20-3529-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



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

Plaintiffs-Appellants,

v.

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 AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned attorney of record for Denise Shull and The ReThink Group Inc. hereby certifies that Denise Shull is an individual and that at all relevant times, The ReThink Group Inc. was a New York corporation. The ReThink Group Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

PRELIMINARY STATEMENT

Plaintiffs-Appellants Denise Shull ("Shull") and The ReThink Group Inc. ("ReThink" and collectively, "Appellants") by and through their undersigned attorneys, respectfully submit this brief in support of their appeal of the orders of the District Court for the Southern District of New York (Hon. George B. Daniels) ("District Court") granting Defendants-Respondents' Andrew Ross Sorkin ("Sorkin"), Brian Koppelman ("Koppelman"), David Levien ("Levien"), David Nevins ("Nevins"), TBFT Productions Inc. ("TBFT"), Showtime Networks Inc. ("Showtime"), and CBS Corporation ("CBS" and collectively, "Respondents") motion to dismiss and denying Appellants' motion for reconsideration, vacatur of judgment and leave to file an amended complaint.

District Court erred when it did not accept Appellants' allegations as true. In its decision granting dismissal District Court articulated that it performed and

relied on the results of an independent "quick internet search." Those results were extraneous to the record and were disputable facts from disputable sources.

Nevertheless, in its decision denying reconsideration, vacatur of judgment and leave to amend, District Court articulated that it took judicial notice of its results.

Since District Court asserted judicial notice in its final decision, Appellants had no opportunity to contest that judicial notice.

District Court abused its discretion by not granting Appellants opportunity to file their First Amended Complaint ("FAC"). It dismissed the Complaint, entered judgment just 4 days later, and then denied Appellants' post-judgment motion to vacate and replead.

JURISDICTIONAL STATEMENT

This appeal is of a final judgment of the District Court, the October 4, 2019, decision granting Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss and the September 16, 2020, decision denying Appellants' timely Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) motion to reargue thus disposing of all parties' claims.

Appellate jurisdiction therefore exists under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- 1. Whether District Court erred by considering and taking judicial notice of facts outside the Complaint, its attachments, or documents incorporated therein by reference, or in the record at all, and without providing Appellants opportunity to contest them.
- 2. Whether District Court abused its discretion when it denied Plaintiffs' application to file an amended complaint.

STATEMENT OF THE CASE¹

A. Procedural Background

Appellants brought this action in District Court, alleging 1) Willful Copyright Infringement – 17 U.S.C. §§ 106, Et Seq.; and 2) Vicarious, Contributory and/or Inducement of Copyright Infringement Under 17 U.S.C. §§ 106, Et Seq.; and 3) Violation of New York Civil Rights Law §§ 50 and 51; and 4) Injury to Business Reputation; Dilution and Unfair Competition Under NY Law NY Gen Bus § 360-L; and 5) Deceptive Trade Practices Under NY Statutory and Common Law; and 6) Unjust Enrichment Under NY Gen Bus §350; and 7) Implied In Fact Contract; and 8) Misappropriation; and 9) Accounting. (A15.)

¹ The Court is respectfully referred to the Appendix, cited herein as "A" and to the Special Appendix cited herein as "SPA."

Respondents moved to dismiss all claims. (A39–A87.) Appellant opposed. (A88–A155.) On April 18, 2019, District Court heard oral argument. (A176–A258.) By decision dated October 4, 2019, the District Court granted Defendants' motion to dismiss all claims. (A273–A306.)

Judgment was entered just 4 days later on October 9, 2019. (A307.) On November 16, 2019, Appellants moved (i) to amend and vacate order and judgment, (ii) for leave to file proposed first amended complaint ("FAC"), and (iii) to remand misappropriation claim to state court. (A308–A392.) Respondents opposed. (A393–A423.)

By its decision dated September 16, 2020, District Court denied Appellants' motion. (A438–A445, SPA1–8.) On October 9, 2020, Appellant filed notice of appeal. (A446).

B. Allegations in the Complaint

As pled in the Complaint, Appellant Denise Shull is the author of *Market Mind Games* and a professional performance coach focusing on the financial industry and Appellant ReThink owns the copyright to *Market Mind Games* and is a risk and performance advisory consulting firm founded by Shull. (A16, ¶¶ 3, 6).

As was pled, *Billions* is a television series that airs on Showtime's premium cable television network ("Showtime") and its associated streaming services, and

Showtime is a wholly owned subsidiary of CBS. (A18, \P 12.) Nevins is the Chief Executive Officer ("CEO") of Showtime and Chief Creative Officer of CBS. (A17, \P 10.) Sorkin, Koppelman, and Levien are the creators of *Billions*. (A17, \P 7–9.) TBTF is a production company. (A17, \P 11.)

Appellants alleged that Shull is an expert in the scientific fields of neuropsychoanalysis, neuroeconomics, and modern psychoanalysis and that Shull is the only professional performing her unique method which employs an amalgam of all three to help her clients obtain peak professional performance. (A19 at [20]) ("20. Plaintiff Ms. Shull is an expert in neuroeconomics, modern psychoanalysis and neuropsychoanalysis. She is the only expert combining these three fields of study and applying them to risk decision-making and performance coaching for hedge funds. Her book, *Market Mind Games*, is the only book known to combine all three fields of study and apply them in the world of finance.").

In *Market Mind Games*, Shull created a fictional account of the character "Denise," modeled on herself and her unique methods. (A16 ¶ 3, A20, ¶ 21.) *Market Mind Games* depicts scenes including fictional public lectures, consultations with private clients, and as an in-house performance coach to a fictional hedge fund. (A20, ¶ 22.) Shull's character "Denise" applies Shull's unique techniques using neuropsychoanalysis, neuroeconomics, and modern psychoanalysis to coach a fictional hedge fund and its people. (*Id.* ¶ 23.) The

"unique perspective and approach to understanding the psychology of trading financial markets, particularly the idea that emotions and emotional baggage are a key component to decision making." (A21 \(\bigvere \)25).

In and around July 2012, Sorkin and his staff invited Shull to appear on his CNBC television show Squawk Box, and on August 9, 2012, she did appear. (A21, ¶ 26.) During the interview, Sorkin expressed surprise upon learning of such a thing as a hedge fund performance coach. (Id.) In November 2013, Sorkin edited and published an article concerning Shull's work as a hedge fund performance coach and unique method of analyzing how the subconscious and emotional baggage influence market decisions; A photo of Shull in her office, with the caption "THE COACH Denise Shull," appeared with the article. (Id. ¶ 28; A138– A142)("28. On or about November 11, 2013, in a special section associated with their annual conference of the same name, Dealbook, a New York Times publication founded and edited by Defendant Sorkin, published a photo of Ms. Shull in her office with the title Denise Shull" and an accompanying article describing Ms. Shull's work as a hedge fund performance coach focusing on helping clients optimize performance by dealing with their emotional baggage and exposing how their subconscious influences their market decisions.").

Sorkin, Koppelman, and Levien developed key storylines for *Billions*, based on *Market Mind Games* and the character "Denise"—created by and modeled on

Shull—a female performance coach to men operating in the modern financial industry employing her methods. (A21, ¶ 29.). This was at about the same time that Sorkin was publicizing Shull's persona and methods in the New York Times. (*Id.* ¶ 28). In or about February or March 2014, Sorkin, Koppelman, and Levien sold the idea for this new television series, titled *Billions*, to Showtime. (A22, ¶ 30.)

On or about August 26, 2015, Sorkin sought Shull's help with the development of their female lead character, Dr. Wendy Rhoades ("Wendy"), a female hedge fund performance coach who helps financial professionals improve their performance by dealing with their own emotional baggage. (A22 at ¶ 34; A143–A145.) Sorkin introduced Shull to Maggie Siff, the actor cast to play the role of "Wendy" by email, noting that Shull is "one of the leading hedge fund performance coaches in the country." (A22, ¶ 35; A146–A149). Ms. Siff requested a meeting with Shull (*Id.*) and Koppelman wrote to Shull that he was "excited" to read an article written by Shull and meet her and that his assistant would be in touch. (*Id.*)

On September 2, 2015, Shull met with Koppelman and Levien. (A22, ¶ 35.) They told Shull that they had met with another known performance coach named Tony Robbins but needed more. (*Id.*) Shull explained to them how her method differed from Robbins' and provided examples. (*Id.*) Koppelman and Levien and Ms. Siff inquired about and Shull delivered information on all aspects of Shull's

work as a performance coach to hedge funds and other financial firms and, in particular, about Shull's unique approach to trading and investing psychology. (*Id*). Ms. Siff specifically stated to Shull that she was reading *Market Mind Games*, and that it was great, "super helpful," and interesting. (*Id*.) Ms. Siff stated to Shull that she looked forward to learning more from Shull. (*Id*.) Defendant Koppelman then asked if there was an audio version of the book and stated his intention to download it. (*Id*.).

A day later, Alphonzo Terrell, Senior Manager of Showtime's Digital Media Group, contacted Shull to discuss involving Shull in promoting *Billions*. (A23, ¶ 37; A150–A153.) On September 9, 2015, Appellants had a conference call with Mr. Terrell and other senior members of Showtime's creative, marketing, and promotional departments to discuss joint promotional initiatives relating to *Billions* and *Market Mind Games*. (A23, ¶ 38.) After the call, Showtime's team asked for the contact information of Shull's attorney and said they would send a nondisclosure agreement, but never did so. (*Id.*) No joint marketing efforts ever occurred. (*Id.*)

Appellants never authorized Respondents to create a derivative work from *Market Mind Games*. (A24, ¶40). Nevertheless, in January 2016, Defendant Showtime released the pilot episode of the television series *Billions*. (*Id*. ¶ 41.) The pilot episode of *Billions* not only portrays "Wendy" as substantially the same as

Shull portrays her own character in *Market Mind Games*, but in the pilot, "Wendy" makes multiple statements and observations that are nearly identical to those made by Shull through her character in Market Mind Games. (A24–A25, ¶¶ 43–46.). "...The pilot episode of Billions not only portrays Dr. Wendy Rhoades as substantially the same as Ms. Shull portrays her own character in *Market Mind Games*, but 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 tuning into the alpha voice." (A24, ¶ 42.)

The similarities alleged in the Complaint between *Billions* and *Market Mind Games* continue through subsequent episodes. (A24, ¶ 43.) For instance, in Chapter 20 of Shull's book, "The 'What Was I Thinking Rehash," "Denise" and "Michael" sit after hours and alone in a conference room at Coup d'État Capital, discussing a trade that went terribly bad for all the wrong unconscious psychological reasons. Denise helps Michael to see that his poor market decision making was the acting out of unrelated personal emotions by saying:

Haven't you told me in the past that one of the problems you would like to solve is getting stubborn? You can be assured that that trait, if you want to call it that, isn't *just* being stubborn. There is a fractal-emotional context that has been with you for a long time. Undoubtedly, it served you well in getting through challenging moments

in school or fighting for the bank job or even being willing to take on this hedge fund challenge. In fact, when the pattern first starting [sic] coming together, I am sure it served you well. It is acting out anger, and if we do that consciously and intentionally, it can be our best ally. But when we are doing so without really knowing who or what we are trying to retaliate against, it tends neither to serve our best interests nor to make us money.

(A25, ¶ 44.)

This fictionalized account is very similar to Episode 11 from Season 1 of *Billions* (titled "Magical Thinking"), in which "Wendy" and "Bobby 'Axe' Axelrod" rehash, a very bad trade that had gone wrong for a host of unconscious psychological reasons. (A24, ¶ 43.) "Wendy" helps Axe to see that his poor market decision making was the acting out of unrelated personal emotions by saying:

Look, you want me to fix the part of you that makes money. But it is attached to the rest, so. . . Like I said, this is gonna take a little while. . . .

Maybe your self-image is creating . . . a blind spot. . . . Well, let's assume your blind spot usually works for you. It's fairly essential if you don't feel indestructible like Superman. How are you gonna risk billions every morning? But it's not working for you now. So you need to figure out what part of your self-image is false. And then you either need to live up to it or lose it.

 $(A25, \P 45)$

Other episodes of *Billions* contain substantial similarities to statements, observations, and fictionalized accounts set forth in *Market Mind Games and is derivative of Market Mind Games*. (A46 ¶14).

As discussed further below, Appellants' FAC alleges twenty specific instances of actual consumers expressing those similarities and confusion as to the origin, sponsorship, or approval of *Billions*. (A329-331 ¶¶ 72(i)–(xx)–73; A335, ¶¶ 98–99) ("¶72 "(i) A February 2017 email in regards to the Magical Thinking episode.... 'I was going to write and ask what you were going to get up to in Billions Series 2, as Ep 11 of Series 1 was 'just so Shull.' But Business Insider prompted me to say hi.' (ii) A December 2017 inquiry from a Twitter follower and podcast interviewer, Jordan Harbinger: "So you are the actual Wendy of Showtime's BILLIONS?" (iii) A January 2019 message from a Twitter follower: "It has been so fascinating for my wife Tracie and I to see your fingerprints throughout the story." (iv) A third-party Twitter post on March 6, 2016: "Dr Mojo = denisekshull minus the whip - I think. (v) An October 17, 2019 LinkedIn message: "It took me <30 seconds to see the similarities between your real-life role and the fictional character role." (vi) A third-party Twitter post, marked as 'like' a total of 23 times, on October 8, 2019 '.. have your book and it's very clear the show wouldn't have been the same without you.' (vii) A third-party twitter post on February 5, 2016: "Wall Street shrink [referring to Plaintiff] puts @SHO_Billions

on the couch: http://observer.com/2016/02/wallstreet-shrink-puts-wendy-rhoadesfrom-billions-on-the-couch/... Must-read by @johnbonazzo." (viii) A third-party twitter post on February 5, 2016: '@FortuneMagazine @SHO_Billions If anyone can tell you about Maggie it's @DeniseKShull' (ix) A third-party twitter post on February 17, 2017: 'The psychiatrist character on @SHO_Billions is based on real people, including Denise Shull.' (x) A third-party twitter post on November 30, 2016: @DeniseKShull is a monster interview! She's the real life Wendy Rhodes and captivates the most testosterone laden traders... (xi) A third-party twitter post on February 5, 2016: 'Watch "Billions?" Wall Street performance coach @DeniseKShull dissects 5 truths of human behavior' (xii) A third-party twitter post on February 5, 2018: 'Meet Denise Shull, The Real Life Performance Coach From Billions' (xiii) A third-party twitter post on February 16, 2018: 'Awesome read! RT @AlisaCohn: I just published 'Meet Denise Shull, The Real Life Performance Coach From 'Billions' (xiv) A third-party twitter post on March 14, 2018: "Meet Denise Shull, The Real Life Performance Coach From @SHO_Billions via @forbes You can view an #exclusive #education #trading session @DeniseKShull did in collaboration w/ @fundseeder...' (xv) A third-party twitter post on March 26, 2018: "Meet the real life performance coach from @SHO Billions! Fascinating interview of @DeniseKShull by @JordanHarbinger with practical work life / real life advice. Thanks for sharing your wisdom guys."

(xvi) A third-party twitter post on March 28, 2018: 'New on Trade Talk: 5 Questions with @DeniseKShull, the real-life performance coach who inspired the @SHO Billions character Wendy Rhoades. Learn how Denise started her career and how mental coaching skills apply to traders.' (xvii) A third-party twitter post on April 1, 2018: 'I want a life coach like Wendy, so I am studying everything I can get my hands on that comes from Denise Shull!' (xiii) A third-party twitter post on May 3, 2018: "Denise Shull is one of the world's best trading psychologists. In 2012, she published the book Market Mind Games. In 2015, she consulted with Showtime's Billions." (xix) A third-party twitter post on June 9, 2018: '@DeniseKShull is the real Wendy Rhoades!!! #billions' (xx) A third-party twitter post on January 27, 2019: 'Spending Australia Day holiday hanging out on my couch and finally getting to watch #Billions coz 1 of my traders gave me 1 year Stan subscription for Xmas...Thank you @briankoppelman and @DeniseKShull....."¶73. Not only did many individuals recognize the similarity of the Wendy Rhoades character to Ms. Shull, but Ms. Shull was also falsely accused of trading on the show Billions, as at least one person remarked of Ms. Shull in a January 2019 comment posted in Real Vision, an Internet financial information channel: 'all seems pretty derivative of what the guys on Billions write for Wendy Rhodes."); and that Defendants used Shull, her persona, and work in bad faith. (e.g. A319, ¶ 46; A320, ¶ 48; A321–A322, ¶¶ 52–53, A333, ¶ 87.)

C. 12(b)(6) Motion, Oral Argument, and Dismissal and Judgment

Respondents moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (A39–A85.) Appellants opposed. (A88–155.) Appellants also compiled a summary of additional examples of substantially similar dialogue and protected expression. (A128–A137). Respondents replied. (A 156–175). District Court heard oral argument (A176–A258) where, inter alia, Appellants' then counsel repeatedly brought up filing an amended Complaint. (A237, ln.13–15) ("MS. FELICELLO: We didn't detail the specific questions in the book. I am happy to amend the complaint to add them if you think that would be helpful."); (A242, In. 7–10) ("MS. FELICELLO: I am not sure if it's stated as clearly in the complaint as we have stated in our papers, which we would offer the Court as an amendment to the complaint."); (A251, ln. 15–20) ("MS. FELICELLO: I agree with you that they do consider it to be, but it's not required to be under the copyright law. It just has to be novel to the person and not have some independent creation. So the standards are little bit different. We could quibble. I would be happy to amend it if you think it's necessary, but I think we have claim.")

On October 4, 2019, District Court granted Defendants' motion to dismiss (A273–A306; A39–A87.) It found, in relevant part, that Appellants' copyright claims did not state a claim because there was not substantial similarity with the protectable elements of Appellants' work and that Appellants' right of privacy

claim did not state a claim for relief because it did not allege that Respondents used Shull's name, picture, or persona in order to advertise *Billions*. (A273–A306.)

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. See e.g. A292–A297 (analyzing Wendy and Shull's relationships with Axe and Michael, respectively); id. at A294–A298 (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]"); id. at A297–A300 (analyzing purported infringing scenes in Billions where Wendy counsels Axe on a bad trading decision). District Court further opined that that Appellants' claim was almost entirely rooted in Shull's gender. (A295) ("Although Shull is well known in the performance coaching world, it cannot be said that she can copyright the idea of a female in-house performance coach. Inherent in a copyright is the grant of exclusivity. Granting Plaintiffs exclusivity in this particular idea is precarious, as it would essentially grant Shull a monopoly on the entire subject matter of the female performance coach until the expiration of her copyright.") (emphasis added); (A 299-300) ("Ultimately, bad trades are common. Accidents and death are unfortunately common.").

District Court opined that under either the discerning ordinary observer test, qualitative/quantitative test, or fragmented literal similarity test: "these works do not seem to resemble each other in the least," and concluded that "*Market Mind Games* and *Billions* differ greatly in 'total concept and feel, theme, characters, plot, sequence, pace, and setting." (A291–A293.)

District Court opined that "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 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.).

Denise says: "Plaintiffs assert that "Denise' explains at a workshop that '[j]udgment calls must be made to fill in the gap between where the numbers leave off and 'alpha'--or exceptional performance -begins.' At another workshop, 'Denise' explains that overconfidence can lead to giving back 'lots of our hard earned 'alpha'" (A297), and in *Billions* where the character of Wendy says: 'You're just listening to the wrong voice. You're tuned in to the one yelling at you over the loud speaker that you're . . . stupid and your performance blows. And you're ignoring the quiet one inside telling you where the alpha is now that's the

voice that got you here.') (Id.). District Court decided that the use of the word "alpha" was generic, common and if copied, de minimis. (Id) ("the word 'alpha' is quite common and regularly used generally, including in reference to men in finance, who are referred to as 'alpha males.' Another issue is that Shull's definition of alpha, 'exceptional performance,' is general in nature, and closely aligns with the connotation of the word alpha as regularly used. Another issue is that Shull's definition of alpha, 'exceptional performance,' is general in nature, and closely aligns with the connotation of the word alpha as regularly used. Put another way, if alpha males are confident, take-charge, and resilient, it only makes sense that they would 'perform exceptionally.""). District Court did not analyze the segment for the copying of Denise's use of her method that results in the interruption of the trader's emotional baggage in order to get to good judgment calls and intuition, termed in Billions the "quiet voice", not just quantitative analysis, to achieve "alpha."

District Court opined that "the character of Denise and Wendy do not resemble one another in the slightest." (A295.) "An in-house psychiatrist may not be a 'stock character'" but, as noted in the very *Dealbook* article Plaintiffs put in evidence, the "idea" of performance coaches for traders was "not new." (A294.)

District Court was so informed after an independent "quick internet search reveals that there are numerous inhouse performance coaches who are currently on

Wall Street. See Claire Gorden, Inside the Secretive World of Hedge Fund

Psychiatrists and Performance Coaches, Fortune (Feb.4, 2016),

https://fortune.com/ 2016/02 /04/showtime-billionsperformance-coachestherapists/ (providing that the subject of the article, Alden Cass, "is one of a dozen
or so performance coaches on Wall Street, many of whom are armed with
doctorates or medical degrees" who work "as temporary in-house coaches, meeting
with traders one on- one on their employers' dime"); Investment Coaching,
Essentia Analytics, https://www.essentia-analytics.com/ good-investment-andtrading-coaches/ (providing that Denise Shull, Dr. Andrew Menaker, Steven
Goldstein, Kenny Lissak, and Dr. Tara Swart are all performance coaches)")
(A295.) ("The idea of a counseling session conducted by an in-house hedge fund
performance coach, as explained supra, is not novel.") (A299–A300.)

Instead of focusing on Shull's proprietary and unique method as expressed in *Market Mind Games*, District 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.) Denise's identity as a character was "not developed." (A295.) Denise was "not given much of a persona." (A296.) Instead, Denise was just used as a vehicle to "explain and demonstrate Shull's ideas." (*Id.*) The Court could not "identify any copying, not even copying that is said to be 'fragment," the Court dismissed

Shull's copyright infringement claims with prejudice. (A293–A294, A300.) However, even though Shull's ideas are pled to be the proprietary and unique method that is copyrightable District 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. (A296.)

D. Motion to Reconsider and Replead and the Allegations in the FAC

Appellants timely moved pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) to vacate judgment and for leave to file their FAC, which was attached to their motion. (A308–A373.)

The FAC interposes additional factual allegations that Billions is trading off of Shull's unique approach, methodology and practice. It is so unique that it is better understood when shown through fictional examples (A316, ¶ 27); Shull is set apart from other performance coaches. and her work is well-known and particularly so in her industry (e.g. A315, ¶¶21 25; A318, ¶ 40; A319, ¶ 45; A329, ¶ 72); Shull's method as expressed in *Market Mind Games* is unique, specific and original, and while other coaches' methods focus on cognitive strategies, goal-setting, positive thinking and creating certain habits for success, Shull's method focuses on coaching clients with an analysis of their early life experiences, disappointments, self-concept and traumas that will illuminate their present-day

risk decision-making mistakes and patterns of market financial decisions; Shull's method teaches portfolio managers and traders how to rely on their expert intuition rather than pure cognitive and quantitative analysis (A315, \P 21–23, 28.) ("21. Plaintiff Ms. Shull's coaching strategy is unique. Whereas other performance coaches focus on strategies, goal-setting, positive thinking and creating certain habits for success, Ms. Shull, instead, focuses on all of a client's feelings and emotions, often delving into her clients' past to help them understand their presentday decision-making and emphasizing the information in the conventionally maligned feelings of fear, frustration, guilt and disappointment. 22. Plaintiff Ms. Shull's approach is radically different from that espoused by any other performance coach. It is grounded in her own research and experience. 23. As a result of her successful publications and numerous media appearances, Ms. Shull has developed valuable rights in her name and persona as the first and leading female hedge fund performance coach in the country."). The Wendy character is a female hedge fund coach employing Shull's psychological methods that are not present in any known prior works other than in Shull's Market Mind Games fictionalized account of a female hedge fund coach offering Shull's proprietary method. (A323, ¶59) ("59. Most notably, the show "Billions" prominently features the character of a female hedge fund coach offering psychological insights that is not present in any known prior works other than the fictionalized account of the

female hedge fund coach offering psychological insights depicted in Market Mind Games. Nor are there any known prior dramas featuring hedge fund coaches at all."); that *Billions*' interactions between performance coach and portfolio managers are substantially similar to those aspects of Shull known in her industry and in particular to Wendy (e.g. A323–A324, ¶¶ 59–63; A325–A329, ¶¶ 65–71); that specific scenes in Billions contain substantial similarities to statements, observations, and fictionalized accounts as in *Market Mind Games*, and employing Shull's unique psychoanalytical approach rather than the common cognitive and quantitative approach to trading psychology. (A324–A329, ¶¶ 64–71); that the character of Wendy is believed by the general public to be, or be by Shull (e.g. A329–A331, \P 72–73); (A325, \P 65.) ("65. In trying to understand how he could have misread the market so badly, "Michael" works alone with "Denise" in a special evening session where they unravel the context of unconscious and unrelated personal emotions — needing to prove himself, being seen and loved for who he is, and guilt — that drove "Michael" to make this self-destructive trading decision.").

The FAC alleges extensive, twenty, actual, specific and producible examples of confusion by consumers of Shull and of *Billions*. (A329-331 ¶¶ 72(i)–(xx)–73; A335, ¶¶ 98–99) Consumers of both Appellant and Respondents' works wrote that they believe the Wendy character either is Shull or is modelled on her. *Id*. The

actual confusion among consumers of both *Billions* and of Appellants' product is so pervasive that Shull herself was accused of appropriating the methods of Wendy in *Billions*. *Id*.

Appellants' argued that the FAC states a claim for Copyright Infringement with additional non-futile similarities between *Market Mind Games* and *Billions* including scenes with specific interactions utilizing Shull's unique, proprietary, and exclusive *methodology* and copied by Respondents through their character "Wendy." (A323, ¶ 59–329, ¶ 71.)

Appellants' argued that the FAC states a claim for false endorsement pursuant to 15 U.S.C. § 1125(a) with additional allegations of ordinary consumers, of both works, publicly and privately stated their perception that the "Wendy" character either is Shull or modelled on her because Wendy's methods copy Shull's unique methods and persona. (A334–336, ¶¶ 90–101.)

Appellants argued that these attributed and often public comments raise substantial issues of fact that were not properly decided on the Rule 12 motion, and warrant revisiting the Court's prior analysis to permit further discovery on copyright infringement and likelihood of confusion and warrant leave to file the FAC. (A308 -392; A 424-437) As pled in detail in the FAC, the facts sufficiently show that Respondents have explicitly misled consumers, thus substantiating their Lanham Act claim. *Id.* Indeed, numerous ordinary observers actually recognize the

substantial similarities between the parties' works, as is relevant to Appellants' copyright claim and the extreme similarities of their personas as manifested by their methods, as is relevant to Appellants' false endorsement claim. (Id)

E. <u>Denial of Appellants' Motion to Reconsider and Replead and the</u> Allegations in the FAC

District Court denied Appellants motion without articulating any analysis of the FAC's additional allegations of specific similarities in the works and its additional cause of action for false endorsement pursuant to 15 U.S.C. § 1125(a), a claim that arises from the same nexus of events alleged in the original Complaint but is stated upon additional fact allegations of actual consumer confusion. (A442; SPA5) ("Instead, Plaintiffs attempt to take a second bite at the apple by making the futile argument that this Court's citations alone demonstrate that they are entitled to relief—despite the fact that the source material this Court cited merely supplemented the information found in the complaint and discussed at oral argument."); (A444; SPA7) ("arguments that simply relitigate issues already handled by the Court."); (Id. at footnote 5) ("Moreover, the proposed amended complaint that Plaintiffs finally did proffer consists entirely of (1) futile allegations previously considered by this Court in the Oct. 4, 2019 Decision, and (2) new claims that Plaintiffs attempt to bring for the first time.").

District Court opined that "while Plaintiffs opposed Defendants' motion to dismiss, (citations omitted), they did not move to amend the complaint. Courts within this Circuit have consistently denied motions for leave to amend where the moving party failed to attach a proposed amended complaint." (A444 at footnote 5; SPA7 at footnote 5.)

District Court opined that it was entitled to take judicial notice of its "quick internet search." (A442–A443: SPA5–SPA6.) ("It is well settled within this Circuit that in reviewing a motion under Rule 12(b)(6), a district court "may refer 'to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." See, e.g., *Fishbein v. Miranda*, 670 F. Supp. 2d 264, 271 (S.D.N.Y. 2009) (quoting *Brass v. Am. Film Tech, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)); see also *Evans v. N.Y. Botanical Garden*, No. 2 Civ. 3591, 2002 WL 31002814, at *4 (S.D.N.Y. Sept. 4, 2002) (holding that a court may take judicial notice of matters of public records on a motion to dismiss).").

District Court's judicial notice was thus first stated in its decision denying reconsideration and leave to replead. Therefore, Appellants had no opportunity to contest its judicial notice.

SUMMARY OF THE ARGUMENT

This is an appeal from District Court's decisions granting Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss and denying Appellants' Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) motion to vacate judgment and for leave to file their FAC. Appellants request that this Court set aside the District Court's Judgment so that they may file their FAC and have their claims of Copyright Infringement and False Endorsement heard on the merits.²

This Court will review District Court's dismissal of a complaint *de novo*, accepting all factual allegations in a facially plausible complaint as true and drawing all reasonable inferences in the Appellants' favor.³

² Riverkeeper, Inc. v. Wheeler, 2020 WL 1188455, at *2 (S.D.N.Y. Mar. 12, 2020) (citations omitted). ("A party seeking to file an amended complaint post[-]judgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b)."

³ Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 2012); We review de novo a district court's dismissal of a complaint under Rule 12(b)(6), accepting all of the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiffs' favor. Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n, 655 F.3d 136, 141 (2d Cir.2011). The complaint must state a claim that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)." The "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement," but only requires "more than a sheer possibility that a defendant has acted unlawfully." Id; Arista Records, LLC v. Doe 3, 604 F.3d 110, 117 (2010) ("To establish infringement of copyright, 'two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.' (citations omitted) 'The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights' described in § 106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir.2001)").

This Court will review District Court's denial of leave to amend for abuse of discretion and reverse where District Court based "its ruling on an incorrect legal standard or a clearly erroneous assessment of the facts and failed to correct a clear error of law or prevent manifest injustice."

Leave to amend should be "freely give[n] ... when justice so requires." Fed. R. Civ. P. 15(a)(2). Where, as here, a plaintiff clearly "expressed a desire to amend, a lack of a formal motion is not a sufficient ground for a district court to dismiss without leave to amend." While leave to amend need not be granted where a proposed amended complaint would be futile, if it is not futile, then this Court may remand without reaching the question of abuse of discretion and where District Court's denial of leave to amend is based on futility, this Court reviews the ruling *de novo*. 6

⁴ Metzler Investment GmbH v. Chipotle Mexican Grill, Inc., 970 F.3d 133, 142 (2d Cir 2020) "We review the district court's denial of a post-judgment motion for leave to replead for abuse of discretion." Williams v. Citigroup Inc., 659 F.3d 208, 212 (2d Cir. 2011) (citations omitted). "A district court abuses its discretion when it 'bases its ruling on an incorrect legal standard or a clearly erroneous assessment of the facts." "City of New York v. Group Health Inc., 649 F.3d 151, 156 (2d Cir. 2011) (quoting Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 348 (2d Cir. 2003); Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85 (2016) (District Court judgment denial vacated after de novo review of futility); Brook v. Simon & Partners LLP, 783 Fed.Appx. 13 at *15 (2d Cir. 2019) (Judgment vacated where District Court directed the Clerk to close the case without either addressing Plaintiffs' request or determining that amendment would be futile.).

⁵ Brook, supra.

⁶ In *Williams*, district court "denied leave to amend under Rule 60(b)(6) solely on the ground that amendment...would be futile, a determination that we review de novo." (citation and footnote omitted)." *Meltzer* at 145. This Court "concluded that the amendment would not be futile and

As pled, Shull's unique persona and psychotherapeutic method analyzing inexplicable money-losing behaviors among a male-dominated hedge fund world through coaching are well known in her industry and to her clients. In essence she is a woman in the hedge fund world who uniquely coaches mostly male traders that trading is manifestation of self-image rather than just good or bad habits. She fixed her concepts and persona in a tangible medium in her book, *Market Mind Games*.

Appellants are entitled to be heard on the merits and to have their claims treated as true at the pleading stage. It was error for District Court to reject Appellants' allegations of Shull's distinctiveness and prominence based on an independent "quick internet search," of which it subsequently took judicial notice without providing Appellants an opportunity to contest. It was an abuse of discretion when District Court denied Appellants' motion for leave to file their FAC, especially without analyzing their additional allegations of facts and causes of action.

reversed without "reach[ing] th[e] issue" of whether the district court abused its discretion in rejecting the plaintiffs' argument that the judgment should be set aside because of newly discovered evidence. Id. at 92 n.4." *Id*.

ARGUMENT

Appellants respectfully request that this Court reverse District Court's decision dismissing the Complaint and denying their Rule 59(e) and Fed. R. Civ. P. 60(b) motion, vacate District Court's judgment, and remand for further proceeding on Appellants' FAC.

I. District Court Erred by Considering Facts Outside the Complaint, Its Attachments, or Documents Incorporated Therein by Reference.

District Court improperly searched outside the record and then took judicial notice of its disputable research results without providing Appellants opportunity to be heard thereon.⁷ Therefore, District Court did not accept the factual allegations in the Complaint as true and draw all reasonable inferences in Appellants' favor and made an error of law with respect to its judicial notice and abused its discretion by denying Appellants opportunity to replead. Respectfully, that was error.

The heart of Appellants' claim that was not accepted as true by District

Court is that Shull is "an expert in neuroeconomics, modern psychoanalysis and

⁷ Magnoni v. Smith & Laquercia, 483 Fed.Appx. 613, 616 (2nd Cir 2012) ("The Federal Rules of Evidence permit a court to take judicial notice sua sponte, and at any stage of a proceeding, of a fact "not subject to reasonable dispute" that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See Fed.R.Evid. 201(b).... the Federal Rules of Evidence provide that "[a] party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed," the relevant rule specifically allows for such an opportunity to be provided after the court has taken judicial notice. See Fed.R.Evid. 201(e).").

neuropsychoanalysis. She is the *only* expert combining these three fields of study and applying them to risk decision-making and performance coaching for hedge funds. Her book, Market Mind Games, is the only book known to combine all three fields of study and apply them in the world of finance." (emphasis added). (A19, ¶ 20; A314 ¶ 20.) Her allegations are not wholly rooted in her gender. (*Id.*). Her unique concept is that bad trading is rooted in distorted self-image which should be treated through her method as opposed to a cognitive approach. Respondents copied and traded off of her unique and original method and persona, as expressed in Market Mind Games and as known to the public through, among many others, prominent media outlets controlled by Co-Creator Sorkin. See eg. (A25, ¶ 45) ("Maybe your self-image is creating . . . a blind spot. . . . So you need to figure out what part of your self-image is false. And then you either need to live up to it or lose it.").

Nevertheless, in deciding Respondents' 12(b)(6) motion, District Court performed its impromptu independent "quick internet search." (A295.) This search informed its decision that just because Shull was one of "numerous in-house performance coaches" she and her work were not unique or novel at all. (*Id.*) District Court further opined that that Appellants' claim was almost entirely rooted in Shull's gender. (*Id.*) Again, disregarding the importance of Appellants' methodology as pled. (A19, \P 20; A314 \P 20.) District Court did not accept as true

Appellant's allegations that *only* she employs her unique method and it was that in conjunction with her overall persona which was copied for *Billions*. (A19 at \P 20; A314 \P 20.)

Therefore, District Court's "quick internet search" was for information specifically related to Shull and the facts of the proceeding. District Court's conclusions therefore unfairly undermined Appellants' as-pled allegations of uniqueness and exclusivity, based not just on Shull's gender, but on her overall persona and her specific professional method. (A19 ¶ 20; A314 ¶ 20.)

District Court should not have relied on its search in lieu of Appellants' aspled allegations, if at all. 8

In denying Appellants' motion to vacate and replead, District Court implicitly acknowledged its error and sought to repair its reliance on extraneous

⁸ Commodity Futures Trading Commission v. McDonnell, 287 F.Supp.3d 213, 230 (EDNY 2018) ("The ABA has issued the following opinion related to individual research by the court: Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control. Committee on Ethics and Responsibility, Independent Factual Research by Judges Via Internet, Formal Opinion 478, Dec. 8, 2017 (ABA)(emphasis added). It is appropriate and necessary for the judge to do research required by a case in order to understand the context and background of the issues involved so long as the judge indicates to the parties the research and conclusions, by opinions and otherwise, so they may contest and clarify. See Abrams, Brewer, Medwed, et al., Evidence Cases and Materials (10th Ed. 2017) (Ch. 9 "Judicial Notice"). It would be a misapprehension of the ABA rule to conclude otherwise.

information by improperly applying legal theory of judicial notice. (A442–A443; SPA5–SPA6.) However, District Court was not entitled to take judicial notice of the results of its "quick internet search." (1) Whether there are "numerous" performance coaches, or whether the other performance coaches cited by District Court are similar to Shull are facts subject to reasonable dispute. (2) The accuracy of District Court's sources can reasonably be questioned. (3) Appellants were never provided an opportunity to argue against District Court's position.⁹

Respectfully, District Court's foregoing errors of law strike at the core of Shull's claims for originality and exclusivity. District Court should not have analyzed Appellants' claim on the basis of its independent research instead of Appellants' allegations of Shull being the only professional to apply her unique method. After opining that it was taking judicial notice, District Court should have provided Appellants with opportunity respond and at least show that there are differences between Shull's method and persona and those of the performances coaches to whom District Court cited. In the context of Appellants' Fed. R. Civ. P. 12(b)(6) motion and subsequent Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) motion it was error of law to take such judicial notice and a manifest injustice to

⁹ *Id*.

supplant Appellants' allegations with extraneous information that Appellants could then not contest.

II. District Court Erred and Abused Its Discretion When It Denied Appellants' Rules 59(E) and 60(B) Motion Without Providing Appellant with Opportunity to Replead.

District Court abused its discretion when it denied Appellants' Rules 59(e) and 60(b) motion without articulating any analysis of Appellants' additional allegations and causes of action and when District Court denied Appellants' motion to file its FAC. District Court continued to supplant Appellants' allegations of originality, exclusivity and actual consumer confusion concerning the character of "Wendy" viz. the real-life Shull with its independent internet research. (See A442–A443; SPA5–SPA6; Point I *supra*.) Respectfully, the FAC is not futile and District Court's denial was not in keeping with the Second Circuit's preference towards providing plaintiffs with at least one opportunity to replead ¹⁰ In *Metzler*,

¹⁰ Foman v. Davis, 371 U.S. 178, 182 (1962)(Court of Appeals erred affirming District Court's denial of motion to vacate judgment to allow amendment of complaint); This Circuit has a "strong preference for resolving disputes on the merits." (Williams, 659 F.3d at 212–213), even when earlier in the litigation a plaintiff "failed to request an opportunity to replead." Id. at 212 (internal citations omitted); Metzler, supra, at 143 ("[P]ost[-]judgment motions for leave to replead must be evaluated with due regard to both the value of finality and the policies embodied in Rule 15."); Id at 144 ("[I]t is an abuse of discretion to deny a motion under Rule 59(e) — to prevent a "manifest injustice," although the Court did not say so explicitly — when the plaintiff was never given an opportunity to replead in the first place ...Foman 'makes unmistakably clear' that a plaintiff need not 'seek leave to replead either together with her response to the motion to dismiss, or indeed prior to the district court's entry of judgment."); at 147 (Affirming denial of Rules 59(e) and 60(b) motion because plaintiffs-appellants fail to identify any "extraordinary circumstances" that would "justify[] relief" under Rule 60(b)(6)" but in particular because

supra, this Court cited to Williams, supra and Foman, supra and gave emphasis to that plaintiff's multiple prior opportunities to replead when it affirmed denial of a Rules 59(e) and 60(b) motion. Here, Appellant's have not had opportunity to replead.

District Court made conclusory findings of the futility of the FAC. (A440–A442; SPA3–SPA5; A444–A445; SPA7–SPA8). It did so without articulating any analysis of the FAC's additional allegations of specific similarities in the works. (*Id.*) It did so without articulating any analysis of Appellants' additional cause of action for False Endorsement. (*Id.*) That new claim, though based on the same nexus of facts and circumstances alleged in the original Complaint, contains additional particularized fact allegations of actual consumer confusion that should have been heard on the merits. (A329–331, ¶¶ 72(i)–(xx)–73; A335, ¶¶ 98-99; A440–A442; SPA3–SPA5.)

District Court also unduly penalized Appellants for not making a formal motion to amend in opposition to Respondents' 12(b)(6) motion to dismiss even though Appellants' counsel repeatedly offered to amend at the oral argument for

[&]quot;unlike in *Foman*, *Williams*, and *SAIC*, the plaintiffs-appellants here were afforded and availed themselves of three opportunities — beyond the original complaint — to state a claim. The district court's denial of the post-judgment motion accordingly rests on no clear error of law. Nor did it cause any injustice, manifest or otherwise; four bites at the apple is more than enough.").

Respondents' 12(b)(6) motion.¹¹ (A444 at footnote 5; SPA 7 at footnote 5; A237, ln.13–15; A242, ln. 7–10; A251, ln. 15–20.)

However, this Court may decide whether Appellants' specific additional allegations of copying and additional cause of action for False Endorsement in the FAC were futile. ¹²

The FAC is not futile. Appellants allege additional facts for their copyright claims and replace their claim for violation of New York Civil Rights Law Sections 50 and 51 (protecting the right of privacy) with a cognizable and stated claim for False Endorsement under the Lanham Act. (A315, ¶ 25; A318, ¶ 40; A319, ¶¶ ¶ 45–46; A320, ¶ 48; A321–A322, ¶¶ 52–53; A324–A331, ¶¶ 59–72(i)–(xx)–73, ¶ 73; A333–A336, at ¶¶ 87–101.)¹³

¹¹ Foman, supra.

¹² Meltzer at 145. (Where this Court reversed without deciding on district court's abuse of discretion because the proposed amendment would not be futile); Victor Rivera v. Board Of Education Of The City School District Of The City Of New York, a/k/a The New York City Department Of Education, 2020 WL 7496282*11 (SDNY 2020). (Amendment is futile only if the "amended portion of the complaint would fail to state a cause of action. (citation omitted)." Appellate court will review district court decisions on substantial similarity de novo. See, e.g., Boisson v. Banian, Ltd, 273 F.3d 262, 272 (2d Cir. 2001); Hamil America, Inc. v. GFI, 193 F.3d 92, 97 (2d Cir. 1999); Folio Impressions Inc. v. Byer California, 937 F.2d 759, 766 (2d Cir. 1991) ("In considering substantial similarity between two items, we review the district court's findings de novo – not on the clearly erroneous standard – because what is required is only a visual comparison of the works, rather than credibility, which we are in as good a position to decide as was the district court").

¹³ Burck v. Mars, Inc., 571 F.Supp.2d 446 454-455 (2008) (Where reliance on New York privacy statutes was misplaced, the Naked Cowboy found redress in Section 43(a) of the Lanham Act which "creates liability for '[a]ny person who, on or in connection with any goods or services, ... uses in commerce ... false or misleading representation of fact, which is likely to cause confusion

The FAC properly alleges Copyright Infringement with additional non-futile similarities between *Market Mind Games* and *Billions* including scenes with specific interactions utilizing Shull's unique, proprietary, and exclusive *methodology* and copied by Respondents through their character "Wendy." (A323, ¶59–329, ¶71). These allegations go to Shull's expressed methods rather than simply towards the context of them with respect to gender, sex, and the Southern District, which District Court essentially found to be *scenes a faire* in its 12(b)(6) dismissal. (A299–A300.)

The FAC further alleges a proper claim for False Endorsement which was not specifically ruled on by District Court. Shull is entitled to claim against

^{...} as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.' 15 U.S.C. § 1125(a)(1). This provision of the Lanham Act 'is an appropriate vehicle for the assertion of claims of falsely implying the endorsement of a product or service by a real person.' (citations omitted) The elements of a false endorsement claim under the Lanham Act are that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services." (citations omitted); Oliveira v. Frito-Lay, Inc., 251 F.3d 56 (2d Cir 2001) ("...courts have protected the "persona" of an artist against false implication of endorsement generally resulting from the use of look-alikes or soundalikes"); Allen v. National Video, Inc., 610 F.Supp. 612, 627–28 (S.D.N.Y.1985) ("look-alike renting videos from defendant"); A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC, 131 F.Supp.3d 196 (SDNY 2015) (Celebrity may assert a claim for false endorsement under Lanham Act "where a party uses the celebrity's 'persona without permission to suggest false endorsement or association.' (citations omitted). To state a claim for false endorsement, the plaintiff must allege that the defendant "'[i] made a false or misleading representation of fact; [ii] in commerce; [iii] in connection with goods or services; [iv] that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services." (citations omitted)); see also A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC, 364 F.Supp.3d 291 (2d Cir 2019).

Respondents for their use of her persona, which is the amalgam of her persona, language, and method, to sell Respondents' product *Billions*. They did so when selling the *Billions* concept to Showtime around the time of Sorkin's November 11, 2013 New York Times article about Shull. (A21 ¶ 28; A138–A142). They did so thereafter to sell their show *Billions* to the public on cable television and on payper-play streaming and on-demand services.

This new claim relies on substantially similar allegations of fact as those alleged in relation to Appellants' discarded right of privacy claim, only raises factual claims that are related to the events described in the original Complaint, and will not cause undue prejudice. ¹⁴ Importantly, Appellant's False Endorsement claim includes repeated additional factual allegations of actual consumer confusion as to the origin, sponsorship, and approval of *Billions* by Shull which in this context is a false or misleading representation of fact in connection with Respondents' television show that is likely to cause consumer confusion as to the origin, sponsorship, or approval thereof. (A329-A335, ¶¶ 72(i)–(xx)–73; A335, ¶¶ 88–99): See eg. (A25, ¶ 45) (Wendy explaining coaching that self-image affects trading); (A329-331 ¶¶ 72(i) actual consumer states that Magical Thinking episode was "just so Shull."). These pervasive and persistent pleadings of evidence of

¹⁴ See A.V. by Versace, Inc. v. Gianni Versace S.p.A., 87 F.Supp.2d 281, 299 (finding no undue prejudice where the amended pleading did not "raise factual claims unrelated to the events in its original third-party complaint.").

actual confusion alone augurs against dismissal and for leave to replead at this stage. ¹⁵ Appellant's FAC states a cause of action for copyright infringement and for False Endorsement that should be remanded to District Court.

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¹⁵ See *Hypnotic Hats, Ltd. v. Wintermantel Enterprises, LLC*, 335 F.Supp.3d 566, at 589 (S.D.N.Y. 2018) citing *Savin Corp. v. Savin Group*, 391 F.3d 4839 (2d Cir 2004) (Even at summary judgment stage, "'[I]t is black letter law that actual confusion need not be shown to prevail under the Lanham Act, since actual confusion is very difficult to prove and the Act requires only likelihood of confusion as to source." *Savin*, 391 F.3d at 459 (citation and internal quotation marks omitted). Nevertheless, "[t]here can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion." *Id.* [citation and internal quotation marks omitted]– finding no actual confusion only because there was de minimis evidence of actual confusion]); see *Franklin v. X Gear*, 101, LLC, 2018 WL 3528731 *12 (S.D.N.Y July 23, 2018) (Polaroid analysis, denying dismissal of Lanham Act trademark claim where, inter alia, "plaintiff has sufficiently shown 'actual confusion' at the motion to dismiss stage.").

CONCLUSION

For the foregoing reasons, the District Court's judgment dismissing this

Action should be vacated and its decision denying Appellants' opportunity to file
their First Amended Complaint should be reversed and the matter remanded to

District Court.

Dated: New York, NY

January 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P.

32(a)(7)(B) because this brief contains 9,322 words, excluding the parts of the

brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)

and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief

has been prepared in a proportionally spaced typeface using Microsoft Word

in Times New Roman, 14 point font.

Dated: New York, NY January 7, 2021

Respectfully submitted,

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

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DATE VILED: SEP 1 6 2020

MEMORANDUM DECISION AND ORDER

18 Civ. 12400 (GBD)

GEORGE B. DANIELS, United States District Judge:

Plaintiffs Denise K. Shull and the ReThink Group, Inc. (collectively, "Plaintiffs") brought this copyright infringement suit against Defendants Andrew Ross Sorkin, Brian Koppelman, David Levien, David Nevins, TBTF Productions Inc., Showtime Networks Inc., and CBS Corporation (collectively, "Defendants"). Plaintiffs alleged, *inter alia*, that Defendants improperly appropriated, copied, prepared, distributed, displayed, and offered for sale Plaintiffs' copyrighted work *Market Mind Games*, as well as Plaintiff Shull's style and persona without permission, compensation, or remuneration, in violation of the Copyright Act, 17 U.S.C. §§ 101–1401, Section 43(a) of the Lanham Act, 115 U.S.C. § 1125(a), Sections 50 and 51 of the New York Civil Rights Law, Section 349 of the New York General Business Law, and an implied-in-fact contract between Plaintiffs and Defendants. (*See* Compl., ECF No. 4 at ¶ 47–97.) Plaintiffs also claimed that Defendants were unjustly enriched by Plaintiff Shull's consulting on their popular television show *Billions*. (*Id.* ¶ 1.)

Defendants previously moved this Court to dismiss Plaintiffs' complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (Notice of Mot. to

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Dismiss Pls.' Compl., ECF No. 56; see also Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Compl., ECF No. 57.) On October 4, 2019, this Court granted Defendants' motion as to the copyright infringement and state law claims and denied Defendants' request for attorneys' fees and costs. (See Mem. Decision and Order ("Oct. 4, 2019 Decision"), ECF No. 74.)

Plaintiffs now move this Court to (1) reconsider and vacate the October 4, 2019 Decision; (2) vacate its October 4, 2019 order and the Clerk of Court's October 9, 2019 judgment; (3) grant leave to amend Plaintiffs' complaint; and (4) remand to the Supreme Court of the State of New York the state claims included in the complaint. (See Notice of Mot., ECF No. 77.) Plaintiffs' motion is DENIED.

I. LEGAL STANDARDS

A. Motions to Vacate or Set Aside Judgment Pursuant to Federal Rule of Civil Procedure 59(e).

Reconsideration is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, 352 F. Supp. 3d 242, 246 (S.D.N.Y. 2019) (citation omitted). "[A] postjudgment motion . . . , if it involves reconsideration of matters properly encompassed in a decision on the merits, is to be deemed a motion to alter or amend the judgment pursuant to Rule 59(e)" of the Federal Rules of Civil Procedure. *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 136–37 (2d Cir. 2000). "The standards governing motions to alter or amend judgment pursuant to Rule 59(e) and motions for reconsideration or reargument pursuant to Local Rule 6.3 are the same." *Sullivan v. N.Y.C. Dep't of Investigation*, No. 12 Civ. 2564 (TPG), 2016 WL 7106148, at *3 (S.D.N.Y. Dec. 6, 2016) (quoting *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 375 (S.D.N.Y.

A complete factual background is set forth in this Court's previous decision on Defendants' motion to dismiss, (see Oct. 4, 2019 Decision at 2–7), with which familiarity is assumed.

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2007)). Rule 59(e) is "meant to 'ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." In re AXA Equitable Life Ins. Co. COI Litig., No. 16 Civ. 740 (JMF), 2018 WL 3632500, at *1 (S.D.N.Y. July 30, 2018) (citation omitted). Accordingly, "the standard for granting such a motion is strict," Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995), and is met "only if the movant satisfies the heavy burden of demonstrating 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Hollander v. Members of Bd. of Regents, 524 F. App'x 727, 729 (2d Cir. 2013) (quoting Virgin Atl. Airways Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)). Indeed, a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Analytical Survs., Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (citations omitted); see also Weiss v. El Al Isr. Airlines, Ltd., 471 F. Supp. 2d 356, 358 (S.D.N.Y. 2006) ("A motion for reconsideration is not an opportunity for a losing party to advance new arguments to supplant those that failed in the prior briefing of the issue.").

B. Motions for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b).

"Rule 60(b) provides for relief from judgment on any of several grounds specified in five numbered subparts and under a sixth, catch-all provision allowing for relief for 'any other reason."

Empresa Cubana Del Tabaco v. Gen. Cigar Co. Inc., 385 F. App'x 29, 31 (2d Cir. 2010) (citations omitted). "Rule 60(b) is 'a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." Weiming Chen v. Ying-Jeou Ma, 595 F. App'x 79, 80 (2d Cir. 2015) (quoting Ruotolo v. City of N.Y., 514 F.3d 184, 191 (2d Cir. 2008)). "[A] Rule 60(b) motion is properly denied where it seeks only to relitigate issues already decided." Whitaker

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v. N.Y. Univ., 543 F. App'x 113, 114 (2d Cir. 2013) (citing Zerman v. Jacobs, 751 F.2d 82, 85 (2d Cir. 1984)).

C. Post-Judgment Motions to Amend a Complaint.

"A party seeking to file an amended complaint [post-judgment] must first have the judgment vacated or set aside pursuant to [Rule] 59(e) or 60(b)." Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011) (quoting Ruotolo, 514 F.3d at 191). A party's Rule 60(b) motion for leave to amend must be "evaluated with due regard to both the value of finality and the policies embodied in Rule 15." Williams, 659 F.3d at 213. "[T]hat the amended pleading offered by the movant will not cure the defects in the original pleading that resulted in the judgment of dismissal may be a valid reason both for denying a motion to amend under Rule 15(a) and for refusing to reopen the judgment under Rule 60(b)." Sahni v. Staff Attorneys Ass'n, No. 14 Civ. 9873 (NSR), 2018 WL 654467, at *3 (S.D.N.Y. Jan. 30, 2018) (quoting Ahmed v. Dragovich, 297 F.3d 201, 209 (3d Cir. 2002)); cf. Strategic Capital Dev. Grp. v. Sigma-Tau Pharms., Inc., Nos. 98-7144, 99-7364, 1999 WL 973313, at *1 (2d Cir. Sept. 23, 1999) (reversing denial of leave to amend where plaintiff "furnished a facially sufficient proposed amended complaint"). See also Nat'l Petrochem. Co. of Iran v. MT Stolt Sheaf, 930 F.2d 240, 245 (2d Cir.1991) ("Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.").

II. PLAINTIFFS ARE NOT ENTITLED TO POST-JUDGMENT RELIEF

A. Plaintiffs are Not Entitled to Relief Pursuant to Rule 59(e).

Plaintiffs argue that they are entitled to relief pursuant to Rule 59(e) because this Court acted in clear error by "rely[ing] on facts that were not 'asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." (See Mem. of Law in Supp. of Pls.' Mot. ("Mem. in Supp."), ECF No. 78 at 4 (citation omitted).) Plaintiffs assert that this Court instead relied upon Defendants' summary of

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the facts, evidenced by its citations to Defendants' memorandum of law in support of its motion to dismiss. (*Id.* at 5.) This argument is without merit—as Plaintiffs attempt to raise a distinction without a difference. Plaintiffs do not identify any specific facts upon which this Court relied that might have been different had it cited to the complaint instead of the Defendants' brief. (*See id.* at 4–5.) Instead, Plaintiffs attempt to take a second bite at the apple by making the futile argument that this Court's citations alone demonstrate that they are entitled to relief—despite the fact that the source material this Court cited merely supplemented the information found in the complaint and discussed at oral argument.

Plaintiffs further argue that this Court should not have considered information available through an internet search, arguing that this was "improper as a matter of law." (*Id.* at 5.) Plaintiffs do not 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. (*See id.*) It is well settled within this Circuit that in reviewing a motion under Rule 12(b)(6), a district court "may refer 'to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *See, e.g., Fishbein v. Miranda*, 670 F. Supp. 2d 264, 271 (S.D.N.Y. 2009) (quoting *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)); *see also Evans v. N.Y. Botanical Garden*, No. 2 Civ. 3591,

² Specifically, a routine internet search in further support of the conclusion that (1) it is common on Wall Street to use in-house performance coaches, and (2) therefore, it is not reasonable for Plaintiff Shull to claim that she can copyright the idea of a female in-house performance coach. (See Oct. 4, 2019 Decision at 22–23.) The results of this search, as clearly articulated in this Court's previous decision, (see id.), served solely to confirm the information and evidence that Plaintiffs themselves proffered to this Court in their opposition to Defendants' motion to dismiss, (see Decl. of Rosanne Elena Felicello, Ex. 4 (November 11, 2013 Dealbook Article), ECF No. 62-4.)

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2002 WL 31002814, at *4 (S.D.N.Y. Sept. 4, 2002) (holding that a court may take judicial notice of matters of public records on a motion to dismiss).

B. Plaintiffs are Not Entitled to Relief Pursuant to Rule 60(b).

Plaintiffs additionally claim that they are entitled to post-judgment relief pursuant to Rule 60(b). (See Mem. in Supp. at 5–7.) First, they argue that this Court "overlooked substantial evidence in the record that support Plaintiffs' claims for copyright and implied contract," pointing to language this Court quoted from oral argument. (Id. at 6.) Specifically, Plaintiffs argue that because this Court quoted its own question from oral argument, but did not also quote Plaintiffs' counsel's response, this Court's "analysis is fundamentally unfair" and it "would be an injustice not to include and consider counsel's response in the analysis." (Id.) Plaintiffs cannot possibly know what efforts this Court undertook and what information this Court did or did not consider in reaching its conclusions. Indeed, this Court's decision and independent analysis at oral argument demonstrate that it gave great weight and consideration to Plaintiffs' arguments and answers to its questions. Moreover, Plaintiffs do not offer any specific information that this Court apparently overlooked that would cause this Court to reach an alternative conclusion. Instead, Plaintiffs 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. Plaintiffs' motion therefore reads solely as an attempt to simply relitigate arguments previously considered and rejected.

³ For example, Plaintiffs further argue that this Court misapplied the law of copyright, because it did "not consider[] the sequence of events of *Market Mind Games* and the interplay of the characters as compared to particular events in *Billions*. (*Id.* at 7.) Plaintiffs also assert the conclusory claim that this Court "erred in determining that a female performance coach working in-house in a fictional hedge fund is a 'stock character.'" (*Id.*) In simply asserting that this Court did not consider certain information, Plaintiffs overlook the fact that this Court's decision analyzed various details under multiple tests analyzing the relationship between the allegedly similar characters. (*See* Oct. 4, 2019 Decision 9–13.)

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C. Plaintiffs' Motion for Leave to Amend is Denied.

Plaintiffs assert that they were "not afforded an opportunity to amend their complaint, despite it being the usual practice in this Circuit to grant leave to replead upon the grant of an initial motion to dismiss and despite Plaintiffs' request during oral argument for an opportunity to amend." (Mem. in Supp. at 6.) Plaintiffs, however, incorrectly recite the order of the record. Plaintiffs requested leave to amend for the first time only after this Court entered a final judgment. Because a judgment was entered prior to Plaintiffs' request to amend, this Court may grant leave to amend only if it finds that "exceptional circumstances" exist, warranting relief under either Rule 59(e) or 60(b)—a principle that Plaintiffs themselves acknowledge. See Weiming Chen, 595 F. App'x at 80 (quoting Ruotolo, 514 F.3d at 191). (See also Pls.' Mem. of Law in Reply, ECF No. 85 at 2 (acknowledging that Plaintiffs "cannot amend under Rule 15(a) unless the judgment is modified, either by this Court pursuant to Rule 59(e) or 60(b) or on appeal").) While this Court has discretion in determining whether to grant leave to amend as a means of post-judgment relief, it need not consider arguments that simply relitigate issues already handled by the Court.

[&]quot;The comments Plaintiffs made at oral argument regarding any potential amendment to their complaint cannot reasonably be construed as an actual request or motion to amend. (See Tr. of Oral Arg. dated Apr. 18, 2019, ECF No. 66 at 62:13–15 ("We didn't detail the specific questions in the book. I am happy to amend the complaint to add them if you think that would be helpful."); 67:7–10 ("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."); 76:19–20 ("I would be happy to amend it if you think it's necessary, but I think we have a claim.").) Plaintiffs did not indicate to this Court—or, as far as this Court is aware, to Defendants—that it intended to file any amendments.

⁵ Indeed, while Plaintiffs opposed Defendants' motion to dismiss, (Mem. of Law in Opp'n to Defs.' Mot. to Dismiss Pls.' Compl., ECF No. 61), they did not move to amend the complaint. Courts within this Circuit have consistently denied motions for leave to amend where the moving party failed to attach a proposed amended complaint. See, e.g., Allison v. Clos-ette Too, LLC, No. 14 Civ. 1618 (LAK) (JCF), 2014 WL 4996358, at *2 (S.D.N.Y. Sept. 15, 2014) (denying the plaintiff's motion for leave to amend where she did not attach a proposed amended complaint, stating that "[a]ny motion to amend should be accompanied by a proposed amended complaint... [and] the court may deny leave when it is unclear what changes are proposed."). Moreover, the proposed amended complaint that Plaintiffs finally did proffer consists entirely of (1) futile allegations previously considered by this Court in the Oct. 4, 2019 Decision, and (2) new claims that Plaintiffs attempt to bring for the first time. (See id.)

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PLAINTIFFS' MOTION TO REMAND THE STATE LAW CLAIMS IS DENIED

Plaintiffs assert that this Court previously declined to exercise supplemental jurisdiction over

Plaintiffs' state law misappropriation claims. They now request that this Court remand those claims

for further proceedings. (Mem. in Supp. at 14.) Plaintiffs incorrectly summarize this Court's

decision. This Court did not decline to exercise supplemental jurisdiction, but instead explicitly

ruled on and found that the state law claims failed as a matter of law "because Plaintiffs fail to

establish that Shull and Defendants were in a fiduciary relationship." (See Oct. 4, 2019 Decision 29

n. 6.) Plaintiffs' request for remand to state court is therefore denied.

IV. CONCLUSION

Plaintiffs' motion (1) to vacate the Oct. 4, 2019 Decision, (2) for reconsideration of the

Oct. 4, 2019 Decision, (3) for leave to amend, and (4) to remand the state law claims to the Supreme

Court of the State of New York, (ECF No. 77), is DENIED. The Clerk of Court is directed to close

this motion accordingly.

Dated: New York, New York

September 16, 2020

SO ORDERED.

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