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TENTATIVE

HEARING DATE:	August 6, 2015
CASE NUMBER:	BC561200
CASE NAME:	*Sivero v. Fox Television Studios, Inc., et al.*
MOVING PARTY:	Defendant 20th Century Fox Film Company
RESPONDING PARTY:	Plaintiff
MOTION:	Special Motion to Strike the Complaint
TENTATIVE:	The court is inclined to grant the motion in its entirety and strike the complaint.

Discussion:

Standards for Code of Civil Procedure section 425.16 Motion to Strike

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc., § 425.16, subd. (b)(1).) A cause of action arising from means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 78.) Acts in furtherance include: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (Code Civ. Proc., § 425.16, subd. (e).)

"'[T]he act which forms the basis for the plaintiff's cause of action' must itself have been an act in furtherance of the right of petition of free speech...." (*Kolar v. Donahue, Mcintosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1538; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1003. In other words, the anti-SLAPP statute is inapplicable as to protected conduct that merely evidences claims, but is not itself the basis for them. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal. App. 4th 658, 673.)

In bringing an anti-SLAPP motion, the defendant bears the initial burden to show that the claims in plaintiff's complaint are covered by the statute. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal. App. 4th 603, 613.) Once defendant meets that burden, plaintiff has the burden of establishing a probability of prevailing on the merits. (*Fleishman v. Superior Court* (2002) 102 Cal. App. 4th 350, 355.)

The burden should be met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses. (*Kashian v. Harriman* (2002) 98 Cal. App. 4th 892, 910.) In opposing an anti-SLAPP motion, a party cannot simply rely on the allegations in its own pleadings, even if verified, to make the evidentiary showing. (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal. App. 4th 227, 236.) A plaintiff must submit admissible evidence. (*Shekhter v. Financial Indemn. Co.* (2001) 89 Cal. App. 4th 141, 154.)

DEFENDANT'S BURDEN - COMPLAINT WITHIN THE SCOPE OF THE STATUTE

In *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, plaintiffs were real estate agents who had dealt with a writer on a CSI show. The writer used the agents'names as placeholders in writing a script, although the names were replaced with fictional names, and the characters were fictional and not modeled after plaintiffs. The court found the writing and dissemination of a sceenplay for a popular television show is a matter of public interest based on evidence of public interest in the script submitted by defendant, and was an act in furtherance to the right of free speech. (*Id.* at pp. 144-145.)

In *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026-1028, No Doubt, a popular music group, sued defendant for releasing a video game which used the band members' images. The court found that video games are expressive works with First Amendment protections, and that use of the band's likenesses was a matter of public interest because of the group's widespread fame. The allegations in the complaint were within the scope of the code section.

The acts alleged in this case are similar. Plaintiff alleges the writers for The Simpsons used plaintiff's likeness, physically and in personality, for the character Louie, and have broadcast 15 episodes using Louie, as well as a movie, video game and mobile video game. The complaint alleges the widespread fame of The Simpsons, that it has been on television for over 25 years, has won numerous awards, and has also been made into a movie, video game and mobile video game as well as having a wide variety of Simpson-related products. The complaint also alleges plaintiff has played the character he developed in numerous films, including Godfather II and Goodfellas, both successful and critically acclaimed movies.

The court is inclined to find that allegations of the complaint fall within the scope of Code of Civil Procedure section 425.16

PLAINTIFF'S BURDEN - PROBABILITY OF PREVAILING ON THE MERITS

The trial court properly considers the evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; superceded by statute onther grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547.) The court does not weigh evidence or make credibility determinations; evidence favorable to the plaintiff is accepted as true and the court evaluates the defendant's evidence only to determine if it defeats the plaintiff's claim as a matter of law. (*Freeman v. Schack* 154 Cal.App.4th at 727.

First Cause of Action for Common Law Infringement of Right of Publicity and Second Cause of Action for Misappropriation of Name and/or Likeness

Common law infringement of the right to publicity requires that defendant knowingly used plaintiff's name, photograph, or likeness; in specified ways either on, or in, products, merchandise, or goods; or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services; without plaintiff's consent. (Civ. Code, § 3344; *Montana v. San Jose Mercury News* (1995) 34 Cal. App. 4th 790, 793)

Misappropriation of name and/or likeness requires the unauthorized use of the plaintiff's identity; to defendant's advantage; by commercially or otherwise appropriating plaintiff's name, voice, likeness, et. cetera; and resulting injury. (*Kirby v. Sega of America, Inc.* (2006) 144 Cal. App. 4th 47, 55.)

Plaintiff submitted evidence from his retained expert that Louie strongly emulates plaintiff's looks and personality (especially with respect to the portrayal of Frankie Carbone in Goodfellas). Plaintiff submits his declaration that he was living across the hall from two writers for The Simpsons in 1989, and ran into, passed or encountered then daily. Producer of The Simpsons, James L. Brooks told plaintiff that the writers did use plaintiff as the source of the character Louie. Plaintiff never received any compensation.

Defendant's evidence of movies in which plaintiff appeared and series episodes, movies and video games in which Louie appeared do not establish as a matter of law that Louie was not based on plaintiff. It would require the court to weigh the evidence and make a finding of fact, which is not appropriate for this motion. Plaintiff has provided suffiecient evidence to establish a probability of prevailing on the merits that the character Louie was based, at least in large part, on plaintiff.

The court does not find defendant's argument that the causes of action are preempted by federal copyright law persuasive. Plaintiff is not suing entirely based on the character of Frankie Carbone in Goodfellas. Plaintiff submits evidence that he has spent his career playing very similar "mobster" characters and developed the mobster characteristics and characters he played himself. Frankie Carbone in Goodfellas was one of his most prominent roles, and the role plaintiff was working on at the time he interacted with the writers from The Simpsons. Plaintiff does not hold the copyright for Goodfellas, which would include the Frankie Carbone character. No copyright infringement has been alleged. Instead, plaintiff alleges that defendant misappropriated plaintiff's physical appearance and personality, that plaintiff brings to the roles in which he is cast.

Defendant argues that it has First Amendment protection as freedom of speech.

"The California Supreme Court addressed the tension between the right to free expression and the right of publicity in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal. 4th 387. In that case, defendant charicaturist made drawings of the Three Stooges and sold lithographs and T-shirts with the likenesses of his drawings. The owner of the rights to the Three Stooges sued. The Court stated:
"The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. (See *Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093; *Midler v. Ford Motor Co.* (9th Cir. 1988) 849 F.2d 460.) Because the First Amendment does not protect false and misleading commercial speech (*Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 563-564 [100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341]), and because even nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection (*Central Hudson*, at p. 566 [100 S. Ct. at p. 2351]), the right of publicity may often trump the right of advertisers to make use of celebrity figures.
"But the present case does not concern commercial speech. As the trial court found, Saderup's portraits of The Three Stooges are expressive works and not an advertisement for or endorsement of a product. Although his work was done for financial gain, "[t]he First Amendment is not limited to those who publish without charge. . . . [An expressive activity] does not lose its constitutional protection because it is undertaken for profit." (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal. 3d 860, 868 [160 Cal. Rptr. 352, 603 P.2d 454] (conc. opn. of Bird, C. J.) (*Guglielmi*).)
"The tension between the right of publicity and the First Amendment is highlighted by recalling the two distinct, commonly acknowledged purposes of the latter. First, " 'to preserve an uninhibited marketplace of ideas' and to repel efforts to limit the ' "uninhibited, robust and wide-open" debate on public issues.' "(*Guglielmi, supra*, 25 Cal. 3d at p. 866.) Second, to foster a "fundamental respect for individual development and self-realization. The right to self-expression is inherent in any political system which respects individual dignity. Each speaker must be free of government restraint regardless of the nature or manner of the views expressed unless there is a compelling reason to the contrary." (*Ibid.*, fn. omitted; see also Emerson, The System of Freedom of Expression (1970) pp. 6-7.)" (*Id.* at pp. 802-803, fn. omitted.)

The Court discussed adopting the fair use doctrine, but determined it did not readily apply to the determination of whether the work at issue was entitled to First Amendment protection. The Court developed a test for that determination:
"Nonetheless, the first fair use factor--"the purpose and character of the use" (17 U.S.C. § 107(1)) --does seem particularly pertinent to the task of reconciling the rights of free expression and publicity. As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor "is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, [citations], or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' [Citation.] Although such transformative use is not absolutely necessary for a finding of fair use, [citation],

the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." (*Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 579 [114 S. Ct. 1164, 1171, 127 L. Ed. 2d 500], fn. omitted.)

"This inquiry into whether a work is "transformative" appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment. As the above quotation suggests, both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor. (See 1 Nimmer on Copyright (2000 ed.) § 1.10, pp. 1-66.43 to 1-66.44 (Nimmer).) The right of publicity, at least theoretically, shares this goal with copyright law. (1 McCarthy, supra, § 2.6, pp. 2-14 to 2-19.) When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist. (See *Zacchini, supra*, 433 U.S. at pp. 575-576 [97 S. Ct. at pp. 2857-2858].)

"On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. As has been observed, works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect. (See *Cardtoons v. Major League Baseball Players* (10th Cir. 1996) 95 F.3d 959, 974 (*Cardtoons*).) Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity. The right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity. (*Ibid.* at pp. 404-405.)

The Court further explained what is meant by significant transformative elements"

" We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting (see, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.* (1968) 58 Misc.2d 1 [294 N.Y.S.2d 122, 129], affd. mem. (1969) 32 A.D.2d 892 [301 N.Y.S.2d 948]) to fictionalized portrayal (*Guglielmi, supra*, 25 Cal. 3d at pp. 871-872; see also *Parks v. Laface Records* (E.D.Mich. 1999) 76 F. Supp.2d 775, 779-782 [use of civil rights figure Rosa Parks in song title is protected expression]), from heavy-handed lampooning (see *Hustler Magazine v. Falwell* (1988) 485 U.S. 46 [108 S. Ct. 876, 99 L. Ed. 2d 41]) to subtle social criticism (see *Coplans et al., Andy Warhol* (1970) pp. 50-52 [explaining Warhol's celebrity portraits as a critique of the celebrity phenomenon]).

"Another way of stating 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. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.

"We further emphasize that in determining whether the work is transformative, courts are not to be concerned with the quality of the artistic contribution--vulgar forms of expression fully

qualify for First Amendment protection. (See, e.g., *Hustler Magazine v. Falwell, supra*, 485 U.S. 46; see also *Campbell v. Acuff-Rose Music, Inc., supra*, 510 U.S. at p. 582 [114 S. Ct. at p. 1173].) On the other hand, a literal depiction of a celebrity, even if accomplished with great skill, may still be subject to a right of publicity challenge. The inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work." (*Id.* at pp. 406-407.)

Finally, the Court stated:
"Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of 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. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection--it may still be a transformative work.

In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Id.* at p. 407.)

This case is similar to *Winter v. DC Comics* (2003) 30 Cal. 4th 881, 890. There, defendants published a five-volume comic book miniseries featuring an anti-hero. In the fourth volume, there were half-worm, half-human characters, the Autumn Brothers, as villains, with great similarities to Johnny and Edgar Winter. The Winters brothers sued. The California Supreme Court applied the test it developed in *Comedy III*:
"Application of the test to this case is not difficult. We have reviewed the comic books and attach a copy of a representative page. We can readily ascertain that they are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses. Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized. To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature. And the Autumn brothers are but cartoon characters--half-human and half-worm--in a larger story, which is itself quite expressive. The characters and their portrayals do not greatly threaten plaintiffs' right of publicity. Plaintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions. The comic books are similar to the trading cards caricaturing and parodying prominent baseball players that have received First Amendment protection. (*Cardtoons v. Major League Baseball Players* (10th Cir. 1996) 95 F.3d 959, discussed in *Comedy III, supra*, 25 Cal.4th at p. 406.) Like the trading cards, the comic books " 'are no less protected because they provide humorous rather than serious commentary.' " (*Comedy III, supra*, at p. 406, quoting *Cardtoons v. Major League Baseball Players, supra*, at p. 969.)"

As in *Winter*, the character Louie is a minor character in the series, appearing in only 15 episodes in its 25 year run. The value of The Simpsons does not derive primarily from plaintiff's fame as a supporting character in critically acclaimed movies about Mafia-type characters. Far more prominent are the main characters, Bart Simpson, Homer Simpson and Marge Simpson, and the writing which is largely parody. Even when the storyline includes Mafia-type characters, Louie is only one of several mobster characters and is not the main mobster character.

Even if the character was patterned on plaintiff, it is distorted for purposes of lampoon, parody and caricature. Louie is a cartoon character, who is yellow and lacks eyebrows. Fans of plaintiff would not find a picture of Louis a substitute for a picture of plaintiff. Louie's voice contains no points of resemblance to plaintiff. Some of the characteristics plaintiff alleged were misappropriated from him are general to all TV/movie depiction of Mafia mobster characters, such a dressing in suits, ties and dress shoes.

The court is inclined to find that the First Amendment provides a complete defense to these causes of action, preventing plaintiff from establishing a probability of prevailing on the merits.

Third Cause of Action for Misappropriation of Ideas

This cause of action alleges that in 1990 plaintiff disclosed the idea of Frankie Corbone for the role in Goodfellas to defendant under conditions, and that defendant's use of the idea was a misappropriation of the idea and a breach of an implied in fact contract.

Plaintiff has submitted his declaration stating he had unspecified "interactions" with the writers, animators, illustrators or producers of The Simpsons. He stated that, in connection with the use of plaintiff's likeness without his consent, he was promised roles in future films. He remembers having a conversation at a wedding in 1982/83 (probably should be 92/93) where he was made such a promise. He also recounts a conversation with Brooks, a producer of The Simpsons, where plaintiff stated "It's about time we do something together" and Brooks responded positively.

An implied in fact contract is an agreement, the existence of terms of which are manifested by conduct. (*Div. Of Labor Law Enforcement v. Transpacific Transport. Co.* (1977) 69 Cal. App. 3d 268, 275.) To form any contract, an offer must be definite enough to be accepted. See, e.g. 1 B. Witkin Summary of California Law (10th ed) Contracts sections 137 – 138, pp. 176 – 178; See generally id. Section 3, p. 61 (essential elements of contract).

Plaintiff has offered little in the way of specific facts to support his cause of action. Nor has he shown that Brooks made an offer sufficiently definite to allow acceptance or formation of a contract. Rather, the conversation with Brooks sounds like a typical cocktail party exchange between professionals in the same business. It is far too vague to support a finding of an implied contract. Plaintiff has provided no evidence of conduct by defendant which would support a finding that defendant engaged in conduct establishing the existence of terms of a contract. The cause of action alleges plaintiff disclosed to his idea to defendant in 1990, and defendant accepted the idea under the conditions it was tendered. Plaintiff has submitted no evidence that

he made any disclosure to defendant in 1990, much less a disclosure with conditions. The only evidence submitted is that plaintiff lived across from two writers of The Simpsons in 1989, and that they "ran into, passed or encountered each other almost daily." This is insufficient to form the basis of an implied contract. Aside from being the wrong year for the disclosure, it does not appear plaintiff made any disclosures to the writers, or even spoke with them.
The cause of action also alleges that the idea misappropriated was the character Frankie Carbone, who appeared in Goodfellas. As stated earlier, the parties agree that Goodfellas is a copyrighted work, including the character Frankie Carbone. Even if plaintiff developed the idea of Frankie Carbone, he no longer has an ownership interest in character. That belongs to the holder of the copyright of Goodfellas.

The court is inclined to find that plaintiff has not established a probability of prevailing on the merits as he cannot establish the contract on which he relies.

Fourth Cause of Action for Intentional Interference with Prospective Advantage

Intentional, or negligent interference with prospective economic relations requires: (1) the existence of a prospective business relationship containing the probability of future economic rewards for plaintiff; (2) knowledge by defendant of the existence of the relationship; (3) intentional acts by defendant designed to disrupt the relationship; (4) actual causation; and, (5) damages to plaintiff proximately caused by defendant's conduct. (*Settimo Assoc.'s v. Environ Systems, Inc.* (1993) 14 Cal. App. 4th 842, 845.) The plaintiff must plead facts showing wrongful conduct beyond the interference itself. (*Della Penna v. Toyota Motor Sales, Inc.* (1995) 11 Cal. 4th 376, 378-79, 392-393.) The independently wrongful conduct must be proscribed by a constitutional, statutory, common law, regulatory, or other legally determinable means. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1158-1160.) The wrongful act must go beyond improper motive, but must be wrong by a legal measure. (*Id.* at p. 1159 n.11.)

Plaintiff has submitted no evidence he had a prospective business relationship with the probability of future economic rewards, the defendant knew of that relationship, and that defendnat acted to disrupt that relationship. There is also no evidence that defendant engaged in conduct which was independently wrongfulby legally determinable means. Plaintiff make no reference to any other relationship which was disrupted by the appearance of Louie in connection with The Simpsons. As stated above, use of Louie in The Simpsons was protected by the First Amendment, and cannot be the "independently wrongful conduct" required.

The court is inclined to find plaintiff has not established a probability of prevailing on the merits.

Fifth Case of Action for Unjust Enrichment

Unjust enrichment does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal. App. 4th 779, 793.) Unjust enrichment is synonymous with restitution. (*Ibid.*) Where a plaintiff pleads and proves restitution, he may recover under unjust enrichment. (*Ibid.*)

As with the third cause of action for breach of implied contract, plaintiff has not submitted evidence that there was a failure to make restitution under circumstances where it would be equitable to do so. Defendant engaged in activity protected by the First Amendment. Plaintiff and defendant had no special relationship whereby defendant obtained information regarding plaitniff unknown to the public and used that information for its own profit. Plaintiff's roles in film are public. The only relationship alleged is that of neighbors for a brief period of time, where plaintiff and two of defendant's writers passed each other in the hall.

The court is not inclined to find the plaintiff established a probability of prevailing on the merits.

Attorney Fees

Defendant is entitled to an award of attorney fees and costs. (Code Civ. Proc., § 425.16, subd. (c)(1).) To recover attorney fees, defendant is instructed to file a motion for attorney fees and submit a memorandum of costs.