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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL S. WASHINGTON,

Plaintiff and Appellant,

v.

TAKE-TWO INTERACTIVE
SOFTWARE, INC. et al.,

Defendants and Respondents.

B232929

(Los Angeles County
Super. Ct. No. BC450602)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

The Law Office of Jeff Grotke and Jeff Grotke for Plaintiff and Appellant.

Mitchell Silberberg & Knupp, David A. Steinberg and Paul Guelpa for Defendants and Respondents.

INTRODUCTION

Appellant Michael Washington filed a complaint alleging that respondents Rockstar Games and Take-Two Interactive Software misappropriated his likeness in creating the main character of a popular video game. Respondents filed a motion to strike the complaint under Code of Civil Procedure section 425.16. The trial court granted the motion to strike, concluding that Washington's claims arose from protected activity and that he had failed to establish a probability of defeating defendant's First Amendment-based "transformative use" defense. The court entered a judgment dismissing the case with prejudice and awarding respondents attorneys' fees and costs.

Washington appeals, arguing that he established a probability of prevailing on his misappropriation claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*A. Summary of Grand Theft Auto: San Andreas*¹

In 2004, Rockstar Games and Take-Two Interactive Software (respondents) released "Grand Theft Auto: San Andreas" (GTA: San Andreas), which is a video game that "allows a player to experience a version of West Coast 'gangster' culture." (*E.S.S. Entertainment 200, Inc. v. Rockstar Videos, Inc.* (9th Cir. 2008) 547 F.3d 1095, 1097 (*E.S.S.*) [reviewing trademark claim involving GTA: San Andreas].) The game is essentially an animated, interactive movie in which the player controls the main character, "Carl Johnson," who is referred to as "CJ." The plot of the game is summarized on the game box: "Five years ago Carl Johnson escaped from the pressures of life in Los Santos, San Andreas, a city tearing itself apart with gang trouble, drugs and corruption. Where filmstars and millionaires do their best to avoid the dealers and gangbangers. Now, it's the early 90s. Carl's got to go home. His mother has been

¹ This factual summary is based on materials that the respondents submitted to the trial court, which included a copy of the video game, the game packaging and numerous articles that discuss and critique the game. In his appellate brief, Washington has not objected to the admission of any of those materials.

murdered, his family has fallen apart and his childhood friends are all heading towards disaster. On his return to the neighborhood, a couple of corrupt cops frame him for homicide. CJ is forced on a journey that takes him across the entire state of San Andreas, to save his family and to take control of the streets.”

The player utilizes the game controls to navigate CJ through different missions that take “place in the virtual cities of ‘Los Santos,’ ‘San Fierro,’ and ‘Las Venturas,’ based on Los Angeles, San Francisco, and Las Vegas, respectively.” (*E.S.S., supra*, 547 F.3d at p. 1097.) The game comes with a “City Guide” that provides information about specific neighborhoods within each city, including food and retail options, sports clubs, night life, and popular areas of interest. The “plot advances with each mission accomplished until the player, having passed through thousands of cartoon-style places along the way, wins the game.” (*Ibid.*)

Over the course of these missions, CJ interacts with a wide-array of fictional characters, including police officers, drug dealers, gang members and members of his family. CJ’s physical appearance changes throughout the game, depending on the type and quantity of food he eats and the amount he exercises. Players can also alter CJ’s clothes and his accessories.

GTA: San Andreas, which was highly profitable, has been the subject of numerous articles and scholarly works. Some commentators have praised the game for its willingness to confront complex social issues such as police corruption, race relations, drug dealing, gang culture, poverty, and obesity. Others have criticized the game for incorporating stereotypes and glorifying criminal behavior.

B. Washington’s Complaint

In December of 2010, appellant Michael Washington, who describes himself as a “a professional model and a back-up singer . . . in the . . . rap group ‘Cypress Hill,’” filed a complaint alleging that respondents misappropriated his likeness and identity for the character “CJ.” According to the allegations in the complaint, Washington was invited to meet with a group of game developers to discuss his participation in a video game “that

would use elements of street life.” The game developers “had been told by a mutual acquaintance, ‘Stevo’, that [Washington] had an authentic background in street life, having been involved with street gangs since he was a teenager.” During the meeting, which occurred in 2003, Washington spent one or two hours discussing details of his “gang and street life.” Washington was told he would be notified if he was selected for the video game. At some point after the meeting, a third party allegedly gave the respondents photos of Washington that had appeared in a magazine.

Approximately seven years after this meeting, Washington “learned from his young nephew that many people suspected that he was ‘CJ,’ the lead character in the game [GTA: San Andreas].” After receiving this information, Washington “recalled the meeting in or about 2003, and it began to dawn on him that his image had been stolen for the game. Upon learning about the game and the details of it, [Washington concluded] his image, and many of the ideas he related at the video game meeting, ha[d] been misappropriated. Upon examination of images of ‘CJ’ . . . and comparison to his photos from that year . . . , it became clear that [respondents] had stolen his image and never paid him.”

Washington’s complaint included five causes of action predicated on respondents’ misappropriation of his “likeness,” “image,” “ideas” and/or “life story.” The first cause of action for “Fraud and/or Fraudulent Concealment” alleged that respondents “engaged in a pattern and practice of defrauding [Washington] in that [respondents] failed to notify [him] that they had chosen to use his ideas and image, denied that he had been or would be used . . . [and] continue to fail to properly credit payments due to [him] in terms of royalties and payments for profits earned.” The second cause of action for “Appropriation of Likeness” alleged that respondents “used [his] likeness, or identity without his knowledge or permission, in the game [GTA: San Andreas].” The third cause of action for “Unjust Enrichment” alleged that it would be “inequitable” to allow respondents to retain profits from GTA: San Andreas because they had “misappropriated, and/or stolen” Washington’s “ideas and life story.” The fourth and fifth claims, which

are captioned “Request for Accounting” and “Injunctive Relief,” requested specific remedies for respondents’ alleged “use of [Washington’s] image, story and ideas.”

C. Trial Court Proceedings

1. Respondents’ motion to strike under Code of Civil Procedure section 425.16

a. Respondents’ motion to strike and supporting evidence

On March 21, 2011, respondents filed a motion to strike Washington’s complaint pursuant to Code of Civil Procedure section 425.16.² Respondents argued that all of Washington’s claims arose from the production of a video game, which qualified as conduct “in furtherance of the exercise of [their] right . . . of their free speech in connection with a public issue or an issue of public interest.” To demonstrate that GTA: San Andreas involved matters of public interest, respondents submitted a copy of the game along with numerous articles discussing the social issues that CJ encounters as he moves from mission to mission.

Respondents also argued that Washington could not establish a probability of prevailing on his appropriation claims because CJ was not “readily identifiable” as Washington. Alternatively, respondents contended that even if there was question of fact regarding whether they misappropriated Washington’s likeness, their use of his image fell within the “transformative use” doctrine and was therefore protected under the First Amendment.

In support of their motion, respondents requested that the court take judicial notice of the game booklet, which listed Washington as one of approximately one hundred “models” that had been used during the production of the game. Respondents also submitted a declaration from an employee who stated that she had reviewed a production binder for GTA: San Andreas that contained documents related to a Los Angeles photo shoot. One of these documents was an invoice from a modeling agency that included a

² Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

line item for providing a “gangster” named “Mike ‘Shag’ Washington.” The binder also contained a confidentiality agreement that Washington and Rockstar Games signed on September 16, 2003.

The employee also stated that she had reviewed a computer file for GTA: San Andreas entitled “SA character shoot LA.” The “character shoot” file contained numerous subfiles named after different types of characters that appear in GTA: San Andreas, including, for example, “preppy,” “venice-skaters,” “elderly people,” “girls” and “black men.” The subfile named “black men” contained several photographs of Washington.

Respondents submitted a second declaration from a research analyst who had taken several screen shots of the character “CJ.” The researcher explained that, in preparing the screen shots, he had utilized the game controls to place CJ in poses that matched the respondents’ digital photographs of Washington. The declaration was accompanied by copies of the screen shots, which were placed side-by-side with Washington’s photographs.

b. Washington’s opposition and ex parte application to permit discovery

In his opposition to the motion to strike, Washington argued that section 425.16 did not apply to any of his claims because he had “not sued [respondents] for making [a] [video] game,” but rather “for using his image.” He also argued that the following evidence established there was a probability he would prevail on his misappropriation claims: (1) “[Washington] looks like CJ and was recognized as such by his nephew”; (2) Washington had spoken to respondents about his life; and (3) Washington was “a credited model [in the video game].”

Washington also argued that he had demonstrated a probability of defeating respondents’ “transformative use” defense because the evidence showed that: (1) CJ was an exact replica of his image that had not been “artistically altered in any . . . way;” and (2) CJ resided in “environs much like those [Washington] grew up in, and participates in activities [Washington] is familiar with.”

The only admissible evidence Washington submitted in support of his opposition was a declaration stating that he had “reviewed the game and [concluded that] the character known as CJ [wa]s readily identifiable as [him]self.”³ Washington also stated that he “first learned of [his] use in the game from [his] nephew, who saw me there.” Washington asserted that the court should discount the respondents’ images of CJ because they had been distorted to conceal any likeness: “I have reviewed the photos of ‘CJ’ . . . and they appear to be pictures of me in the game. They appear to depict CJ in a gaunt or frail state, in order to distort to make him look less like me. [*Sic.*] I have played the game and I have personal knowledge CJ’s appearance can become frail, or become more muscular, depending on how the player behaves in the game. This is CJ (me) in a frail or emaciated state.” Washington also stated that he did not recall signing any nondisclosure agreement with respondents.

The remainder of the declaration discussed Washington’s relationship with an individual named Estevan Oriol, who Washington met while working for Cypress Hill. Oriol had allegedly taken modeling pictures of Washington for the “Karl Kani” clothing line. According to Washington, Oriol was the individual who “conned” him into attending the 2003 meeting with Rockstar Games and “giving up the details of [his] life.” Washington also asserted that, at the time of the 2003 meeting, Oriol did not disclose that he worked for the respondents.

³ Washington also submitted two declarations from his attorney and requested that the court treat the allegations in his complaint as evidence. Respondents objected to the admission of both attorney declarations and also objected to the admission of the complaint. The court sustained all three objections in the minute order granting the motion to strike. On appeal, Washington has raised two arguments regarding those evidentiary rulings. First, he asserts that the trial court should have ruled on respondents’ evidentiary objections before hearing the motion to strike. We are aware of no authority that requires a trial court to rule on evidentiary issues prior to the section 425.16 hearing. We find no error in the timing of the trial court’s ruling. Washington’s second argument pertains to a single exhibit that was attached to one of his attorneys’ declarations, which was allegedly a photograph of Washington that had been downloaded from a website. The court ruled that the document was not properly authenticated. For the purposes of this appeal, we will consider the photograph. The remainder of the attorney declarations and the allegations in the complaint will not be considered as evidence.

Two court days prior to the hearing on respondents' motion to strike, Washington filed an *ex parte* application to stay the motion and permit additional discovery pursuant to section 425.16, subdivision (g).⁴ Washington argued that he should be allowed to conduct discovery because he had recently learned the true name of Estevan Oriol, who Washington had previously known as "Stevo." Washington also alleged that new evidence indicated Oriol was an employee of Rockstar Games and that Rockstar had attempted to cover up this employment relationship. Based on these allegations, Washington requested permission to conduct a wide range of discovery exploring Oriol's relationship with respondents.

2. The trial court's ruling

After hearing respondents' motion to strike, the trial court issued a minute order granting the motion and denying Washington's *ex parte* application to conduct additional discovery. The court's order, which was filed on April 27, 2011, applied the two-pronged test required under section 425.16. Under the first prong, the court concluded that all of Washington's claims arose from the production and distribution of *GTA: San Andreas*, which was an "expressive work[]" entitled to First Amendment protection." It further explained that *GTA: San Andreas* "concerned issues of public interest (such as gang activity, crack cocaine use, the Rampart LAPD scandal, race relations, and the 1992 Los Angeles riots), has received critical acclaim, and has garnered such success and notoriety that the game itself has become a subject of public interest."

Under the second prong, the court concluded that Washington had failed to introduce evidence that established a probability of prevailing on the merits of his claims. First, the court noted that Washington had presented little or no evidence demonstrating that CJ was based on his image or likeness: "The main character CJ is a black male with

⁴ Section 425.16, subdivision (g) provides: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

a completely generic and somewhat variable appearance. He has short black hair, a goatee and mustache, medium brown skin, and an athletic build. He wears a sleeveless tee-shirt and low-slung baggy pants with boxer shorts appearing above the waistline. In the game, CJ's appearance can be altered by dressing him different and even by making his body heavier or thinner. [¶] Plaintiff has presented no evidence to support his argument that CJ is based upon Plaintiff's own image or likeness. There is nothing about CJ's appearance which is linked to Plaintiff, such as distinctive tattoos, birthmarks or other physical features; there is nothing about CJ's characteristics or background linked to Plaintiff, such as his work, activities, life story or interests; and there is nothing about CJ's surroundings linked to Plaintiff, such as his neighborhood associates or residence. Plaintiff is relying entirely on CJ's physical appearance in the game, but that appearance is so generic that it necessarily includes hundreds of other black males."

The trial court also concluded that Washington failed to introduce evidence demonstrating that he had a probability of defeating respondents' "transformative use" defense: "[Respondents] provided substantial evidence that their video game has creative elements which make the character of CJ almost infinitely variable: he can be placed in different virtual cities and in different virtual neighborhoods within each city; his clothes and accessories can be changed; and even his physical appearance can grow or shrink, fatten up or slim down, and change from weak to strong. In short, [respondents] have shown that . . . [e]ven if [Washington] could establish that the concept of CJ began with his likeness, the creative elements of the game have added so much variation and fantasy that CJ has been transformed into a new expression that is constitutionally protected."

The court also ruled that Washington had failed to demonstrate the need for discovery. The court explained that none of the evidence Washington described in his ex parte application "changes or even addresses the Court's determination that the ultimate character and appearance of CJ are so generic and variable as to bear no material resemblance to Plaintiff, and the creative elements of the game have transformed the character of CJ into a new expression and is constitutionally protected."

On May 17, 2011, the court entered a judgment dismissing Washington’s action with prejudice and awarding respondents approximately \$151,000 in attorneys’ fees and \$800 in costs. (See § 425.16, subd. (c)(1) [“a prevailing defendant on a . . . [section 425.16] motion to strike shall be entitled to recover his or her attorney’s fees and costs”].) Washington appealed the judgment.

DISCUSSION

A. Governing Legal Principles and Standard of Review

Section 425.16 is intended “to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315.) The section authorizes the filing of a special motion that requires a court to strike claims brought “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 Constitution or the California Constitution in connection with a public issue . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

Section 425.16 “requires that a court engage in a two-step process when determining whether a defendant’s anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.]” (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.)

“An appellate court reviews an order granting an anti-SLAPP motion under a de novo standard. (Citation.) In other words, [we employ] the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted.”

(*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

B. *The Trial Court Properly Granted Respondents' Section 425.16 Motion*

1. Washington's claims arise from protected activity

To prevail on the first prong under section 425.16, the moving defendant must demonstrate that that “the *substance* of the plaintiff’s cause of action was an act in furtherance of the right of petition or free speech.” (*Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 630.) “[T]he critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Stated differently, “it is *the principal thrust or gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*).

The trial court concluded that Washington’s claims were governed by section 425.16 because they arose from the production of a video game that involved issues of public interest. In support, the court cited cases holding that “[v]ideo games generally are considered ‘expressive works’ subject to First Amendment protections.” (*No Doubt v. Activation Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 (*No Doubt*) [plaintiffs’ claims that defendant misappropriated their likeness in a video game were subject to section 425.16].) The court also noted that respondents had submitted evidence demonstrating GTA: San Andreas examined numerous public issues and had generated significant interest among the public.

Washington does not dispute the trial court’s finding that “making a video game” qualifies as a form of protected activity nor does he contest that GTA: San Andreas involves public issues. Instead, he argues that his claims are not predicated on respondents’ act of “making a video game,” but rather are based on respondents’ alleged “fraud and theft” of his identity. Washington maintains that “the particular act of fraud

and fraudulent concealment alleged by the plaintiff is not and should not be protected activity.”

Division Four of this court recently considered and rejected an analogous argument. In *No Doubt, supra*, 192 Cal.App.4th 1018, the members of the band No Doubt entered into a contract that permitted a video game producer to use their image in certain, specified contexts. After the video game was released, the band filed a complaint alleging that the producer had used their image in contexts other than those described in the contract. The defendant filed a section 425.16 motion asserting that the band’s claim was predicated on a protected activity – the production of a video game. No Doubt opposed the motion, arguing that the defendant did not “satisfy the threshold showing under section 425.16 because a contract issue, not [defendants] right to free speech, is at the heart of the parties’ dispute.” (*Id.* at p. 1027) The court rejected the argument, explaining that although the conduct at issue – production of a video game – might qualify as a breach of the parties’ contract, it also involved a form of protected activity. (*Ibid.* [“conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning”] [citing and quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92].)

No Doubt’s analysis applies here. The “principal thrust” (*Martinez, supra*, 113 Cal.App.4th at p. 188) of every claim in Washington’s complaint is that respondents misappropriated his likeness by producing a video game that featured a character whose physical features and life story were based on Washington. Although Washington appears to contend that respondents’ act of producing a video game that utilizes his image without his permission qualifies as a form of fraud, that does not change the fact that such conduct also qualifies as a form of protected activity.

2. *Washington failed to establish a probability of prevailing on his claims*

Having concluded that all of Washington’s claims are covered by section 425.16, we next consider whether Washington demonstrated a probability that he would prevail on those claims. “To show a probability of prevailing for purposes of section 425.16, a

plaintiff must ““make a prima facie showing of facts which would, if proved at trial”” (ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010 (ComputerXpress), ““substantiate each element of their cause of action”” (No Doubt, supra, 192 Cal.App.4th at p. 1028) and “negate [any] defenses.” (Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 824 [disapproved of on other grounds in Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 68 fn. 5].)

“[T]he plaintiff ‘cannot simply rely on the allegations in the complaint’ [citations].” (ComputerXpress, supra, 93 Cal, App.4th at p. 1010.) Rather, “[t]he plaintiff’s showing of facts must consist of evidence that would be admissible at trial.’ [Citation.]” (Stewart v. Rolling Stone LLC (2010) 181 Cal.App.4th 664, 679 (Stewart).) “This standard is ‘similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment,’ in that the court cannot weigh the evidence.” (ComputerXpress, supra, 93 Cal.App.4th at p. 1010.)

a. Summary of applicable legal principles and case law

i. Commercial misappropriation of likeness

Washington’s claims are predicated on his allegation that respondents misappropriated his likeness. “[T]he ‘invasion of privacy’ tort for appropriation turns on a right of publicity arising from commercially exploitable opportunities embodied in the plaintiff’s likeness. (Citation.) The cause of action may be both common law and statutory.” (Kirby v. Sega of America (2006) 144 Cal.App.4th 47, 55 (Kirby).) “To sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: ‘(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.’ [Citation.]” (Stewart, supra, 181 Cal.App.4th at p. 679.)

“In addition to the common law cause of action, California has provided a statutory remedy for commercial misappropriation under Civil Code section 3344, which provides, in relevant part” (Stewart, supra, 181 Cal.App.4th at p. 680): “Any person who

knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." (Civ. Code, § 3344, subd. (a).) "Under section 3344, a plaintiff must prove all the elements of the common law cause of action. In addition, the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." [Citation.]” (*Stewart, supra*, 181 Cal.App.4th at p. 680.)

No California decision has specifically addressed “how identifiable an image must be to constitute a likeness under the common law and section 3344.” (*Newcombe v. Adolf Coors Co.* (9th Cir. 1998) 157 F.3d 686, 692 (*Adolf Coors*).) However, in *Adolf Coors*, the Ninth Circuit concluded that, to be actionable under California law, the likeness “must be readily identifiable as [the plaintiff].” (*Ibid.*)

ii. *The “transformative use” defense*

In *Comedy III Production, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 (*Comedy III*), the California Supreme Court “held a defendant may raise the First Amendment as an affirmative defense to an allegation of appropriation if the defendant’s work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . [Citation.]” [Citation.]” (*Kirby, supra*, 144 Cal.App.4th at p. 58.) The court explained that this “transformative use” defense was “essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” (*Comedy III, supra*, 25 Cal.4th. at p. 391.)

In *Winter v. DC Comics* (2003) 30 Cal.4th 881 (*DC Comics*), the court analyzed whether the “transformative use” defense applied to celebrity depictions that appeared in a comic book. Johnny and Edgar Winter, who were well-known musicians, sued DC Comics alleging that two characters in the comic miniseries “Jonah Hex” were based on their likeness. The characters, Johnny and Edgar “Autumn,” had “pale faces and long

white hair. . . . One brother w[ore] a stovepipe hat and red sunglasses, and h[eld] a rifle. The second ha[d] red eyes and h[eld] a pistol.” (*Id.* at p. 886.) The Autumn brothers were “depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground.” (*Ibid.*)

In analyzing whether the First Amendment precluded plaintiffs’ likeness claim, the Supreme Court explained that the “transformative use” test was formulated to aid courts in discerning “whether a work merely appropriates a celebrity’s economic value, and thus is not entitled to First Amendment protection, or has been transformed into a creative product that the First Amendment protects. 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.’ [Citation.] . . . ‘[A]n artist depicting a celebrity must contribute something more than a ““merely trivial”” variation, [but must create] something recognizably ““his own””’ [citation], in order to qualify for legal protection.’ [Citation.] ‘[W]hen an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to . . . commercially exploit his or her fame, then the artist’s right of free expression is outweighed by the right of publicity.’ [Citation.]” (*DC Comics, supra*, 30 Cal.4th at pp. 888-889.)

The court concluded that DC Comics’ depictions of the Winter brothers qualified as a transformative use: “We have reviewed the comic books and . . . 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.” (*DC Comics, supra*, 30 Cal.4th at p. 890.)

iii. The “transformative use” defense test in the context of video games

Two published decisions have applied the transformative use test in the context of video games. In *Kirby, supra*, 144 Cal.App.4th 47, Kieren Kirby, the lead singer of the band “Deee-Lite,” filed an appropriation claim against a video game producer alleging that a computer-generated character named “Ulala” was based on her likeness. Ulala appeared in the video game “Space Channel 5” (SC5), which is “set in outer space in the 25th Century.” (*Id.* at p. 52.) In the game, Ulala is a “young . . . female reporter” who “is dispatched to investigate an invasion of Earth by dance-loving aliens who shoot earthlings with ray guns, causing them to dance uncontrollably. During her investigation, Ulala encounters the aliens and competitor reporters. The player attempts to have Ulala match the dance moves of the other characters. If successful, the player acquires points, eliminates certain characters, and causes others to become part of Ulala’s dance troupe. The player moves to higher levels of more difficult play until he or she reaches a final level and a surprise ending to Ulala’s story.” (*Ibid.*)

Kirby alleged that Ulala shared many of her physical attributes and borrowed elements of her “distinctive style,” including her “signature” costumes and “lyrical expressions.” (*Kirby, supra*, 144 Cal.App.4th at p. 51.) The video game producer filed a motion for summary judgment arguing that there was no triable issue of fact as to whether Ulala was based on Kirby’s likeness. Alternatively, the defendant argued that “the First Amendment provided a complete defense to the entire action.” (*Id.* at p. 53.) The trial court granted the motion based on the transformative use defense.

On appeal, the court considered two issues: (1) whether a material issue of fact existed as to whether the defendant appropriated Kirby’s likeness or identity, and (2) if so, whether the transformative use defense applied. On the first issue, the court concluded that although Kirby and Ulala differed in “significant respects,” “Ulala’s facial features, her clothing, hair color and style, and use of certain catch phrases [we]re

sufficiently reminiscent enough of Kirby’s features and personal style to suggest imitation.” (*Kirby, supra*, 144 Cal.App.4th at p. 56.) The court therefore agreed with the trial court’s determination that “a material factual issue exist[ed] as to whether respondents misappropriated Kirby’s likeness.” (*Ibid.*)

The appellate court further concluded, however, that even if the defendants had appropriated Kirby’s likeness, their use of her image was protected under the transformative use doctrine: “[N]otwithstanding certain similarities, Ulala is more than a mere likeness or literal depiction of Kirby. Ulala contains sufficient expressive content to constitute a ‘transformative work’ under the test articulated by the Supreme Court. First, Ulala is not a literal depiction of Kirby. As discussed above, the two share similarities. However, they also differ quite a bit: Ulala’s extremely tall, slender computer-generated physique is dissimilar from Kirby’s. . . . Ulala’s typical hairstyle and primary costume differ from those worn by Kirby who varied her costumes and outfits, and wore her hair in several styles. Moreover, the setting for the game that features Ulala – as a space-age reporter in the 25th century – is unlike any public depiction of Kirby. Finally, we agree with the trial court that the dance moves performed by Ulala – typically short, quick movements of the arms, legs and head – are unlike Kirby’s movements in any of her music videos. Taken together, these differences demonstrate Ulala is ‘transformative,’ and respondents added creative elements to create a new expression.” (*Kirby, supra*, 144 Cal.App.4th at p. 59.)

In the more recent decision *No Doubt, supra*, 192 Cal.App.4th 1018, Division Four of this court concluded that the transformative use defense did not apply to literal reproductions of musicians that appeared in a video game. The rock band No Doubt filed a complaint against the producer of “Band Hero,” which is a video game that “allows players to simulate performing in a rock band in time with popular songs.” (*Id.* at p. 1023.) Players may select from a number of “digital representations of real-life rock stars” or design their own “unique fictional avatars.” (*Ibid.*) No Doubt entered into a contract permitting the defendant to include No Doubt as one of the bands featured in the game. However, under their agreement, the defendant was only permitted to allow

players to select No Doubt's avatars if the players were performing one of three licensed No Doubt songs. Two weeks prior to the release of the video game, No Doubt discovered that the game included an "unlocking" feature that "would permit players to use No Doubt's avatars to perform any of the songs included in the game. . . ." (*Id.* at p. 1024.) After the producers refused to change the game, No Doubt filed breach of contract and misappropriation claims arising from "[defendant]'s allegedly unauthorized exploitation of No Doubt's name, performance and likenesses." (*Id.* at p. 1025.)

The defendant filed a motion to strike the claims pursuant to section 425.16 arguing, in part, that No Doubt's claims were barred by the transformative use defense. Unlike in *Kirby*, the defendant admitted that the images of No Doubt were "computer-generated recreations of the real band members, . . . designed to mimic their likeness." (*No Doubt, supra*, 192 Cal.App.4th at p. 1033.) The defendant argued, however, that its use of "No Doubt's likenesses . . . was transformative because the video game shows the No Doubt avatars 'surrounded by unique, creative elements, including in fanciful venues such as outer space . . . and performing songs that No Doubt . . . would never perform in real life.'" (*Id.* at p. 1034)

The court began its analysis by explaining that the transformative use defense could apply to literal depictions: "[E]ven literal reproductions of celebrities can be 'transformed' into expressive works based on the context into which the celebrity image is placed. . . . Thus, when the context into which a literal celebrity depiction is placed creates "something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message," the depiction is protected by the First Amendment." (*No Doubt, supra*, 192 Cal.App.4th at p. 1033-1034.)

The court further concluded, however, that "although context may create protected expression in the use of a celebrity's literal likeness, the context in which [defendant had] use[d] the literal likenesses of No Doubt's members d[id] not qualify . . . for First Amendment protection." (*No Doubt, supra*, 192 Cal.App.4th at p. 1034.) The court explained that "the No Doubt avatars . . . perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as

literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space . . . , or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” (*Id.* at p. 1035.)

b. Washington has failed to establish a probability of defeating respondents’ transformative use defense

The trial court found that Washington failed to establish a probability of prevailing on his claims for two reasons. First, it concluded that Washington had not introduced sufficient evidence to make a prima facie showing that CJ was based on his likeness. Second, it ruled that Washington failed to demonstrate a probability of defeating respondents’ transformative use defense.

Washington argues at length that a jury could reasonably conclude respondents appropriated his likeness based on the following evidence: (1) the images of himself and CJ which, in Washington’s view, share many physical attributes; (2) the game booklet lists him as one of approximately one hundred “models” that participated in making the game; (3) respondents admit that their files contain photographs of Washington, demonstrating that they had the opportunity to copy his image; (4) numerous documents indicate that Estevan Oriol, who brought Washington to meet with game developers, worked as a consultant on GTA: San Andreas.

We need not decide whether this evidence would be sufficient to substantiate a misappropriation claim. Even if we assume that respondents did utilize Washington’s likeness, Washington has failed to establish a probability of negating respondents’ transformative use defense.

As explained above, the transformative use test “requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant’s work contributes significantly distinctive and expressive content; i.e., is ‘transformative.’” (*Kirby, supra*, 144 Cal.App.4th at p. 61.) We agree with the trial

court's conclusion that respondents incorporated several “significant creative elements [that] transformed [the game] into something more than a mere . . . likeness or imitation” of Washington. (*DC Comics, supra*, 30 Cal. 4th at p. 885.)

First, as in *Kirby*, CJ is “not a literal depiction” of Washington. (*Kirby, supra*, 144 Cal.App.4th at p. 59; see also *DC Comics, supra*, 30 Cal. 4th at p. 890 [defendants’ characters were not “just conventional depictions of plaintiffs”].) As the trial court explained, CJ’s appearance is rather “generic”; there is not a single feature that “directly links” CJ to Washington, such as “distinctive tattoos, birthmarks or other physical features.” Moreover, CJ’s physical appearance changes during the game depending on the amount he exercises and the amount he eats. There is also no evidence indicating that CJ’s clothing or accessories, which also change throughout the game, are based on Washington’s appearance. Thus, regardless of whether Washington has established that he and CJ look similar in some respects, there is no evidence that CJ is a literal depiction of Washington.

Second, and more importantly, *GTA: San Andreas* contains significant creative elements that have no apparent connection to Washington. As explained by the trial court, CJ travels throughout the “virtual state of ‘San Andreas.’ Each individual game occurs in the virtual cities of ‘Los Santos’, ‘San Feirro’ and ‘Las Venturas’ CJ . . . travels through each setting, encountering dangers, opportunities and other avatars along the way.” Throughout his adventures, CJ encounters dozens (if not hundreds) of characters, including police officers, drug dealers, gang members and members of his own family. He is also forced to confront many social issues, including police corruption, race relations, drug dealing, and gang culture.

Washington has introduced no evidence indicating that the fictionalized locations, characters or events in the video game are based on his own life. The only piece of admissible evidence Washington submitted to the trial court was a declaration stating that: (1) he and his nephew believe CJ looks like him; and (2) Estevan Oriol is an employee of respondents who convinced him to attend a meeting about the game. The declaration does not include any facts about his life, it does not describe any of the

information that he allegedly provided to respondents and it does not identify any event in GTA: San Andreas that is purportedly based on his own experiences.

The facts presented in this case cannot be distinguished from *Kirby*. Like Ulala, CJ is a “‘fanciful, creative character’ who exists in the context of a unique and expressive video game.” (*Kirby, supra*, 144 Cal.App.4th at p. 61.) Therefore, even if we assume there is sufficient evidence to show respondents misappropriated Washington’s likeness, respondents have nonetheless demonstrated that this “likeness” is not the “the very sum and substance of the work in question,” but rather is “one of the ‘raw materials’ from which an original work is synthesized.” (*DC Comics, supra*, 30 Cal.4th at pp. 888-889.)

c. Washington’s arguments regarding the transformative use defense are without merit

Washington argues that there are several reasons why we should not apply the transformative use defense under the circumstances of this case. All of them are without merit.

First, Washington contends that respondents cannot claim the transformative use defense because they deny that they misappropriated Washington’s likeness. According to Washington, the respondents must either: (1) demonstrate that they did not misappropriate his likeness, or (2) admit that they did seek protection under the transformative use defense. Washington has cited no authority – and we are aware of none – that prohibits respondents from presenting alternative arguments in support of their defense to Washington’s claims. (See generally *Kirby, supra*, 144 Cal.App.4th 47 [independently considering whether defendant misappropriated plaintiff’s likeness and, if so, whether the use was transformative].)

Washington next contends that this case is controlled by *No Doubt, supra*, 192 Cal.App.4th 1018, rather than *Kirby, supra*, 144 Cal.App.4th 47. We disagree. The court in *No Doubt* concluded that that defendant’s literal depictions of the plaintiffs were not transformative because “the No Doubt avatars . . . perform rock songs, the same activity by which the band achieved and maintains its fame. . . . [Nothing in the video game]

transform[s] the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” (*Id.* at p. 1035.) Here, however, Washington has presented no evidence demonstrating that the plot or characters of GTA: San Andreas have any relevance to his life or his purported fame. *No Doubt* has no application to this case.

Finally, Washington argues that we should either reject the “transformative use” defense, or refine the manner in which it is applied. In Washington’s view, “[t]he notion that the use of an image can be ‘transformative’ and hence protected, simply because the image . . . is only a small part of a larger whole, would make it possible to steal any person’s image . . . so long as they were put into a larger whole and surrounded with enough bells and whistles to legitimate the theft.”⁵ To address these concerns, he requests that we apply the transformative use test at the damages stage, rather than at the liability stage, thereby limiting a plaintiff’s recovery to “the relative merit and worth of [his or her] particular [] contribution.”

The plaintiff in *Kirby* made a similar argument, encouraging the court to either “refine” the transformative use test or “reject the test outright.” (*Kirby, supra*, 144 Cal.App.4th at p. 60.) The court declined, explaining that, as a “[c]ourt exercising inferior jurisdiction,” it was “bound to follow” the “transformative [use] test developed by our Supreme Court.” (*Id.* at pp. 60-61.) It also disagreed with the plaintiff’s contention that the “transformative test requir[ed] refinement. . . .” (*Id.* at p. 61.) We

⁵ Washington’s appellate brief includes numerous other statements that essentially ask us to reject the transformative use doctrine: “The trial court [erred] . . . by bringing in elements of the character of CJ’s story and asserting that the story somehow had something to do with the image that was used The image of CJ, and of the Appellant, are the only thing that can be looked at, in determining whether or not the use of a professional’s image is transformative”; “[t]ransforming an image . . . means to change it fundamentally, not just include it in a larger whole and claim that the sheer weight of it has changed an otherwise unchanged image.”

agree with both observations and decline Washington’s invitation to either ignore or reformulate the transformative use test.⁶

C. The Trial Court Did Not Abuse its Discretion in Denying Washington’s Request for Additional Discovery

Washington argues that the trial court erred in denying his request to permit discovery prior to the hearing on respondents’ motion to strike. Under section 425.16, subdivision (g), the filing of a section 425.16 motion immediately stays “[a]ll discovery proceedings in the action . . . until notice of entry of the order ruling on the motion.” The trial court may, however, allow discovery “for good cause shown.” (§ 425.16, subd. (g).)

“We review for abuse of discretion the trial court’s decision as to whether a plaintiff has complied with the requirements of section 425.16, subdivision (g) to merit discovery prior to a hearing on the motion to strike. [Citations.] ‘Under this standard the reviewing court will not disturb the trial court’s decision unless it “has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.”’ [Citation.]” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port* (2003) 106 Cal.App.4th 1219, 1247.)

The court did not abuse its discretion in denying Washington’s discovery request. Washington argued that he should be allowed to conduct discovery because he had recently obtained the true name of the man who lured him to the 2003 meeting with respondents. In addition, Washington alleged that he had recently uncovered facts demonstrating that this individual – Estevan Oriol – worked for the respondents and that respondents had attempted to destroy evidence of any such employment. Based on these

⁶ We also decline Washington’s request that we declare section 425.16 “unconstitutional” on the basis that it “denies persons like the Appellant equal protection and due process under the law.” Washington appears to contend that the attorneys’ fees provision in section 425.16, subdivision (c) “has the effect of chilling the rights of Americans to seek civil redress.” Other courts have considered and rejected virtually identical challenges to section 425.16. (See e.g., *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 362-367.)

facts, Washington believed he should be given an opportunity to more thoroughly investigate the relationship between respondents and Oriol.

In denying Washington's request, the trial court explained that the discovery he was seeking had no relevance to the court's determination that "the creative elements of the game have transformed the character of CJ into a new expression that is constitutionally protected." On appeal, Washington has failed to respond to that point. The trial court did not abuse its discretion in denying Washington discovery that had no relevance to the determinative issues in the case.⁷

DISPOSITION

The trial court's judgment is affirmed. Respondents are to recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

⁷ We also reject Washington's argument that the trial court was required to rule on the ex parte application to remove the discovery stay prior to hearing or deciding respondents' motion to strike. Washington has presented no authority that imposes such a requirement.