20-3529

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DENISE K. SHULL, THE RETHINK GROUP, INC.,

Plaintiffs-Appellants,

—against—

TBTF PRODUCTIONS, INC., SHOWTIME NETWORKS INC, CBS CORPORATION, BRIAN KOPPELMAN, DAVID LEVIEN, DAVID NEVINS, ANDREW ROSS SORKIN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned, counsel of record for Defendants-Appellees, certifies the following:

- TBTF Productions Inc. is a privately held corporation based in New York. No publicly traded corporation holds a 10% or greater ownership interest in TBTF Productions Inc.
- As of December 4, 2019, Viacom Inc. merged with and into CBS Corporation with CBS Corporation continuing as the surviving corporation, now known as ViacomCBS Inc. ViacomCBS Inc. is a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of ViacomCBS Inc. ViacomCBS Inc. is not aware of any publicly held corporation owning 10% or more of its total common stock, i.e., Class A and Class B on a combined basis.
- Showtime Networks Inc. is a wholly owned subsidiary of ViacomCBS Inc.
- Brian Koppelman, David Levien, David Nevins, and Andrew Ross Sorkin are individuals.

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PRELIMINARY STATEMENT

This case arises out of the richly-conceived and entirely fictional serial drama series, *Billions*. The drama is about the high stakes battles between Chuck Rhoades, the fictional former United States Attorney for the Southern District of New York, and a hedge fund manager identified as Bobby 'Axe' Axelrod – with Chuck's wife, Wendy Rhoades, as the woman in the middle who both Chuck and Axe depend on. Plaintiff-Appellant Denise K. Shull and her company, The Rethink Group, Inc. (together, "Appellants") claim that the entirely fictional character Wendy in the entirely fictional show *Billions* actually depicts Shull and that *Billions* actually appropriates Shull's book, *Market Mind Games*. They now appeal the District Court's dismissal of their copyright infringement claim as well as the District Court's refusal to allow them to belatedly amend their complaint to add a Lanham Act false endorsement claim. But the District Court was absolutely correct – both of these claims are meritless.

After painstakingly comparing the two works at issue – Appellees' acclaimed television series, *Billions*, and Shull's book, *Market Mind Games* – in terms of their plots, characters, settings, themes, and "total concept and feel," the

District Court concluded that the works "do not seem to resemble each other in the least," and therefore, are not substantially similar as a matter of law.[1] A291.[2]

On appeal, Appellants do not identify *any* similarity between the protectible elements of the actual works, including anything that would support that the Wendy character is substantially similar to Shull. Instead, their appeal rests on two narrow issues: First, Appellants argue that the District Court's cursory internet search amounted to reversible error; and second, Appellants argue that the District Court erroneously denied Appellants' belated motion for leave to amend the Complaint. In short, the District Court did not err on either count.

With respect to the internet search, the District Court was well within its discretion to take judicial notice of an internet search that had no bearing on its substantial similarity analysis, particularly when the search was only confirming evidence already in the record. And Appellants' belated motion to amend was denied for two independent and sound reasons. First, the proposed Amended Complaint attempted to buttress the copyright claim but did nothing more than expand on allegations of substantial similarity that were already reviewed and found meritless by the District Court. No amount of repleading concerning alleged similarities can change that conclusion since it is "the works themselves, not

[1] Appellants also brought several state law claims, which were dismissed below, a decision that they do not contest on appeal. *Infra* Part IV.
[2] References to Appellants' Appendix are cited as "A."

descriptions or impressions of them, [that] are the real test for claims of infringement." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1986).

Next, the court below properly denied the request to amend the complaint to add a new Lanham Act false endorsement claim because it was clearly futile. In order to succeed, the Lanham Act claim depends on a necessary finding that viewers would identify the Wendy character as depicting Shull and therefore erroneously believe that Shull endorsed *Billions*. Yet, as the District Court already found, the fully realized character of Wendy in *Billions* does not resemble the abstractly sketched Denise character in Shull's book *Market Mind Games* "in the slightest," beyond both being female performance coaches. A295. Further, the application of the Lanham Act to a fully protected entertainment work like *Billions* does not begin to pass muster under the First Amendment. Accordingly, the motion to amend the complaint after judgment was entered dismissing the Complaint was properly denied.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did Plaintiffs-Appellants state a claim for copyright infringement, even if the District Court briefly referenced an internet search as part of its substantial similarity analysis?

(2) Did the District Court abuse its discretion by denying Plaintiffs-Appellants' belated motion to amend their Complaint?

STATEMENT OF THE CASE

A. The Two Works

1. Appellees' Television Series: *Billions*

This action arises out of the premium television series, *Billions*. *Billions* is an hour-long serial drama that has aired on SHOWTIME for five seasons. *Billions* is:

> a complex drama about power politics in the world of New York high finance. Shrewd, savvy U.S. Attorney Chuck Rhoades . . . and the brilliant, ambitious hedge fund king Bobby "Axe" Axelrod . . . are on an explosive collision course, with each using all of his considerable smarts, power and influence to outmaneuver the other. The stakes are in the billions in this timely, provocative series.

SA-1, SA-3 (McNamara Decl. Ex. A, Back Cover).[3]

Axe is a folk hero who went from a working class background to billionaire founder of the hedge fund, Axe Capital, by using means both legal (his cutthroat perception and intellect) and illegal (extorting and bribing individuals for insider information) to successfully beat the market. Chuck, who grew up in a privileged

[3] The District Court reviewed a copy of *Market Mind Games* and DVDs of Seasons One, Two, and Three of *Billions*. A86-87 (attaching as exhibits Season One of *Billions* on DVD and a copy of *Market Mind Games*); A125-127 (attaching as exhibits Seasons Two and Three of *Billions* on DVD); *see also Warner Bros., Inc. v. American Broad. Cos., Inc.*, 720 F.2d 231, 240-41 (2d Cir. 1983) (substantial similarity requires review of the two works at issue). Appellees have filed a Supplemental Appendix with exhibits containing copies of *Market Mind Games* and DVDs of Seasons One, Two, and Three of *Billions*. References to the Supplemental Appendix are cited as "SA."

New York family, is the United States Attorney of the Southern District of New York ("U.S. Attorney") known for his perfect record prosecuting financial crimes – but he also has a flexible moral compass. The showdown between Axe and Chuck arises when Chuck begins looking to prosecute Axe for his alleged illegal activities.

Complicating the battle between Axe and Chuck is Wendy. Wendy is married to Chuck but has worked with Axe for the past fifteen years as an in-house psychiatrist and performance coach. Wendy and Chuck have two children and live in a multi-million dollar townhouse in Brooklyn. It is Wendy's career that supports their lifestyle as she earns eight times as much as Chuck. The power dynamics between Chuck and Wendy are defined by Wendy's first introduction to viewers – through their sadomasochistic sex lives with Wendy as the dominatrix and Chuck as the submissive.

Further complicating Chuck and Wendy's relationship is Wendy's close relationship with Axe, whom she has worked with longer than she has been married to Chuck. Wendy served as Axe's main support when the partners at his former firm were killed on 9/11. Wendy is also Axe's biggest defender, a role Axe recognizes, telling his wife only Wendy can "fix" him. In Wendy's role as in-house performance coach, she works with Axe Capital employees in one-on-one

intimate sessions, most often with Axe himself. Here, too, Wendy comes off as the dominant one, going toe to toe with each of the male titans in her life.

Despite Wendy's dedication to both men, Chuck and Axe each consistently question Wendy's loyalty to them. Season One ends with Wendy leaving them both – throwing Chuck out of their family townhouse after he steals her session notes to use against Axe, and quitting Axe Capital after Axe threatens to publicize the fact that she is a dominatrix because he thinks Wendy gave Chuck the incriminating evidence.

2. Appellants' Book: *Market Mind Games*

Market Mind Games explains the basics of neuroscience and provides the reader with a trading system that Shull claims is designed to take full advantage of your emotional assets. *See* SA-1, SA-4 (McNamara Decl. Ex. B). Shull's theories are based on the academic disciplines of neuroeconomics, modern psychoanalysis, and neuropsychoanalysis. According to Shull, it is an individual's ability to decipher his or her feelings and emotions – not mathematical formulas – that will help him or her outperform the market. As part of this theory, Shull discusses in great detail the idea of the collective "*fCs*," which she defines as the "context of feelings we bring to each and every perception we have, judgment we make, and decision we act on," and contends that this *fC* "offers . . . something much more

useful than attempting to find the missing natural mathematic law" in trading. *Id.* at Prologue xiv.

Market Mind Games presents Shull's academic concepts through a series of lectures, workshops, and seminars given by a non-fictional representation of Shull based on the "typical lectures, workshops and consulting programs" Shull gives in real life. *Id.* at Prologue xvi. Shull then incorporates some fictional elements in the book as a way to transition the book through her typical academic-based lectures. Only approximately 20% of *Market Mind Games* – 47 pages out of the 236-page book – discusses the fictionalized characters, while the rest of the book focuses on Shull's theories and the academic research supporting them. *Id.* at 3-7, 45-52, 103-111, 171-173, 205-222, 231-234.

Specifically, Shull uses the character Michael Kelley ("Michael"), "an academic about to get a real shot at running money," as the main fictional subject of her lectures. *Id.* at Prologue xvi. At first, one of Michael's professors from his PhD program invites Michael to attend a three-day lecture by Denise, a fictionalized representation of Shull. The lecture operates to introduce Shull's trading theories to the reader. As the book's chapter and subheadings indicate, this lecture series focuses on the "difficult question of how investors do (or should) form their probability beliefs," addressing topics such as *Numbers Look*

You in the Eye and Lie and *Mis-Remembering the Caveats of the Early Quants*. *Id.* at 9-44.

The next time Michael and Denise interact is when Michael attends another set of lectures by Denise, this time as part of a four-day new-hire trading program at a fictional Wall Street bank where he is employed after graduate school. As before, Denise lectures to a full audience and her focus is on high-minded academic topics including *Ambient, Circumstantial, and Contingent Reality*; *A Coherent Theory Proposal for Behavioral Economics*; and *Perception's Labyrinth*. *Id.* at 53-100. Portions of these lectures describe available research showing that the human brain responds differently to uncertain risk compared to quantifiable risk. *Id.* at 77-78.

When Michael is laid off from the bank, he goes skiing and meets up with his former classmate Renee Smith's ("Renee") father, Christopher Smith ("Chris"), and his "trading buddies." Chris and his friends provide Michael with capital to start his own hedge fund, after which Michael and Renee attend The Rethink Group's (Shull's real life consulting firm, and her co-plaintiff) three-day "advanced workshop" covering topics such as *Regret Theory – 'Greed Misleads'* and *Fractal Geometry*. *Id.* at 111-167. According to Shull's work, "the fractals of our early feelings repeat themselves out" during trading decisions, meaning that the feelings an individual experiences when trading are

the same feelings experienced during an event in his or her childhood, such as not making the football team, but once an individual is aware of these fractal patterns, he or she can make better, more informed trading decisions. *Id.* at 148-164.

After Michael's newly created hedge fund hires Denise as its coach, she provides three separate group seminars to the fund's employees covering topics such as *The Physical Game of Risk Decisions: Body-Brain-Mind Reality*. *Id.* at 175-202. These seminars focus on the idea that trading is a "physical game" that requires individuals to take care of themselves physically, as well as mentally, and separately how to identify and accept their feelings instead of fighting them. *Id.*

When Michael makes a set of bad trades (falling into various pitfalls identified by Shull's earlier lectures), and in the only scene where Denise and Michael have a one-on-one session, Denise dissects these trades using the academic theories introduced earlier. *See id.* at 217-222. The book ends with a chapter from the hedge fund's Trader Training Manual entitled *A Note on the Psychology of Dealing with Uncertainty*, which theorizes that the best way to move beyond a bad trade is to "let yourself feel disgusted" and "bad." *Id.* at 223-230. Michael then successfully applies these theories to overcome his losing trades. At no time does the reader of *Market Mind Games* learn anything about the Denise

character – what she looks like, where she lives, what kind of family or history she has – beyond her gender and occupation.

B. Procedural History and the Rulings Below

On January 2, 2019, Appellants filed this action for copyright infringement. They claimed that *Billions* is an "unauthorized" use and "derivative work" of *Market Mind Games*, based solely on the purported similarities arising out of the inclusion of a character that works as an in-house performance coach at a hedge fund and the alleged use of Shull's "unique" approach to the psychology of trading in financial markets. A16, 21, 24-25. Appellants also brought claims against all Appellees for (i) unjust enrichment under Section 350 of New York General Business law ("GBL") (A32), and against all Appellees except Nevins for (ii) unauthorized use of Shull's persona in violation of Sections 50 and 51 of New York Civil Rights Law ("Section 51") (A28-31); (iii) injury to business reputation, dilution, and unfair competition in violation of GBL Section 360-L (A31); (iv) deceptive trade practices in violation of GBL Section 349 and under common law (*id.*); (v) implied in fact contract (A32-33); (vi) misappropriation of ideas (A33-34); and (vii) accounting (A34-35).

Appellees moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, arguing that Appellants' copyright infringement claims fail as a matter of law because the works are not substantially similar and the

state law claims were either preempted by the Copyright Act, or in the alternative, failed to state a claim. A39-85. Appellants opposed the motion but in their opposition never sought leave to amend the Complaint. A88-124.

On April 18, 2019, Judge George B. Daniels of the United States District Court for the Southern District of New York held a two-hour oral argument on the motion, during which Appellants' counsel below had a full opportunity to detail each of the ways counsel believed the Denise and Wendy characters in *Market Mind Games* and *Billions* were substantially similar. A176-258. Appellants' counsel below then went over – in great detail – each of the three scenes she believed were similar in the works, A201-08 (discussing scene in *Billions* Season 1 Episode 11 where Wendy counsels Axe on a bad trade after the death of their colleague), A216-A220 (discussing scene in *Billions* Season 1 Episode 1 where Wendy has a one-on-one counseling session with a hedge fund trader, Danzig, and asks about his physical health, eating, sleeping, and exercising, asks him where the "alpha" is, and tells him to "cut bait" on his losing stocks), A221-224 (discussing scene in *Billions* Season 3, Episode 6 where Wendy and Taylor discuss listening to your instinct). At no point, however, did Appellants' counsel identify *any* actual expression that was copied, beyond the abstract similarity that each character was a female performance coach at a hedge fund counseling traders.

Consistent with their opposition to the motion to dismiss, at oral argument Appellants did not request leave to amend their Complaint, as they now suggest on appeal. Appellants' Br. at 33-34. Instead, when pressed by the Court concerning the lack of substantive similarities between the works, Appellants' counsel stated that she would be "happy to amend the complaint to add [additional details] if [the Court] think[s] that would be helpful", A237, or, "I am not sure if it's stated as clearly in the complaint as we have stated it in our papers, which we would offer the Court as an amendment to the complaint," A242, and, finally, "I would be happy to amend it *if you think it's necessary, but I think we have a claim*," A251 (emphasis added). Appellants' first request to amend their Complaint occurred a month after the action was dismissed and judgment had been entered.

1. Decision Granting Appellees' Motion to Dismiss

On October 4, 2019, the Court issued its 34-page decision granting the motion to dismiss in its entirety. A273. Establishing that the Court independently reviewed the two works at issue, the Court extensively described each – a summary that included many details from the works that were not highlighted by either party.[4] The Court then analyzed the characters of Wendy and Denise, their

[4] *See, e.g.* A288 (explaining that in *Market Mind Games* "to further explain the [*f*]C, Shull details a December 2010 report, released after 'the Financial Crisis Inquiry Commission' reportedly broke down: . . . . Shull uses this example to demonstrate that behind partisanship and political circuses are opposing parties holding dissimilar points of view."); A289 ("in illustrating her ideas [in *Market*

interactions with the other characters in their respective works, as well as each scene from *Billions* identified by Appellants as allegedly infringing Shull's character or *Market Mind Games*. *See e.g.*, A293-96 (analyzing Wendy and Denise's relationships with Axe and Michael, respectively); A296-98 (analyzing the purported infringing scenes in *Billions* where Wendy counsels a hedge fund trader and mentions "alpha," "physical wellbeing," and "eat[ing], sleep[ing], and exercise[ing]"); A298-300 (analyzing purported infringing scenes in *Billions* where Wendy counsels Axe on a bad trading decision).

After reviewing the works, the Court explained that under *three* copyright infringement tests – discerning ordinary observer test, qualitative/quantitative test, or fragmented literal similarity test – "these works do not seem to resemble each other in the least," concluding "*Market Mind Games* and *Billions* differ greatly in 'total concept and feel, theme, characters, plot, sequence, pace, and setting.'" A291-92. As expressly found by the Court:

> the issue does not lie in the fact that one is a book and one is a television show, but the fact that Plaintiffs' work

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Mind Games], Shull draws on other ideas that are historical in nature, and also references other literary works" referencing Shull's use of Peter Bernstein's market book, *Against the Gods: The Remarkable Story of Risk*, Benoît Mandelbrot's books on fractal geometry, the neurological study of Albert Einstein's brain tissue, and Antonio Damasio's book, *Descartes' Error*). None of these references were included in Appellees' motion papers.

> is an academic work which interweaves fiction to better help the reader understand Shull's ideas, while Defendants' work is a television show, based in the Southern District of New York, to demonstrate the drama that lies in the age old trifecta of money, power, and sex.

A291. Getting to the heart of Appellants' copyright claims, the alleged similarity between the characters, the Court concluded that "the characters of Denise and Wendy do not resemble one another in the slightest." A295. It started its analysis by observing that "[a]n in-house psychiatrist may not be a 'stock character'" but, as noted in a *New York Times Dealbook* article Appellants put in evidence, the "idea" of performance coaches for traders was "not new." A294. Moreover, the Court found Shull's argument "precarious" that she had "exclusivity in this particular idea" because it would "essentially grant Shull a monopoly on the entire subject matter of the female performance coach." A295. The Court reached this conclusion because in *Market Mind Games* Denise's identity as a character was "not developed," noting that Denise was "not given much of a persona" and the character instead was just used as a vehicle to "explain and demonstrate Shull's ideas." A296. Accordingly, the Court rejected Appellants' claim as nothing more than "essentially argu[ing] that because Wendy is *also* a female in-house hedge fund performance coach," the Denise and Wendy characters were substantially similar. *Id*. (emphasis original).

The Court also expressly addressed – and rejected – Appellants' argument that both characters are similar because they "go toe-to-toe with male hedge fund traders in advising them how to explore and apply their emotions for fun and profit." A295. The Court found that this "representation [of going toe-to-toe with male traders] serves to mischaracterize both Denise and Wendy" as the actual expression in each work is entirely different.[5] *Id.* Overall, because the Court could not "identify any copying, not even copying that is said to be a 'fragment'", the Court dismissed Shull's copyright infringement claims with prejudice. A293.

Turning next to Appellants' New York general business law and accounting claims – their unfair competition, deceptive business practices, and lack of accounting claims – the Court found they were preempted by the Copyright Act, A301, and that the implied-in-fact contract, Section 51, and unjust enrichment claims failed on the merits. A301-05.

2. Appellants' Motion to Amend, Alter, or Vacate Dismissal Denied

On November 6, 2019, Appellants moved the District Court pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) to amend, alter, or vacate the

[5] The Court found that "Denise explains her mathematical and scientific concepts through fictionalized lectures and workshops" and her going "toe-to-toe" with Michael on his bad trade does not resemble Wendy's dealings with the "overly dominant Axe Capital employees and her own husband and overbearing father-in-law." A295-96.

District Court's decision dismissing the Complaint in its entirety, in relevant part for this appeal, on the ground that the District Court conducted a "quick internet search" to refute the facts alleged in the Complaint. A308, A382. In the alternative, Appellants requested leave to amend the Complaint pursuant to Rule 15 in order to "introduce[] additional allegations of fact relating to the currently asserted copyright claims" and replace the dismissed right of publicity claim under New York Civil Rights Law Sections 50 and 51 with a Lanham Act claim for false endorsement. A386.

On September 16, 2020, the District Court denied Appellants' motion in its entirety. A439. The District Court found that Appellants were not entitled to relief pursuant to Rule 59(e), in relevant part for this appeal, because with respect to the allegedly improper internet search, Appellants failed to "provide any case law or supporting references to support this claim, nor do they provide any detail as to the basis on which they conclude that this Court conducted an improper internet search." A442. As the District Court recognized, it is "well settled within this Circuit" that in reviewing a Rule 12(b)(6) motion, a district court may refer to documents attached to the complaint or incorporated by reference, or to documents "either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Id.* (citations and internal quotation marks omitted).

Nor did the District Court find that the Appellants were entitled to relief under Rule 60(b), recognizing that Appellants "do not offer any specific information that this Court apparently overlooked that would cause this Court to reach an alternative conclusion." A443. Instead, Appellants "simply reassert the same or similar arguments they previously made, and this Court previously rejected, despite this Court's thorough review at the motion to dismiss phase." *Id.* In sum, Appellants' motion was merely an "attempt to . . . relitigate arguments previously considered and rejected." *Id.*

Finally, the District Court denied Appellants' motion for leave to amend. A444. Finding that the Appellants had requested leave to amend for the first time only after entry of final judgment, the District Court acknowledged that it may grant leave to amend only if "exceptional circumstances" exist. *Id.* Arguments that "simply relitigate issues already handled by the Court" did not so qualify. *Id.*[6]

Appellants now appeal.

SUMMARY OF ARGUMENT

This case largely turns on a foundational issue: a lack of substantial similarity of protected expression between *Market Mind Games* and *Billions*. From these two dramatically different works, Appellants attempt to construct a

[6] The District Court also denied Appellants' request to remand its state law misappropriation claims, as it had already ruled on and found that those claims failed as a matter of law. A445.

copyright claim based only on a broad unprotectible idea – a female hedge fund performance coach counseling clients about their emotions. But as the District Court properly found, the application of well-settled Second Circuit law dictates the dismissal of Appellants' main claim of copyright infringement.

Under well-established Second Circuit law, courts evaluating substantial similarity initially separate out the unprotected ideas, common stock elements, and *scènes à faire*, before examining the protected expressive elements in the works. In comparing such works, courts review the actual works, not characterizations of them, and analyze whether such aspects as the plot, themes, characters, setting, sequence, pace and "total concept and feel" of the works are substantially similar. In its well-reasoned and thorough opinion, the District Court undertook this controlling analysis and reached the only possible conclusion: these two works not only lacked substantial similarity; they did "not seem to resemble each other *in the least*." A291 (emphasis added).

Revealingly, on appeal, Appellants do not contest any aspect of the District Court's substantial similarity analysis, nor do they affirmatively argue that the works are substantially similar in any respect. Instead, Appellants focus on a passing observation by the District Court and argue it erred by conducting a cursory internet search that merely confirmed the evidence Appellants themselves placed in the record. The record evidence and the Court's search only confirmed

that the idea of in-house performance coaches on Wall Street is neither novel nor unique. This information in no way shaped its comparison of the two works or its substantial similarity analysis. Appellants' attempt to now overturn the District Court's decision based on this inconsequential internet search – which, at any rate, the District Court was entitled to make – should be rejected.

The District Court also properly rejected Appellants' motion to amend their Complaint. As this Court has recognized, substantial similarity must be assessed by comparing the works themselves, rather than how similarity is set forth in the pleadings. Because the District Court's detailed comparison of the two works establishes that there is no substantial similarity here and compels dismissal, Appellants' proposed amendments – which would merely add additional alleged examples of similarity that the District Court already considered – would be futile. Further, Appellants' addition of a false endorsement claim under the Lanham Act fails as a matter of law, is barred by the First Amendment, and is therefore equally futile.

Finally, on appeal, Appellants have abandoned all of their remaining state law claims, and rightfully so, as they are without any merit. Appellees respectfully submit that the District Court's dismissal with prejudice be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The Second Circuit reviews the dismissal of a copyright infringement claim on substantial similarity grounds *de novo*. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001). This Court reviews a district court's decision denying a motion to amend pleadings under the "abuse of discretion" standard, a "deferential standard" under which "[this Court] will reverse a district court only 'if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions.'" *Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 256 (2d Cir. 2018) (citation omitted).[7]

[7] Appellants rely on *Brook v. Simon & Partners LLP*, 783 F. App'x 13, 15-16 (2d Cir. 2019) to claim that the abuse of discretion standard is not applicable here because they expressed their desire to amend and the proposed amendment is not futile. But, *Brook* is inapplicable for a number of reasons. First, the plaintiffs in *Brook* "contingently requested leave to amend in their brief opposing the motion to dismiss," and "repeated that request at oral argument," 783 F. App'x at 16, but Appellants *never* requested leave to amend in their briefing below and only mentioned potential amendment in passing during oral argument. A237, A242, A51. Second, as Appellees argued below, and again on appeal, *see* A413-422; *infra* at 38-49, the proposed Amended Complaint is futile. Accordingly, this Court should review the District Court's decision for abuse of discretion. But even if this Court reviews Appellant's copyright claim and Lanham Act claim *de novo*, the District Court's decision should be affirmed as the proposed Amendment Complaint remains wholly futile. *See* Section III.B.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' COPYRIGHT INFRINGEMENT CLAIM SINCE THE WORKS ARE NOT SUBSTANTIALLY SIMILAR AND ITS BRIEF REFERENCE TO AN INTERNET SEARCH DOES NOT CHANGE THAT CONCLUSION

The District Court's dismissal of Appellants' copyright infringement claim turns on a single issue: a lack of substantial similarity of protected expression between *Billions* and *Market Mind Games*. Based on an extensive review of the actual works (not Appellants' characterization of them) and a comparison of each of the scenes and characters that Appellants claim were infringing (the same claims they press on appeal), the District Court correctly concluded in a 34-page opinion that the two works are not substantially similar as a matter of law.

On appeal, Appellants do not argue – nor can they – that the District Court erred in finding that the works are not substantially similar. Instead, Appellants challenge the District Court's internet search that merely confirmed that the idea of an in-house performance coach is not an original one. Appellants' Br. at 28-31. Because the District Court did not err in conducting this internet search – and because Appellants do not otherwise contest the works' lack of substantial similarity, the District Court's decision should be affirmed.

A. The District Court Correctly Held That the Works Are Not Substantially Similar

It is not surprising that Appellants studiously avoid any real argument that *Billions* is substantially similar to *Market Mind Games* and that the District Court

somehow erred in its conclusion that as a matter of law there is no similarity between the protectible elements in each work. The law supporting the decision below is well established – indeed, over and over this Court has rejected claims based on far more alleged similarities than anything alleged here.

In determining whether two works are substantially similar, courts in this Circuit apply the "ordinary observer test," asking "whether a lay observer would consider the works as a whole substantially similar to one another." *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996). Where, as here, the works in question contain both protectible and unprotectible elements, the court must apply a "discerning ordinary observer test" and "take care to inquire only whether 'the protectible elements, standing alone, are substantially similar.'" *Id.* (quoting *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). Under this analysis, courts examine the substantial similarity of works by comparing "the total concept and feel, theme, characters, plot, sequence, pace, and setting" of the original and the allegedly infringing works. *Williams*, 84 F.3d at 588. In doing so, there are several fundamental principles which the Court must apply.

First, "[i]t is a principle fundamental to copyright law that a copyright does not protect an idea, but only the expression of an idea." *Id.* at 587 (internal quotations and citations omitted). As Judge Learned Hand explained:

> Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and

> more of the incident is left out. . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). This "idea/expression dichotomy" is not merely premised on decisional law, but is a First Amendment safeguard. *Golan v. Holder*, 565 U.S. 302, 328-29 (2012).

Second, the Second Circuit has repeatedly held that stock scenes and stock themes, often called *scènes à faire*, cannot form the basis of a copyright claim. These are defined as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic," *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980), or as "thematic concepts . . . which necessarily must follow from certain plot situations." In a police story set in the Bronx, for example, "[e]lements such as drunks, prostitutes, vermin and derelict cars" as well as "[f]oot chases[,] . . . the morale problems of policemen . . . [and] the Irish cop" were unprotectible *scènes à faire* or stock elements. *Walker*, 784 F.2d at 50 (2d Cir. 1986).

Third, purported "similarities" isolated from the context in which they appear, like the ones identified by Appellants below, A24-25, are "inherently subjective and unreliable" metrics by which to assess substantial similarity.

Williams, 84 F.3d at 590. This is particularly true where, as here, the similarities are not copyrightable.

Thus, the standard for establishing substantial similarity is a demanding one. And in case after case, claims based on popular movies and television series are dismissed on pre-discovery motions because, inevitably, no similarity exists beyond abstract ideas, facts or random words or phrases – much less the substantial similarity that the law requires. *See, e.g.*, *Abdin v. CBS Broad. Inc.*, 971 F.3d 57, 72 (2d Cir. 2020) (dismissal of copyright action arising out of defendant's *Star Trek* TV series where any similarities between the works are "*scènes à faire* typical in the science fiction genre"); *Green v. Harbach*, No. 1:17-cv-6984, 2018 WL 3350329, at *5 (S.D.N.Y. July 9, 2018) (no substantial similarity between defendant's book *The Art of Fielding* and plaintiff's book where both works "are about a struggling Division III baseball college team, and both works track the baseball team's changed fortunes after the arrival of a new player"), *aff'd*, 750 F. App'x 57 (2d Cir. 2019); *Nobile v. Watts*, 289 F. Supp. 3d 527, 534 (S.D.N.Y. 2017) (no substantial similarity between defendants' book and the movie *The Light Between Oceans* where both works involved couples coping with the moral complexities surrounding "the providential arrival of a baby in a boat to a childless couple"), *aff'd*, 747 F. App'x 879 (2d Cir. 2018); *Brown v. Perdue*, No. 04 Civ. 7417 (GBD), 2005 WL 1863673, at *9, 13 (S.D.N.Y. Aug. 4, 2005) (no substantial

similarity between defendants' book *The Da Vinci Code* and another thriller that incorporates "religious themes" and also included a murder, questions of the divine feminine, and secret religious organizations), *aff'd*, 177 F. App'x 121 (2d Cir. 2006).[8]

Here, when *Billions* and *Market Mind Games* are compared – instead of Appellants' allegations about the works – and the appropriate legal standards are applied, it becomes clear that, as the District Court correctly found, there is no similarity between the protectible elements in each of the two works. Therefore, the District Court's dismissal of Appellants' copyright infringement claim should be affirmed.

[8] *See also Montgomery v. NBC Television*, 833 F. App'x 361, 364 (2d Cir. 2020) (no substantial similarity between TV miniseries "Rosemary's Baby" and plaintiff's short stories in part because the shared settings of "cafés, bridges crossing the Seine, apartments, and parties are all *scènes à faire* arising from the works' respective depictions of Americans living in Paris"); *Hord v. Jackson*, 281 F. Supp. 3d 417, 425 (S.D.N.Y. 2017) (dismissal of copyright action arising out of defendant's television show *Power* where both "works involve an African-American protagonist who deals drugs and engages in violence" because "such a story line is extremely common in television and movies"); *DiTocco v. Riordan*, 815 F. Supp. 2d 655, 672 (S.D.N.Y. 2011) (dismissal of copyright action arising out of defendant's *Percy Jackson* books and films, where both "feature a contemporary teenage hero named after Perseus who fights battles from Greek mythology" and must "navigate the world of Greek mythology in order to solve the mystery of Zeus' missing lightning bolt where the villains, setting, and plot develop differently), *aff'd*, 496 F. App'x 126 (2d Cir. 2012).

1. The Plots of the Works Are Not Similar.

As the District Court noted, to the extent *Market Mind Games* even "has a fictional plot," A292, the story it tells with its fictional characters is to follow an already fairly well-to-do man as he makes his way through a PhD program to a Wall Street firm before starting his own fund, and participating in group lectures from Denise that help him learn how to trade better. This "plot" is primarily a vehicle to explain how to apply the academic disciplines of neuroeconomics, modern psychoanalysis, and neuropsychoanalysis in order to assess risk and improve performance in financial markets.

Billions, by contrast, is a fictional hour-long serial drama that is a far cry from any notion of training in the academic disciplines of neuroeconomics, modern psychoanalysis, or neuropsychoanalysis. Rather, *Billions* tells the story of the high stakes battle between two New York titans – Chuck, the U.S. Attorney, and Axe, the billionaire hedge fund founder. The plot of *Billions* centers on the illegal activities employed by Axe to maintain his success and his attempt to outsmart Chuck, who wants to prosecute Axe. *Billions* portrays both men as doing whatever is necessary to win, including crossing various legal and moral lines. Wendy, a powerful woman in both men's lives, is stuck in the middle of the battle between Axe and Chuck.

Despite the works being radically different, Appellants claim that they are substantially similar, largely based on the inclusion in both works of a female performance coach who works at a hedge fund and counsels clients using a "unique" approach to trading and investing psychology. A15-16, A24; Appellants' Br. at 29. As an initial matter, neither the idea of the in-house hedge fund performance coach nor Shull's purported "proprietary method" of coaching are unique. Appellants' Br. at 20. As Appellants conceded below, Shull is "*one of* the leading hedge fund performance coaches in the country" and certain of the Appellees had met with another famous performance coach, Tony Robbins, *before* meeting with Shull. A22-23. Indeed, an article cited by Appellants in their Complaint establishes that "the idea [of performance coaches for traders] is not new[.]" *For Better Performance, Hedge Funds Seek The Inner Trader*, *The New York Times*, F14, November 12, 2013, *available at* https://dealbook.nytimes.com/2013/11/11/for-better-performance-hedge-funds-seek-the-inner-trader. ("*The New York Times Dealbook* Article"). A21. Further, that same article makes clear that Shull's purported "proprietary and unique" approach to trading advice, Appellants' Br. at 19, is also common:

> In the early 1990s, Steven A. Cohen, the founder of SAC Capital Advisors, hired Ari Kiev, a psychiatrist who had previously worked with athletes, to coach SAC's traders. Two decades on, aided by the growing popularity of literature on the behavioral science of decision making, the idea that self-awareness can lead to better decisions in

> business and finance is beginning to be accepted on Wall Street. Borrowing from books like Daniel Kahneman's "Thinking, Fast and Slow," trading coaches talk about the systemic, recurrent and predictable mistakes to which humans are prone.

The District Court agreed, concluding that the "idea of eating, sleeping, and exercising to perform well is not a novel one." A300.

But even if Shull were the first person to come up with this allegedly unique approach or the first in-house performance coach, copyright law does not give Shull a monopoly over those ideas. Uniqueness has nothing to do with substantial similarity. *See Williams*, 84 F.3d at 589 (concept of a dinosaur-zoo setting (however novel or unique) was an "uncopyrightable concept"). Nor, as the District Court found, can Appellants transform these abstract ideas to protectible expression by asserting that Shull's purported "unique approach" to trading advice is evident in *Billions* because Wendy is a hedge fund performance coach who "focus[es] on the physical well-being" and "alpha voice" of a trader during a session. A24. These core elements of Shull's allegedly unique approach – for example, the concept that physical wellbeing is something a "coach" should consider – remain unprotectible ideas. Shull essentially admits as much in her book:

> These points are so obvious, and yet so many of us don't take them seriously. We know we should eat better, get more exercise, and get to bed earlier . . . . In fact, back in

> the 1990's, when I actually hired a psychological trading coach [ ] she told me the same thing. . .

Market Mind Games at 115; *see also The New York Times Dealbook Article* ("Trading coaches focus on the same areas as athletes do — rest, patience, mental outlook, intuition and personal obstacles.").

But even if Shull's apparently unique method was protectible expression – which it is certainly not – Appellants still fail to show how *Billions* actually appropriated Shull's method in any respect. Both below and on appeal, Appellants point to only *one* scene in which *Billions* purportedly relied on Shull's "unique concept:" a scene focused on bad trades. Appellant's Br. at 29 (quoting A25, ¶ 45). However, the District Court's careful, independent review of this scene underscores just how substantially different the works are.[9] A298-300.

In that scene, Denise walks Michael through a bad trade in *Market Mind Games*, which Shull claims is substantially similar to a scene where Wendy and Axe discuss a bad trade in *Billions*. *Id*. As an initial matter, as the District Court determined, the alleged similarities are nothing more than unprotectible ideas or *scènes à faire*. A299 ("[B]ad trades are surely conventional in the world of

[9] In fact, Appellants concede the District Court analyzed this scene. Appellants' Br. at 15 ("District Court analyzed the characters of 'Wendy' and 'Denise,' and their interactions, as well as the scenes from *Market Mind Games* and *Billions* alleged by Appellants to be infringing.") (collecting scenes analyzed by the District Court).

finance, and particularly hedge funds."). Works that deal with Wall Street will inevitably include hedge fund managers, traders, performance coaches, and bad trades. *Compare Abdin*, 971 F.3d at 71 (works that deal with science fiction "typically involve[] 'stock themes,' such as space travel, supernatural forces, war games, alien discovery, and adventuring through space").

More importantly, the District Court properly concluded that the manner in which these ideas are expressed in the two works is entirely distinct. In *Market Mind Games*, the "backdrop of the bad trade is Michael's brother, who was hospitalized after a biking accident that left him in critical condition." A299. Denise concludes that Michael's bad trades were the result of sleep deprivation, fear of missing out on a chance to outperform the market, an attempt to regain control, and the result of a fractal pattern of stubbornness. *Market Mind Games* at 217-221.

Conversely, in *Billions*, the bad trade discussed by Wendy and Axe occurred the day after their colleague Donnie (who Axe was using to feed false information to the FBI and Wendy's U.S. Attorney husband) died from cancer. SA-3 (*Billions* S:1 E: 11). Wendy concluded that Axe made the bad trade to punish himself because he intentionally withheld life-extending cancer treatment from Donnie to facilitate the scheme. *Id.* As the District Court stated, "not only do Denise and Wendy's verbatim words differ when counseling Michael and Axe, respectively,

but the backdrops of these bad trades are also different." A299. The District Court's close comparison of these scenes aptly demonstrates that Appellants' claim rests on nothing more than unprotectible stock elements and ideas, not on substantial similarity in the expression in the two works. Accordingly, in the only scene in which Appellants argue that *Billions* copied Shull's "unique, proprietary, and exclusive methodology," the District Court already considered and properly rejected that argument. Appellants' Br. at 35.

2. The Characters in the Works Are Not Similar

The heart of Appellants' copyright infringement claim is the alleged similarity between the fictional character Wendy in *Billions* and the non-fictional representation of Shull, Denise, in *Market Mind Games*. But as the District Court correctly found, these characters "do not resemble one another in the slightest." A295.

"In determining whether characters are similar, a court looks at the 'totality of [the characters'] attributes and traits as well as the extent to which the defendants' characters capture the 'total concept and feel' of figures in [plaintiff's work]." *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 309–10 (S.D.N.Y. 1999) (citing *Walker*, 784 F.2d at 50). The bar for substantial similarity in a character is "quite high," *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 208 (S.D.N.Y. 2010).

In *Market Mind Games*, like Shull in real life, Denise (who, significantly, is not a medical doctor actually or in her book) runs a Wall Street consulting firm and gives lectures and workshops on the "new philosophy of risk, uncertainty, and decision making." Conducting therapy in one-on-one sessions – Wendy's main approach – is hardly depicted in Shull's work. And only in a brief section at the very end of *Market Mind Games* does Denise even become an in-house performance coach at a newly created hedge fund. Even in that context, Denise and the hedge fund founder, Michael, have a strictly professional relationship and the reader is told nothing about Denise's personal life or her sex life. The reader is not provided any information concerning how Denise looks, her age, if she is married, if she has children, or where her personal loyalties lie. As the District Court observed, the character of Denise "is not given much of a persona," beyond the fact that she is a female in-house performance coach at a hedge fund. A296. *See also Nichols*, 45 F.2d at 121 ("[T]he less developed the characters, the less they can be copyrighted[.]")

In striking contrast, Wendy is a completely fictitious character whose personal life (not her professional abilities as either a medical doctor or a coach) is at the center of her role in *Billions*. Wendy and Chuck's sadomasochistic sexual role playing (with Wendy as the dominatrix) is an important part of her character and the show, and it is Wendy's marriage to Chuck while working at Axe Capital

that propels the conflict between Chuck and Axe forward. Wendy's intimate (close to inappropriate) friendship with Axe is on full display throughout Season One. Wendy works almost exclusively with traders one-on one. As a medical doctor, Wendy is described as the second wealthiest person in her medical school class, and is depicted as such through her cars and home.

In short, any similarity between Wendy and Denise begins and ends with them being women employed as in-house performance coaches at hedge funds, which, as the District Court properly concluded, is neither a copyrightable idea nor sufficient to establish substantial similarity.[10] *See, e.g., Abdin*, 971 F.3d at 72 ("While the characters do share some traits such as hair color, race, and profession, the Videogame's many characters have a wide range of physical traits and the suggestion that a copyright infringement claim can be based on such generic and common characteristics is 'highly illogical.'"); *Sheldon Abend Revocable Trust*, 748 F. Supp. 2d at 209 (finding that similarities of "age, sex, and status" are "a

[10] Appellants wrongly claim that the District Court "opined that Appellants' claim was almost entirely rooted in Shull's gender." Appellant's Br. at 29. Not so. Rather, the District Court found that the alleged similarity between Wendy and Denise boiled down to the idea of a "female in-house performance coach," which is not a copyrightable idea. A295. Appellants also claim, both below and on appeal, that in the pilot episode of *Billions*, Wendy makes "multiple statements and observations that are nearly identical" to those made by Denise in *Market Mind Games*. Appellants' Br. at 9 (quoting A24-25). This too is inaccurate. These purportedly "identical statements" all relate to the "bad trade" scenes in *Market Mind Games* and *Billions*, which as explained above, the District Court reviewed closely and concluded were completely distinct. A298-300.

basic character type" not protected under copyright); *accord Tanksley v. Daniels*, 902 F.3d 165, 174 (3d Cir. 2018) ("the share[d] premise of the shows – an African-American, male recording executive – is unprotectible. These characters fit squarely within the class of 'prototypes' to which copyright protection has never extended.").

3. The Settings of the Works Are Not Similar

The settings of *Billions* and *Market Minds Games* are distinct, and Appellants make no allegation otherwise, either below or on appeal. The majority of Season One is spent at Axe Capital and the U.S. Attorney's office in Manhattan, Axe's mansion in Connecticut, and Wendy and Chuck's townhouse in Brooklyn. Conversely, *Market Mind Games* is set primarily in various lecture halls and conference rooms in Chicago while Michael is in graduate school and again when he starts his hedge fund.

4. The Themes of the Works Are Not Similar

The two works' themes are also strikingly different. *Billions* tackles such themes as morality, justice, power, the corruption of that power, and loyalty. The theme of *Market Mind Games* is simply to explain Shull's academic theories. To claim that the works share thematic similarities merely because they involve financial markets "would be as irrational as saying the movie 'Animal House' is substantially similar to 'Rudy' or 'Good Will Hunting' because the movies all

focus on college life." *Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 307 (E.D.N.Y. 2009) (no substantial similarity where the themes of the movies shared "nothing in common other than the backdrop of a Presidential election"). The themes of these works could not be more dissimilar.

5. The Total Concept and Feel of the Works Are Not Similar

Here, the total concept and feel of the works – *i.e.*, how the creator selected, coordinated, and arranged the elements of the work – differ completely. As made clear above, *Billions* and *Market Mind Games* are not similar in plot, themes, characters, or setting. Beyond these myriad differences, the stylistic differences between the works defeat any claim that the works are similar. *Market Mind Games* is an academic book that painstakingly explains "the basics of neuroscience and how to rethink your thinking about market risk," while *Billions* is a dramatic, fictional televised series. *Billions* is a fast paced wholly fictionalized drama, while *Market Mind Games* is a detailed academic work where only 20 percent of the book focuses on the fictional characters. As such, the total concept and feel of the two works are not close to substantially similar. *See Crane v. Poetic Productions, Ltd.*, 593 F. Supp. 2d 585, 597 (S.D.N.Y. 2009) ("Due to these substantial differences in plot and theme, as well as the different mediums each author uses (non-fiction book versus fictional play), the two works cannot be said to be

substantially similar in total concept and feel to support a finding of copyright infringement"), *aff'd,* 351 F. App'x 516 (2d Cir. 2009).

B. The District Court Did Not Err by Briefly Referencing an Internet Search in its Substantial Similarity Analysis

Appellants do not identify *any* purported similarities that the court below failed to address; instead they latch on to a minor and passing observation in the decision below in an effort to find an error: that the District Court allegedly performed an improper internet search to confirm that Shull's concept of an in-house performance coach was neither novel nor unique. Appellants' Br. at 28-29. Yet, Appellants fail entirely to explain how the District Court's internet search shaped its analysis of whether the works are substantially similar, and, in turn, its dismissal of the copyright claim.

As described above, the District Court engaged in a meticulous, side-by-side comparison of the two works – considering each and every one of Appellants' alleged similarities – and readily concluded that the works are not substantially similar. While conducting that analysis, the District Court separately determined that the idea of an in-house performance coach, even in the context of a hedge fund, was not a protectible, original idea. A294-95.[11] In support of its conclusion,

[11] And this makes good sense. If Shull were correct, *no one* could create an expressive work that followed a fictional, female, performance coach without her permission.

the District Court cited evidence already in the record and introduced by Appellants themselves: The *New York Times Dealbook* Article attached to Appellants' Complaint which observed that "the idea [of a performance coach for traders] is not new." A294. The District Court then stated in passing that it conducted a "quick internet search" and cited two articles further confirming that there "are numerous in-house performance coaches who are currently on Wall Street." A295. Appellants' argument ignores that the Court's "internet search" revealed no new information. Instead, it did nothing more than bolster the very evidence Appellants offered – that the general concept of in-house performance coaches at hedge funds is hardly a novel or unique concept.

Even assuming the District Court's internet search revealed new information – which it did not – the District Court was well within its discretion to take judicial notice of information online to "confirm [its] own intuition." *United States v. Bari*, 599 F.3d 176, 180 (2d Cir. 2010) (holding that a district court does not commit reversible error when it "need only take a few moments to confirm [its] intuition by conducting a basic Internet search," in that case, confirming that there were many types of yellow rain hats available for sale). *See also Owens v. Duncan,* 781 F.3d 360, 362 (7th Cir. 2015) (taking judicial notice of an Internet search determining the time of sunset on a particular day in Chicago); *Patsy's Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427, 443 n.18 (E.D.N.Y. 2008), *aff'd*, 658

F.3d 254 (2d Cir. 2011) ("It is generally proper to take judicial notice of articles and Web sites published on the Internet."); *Vox Amplification Ltd. v. Meussdorffer*, No. 13 Civ. 4922 (ADS) (GRB), 2014 WL 558866, at *8 (E.D.N.Y. Feb. 11, 2014), *report and recommendation adopted*, 50 F.Supp.3d 355 (E.D.N.Y.2014) (taking judicial notice of the fact that "there are scores of stringed instruments featuring teardrop bodies" based on the court's "independent web searches").

Even if the District Court's search revealed new information outside of the record (it did not) and even if the District Court erred by conducting and parenthetically referencing its cursory internet search, Appellants never explain how that search had any substantive impact on the District Court's entirely correct substantial similarity analysis. Nor can they, because the District Court's one-sentence reference to an internet search had no bearing on its extensive comparison of the Denise and Wendy characters (including its central conclusion that the two characters are not similar "in the slightest"), or the rest of its ten-page substantial similarity analysis of the respective works' total concept and feel, their settings, plot, or the court's ultimate finding that the works are completely distinct. A295.

Accordingly, any error that the District Court may have made by mentioning the fruits of its quick internet search was harmless under Fed. R. Civ. P. 61, which mandates that courts disregard any error that does not affect the "substantial rights of the parties." *See Lore v. City of Syracuse*, 670 F.3d 127, 150 (2d Cir. 2012)

("[Under Fed. R. Civ. P. 61], a substantial right is not implicated if there is no likelihood that the error or defect affected the outcome of the case."); *Tesser v. Bd. of Educ. of City Sch. Dist. of City of New York*, 370 F.3d 314, 319 (2d Cir. 2004) ("[A]n evidentiary error in a civil case is harmless 'unless [the appellant demonstrates that] it is likely that in some material respect the factfinder's judgment was swayed by the error.'") (citation omitted). Because the District Court's internet search had no impact whatsoever on its finding that the works are not substantially similar, and in turn, its dismissal of Appellants' copyright claim, any error was harmless. [12]

[12] Appellants also argue that the District Court erred by taking judicial notice of the internet search "without providing Appellants an opportunity to contest" that judicial notice. Appellants' Br. at 27, 31. Even if the District Court erred on this point, Appellants have not effectively challenged the propriety of judicial notice on appeal. *Magnoni v. Smith & Laquercia*, 483 F. App'x 613, 616 (2d Cir. 2012) ("[G]iven the opportunity to argue the propriety of judicial notice, [the appellant] has not effectively challenged it."). Appellants do not refute that other in-house performance coaches exist, which is the only point confirmed by the District Court's internet search. Instead, Appellants claim that they should have had an opportunity to show that "there are differences between Shull's method and persona and those of the [other] performance coaches." Appellants' Br. at 31. But the District Court's observation that there are other in-house performance coaches was immaterial to its finding that the works here are not substantially similar. As noted above, even accepting that Shull's coaching method *is* unique – which it is not – after reviewing all of the allegedly infringing scenes, the District Court ultimately found no trace of that method in *Billions*, and thus concluded that the works are strikingly dissimilar. The District Court's taking of judicial notice regarding the existence of other in-house performance coaches had no bearing on that conclusion.

This Court should reject Appellants' strained, perfunctory attempt to locate error in the District Court's thorough decision. Appellants cannot dodge the inescapable reality that, at bottom, *Billions* and *Market Mind Games* are strikingly dissimilar, and for this reason, Appellants' copyright infringement claim fails.

III. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION TO AMEND THEIR COMPLAINT

A. Appellants' Motion for Leave *After* Entry of Final Judgment Faces a Higher Bar

The District Court was well within its discretion to deny Appellants' motion to amend. In the ordinary course, leave to amend under Federal Rule of Civil Procedure 15(a)(2) should be freely given by a court "when justice so requires." However, where, as here, "a party does not seek leave to file an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality." *Williams v. Citigroup Inc.*, 659 F.3d 208, 212–13 (2d Cir. 2011). "[T]o hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Id.* at 213 (quoting *Nat'l Petrochem. Co of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991)); *see also State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990) ("When the moving party has had an opportunity

to assert the amendment earlier, but has waited until after judgment before requesting leave, a court may exercise its discretion more exactingly.").

Appellants attempt to avoid this well-established principle by claiming that counsel's casual statements at oral argument constitute a motion to amend. Appellants' Br. at 33-34. However, as the District Court found, these comments made in passing "cannot reasonably be construed as an actual request or motion to amend," as Appellants never made any formal indication or motion to the District Court that it intended to file any amendments. A444. When faced with a similar belated request for a do-over, this Court soundly rejected this tactic as "frivolous." *See Williams*, 659 F.3d at 212 ("the contention that the District Court abused its discretion in not permitting an amendment that was never requested [is] frivolous."). Accordingly, because Appellants only entered their request to amend after entry of final judgment, the District Court may only grant leave to amend if "exceptional circumstances" exist, warranting relief under either Federal Rule of Civil Procedure 59(e) or 60(b). Arguments that "simply relitigate issues already handled by the Court" do not constitute such exceptional circumstances. A444.

B. Appellants' Proposed Amended Complaint is Futile

Even if Appellants had timely asked for leave to amend their Complaint, Appellants would have faced the same futility roadblock that dictates why their belated request fails. Appellants' proposed Amended Complaint attempts to

buttress their copyright claims with "additional allegations of specific similarities in the works," Appellants' Br. at 33, but these additional allegations were already expressly addressed in the motion to dismiss briefing and at oral argument. For example, allegations about Wendy's focus on "physical well-being" and "alpha voice" during a session with an Axe Capital trader were not only asserted in the original Complaint and discussed at length in the parties' briefing, but the Court and Appellants' counsel had an entire discussion at oral argument about the scene that Appellants now seek leave to include. *Compare* A221-224 *with* A353-54.[13] Likewise, Appellants' proposed amendments around Shull's "unique" approach to trading and investment philosophy were also already raised and rejected by the Court. *See* A201, A295-96.[14]

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[13] *Compare* A24 ("in the pilot Dr. Rhoades makes multiple statements and observations that are nearly identical to those made by Ms. Shull in *Market Mind Games*, including focusing on the physical well-being of the trader client (*i.e.* eat, sleep, exercise) and turning into the alpha voice.") *with* A354 ("the very first coaching session shown in the pilot of "*Billions*," Dr. Rhoades inquires "are you eating, sleeping, and exercising?" In *MarketMind Games*, Ms. Shull prioritizes these physical activities in the same order.") *and* A354 ("Dr. Rhoades' novel advice to 'Danzig' in the pilot episode of "Billions" to listen to the quiet voice "telling you where the alpha is," she is mirroring Ms. Shull's character's explanation that "[j]udgment calls must be made to fill in the gap where the numbers leave off and 'alpha' – or exceptional performance – begins." . . . . And the "quiet voice" referenced by Dr. Rhoades is the "judgment call" or "intuition" extensively and originally explicated in *Market Mind Games*."); *see also* A64-65; A103, 114.

[14] *Compare* A21 (Market Mind Games has received critical acclaim . . . thanks to its unique perspective and approach), *id.* ("Ms. Shull and her unique approach to performance coaching and trading psychology") *with* A345 ("Shull's coaching

Beyond doing nothing more than expanding allegations of substantial similarity that were already reviewed and found by the District Court to not support a copyright claim, Appellants now also seek to add a Lanham Act claim that would violate the First Amendment and fail in the face of the District Court's unequivocal finding that the Wendy and Denise characters are not similar. In short, the proposed Amended Complaint is completely futile. *See Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) ("An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).").[15]

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strategy is unique . . ."); *id.* ("Shull's approach is radically different from that espoused by any other performance coach"). Appellants' other proposed amendments for her copyright claims merely seek leave to include greater portions of scenes that were already included in the original Complaint, addressed in the parties' briefing, and rejected by the District Court. *Compare* A24-25 *with* A354-57.

[15] On appeal, Appellants have abandoned their implied in fact contract claim. *See infra* Part IV. As the District Court found, that claim failed in the face of Appellants' concession in the Complaint that any terms of an agreement between Shull and Appellees would be negotiated later and it was Shull's belief, not Appellees' agreement, that she would be paid. A302 ("In the complaint, in fact, Plaintiffs state that Shull herself 'understood that the initial phone conference and in-person meeting was the beginning of the relationship and terms *would be negotiated subsequently* in concert with marketing the series") (quoting A24) (emphasis added). This same allegation also appears in the proposed Amended Complaint. A352.

1. The District Court Already Considered the Substance of Appellants' Proposed Amendments in Support of their Copyright Claim and Determined that the Works are Not Substantially Similar

As conceded by Appellants, their proposed amended allegations in further support of their copyright claim do nothing more than provide "additional allegations of specific similarities in the works." Appellants' Br. at 33. However, Appellants' attempt to be more expansive in identifying how the works are similar is a wasted exercise. Substantial similarity is determined by a review of the actual works, not a plaintiff's characterization of the works. *Walker*, 784 F.2d at 51 ("the works themselves, not descriptions or impressions of them, are the real test for claims of infringement."); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) ("In copyright infringement actions, 'the works themselves supersede and control contrary descriptions of them,' including 'any contrary allegations, conclusions or descriptions of the works contained in the pleadings.'"). Thus, the proposed amendments are simply irrelevant to the substantial similarity inquiry.

To be clear, no amount of re-pleading can change the inevitable conclusion, already reached by the Court after an independent review of the works, that *Billions* and *Market Mind Games* are entirely different. Because of this indisputable conclusion alone, the District Court was well within its discretion to deny Appellants' request to amend their copyright infringement claim. *Kaye v.*

Cartoon Network Inc., 297 F. Supp. 3d 362, 371 (S.D.N.Y. 2017) (denying leave to amend "because the finding of a lack of substantial similarity turns on the works themselves and not on the artfulness or sufficiency of the pleading"); *Hord*, 281 F. Supp. 3d at 427 (same).

If that were not enough – and it is – Appellants' proposed amendments to their copyright infringement claim were, in fact, already addressed in the motion to dismiss briefing and at oral argument. Whether it be the alleged "uniqueness" of Shull's approach to trading and investment philosophy, or discussions of the "alpha voice," or a focus on traders' "physical well-being," the District Court expressly considered – and rejected – each of these allegations as supporting a finding of substantial similarity. A293-300. Expanding on the very same issues cannot and will not change that conclusion. In sum, the District Court carefully considered all of the allegations of similarity raised in the complaint and proposed Amended Complaint. Accordingly, Appellants' request for leave to amend their complaint to add additional allegations of similarity is futile.[16]

[16] Appellants' proposed amendments alleging that certain third parties believed that there were similarities between the actual Denise Shull (not the character in *Market Mind Games*) and the character of Wendy in *Billions*, Appellants' Br. at 13; A329-31, A335) do not alter the conclusion that amendment is futile. The "[o]pinions of third parties . . . are [] irrelevant" to the question of substantial similarity." *Sheldon Abend Revocable Trust*, 748 F. Supp. 2d at 204 n.4 (disregarding media articles and film critics' reviews likening the allegedly infringing work to the original work); *see also Walker*, 615 F. Supp. at 430, 437 ("a few opinions cannot

2. Appellants' Proposed Claim Under the Lanham Act § 43(a)(1)(A) Fails as a Matter of Law and is Barred by the First Amendment

Appellants' proposed Amended Complaint also seeks to replace their dismissed right of publicity claim under New York Civil Rights Law Sections 50 and 51 with a new cause of action for false endorsement under the Lanham Act § 43(a)(1)(A). Appellants' Br. at 34. Recognizing the undisputed fact that *Billions* does *not* use Shull's name, physical attributes, or voice anywhere in the series – a necessary predicate for a Section 50-51 claim – Appellants now attempt to find comfort in the Lanham Act. But, the claim is no more viable under the Lanham Act than it was under state law.

Any Lanham Act claim based on false endorsement turns on a necessary finding that viewers would erroneously believe that the actual Shull endorsed *Billions* because she is allegedly depicted as the Wendy character in the show. Yet, after a thorough analysis, the District Court already determined this was not the case, finding that Wendy and Denise (who is a fictionalized representation of the *actual* Denise Shull), "do not resemble one another in the slightest." A295. Appellants cannot logically now claim that Appellees violated the Lanham Act by falsely implying that the actual Shull somehow endorsed *Billions* when the court below already found as a matter of law that the two characters are not substantially

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enlarge the scope of statutory protection enjoyed by a copyrighted property"), *aff'd*, *Walker*, 784 F.2d at 44.

similar and Appellants do not make any argument on appeal to disturb that finding. *See Warner Bros.*, 720 F.2d at 246 (noting that "the absence of substantial similarity leaves little basis for asserting a likelihood of confusion or palming off" for purposes of a Lanham Act Section 43(a) claim); *Vacchi v. E*TRADE Fin. Corp.*, No. 19CV3505 (DLC), 2019 WL 4392794, at *6 (S.D.N.Y. Sept. 13, 2019) (plaintiff's "fail[ure] to state a claim for copyright infringement because he cannot establish substantial similarity between the protectible elements of the character in the [the two works]" barred him from stating a claim that defendants "falsely imply[ed] that [plaintiff] *or* his character endorsed" defendants in violation of Section 43(a) of the Lanham Act); *see also Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1244 (9th Cir. 2013) ("if [plaintiff's] likeness does not in fact appear in the games—[plaintiff] has no claim at all under the Lanham Act.").[17] Appellants' proposed Lanham Act claim fails for this reason alone.

If the failure to actually identify Shull in *Billions* were not enough – and it is – Appellants' Lanham Act claim independently fails because it is barred by the First Amendment.[18]

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[17] Appellants' reliance in the Amended Complaint on an alleged "initial" meeting, emails, and phone call between Shull and certain Defendants as evidence of the use of her persona is undermined by their own pleadings. At the time of this alleged "initial" meeting, the character of Wendy had already been created and cast, and Defendants had already met with another performance coach, Tony Robbins. A22.

[18] A fictionalized drama such as *Billions* enjoys First Amendment protections. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("There

Over thirty years ago, this Court recognized in *Rogers v. Grimaldi* that "[b]ecause overextension of Lanham Act restrictions . . . might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict." 875 F.2d 994, 998 (2d Cir. 1989). In *Rogers*, the famous actress Ginger Rogers brought a Lanham Act claim against a film entitled "Ginger and Fred" about the reunion of two fictional Italian cabaret performers who early in their lives imitated Ginger Rogers and Fred Astaire, claiming the title created a likelihood of confusion that the film was about her or that she "produced, endorsed, sponsored, or approved the film." *Id.* at 1000-01. This Court found the First Amendment barred the application of the Lanham Act to the film's "minimally relevant use of a celebrity's name in the title . . . where the title d[id] not *explicitly* denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content." *Id.* at 1005 (emphasis added).

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is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Kaplan v. California*, 413 U.S. 115, 119-120 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection[.]"). The fact that Appellees are in the business of content creation or are for-profit entities does not diminish the application of the First Amendment. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.").

Since *Rogers*, courts within the Second Circuit have recognized that the "Lanham Act is inapplicable to 'artistic works' as long as the defendant's use [of] a [plaintiff's] [trade]mark is (1) 'artistically relevant' to the work and (2) not 'explicitly misleading' as to the source of the work." *See Louis Vuitton Malletier S.A. v. Warner Bros. Entertainment Inc.*, 868 F. Supp. 2d 172, 177 (S.D.N.Y. 2012) (citing *Rogers*, 875 F.2d at 999, and *Twin Peaks Prods, Inc. v. Publ'ns Int'l Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993)). These requirements are met here.

First, even if one assumes for the sake of analysis that Shull's "persona" as a female hedge fund performance coach counseling clients about their emotions was used – and the District Court already properly found that her likeness was *not* used – there can be no dispute that any such use was artistically relevant to *Billions*. "The threshold for 'artistic relevance' is purposely low and will be satisfied unless the use 'has *no* artistic relevance to the underlying work *whatsoever*.'" *Louis Vuitton*, 868 F. Supp. 2d at 178 (quoting *Rogers*, 875 F.2d at 999) (emphasis in original); *see also E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008) ("[T]he level of relevance merely must be above zero."). Here, including a performance coach counseling traders on how to make better trades is relevant to *Billions*, a "complex drama about power politics in the world of New York high finance" that features a self-made billionaire hedge fund founder who uses any means necessary to successfully beat the market, including his own

in-house performance coach for himself and his employees. This level of relevance more than surpasses the "minimum threshold" of the more than zero relevance that is needed. *See Rogers*, 875 F.2d at 1001 (finding the title "Ginger and Fred" was artistically relevant to the film where "the central characters in the film are nicknamed Ginger and Fred, and these names are not arbitrarily chosen just to exploit the publicity value of their real life counterparts but instead have genuine relevance to the film's story").

Second, neither *Billions* nor Wendy's character "explicitly mislead" viewers as to the source of the character. "[T]he finding of likelihood of confusion must be particularly compelling to outweigh the First Amendment interest recognized in *Rogers*." *Twin Peaks*, 996 F.2d at 1379. Unlike *Rogers*, where the title and premise of the film used Ms. Rogers' name and played off her famous relationship with Fred Astaire, Appellees do *not* use Shull's name, place of residence, educational background, employment history, personal history, family history, voice, or physical likeness in *Billions* and the title, *Billions*, does not relate in any way to Shull. This is far removed from the facts of *Rogers*—facts which *still* failed to state a claim. There is simply no basis, consistent with the First Amendment, to conclude that *Billions* "expressly misleads" viewers to believe that Shull endorsed the show.

This conclusion is not changed by Appellants' proposed factual allegations that third parties were confused about Shull's involvement with *Billions*. *See* Appellants' Br. at 11-13, 36-37.[19] Contrary to Appellants' argument, any alleged actual consumer confusion described in the proposed Amended Complaint does not trump the First Amendment limitations imposed on Lanham Act claims. The *Rogers* test "teaches that mark owners must accept 'some' confusion when outweighed by free speech interests." *See also Louis Vuitton*, 868 F. Supp. 2d at 181, 184 n. 19 ("Even if the court assumes, *arguendo*, that Louis Vuitton has stated a cognizable claim of confusion, its claim would fail anyway" under the First Amendment). In fact, in *Rogers* the plaintiff submitted a market research survey and anecdotal evidence indicating that potential movie viewers were misled by the title "Ginger and Fred" to believe that Rogers was involved with the film. *Rogers*, 875 F.2d at 997. Notwithstanding the evidence of viewer confusion, the Second

[19] As observed below, A420, it is Shull, not Appellees, who has created the false impression that the Wendy character is inspired by her. Shull has repeatedly associated herself with *Billions* and Wendy, including it in her Twitter identification, her online bio, and other publications. She should not be able to bootstrap a false association *she* alone created as support for her claim. *See, e.g.,* https://therethinkgroup.net/our-team (touting Shull's association with *Billions*); https://twitter.com/DeniseKShull/status/1199291293681225728 (responding to a tweet that she would characterize herself as the acclaimed performance coach "which the character Wendy Rhoades is based on"); https://twitter.com/DeniseKShull/status/1062740528343736321 ("Super grateful 2 have opportunity 2 take my #WendyRhoades @SHO_Billions coaching work into broader challenges").

Circuit held that any risk of misunderstanding "is so outweighed by the interests in artistic expression as to preclude application of the Lanham Act." *Rogers*, 875 F.2d at 997; *see also ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 937 (6th Cir. 2003) ("even where "plaintiff's survey evidence . . . indicates . . . that some members of the public would draw the incorrect inference that [Tiger] Woods had some connection with Rush's print" "the risk of misunderstanding" "is so outweighed by the interest in artistic expression" that the First Amendment bars the application of the Lanham Act to the print). Thus, Appellants cannot overcome the First Amendment standard articulated in *Rogers* simply because some third parties allegedly drew some connection between Shull and the Wendy character since they were both female performance coaches.

Appellants also ignore the critical distinction between expressive and commercial works in evaluating the reach of the Lanham Act. Indeed, all of the cases relied on by Appellants as support for their Lanham Act claim address the application of the Lanham Act to commercial uses – not expressive works like *Billions*. Appellants' Br. at 34-35 n.13; *see Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 57-58 (2d Cir. 2001) (commercial for Frito-Lay's baked potato chips using a recording of "The Girl from Ipanema"); *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 300 (S.D.N.Y. 2019) (use of Marilyn Monroe's image on merchandise); *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, 131 F.

Supp. 3d 196, 201-02 (S.D.N.Y. 2015) (same); *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 456 (S.D.N.Y. 2008) (a blue cartoon M & M appeared in a commercial setting dressed like plaintiff's street performance character known as "The Naked Cowboy"); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), *as amended* (Aug. 19, 1992) (Samsung advertisement depicting a robot, dressed in a wig, gown, and jewelry selected to resemble Vanna White); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1068 (9th Cir. 2015) (use of Bob Marley's image on merchandise); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 617 (S.D.N.Y. 1985) (use of Woody Allen look-alike's image in an advertisement for a national video rental franchise). These cases are simply not relevant here, where the Lanham Act claim involves a highly creative expressive work like *Billions* that is fully protected by the First Amendment. Under *Rogers* and its progeny, Appellants cannot and do not state a Lanham Act claim. Accordingly, this claim is futile as well and the District Court was correct in denying the motion to amend.

IV. ON APPEAL, APPELLANTS HAVE ABANDONED ALL OF THEIR REMAINING CLAIMS

Apart from their copyright infringement and Lanham Act false endorsement claims, Appellants have abandoned all of their remaining claims.

First, the proposed Amended Complaint strikes their claims for (1) injury to business reputation, dilution, and unfair competition in violation of GBL Section 360-L (A367-68); (2) deceptive trade practices in violation of GBL Section 349

and under common law (A368); (3) unjust enrichment under Section 350 of New York General Business law ("GBL") (A368-69); (4) misappropriation of ideas (A370-71); and (5) accounting (A371-72). As the District Court properly found, these claims are all either preempted by the Copyright Act or fail as a matter of law. A301-305.

Second, the proposed Amended Complaint replaces the Section 51 right of publicity claim with the Lanham Act claim, which fails for the reasons described above.

Finally, Appellants have abandoned their implied in fact contract claim on appeal. Appellants mention their implied in fact contract claim only once in their opening brief, in describing the procedural background of the case. Appellants' Br. at 3. Appellants do not otherwise press on appeal the merits of their implied in fact contract claim, nor do they take issue with the District Court's dismissal of that claim. Therefore, Appellants have waived that claim. Appellants' Br. at 25, 37 (limiting appeal to copyright infringement and false endorsement claims); *see JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

Accordingly, Appellants are left with their copyright infringement claim and Lanham Act claim, which for all the reasons described *supra*, are futile.

CONCLUSION

For the foregoing reasons, Appellees respectfully submit that the District Court's judgment should be affirmed.

Dated: New York, New York
February 11, 2021

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Dated: New York, New York
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