BRAD D. BRIAN (State Bar No. 79001)
brad.brian@mto.com
KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com
CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
carolyn.luedtke@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

RUDOLPH W. GIULIANI
MARC L. MUKASEY
BRACEWELL & GIULIANI LLP
1251 Avenue of the Americas
New York, New York 10020
(admissions *pro hac vice* pending)

Attorneys for Defendants

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

OCT 08 2014

Sherri R. Carter, Executive Officer/Clerk
By Raul Sanchez, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MANUEL NORIEGA,

Plaintiff,

vs.

ACTIVISION BLIZZARD, INC., a corporation, d/b/a ACTIVISION and TREYARCH, a corporation,

Defendants.

CASE NO. BC551747

**REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT UNDER THE CALIFORNIA ANTI-SLAPP STATUTE, CIV. PROC. CODE §§ 425.16, *ET SEQ.***

Date: October 16, 2014
Time: 9:30 A.M.
Judge: Hon. William F. Fahey
Dept.: 69

Action Filed: July 15, 2014
Trial Date: None set

# TABLE OF CONTENTS

**Page**

INTRODUCTION ..... 1

I. THE FIRST AMENDMENT BARS NORIEGA'S CLAIMS ..... 2

A. The First Amendment Does Not Allow Historical Figures to Censor Creative Depictions of their Role in Historical Events ..... 2

B. The Transformative Use Test Also Bars Noriega's Publicity Claims ..... 4

1. The Transformative Use Test Requires Noriega to Do More than Show that *Black Ops II* Depicts a Noriega Character ..... 5

2. Noriega Cannot Distinguish *Ross v. Roberts* ..... 7

II. NORIEGA PROVIDES NO BASIS FOR CONCLUDING HE CAN PREVAIL ON HIS UCL CLAIM ..... 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## TABLE OF AUTHORITIES

**Page(s)**

**STATE CASES**

*1-800 Contacts, Inc. v. Steinberg*
(2003) 107 Cal.App.4th 568 .......... 9

*Bank of the West v. Superior Court*
(1992) 2 Cal.4th 1254 .......... 10

*Braun v. Chronicle Publ'g Co.*
(1997) 52 Cal.App.4th 1036 .......... 9

*Comedy III Prods., Inc. v. Gary Saderup, Inc.*
(2001) 25 Cal.4th 387 .......... passim

*DuPont Merck Pharm. Co. v. Superior Court*
(2000) 78 Cal.App.4th 562 .......... 10

*Evans v. Unkow*
(1995) 38 Cal.App.4th 1490 .......... 9

Gugliemli v. Spelling—Goldberg Prods.
(1979) 25 Cal.3d 860 .......... 1, 2, 3

*Kasky v. Nike*
(2002) 27 Cal.4th 939 .......... 10

*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*
(2002) 99 Cal.App.4th 1179 .......... 9

*No Doubt v. Activision Publishing, Inc.*
(2011) 192 Cal.App.4th 1018 .......... 5, 6, 10

*Robertson v. Rodriguez*
(1995) 36 Cal.App.4th 347 .......... 9

*Ross v. Roberts*
(2013) 222 Cal.App.4th 677 .......... passim

*Wilcox v. Superior Court*
(1994) 27 Cal.App.4th 809 .......... 9

*Wilson v. Parker, Covert & Chidester*
(2002) 28 Cal.4th 811 .......... 1

*Winter v. DC Comics*
(2003) 30 Cal.4th 881 .......... 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

**FEDERAL CASES**

*ETW Corp. v. Jireh Pub., Inc.*
(6th Cir. 2003) 332 F.3d 915 ........................................................ 6

*In re NCAA Student-Athlete Name & Likeness Litigation*
(9th Cir. 2013) 724 F.3d 1268 ........................................................ 3, 6, 7

*Presley's Estate v. Russen*
(D.N.J. 1981) 513 F. Supp. 1339 ........................................................ 2

*Zacchini v. Scripps-Howard Broadcasting Co.*
(1977) 433 U.S. 562 ........................................................ 3, 6

**STATE STATUTES**

Cal. Civ. Code § 3344(a) ........................................................ 7

Cal. Civ. Proc. Code § 425.16(g) ........................................................ 9

## INTRODUCTION

Noriega does not dispute that Step One of the anti-SLAPP test is satisfied because *Black Ops II* is protected expression. Noriega therefore must show that his claims are "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (internal citations omitted). Noriega utterly fails to meet his burden:

1. Noriega does not even attempt to distinguish *Guglielmi v. Spelling—Goldberg Prods.* (1979) 25 Cal.3d 860, which holds that historical figures cannot use the right of publicity tort to censor their appearance in historical fiction. *Guglielmi* ends Noriega's publicity claims.

2. Noriega is flatly wrong that, under the transformative use test, "an exact depiction" of a plaintiff—in and of itself—"violate[s] that person's right of publicity." Opp. at 12:7-8. Noriega's misstatement of California law explains why Noriega confines his discussion of *Black Ops II* to a single mission ("Suffer With Me")—just one of 11 total missions within just one of three game play modes—and why a third of his brief contains truncated screen shots and dialogue of the Noriega character. That is not how the transformative use test works. *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 ("*Comedy III*"), makes it clear that the Court must examine the *entirety* of the defendant's work to determine if the plaintiff's name and likeness are the "sum and substance" of the *entire* work. *Id.* at 406. Noriega barely acknowledges Activision's showing, which establishes that the entire *Black Ops II* game is transformative of Noriega's name and likeness.

3. Noriega does not dispute that unjust enrichment is not a cause of action, and therefore concedes that his second claim must be stricken.

4. Noriega's only "evidence" for his UCL false-endorsement claim is his self-serving testimony that his grandkids wondered why their jailed grandfather appears in *Black Ops II* as a villain. Neither that "testimony" nor anything else in Noriega's submission substantiates his theory that *Black Ops II* tricks consumers into thinking that he endorsed the game. Thus, the UCL claim, like the others in the Complaint, fails and must be stricken.

## ARGUMENT

### I. THE FIRST AMENDMENT BARS NORIEGA'S PUBLICITY CLAIMS

#### A. The First Amendment Does Not Allow Historical Figures to Censor Creative Depictions of their Role in Historical Events

A majority of the Court in *Guglielmi* held that "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*." 25 Cal.3d at 869 (emphasis added). Noriega does not and cannot dispute that *Guglielmi* remains good law. *See Comedy III,* 25 Cal.4th at 396 n.7. Nor does he make any effort to distinguish *Guglielmi* or explain why his "lingering persona" is any less an "apt topic for poetry or song, biography *or fiction*" than Rudolph Valentino's was. 25 Cal.3d at 870 (emphasis added). So, Noriega simply ignores the case—except to wrongly attribute language to the opinion that does not appear in it.[1] The bottom line is that, under *Guglielmi*, "[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality." *Id.* at 869.

The arguments that Noriega does make on this issue are demonstrably wrong. *First*, Noriega says that Activision argues for a flat "ban on right of publicity claims involving literal depictions of anyone who, *in any way*, left a mark on history." Opp. at 13:1-3 (emphasis added). That is wrong. What *Guglielmi* held—and what Activision relies on—is that "prominent" historical figures cannot use a right of publicity claim to censor their appearance in fictionalized expression that uses those figures to illustrate the history in which they played a prominent role. 25 Cal.3d at 865, 869. *See* Mot. at 7:11-8:5. *Guglielmi* clearly applies to the Noriega character's appearance in *Black Ops II*. Noriega does not dispute the prominence of his role in the troubled history of U.S. relations with Panama and Central America in the late 1980s. Noriega exported drugs that ravaged American communities, oppressed his people and plundered their treasury, and

---

[1] The language that Noriega quotes at Opp. at 9 n.2 is actually from a New Jersey federal district court decision. *Presley's Estate v. Russen* (D.N.J. 1981) 513 F. Supp. 1339, 1359. *Guglielmi*, like the quote that Noriega rips from *Presley's Estate*, did refer to an article by Yale Law Professor Thomas Emerson. But *Guglielmi* did so to make a point that completely undermines Noriega's argument that "all of Defendants' cited cases dealt with reporting facts." Opp. at 13:8-9. *Guglielmi* says: "It is clear that *works of fiction are constitutionally protected in the same manner* as political treatises and topical news stories." 25 Cal. 3d at 867 (emphasis added).

refused to yield his iron grip until forced to do so by an invasion that cost American and others' lives. *Black Ops II* draws on Noriega's reputation on all of these points to illuminate the game's historical setting and propel forward the game's fictionalized narrative. There may be close cases as to whether a particular person's place in history is sufficiently "prominent" to make them an "apt topic" for historical fiction. This is not one of them.

*Second*, Noriega argues that *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, supports his claims, purportedly because the Court rejected the defendant's First Amendment defense without inquiring into the "human cannonball's" "place in history." Opp. at 14:8-11,18. *Zacchini* did not address the First Amendment's application to claims by prominent historical figures because the plaintiff there was not such a figure. Zacchini was a county fair entertainer, whose act consisted of being shot from a cannon into a net. 433 U.S. at 563. It is unsurprising that the Court did not inquire whether Zacchini's right of publicity claim would mute historical fiction or delineate First Amendment limits on using the tort to censor such works.

What *Zacchini* does say about the balance between the publicity tort and the First Amendment actually undermines Noriega's claims. Zacchini sued the local TV station for broadcasting the "entire act for which [he] ordinarily gets paid." *Id.* at 574. This was critical to the Court's conclusion that the First Amendment did not limit Zacchini's tort claim. The Court found that the TV station's use of the act was an "appropriation of the very activity by which *the entertainer* acquired his reputation in the first place" which "goes to the heart of [his] ability to *earn a living as an entertainer*." *Id.* at 576 (emphasis added). Like a copyright claim, the publicity claim preserved Zacchini's economic incentive to create the act. *Id.* at 575.

Noriega's publicity claims, in contrast, have nothing to do with protecting any economic interest in rewarding him for anything that he created. Noriega submits zero evidence that anyone, anywhere has ever paid him for the use of his character in works set in Panama during the late 1980s. The idea that California has an interest in rewarding Noriega for playing his role in history is absurd. *Gugliemli* shows that California law will not reward that.[2]

[2] Citing *In re NCAA Student-Athlete Name & Likeness Litigation* (9th Cir. 2013) 724 F.3d 1268 ("*Keller*"), Noriega argues that *Black Ops II* is not "a historical resource" and so is not protected.

*Third*, Noriega argues that "all prominent figures," and not just "entertainers," have a right of publicity. Opp. at 14:12-14. But Noriega does not cite any case in which any court ever has recognized a publicity claim by a prominent historical figure, as opposed to an entertainer in connection with a work in which the character entertains. California protects celebrities' names and images "as a means of protecting the fruits of a *performing artist*'s labor." *Comedy III*, 25 Cal.4th at 401 (emphasis added). Noriega notes that the *Comedy III* Court listed "notoriety" along with "skill" and "reputation" as something that can take "[y]ears of labor to develop." Opp. at 14:14-16 (citing 25 Cal.4th at 387). But notoriety is fame, and the key to whether rewarding that fame overcomes the First Amendment is *why* the plaintiff was famous. Noriega's fame derives from his historical role in the time and place that is the backdrop for the *Black Ops II* story. And, contrary to Noriega's assertion, the test does not turn on whether the plaintiff was a sinner or a saint in the annals of history. Noriega cannot control how creators of fictional works portray him any more than the heirs of Mother Theresa or Princess Diana could control their appearance in expressive works dealing with their role in history.[3]

### B. The Transformative Use Test Also Bars Noriega's Publicity Claims

Noriega's claims also fail under the transformative use test. Noriega's opposition focuses myopically on the Noriega character's appearance in one mission, while ignoring that character's minor role in the entirety of the fictional work. Opp. at 1:12-7:12, 9:7-8, 10:12-14, 10:27-11:3. He says that, so long as that character is "an exact depiction" of him, then Activision "has violated [his] right of publicity," and there can be no transformative use as a matter of law. *Id*. at 12:7-8. Noriega is wrong.

---

Opp. at 13:12-13. This argument appears directed to Activision's *alternative* argument that Noriega's claims *also* are barred by the public interest exception. *See* Mot. at 10 n.5. *Keller's* crabbed reading of the public interest exception cannot be squared with the California cases construing this state-law exception. *See id*. at 9:22-10:8. In any event, Activision's first argument is independent of the public interest exception, and it bars Noriega's claims.

[3] Noriega's claims, if validated, would chill, among other things, works like Monica Ali's *Untold Story,* which imagines that Diana faked her death to escape to an anonymous life in the American Midwest, and Peter Lefcourt's *Di and I*, which imagines that Diana fell in love with a Hollywood screenwriter and eloped with him to America, where they run a McDonald's. *See* http://www.amazon.com/Di-I-Peter-Lefcourt/dp/0679425837; http://www.amazon.com/Untold-Story-Novel-Monica-Ali/dp/1451635508 (last visited Oct. 6, 2014).

### 1. The Transformative Use Test Requires Noriega to Do More than Show that *Black Ops II* Depicts a Noriega Character

*Comedy III* and cases following it flatly reject Noriega's proposed rule that any purported replication of the plaintiff's name and likeness defeats the transformative use test: "[W]e do not hold that all reproductions of celebrity portraits are unprotected by the First Amendment." 25 Cal.4th at 408. Under Noriega's view, the First Amendment would not protect Andy Warhol's famous silkscreens because they depict Marilyn Monroe, Elizabeth Taylor, Elvis Presley, Mao and others as they were. But the Court in *Comedy III* recognized that "[s]uch expression may well be entitled to First Amendment protection." *Id.* at 408-09. Noriega relies heavily on *No Doubt v. Activision Publishing, Inc*. (2011) 192 Cal.App.4th 1018, but that case, too, rejects Noriega's extreme position. It holds that "even literal reproductions of celebrities can be 'transformed' into expressive works based on the context into which the celebrity image is placed." *Id.* at 1033.

The transformative use test focuses on the entirety of the defendant's work, not simply on how accurately the plaintiff's likeness is portrayed. The heart of the test 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." *Comedy III*, 25 Cal.4th at 406 (emphasis added). The Court also asks: "does the marketability and economic value *of the challenged work* derive primarily from the fame of the celebrity depicted?" *Id.* at 407 (emphasis added). These standards require the Court to analyze the depiction in the context of the entire work.

If Noriega's reading of the transformative use test were law, then the courts applying that test would have ended their analyses with a review of the plaintiff's likeness. They did not do that. In *Winter v. DC Comics* (2003) 30 Cal.4th 881, the Court analyzed not only the plaintiffs' "half-worm, half-human" appearance, but also how those characters were part of a "larger story, which is itself quite expressive." *Id.* at 890. Similarly, *Ross v. Roberts* (2013) 222 Cal.App.4th 677, emphasized that plaintiff's persona was "merely a minor detail *when viewed in the context of the larger story*" which involved "much more than literal depictions of the real Rick Ross." *Id.* at

689 (emphasis added). *See also ETW Corp. v. Jireh Pub., Inc.* (6th Cir. 2003) 332 F.3d 915, 936 (painting of Tiger Woods and other golf legends was transformative because the "work consists of much more than a mere literal likeness of Woods"). The degree to which a character resembles the plaintiff is just one piece of the analysis. It does not end the inquiry.

As anticipated, Noriega relies almost entirely on *No Doubt* and *Keller*. But neither case adopts his proposed reading of the transformative use test. *No Doubt* in fact recognized that "context" can transform "literal reproductions." 192 Cal.App.4th at 1033. It held only that the context there did not transform. For the Court there, the critical feature of the game was that the players could "'be' the No Doubt rock stars" in "doing exactly what they do as celebrities." *Id.* at 1034. The depiction of the band members was thus essentially like the depiction in *Zacchini*: a reproduction of the "entire act for which the performer ordinarily gets paid." 433 U.S. at 574.

In that context, the court reasoned that players' ability to "perform at fanciful venues including outer space or to sing songs the real band would object to singing" did not "transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." 192 Cal.App.4th at 1034. Whether the band was depicted playing its own songs in a real venue or other people's songs somewhere else, the "sum and substance" of the game play, the court held, was to perform as No Doubt. The "background content of the game" was "secondary" to using "life-like depictions" of the band to encourage its "sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt." *Id.* at 1035.

*Keller* likewise rejects Noriega's position that context is "irrelevant to the analysis." 724 F.3d at 1276 n.7. Indeed, the *Keller* majority expressly "reject[ed] the notion that [its] holding" would "jeopardize[e] the creative use of historic figures in" creative works. *Id*. at 1279 n.10. The majority instead relied on the context of the college sports games as a whole in finding that they were not transformative. *Keller* was a putative class action on behalf of every student-athlete whose jersey number corresponded to the number worn by an avatar on his school's team in EA's game. The majority concluded that these depictions of the class were the "sum and substance of the work"—even if no individual depiction was—because it believed that the entire context of the game was designed to make the avatars the stars of the show. *See id*. The majority noted that the

"context" in which the student-athlete characters played—entire teams of student-athletes with "replicated" "physical characteristics" playing in "realistic depictions of actual football stadiums"—was "similarly realistic" to how each individual plaintiff was depicted. *Id.* at 1276. Thus, according to the majority, the other elements did not transform the depictions but instead reinforced that the games were about the plaintiffs.

This case is very different. Even construed narrowly, the "context in which" the Noriega character's "activity occurs" in *Black Ops II* is not "similarly realistic." *Id.* Whereas the Ninth Circuit in *Keller* believed that the game depicted real players in real stadiums doing what they do in real life, the Noriega character does fictional things with fictional people in fictional places (a fictional narcoterrorist's Nicaraguan compound and a motel).

More significantly, the rest of the game goes far beyond the Noriega character. Players only encounter Noriega for a few minutes of a multi-hour game story that follows other fictional protagonists tracking another fictional villain amidst dozens of other characters. Suarez Suppl. Decl. ¶¶ 5-6. And this occurs only within the least popular of three different game play modes that are played for endless hours by avid players. *See id.* ¶¶ 3-5; Suarez Decl. ¶¶ 10, 40. The complete storyline involves dozens of fictional characters who never meet the Noriega character, who are engaged in missions that do not concern Noriega, and who exist in places that Noriega has never been and, at many times, in the future. These are "transformative elements or creative contributions that require First Amendment protection." *Comedy III*, 25 Cal.4th at 406.[4]

### 2. Noriega Cannot Distinguish *Ross v. Roberts*

Activision's motion demonstrated that under numerous California cases applying the transformative use test, Noriega's claims fail. *See* Mot. at 10:9-12:18. Noriega's efforts to distinguish these cases rest on his erroneous argument (discussed above) that a work cannot be transformative unless it transforms the plaintiff's appearance. The only case that Noriega tries to

[4] Noriega does not contest that his name and likeness were not used "for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services." Cal. Civ. Code § 3344(a). Accordingly, at a minimum, his statutory claim must be stricken.

distinguish with additional argument is the case most closely on point, *Ross v. Roberts*. *See* Opp. at 12:9-19. Noriega's efforts to distinguish *Ross* fail.

The plaintiff there was Ricky D. Ross, an imprisoned "former criminal who achieved some sort of celebrity status due, in part, to the enormous scale of his cocaine-dealing operations," which were connected to the Iran-Contra affair. 222 Cal.App.4th at 680-81. The defendant, Roberts, performed as the rapper Rick Ross. His "lyrics frequently include fictional stories about running large-scale cocaine operations." *Id.* at 682. He even used "a phrase previously used by plaintiff in interviews when describing his life as a criminal." *Id.*

The court recognized that "Roberts's work—his music and persona as a rap musician—relies to some extent on plaintiff's name and persona. Roberts chose to use the name 'Rick Ross.' He raps about trafficking in cocaine and brags about his wealth." *Id.* at 687. And the court acknowledged that "[t]hese were 'raw materials' from which Roberts's music career was synthesized." *Id.* However, the court held that "these are not the 'very sum and substance' of Roberts's work." *Id.* Instead, "Roberts's work clearly added new expression." *Id.* at 688. Roberts "was not simply an imposter seeking to profit solely off the name and reputation of Rick Ross. Rather, he made music out of fictional tales of dealing drugs and other exploits—*some of which related to plaintiff*." *Id.* at 687-88 (emphasis added). "Roberts's music may be analogized to a work of fiction in which the protagonist bears some resemblance to the original Rick Ross. The resemblance is one 'raw material' upon which the story is based, *but it is merely a minor detail when viewed in the context of the larger story*—Roberts's music and persona are much more than literal depictions of the real Rick Ross." *Id.* at 689 (emphasis added).

That perfectly describes Noriega's role in *Black Ops II*: "a minor detail when viewed in the context of the larger story." *Id.* Noriega's opposition ignores the context that makes *Black Ops II* transformative. Noriega omits that he only appears for a few minutes of the entire game—and not at all in the two most popular of the game's three modes. *See* Suppl. Suarez Decl. ¶¶ 3-6; *see also* Suarez Decl. ¶¶ 9-10, 27-30, 40. Noriega also ignores that *Black Ops II* is a fictional story about fictional American intelligence agents working to neutralize a fictional narcoterrorist who becomes the leader of a fictional global movement in the future. *See id.* ¶¶ 30-43. And

1 Noriega sidesteps the fact that the Noriega character is one of several historical characters, and
2 that all of these characters are minor in comparison to the lead fictional characters (the Masons
3 and Wood). *See id.* ¶ 40.

4 Noriega argues that *Ross* turned on some unique set of facts related to "'whether the
5 marketability and economic value of the challenged work derive primarily from the fame of the
6 celebrity.'" Opp. at 12:14-16 (quoting *Ross*, 222 Cal.App.4th at 686). That is incorrect. *Ross*
7 merely noted that, in addition to the reasons discussed above, this "'subsidiary inquiry' *also*
8 *supports* application of the First Amendment defense." *Id.* at 688 (emphasis added). And, in any
9 event, even if Noriega were right in this reading of *Ross*, that would do nothing to help him.
10 Noriega does not identify any effort by Activision to market the game with Noriega's image, or
11 any evidence that the economic value of the game derives from Noriega's fame. The evidence is
12 entirely to the contrary. *See* Harvey Decl. ¶¶ 3-6; Luedtke Decl. ¶ 22.[5] Again, *Ross*'s analysis is
13 right on point: "It defies credibility to suggest that [the defendant] gained success primarily from
14 appropriation of plaintiff's name and identity." *Ross*, 222 Cal.App.4th at 866.

15 Noriega also urges the Court to disregard *Ross* because it was decided on summary
16 judgment. Opp. at 12:17-19. A central purpose of the anti-SLAPP statute, however, is to
17 "eliminate" "meritless litigation" impacting protected speech "at an early stage." *Wilcox v.*
18 *Superior Court* (1994) 27 Cal.App.4th 809, 824. "This statutory purpose is met by requiring the
19 plaintiff to demonstrate sufficient facts to establish a prima facie case." *Id.* That was the
20 legislature's way of "providing a fast and inexpensive unmasking and dismissal of SLAPPs." *Id.*
21 at 823. Noriega needed to show this Court *now* that this litigation is likely to be worth the cost to
22 expressive freedom because it is probable that he will prevail. *See Mattel, Inc. v. Luce, Forward,*
23 *Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188.[6] He failed to do so.

24

25 [5] Noriega's quotation of a "wiki" page discussing "Suffer With Me," Opp. at 1, does nothing to help his case. That is a *fan*-operated site, not an Activision site. http://www.wikia.com/About. And the page itself says that "Suffer With Me" is important to the overall game, *not* because of
26 the Noriega character, but because the mission "sees the destiny of Alex Mason which the player decides, the demise of Jason Hudson, and sets up the main event of the game for the player."

27 [6] Noriega's reference to the possibility of discovery, Opp. at 2 n.1, does not overcome the automatic stay of Cal. Civ. Proc. Code § 425.16(g). The statute requires a "noticed motion"
28 showing "good cause" for "specified discovery." *Id.* *See Braun v. Chronicle Publ'g Co.* (1997)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## II. NORIEGA PROVIDES NO BASIS FOR CONCLUDING HE CAN PREVAIL ON HIS UCL CLAIM

Noriega argues that his UCL false-endorsement claim survives, purportedly because *No Doubt* rejected the *Rogers* test. Opp. at 14:19-24. He is wrong and cannot carry his burden. *No Doubt* expressly did "not reach" whether *Rogers* applies to a UCL claim based on alleged use of a plaintiff's likeness. 192 Cal.App.4th at 1039. It held only that *Rogers* does not apply if the Court has determined that the use of the plaintiff's likeness was "non-transformative." *Id.* Activision's depiction of the Noriega character was "transformative." Noriega offers no reason why, in those circumstances, the same First Amendment protection that applies to Lanham Act claims should not apply to a UCL claim directed at the same kind of wrongful conduct.

Regardless of whether Noriega must prove that *Black Ops II* is "explicitly misleading," his claim must be stricken because he offers no proof that "members of the public are likely to be deceived." *No Doubt*, 192 Cal.App.4th at 1040; *see also Kasky v. Nike* (2002) 27 Cal.4th 939, 951; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267. He does nothing to rebut Defendants' showing that he is not part of the marketing for *Black Ops II.* Nor does he offer a single statement from a single consumer to substantiate the Complaint's conclusory allegation that Activision "deceived and confused the public into believing" that he endorses the game. Compl., ¶ VI.2. That failure of proof dooms his UCL claim under the anti-SLAPP statute. *See DuPont Merck Pharm. Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568, *as modified* (Jan. 25, 2000) ("It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint. Substantiation requires something more than that.").

DATED: October 8, 2014

MUNGER, TOLLES & OLSON LLP

By: *Kelly Klaus (by SMP)*
KELLY M. KLAUS
Attorneys for Defendants

---

52 Cal.App.4th 1036, 1052; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499. Even if Noriega made a motion (he has not), he does not even hint "what additional facts" could change the result on this motion. *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 (quotation marks omitted).