican. Meanwhile, U.S. forces commenced playing loud rock music outside the Nunciatura. The media depicted this as a form of press censorship.

On December 29, 1989, a Vatican newspaper reported that a high-level Vatican official would be traveling to Panama to attempt to persuade Noriega to turn himself into U.S. Officials. Noriega did so on January 3, 1990 and he was arrested and flown to Homestead Air Force Base in Florida. In 1992, Noriega was convicted of narcotics trafficking and racketeering. He was sentenced to 40 years in prison. He was later convicted in Panama and France of other offenses. He remains in a Panamanian prison to this day.

Noriega's opposing papers do not contest any of this. Noriega's short declaration states only that he was not aware, until advised by his grandchildren, that his image and likeness were being used without his consent. Noriega fails to provide any evidence of harm to his reputation. Indeed, given the world-wide reporting of his actions in the 1980's and early 1990's, it is hard to

imagine that any such evidence exists.

Consistent with the relevant authorities, Noriega's opposition invites the Court to examine all of the evidence submitted and conclude that the transformative test "mandates denial of defendants' motion." Defendants agree that the question before the Court is one of law and urges that its motion be granted.

Both sides have provided various excerpts from the video game, which this Court has reviewed. Defendants have also provided the declarations of Daniel Suarez and Todd Harvey. These declarations establish several important and undisputed facts, including: (1) the video game is a fictional "first person shooter game" where players assume the role of a foot soldier placed in simulated infantry and warfare scenarios; (2) the game is set in the context of the Cold War and incorporates clandestine CIA operations driven by specialized Black Ops soldiers; (3) defendants devoted two years, over \$100 million and a team of over 250 designers, engineers and talent to develop and produce the video game; (4) Noriega's character appears in but two of the 11 "missions," which in turn are divided into two campaigns, one set in the Cold War and one set in 2025; (5) Noriega is just one of more than 45 characters, including other historical figures, who appear in the game; (6) players of the game can never assume the Noriega character's identity, control its movements or experience gameplay through its eyes; (7) the Noriega character appears in the two missions for only a matter of minutes and voices less than 30 lines; and (8) defendants do not use the Noriega character in any marketing or advertising of the game.

This evidence compels the conclusion that defendants' use of Noriega's likeness was transformative. The publicly available photographs of Noriega used to create his avatar were part of the extensive "raw materials" from which the game was synthesized. Noriega's depiction was not the "very sum and substance" of the work. The complex and multi-faceted game is a product of defendants' own expression, with *de minimis* use of Noriega's likeness. Because the video game is transformative, economic considerations are not relevant. Regardless, the Court concludes that the marketability and economic value of the challenged work in this case comes not from Noriega, but from the creativity, skill and reputation of defendants.³

As stated by Justice Bird, "public prominence does not confer a shield to ward off caricature, parody and satire." Plaintiff's claim pursuant to Civil Code 3344 cannot survive

³ Compare *No Doubt, supra*, where the Court of Appeal concluded that Activision's use of the band's images was motivated by the commercial interest in using the band's fame to market the video game.

defendants' First Amendment defense.⁴

Plaintiff's third cause of action, premised on Business & Professions Code 17200, fares no better. Plaintiff's complaint makes clear that this claim is based on the same facts alleged in his other causes of action: "Plaintiff incorporates herein by this reference each and every allegation contained in each paragraph above." Complaint, par. VI(1). Because this Court has concluded that the facts alleged cannot withstand First Amendment scrutiny, the third cause of action must fail.

Plaintiff's opposition only briefly addresses this issue and suggests that this claim should survive based upon certain language in *No Doubt*, 192 Cal. App. 4th at 1040. However, as defendants correctly point out, the Court of Appeals there found that there was a non-transformative use of the bands' image, unlike the situation in the instant case. As a consequence, the mere allegation in paragraph VI(2) of the complaint, *i.e.*, "defendants have deceived and confused the public into believing that plaintiff authorized, approves, and endorses the use of its [sic] name and likeness in Black Ops II," is insufficient. In defending against an anti-slapp motion, plaintiff is required to provide admissible evidence demonstrating a probability of prevailing on his claim. Plaintiff has provided no evidence at all and his unfair business practices claim must be dismissed. *See DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4th 562, 568 (2000) (allegations in an unverified complaint are insufficient to meet the second prong of the anti-slapp analysis). Accordingly, good cause having been shown,

IT IS ORDERED that defendants' Special Motion to Strike is Granted and plaintiff's complaint is dismissed with prejudice.

Notice by defendants.

⁴ Plaintiff places great reliance *Keller v. Elec. Arts Inc.*, 724 F.3d 268 (9th Cir. 2013). First, that case is not binding authority on this Court. Further, to the extent that *Keller* suggests that the entirety of the disputed work should not be considered under the second prong of the anti-slapp analysis, such reasoning is in conflict with the controlling California authorities cited herein and relied upon by this Court.