SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CAYUGA NATION and CLINT HALFTOWN, Plaintiffs, - against - SHOWTIME NETWORKS INC., BRIAN KOPPELMAN, ANDREW ROSS SORKIN, and DAVID LEVIEN, Defendants.	Index No. 157902/2019

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants Showtime Networks Inc. ("Showtime"), Brian Koppelman ("Koppelman"), Andrew Ross Sorkin ("Sorkin") and David Levien ("Levien") (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion to dismiss the complaint in this action pursuant to CPLR § 3211(a)(1) and CPLR § 3211(a)(7).

PRELIMINARY STATEMENT

This action arises out of the richly-conceived fictional serial drama series, *Billions*, about the high stakes battles between fictional Chuck Rhoades ("Chuck"), the former United States Attorney for the Southern District of New York, and an evolving cast of formidable rivals. By its fourth season, Chuck is now the newly-elected New York State Attorney General and his political competitor is the fictional United States Attorney General, Waylon "Jock" Jeffcoat.

Plaintiffs' claims focus on one episode in the fourth season of *Billions* in which Jane Halftown ("Jane"), a fictional Council Member of the Cayuga Nation, finds herself in the middle of a power-play between Chuck and Jock concerning mobile voting – a means to enfranchise previously largely ignored pockets of the electorate including members of the Cayuga Nation in upstate New York. Jock is against mobile voting – and Jock's resistance is enough to propel Chuck forward with a pilot program to start mobile voting. For his plan to work, Chuck needs to partner with the Cayuga Nation. In previous episodes, Chuck's father, Charles Rhoades Senior ("Charles") had made a loose partnership with the Cayuga Nation to buy land, and Chuck now needs his father to make the introduction. Thus, as regular viewers well know, when Chuck needs help behind the scenes, he turns to his father to grease the wheels.

Jane herself sees through Chuck's attempts to curry favor with her, and is able to use the moment to right Charles' secret past wrongs while also helping to enfranchise the members of the Cayuga Nation. Jane is savvy, witty, she is ethical and completely incorruptible. But, most of all, she is fictional. She is a character on a fictional television show. Nevertheless, Plaintiff

Clint Halftown, the federal representative to the Cayuga Nation, has brought claims for defamation and misappropriation on behalf of himself and the Cayuga Nation, claiming the episode states *as fact* that the Cayuga Nation was involved in an illegal casino land deal and that he, in the form of fictional character Jane, participated in bribery and blackmail.

Plaintiffs' claims fail for several independent reasons. *First*, the Cayuga Nation, as a separate sovereign entity, is barred from asserting defamation claims. It has no more standing to assert a libel claim than does the State of New York or the City of Albany. *Next*, Clint Halftown's defamation claims fail because the depiction of Jane is not defamatory and his effort to strain and twist the portrayal does not comport with basic principles of New York defamation law. Even more problematic, Jane is not *him.* This is a fictional series, with fictional events, and fictional characters. In the language of defamation, as a matter of law, the events depicted are not "facts" and the storyline about Jane is not "of and concerning" Clint Halftown. *Finally*, Plaintiffs' misappropriation claim conflicts with the plain language of New York's statutory right of publicity and a body of law interpreting the statute that routinely dismisses actions, like this one, that target expressive works because "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade' [in New York's Civil Rights Law Section 51]." *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't 2001). For all these reasons, Plaintiffs' Complaint must be dismissed with prejudice.

FACTUAL BACKGROUND

A. Parties

According to the Complaint, "Plaintiff Cayuga Nation is a sovereign Indian nation recognized by both the United States and the State of New York. . . . The Nation is governed by the five-member Cayuga Nation Council, which, based on the Nation's sovereign status, enjoys a

direct government-to-government relationship with the federal government." Compl. ¶ 2. The Cayuga Nation operates "two Class II gaming facilities on lands within its reservation." *Id.* ¶ 4.

Plaintiff Clint Halftown ("Clint") is, according to the Complaint, "a member of the Cayuga Nation Council and is also the Nation's federal representative." *Id.* ¶ 2.

The fictional television series *Billions* airs on Defendant Showtime's premium television network SHOWTIME. *Billions* was originally created by Defendants Sorkin, Koppelman, and Levien.[1] Compl. ¶¶ 14-17, 27.

B. *Billions* Land Deal

As Plaintiffs' Complaint recognizes, "[t]he *Billions* storyline unfolds in the world of New York City high finance, pitting the fictionalized Charles 'Chuck' Rhoades . . . identified initially as the U.S. Attorney for the Southern District of New York, against a fictionalized hedge fund manager identified as Bobby 'Axe' Axelrod." Compl. ¶ 28. In recognition of this obvious fictional status, the Complaint also acknowledges that "[a] disclaimer plays during the rolling credits at the end of each *Billions* episode" that notes that "[t]he events and characters depicted in this motion picture are fictitious. Any similarity to actual persons, living or dead, or to actual events, is purely coincidental." *Id.* ¶ 34.

One of these fictional events revolves around Chuck's father, Charles, a New York real-estate mogul. During season two of *Billions,* both Charles and Axe are stealthily buying up land in upstate New York, in the hopes the land they invest in will be granted a valuable casino gaming license.[2] It is widely believed the license will be granted to the fictional town of

[1] Andrew Ross Sorkin is erroneously named in that he had no responsibility for the script (or the resulting Episode) at issue in this action.
[2] Exhibit B, Episode 206, 35:08–37:42 (Axe negotiates with a Sandicot land owner to buy the property he needs to open the casino), 50:16–44 (Axe celebrates that his plan to buy the Sandicot land has been successful); Exhibit C, Episode 209, 48:50–59:50 (Charles mentions his cash is tied up in real estate investments in Kingsford, New York); *id.* Episode 211, 4:45–5:12 (Axe learns Charles has acquired significant real estate in the town of Kingsford).

Sandicot, where Axe bought land, but then Charles somehow pulls strings behind the scenes to switch the grant of the gaming license to the fictional town of Kingsford, where he bought land.[3] Because the gaming license was long rumored to go to Sandicot, the parties from whom Charles acquired the Kingsford land– who are not identified in season two – would have had no reason to believe he was preparing to build a casino in the area.

C. The Episode at Issue

The episode at issue in Plaintiffs' Complaint is the eighth episode of the show's fourth season (the "Episode"). Compl. ¶ 6.[4] By season four, Chuck has become the Attorney General for the State of New York. Axe is no longer his rival – and Chuck's attention is now focused on his political opponent "Jock" Jeffcoat, the U.S. Attorney General (and Chuck's former boss).

Although his reasons are unclear, Jock has "grave concerns" about a proposal to allow blockchain mobile voting, which could be used to assist the disenfranchised. As soon as Chuck learns that Jock opposes mobile voting, that is enough for Chuck to immediately support the idea, and he then proposes a pilot mobile voting program. Exhibit D, 11:14–13:07. *See also* Compl. ¶ 40. Wrapping himself in faux-inclusiveness concerns, Chuck proclaims that we need

[3] Exhibit B, Episode 206, 27:35– 28:50 (After learning Sandicot will receive a gaming license, Charles calls a powerful friend "Black Jack" Foley to ask for the license to be moved to another town); 56:01–17 (Axe learns Sandicot will not get the gaming license because it went to another town); 47:31–48:17 (Axe learns Foley made the call to switch the gaming license); *id.* Episode 208, 37:00–38:39 (Foley tells Axe he arranged for the switch of the gaming license as a favor to someone else, presumably Charles), 51:30–53:56 (Axe confronts Chuck Rhoades and Charles over the switch of the gaming license).

[4] "In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." *Lore v. N.Y. Racing Ass'n*, 12 Misc. 3d 1159(A), 2006 N.Y. Slip Op. 50968 at *3 (Sup. Ct. Nassau Cty. 2006) (citation and internal quotation marks omitted). Because, on a defamation claim, "the context in which the allegedly defamatory statement was made is critical," *Ava v NYP Holdings, Inc*., 64 A.D.3d 407, 413 (1st Dep't 2009), courts must assess the entire publication at issue – not just the particular words complained of by the plaintiff – on a motion to dismiss. *See also Aronson v. Wiersma*, 65 N.Y.2d 592, 594 (1985) (reviewing entire article on motion to dismiss). For this reason, this Court must consider the full episode at issue here. For the same reason, the episodes from season two are also necessary to understand the Episode in context, and are documentary evidence under CPLR § 3211(a)(1).

to "seize this opportunity to be true patriots – to bring a voice to those without one." *Id.* 12:10–37.

Chuck's biggest challenge to getting the proposal off the ground is that the New York Board of Elections Commissioner Halloran ("Halloran"), who openly "dislikes" Chuck, must approve the plan. *Id.* 14:38. As Halloran tells Chuck: "you're not gonna get a fu*#ing pilot program," explaining that "My wife. Cheryl. Lovely woman. Every year for the past 23 years I take Cheryl to Aruba. She relaxes down there, we reconnect down there. But this year you [Chuck] decided to indict 30 of my best friends, in Albany, merely for doing what every state senator's been doing for the past hundred years – favor trade for the betterment of the State. And now I'll be lucky if the wife and I can catch the bus to Belmar." *Id.* 14:30–15:02.

Chuck realizes he needs a powerful partner for the pilot to win over Halloran. As Chuck explains to his father, the list of groups who applied for mobile voting – but whose applications were denied included "military overseas, denied. Rural townships, denied. Indigenous peoples…." *Id.* 20:46–21:00. Pausing on the last group, Chuck asks his father, Charles, for an introduction to "the Tribe." *Id.* 20:14; *see also* Comp. ¶ 41. In response, Charles derogatorily refers to the Cayuga Nation as "my Indians" and "[m]y casino Indians," which Chuck groans at, tries to correct him but eventually concedes that "I don't care to correct you again 'cause it'll just make you go darker." *Id.* 20:30–21:07.[5] But it is through this exchange that we learn for the first time that Charles knows the Cayugas because he partnered with the Cayugas on the land "***around*** the casino in Kingsford." *Id.* 20:37–42.

[5] Charles' initial response to Chuck's request for an introduction to "the Tribe" is "Son, I'm surprised. You've worked alongside the Hebrews your entire career. You know, there was a nasty rumor once about my grandfather being of Ukrainian extraction." *Id.* 20:15– 20:27. As *New York* magazine said of this scene, Charles "manages to insult the Jews, the Ukrainians, and Indigenous Americans in a single breath when Chuck asks for an introduction to the Cayuga Nation," https://www.vulture.com/2019/05/billions-recap-season-4-episode-8-fight-night.html.

Later in the Episode, in the first scene at issue, both father and son meet with Council Member Jane Halftown of the Cayuga Nation ("Jane"), who is quickly revealed to be shrewd and protective of the members of the Cayuga Nation ("First Scene"). Compl. ¶ 43 Chuck goes into the meeting, trying to get Jane's buy-in for the pilot program with his claims that he won't "sit idly by while your civil rights are being hijacked" and quotes from Jane's "wise predecessor, Wilma Mankiller" (who, in the Episode was Cherokee when Jane was Haudenosaunee) in a failed attempt to show his cultural sensitivity. Exhibit D 30:52–31:42. Jane immediately sees through Chuck, corrects his ham-fisted cultural reference, and says "Mr. Rhoades, you want me to lobby the elections board for you." *Id.* 31:47. Underscoring that Cayuga Nation did not get a good arrangement in their Kingsford land deal with Charles – probably because only Charles knew that the casino license would be granted to the town of Kingsford – Jane asks, looking at Charles, "Why would I do that for the people who chiseled us on the land deal ***surrounding*** the casino?" *Id.* 31:51–56. She then welcomes a Cayuga Nation member into the room who is holding her young baby daughter, and indicates that Charles is the baby's father – telling Chuck, "Your father has tasted the fruits of our tribe in a way that makes us disinclined to trust either him or you." *Id.* 31:59–17. Charles coos over the baby, saying he recognizes "that chin." *Id.* 32:26. And Chuck tells Jane he will ensure that "my father will sweeten your piece on Kingsford to what you feel is fair." Jane agrees that she will review Chuck's proposal on the pilot program, but makes no promises. *Id.* 32:34–52.

Later in the episode, Jane Halftown and Chuck meet with Commissioner Halloran. Compl. ¶ 46 ("Second Scene"). Far from trying to bribe Halloran, Jane applies political pressure, threatening that the Cayuga Nation will protest in "full regalia," "giv[ing] interviews about how you [Halloran] are refusing us the vote" and "stag[ing] a sit-in at your office."

Compl. ¶ 47; Exhibit D 34:45–59. Halloran – showing his true colors– asks if she is "shoving a fu*&ing arrowhead up my a**?" And, Jane retorts that "she is not shoving it. You'd be sitting down on it on your own accord. But at your weight, that is where it would end up for sure." Halloran chuckles, "so you are allowed to be insensitive but I'm not," and Chuck and Jane say in unison "yes!" *Id.* 35:00–14. But Jane's threats of protest – to exercise her constitutional rights– were enough for Halloran to say "F*&k. . . yeah, you got your pilot program." *Id*. 35:15–23. Chuck then steps across the room – leaving Jane out of view from the camera – to have a private conversation with Halloran. Lowering his voice so Jane cannot hear him, Chuck whispers "it's not all stick," and then ***Chuck*** hands Halloran an envelope with "all expenses paid" tickets to Aruba for Halloran and his wife. *Id.* 35:23–39. After Halloran leaves, Jane congratulates Chuck for doing some good for her people. She also uses the opportunity to ensure that Charles will pay for his daughter's college fund – unquestionably the right thing to do. *Id.* 35:42–53.

In actuality, there is no "blockchain mobile voting pilot program" in New York, there is no casino in Kingsford, no town of Sandicot, no Commissioner Halloran whose wife misses her trips to Aruba, no Chuck Rhoades, no Jock Jeffries, and no Charles who fathered a baby with a woman from the Cayuga Nation. In short, *Billions* is fiction, which Plaintiffs do not dispute.

D. The Complaint

On August 13, 2019, Plaintiffs filed their Complaint in this action against the Defendants, claiming that the scenes in the Episode featuring Jane Halftown are intended to portray Clint Halftown because they share the same last name and are both are members of the Cayuga Nation's Council. Plaintiffs bring a claim for defamation, alleging that the First Scene "stated . . . that the Cayuga Nation owns casino land, even though the Nation does not own a casino or casino land." Compl. ¶ 65. Plaintiffs also bring a claim for defamation per se based on the Second Scene, claiming that Jane Halftown's actions somehow amount to crimes of "coercion

and the giving of unlawful gratuities" as well as "honest services fraud." Compl. ¶ 60. Finally, Plaintiffs attempt to assert a claim for "misappropriation of likeness" because *Billions* uses the likenesses of Clint and the Cayuga Nation. *Id*. ¶¶ 69-74.

ARGUMENT

POINT I

COURTS ROUTINELY GRANT MOTIONS TO DISMISS IN LIBEL CASES SUCH AS THIS ONE

The New York Court of Appeals has recognized that "[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (alteration in original)). Indeed, "[t]o unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dep't), *aff'd*, 74 N.Y.2d 548 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990), *aff'd*, 77 N.Y.2d 235 (1991). For that reason, New York courts are encouraged to dispose of libel cases at the pre-answer motion to dismiss stage, where, as here, the threshold issues can be resolved by the court as a matter of law. *See, e.g.*, *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281 (2011); *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

When evaluating a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the Court must determine from the Complaint's four corners whether "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (citation omitted). "However, bare legal conclusions and factual claims which are flatly contradicted by

the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." *Parsippany Constr. Co. v. Clark Patterson Assocs.*, 41 A.D.3d 805, 806 (2d Dep't 2007) (internal quotation marks and citation omitted).

Likewise, where "documentary evidence submitted 'conclusively establishes a defense to the asserted claims as a matter of law,'" dismissal is warranted pursuant to CPLR § 3211(a)(1). *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 183 (1st Dep't 2001) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994)). As set forth below, and as a simple review of the Episode establishes, Plaintiffs' claims of defamation and misappropriation fail for several independent reasons.

POINT II

THE CAYUGA NATION IS A GOVERNMENT ENTITY THAT IS PRECLUDED FROM PURSUING DEFAMATION CLAIMS

First, as Plaintiffs' Complaint makes clear, Cayuga Nation is in fact a sovereign nation. As such, Cayuga Nation is prohibited from asserting a defamation claim. In *New York Times v. Sullivan*, the United States Supreme Court explicitly held that the First Amendment bars government entities from suing in defamation, explaining that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." 376 U.S. 254, 291 (1964) (citation omitted). This well-established rule ensures that a "good-faith critic of government will not be penalized for his criticism." *Id.* at 292. Following the logic of the Supreme Court's ruling, courts have "unanimously concluded that a government entity, by reason of its nature as a government entity, cannot maintain an action for defamation in its own right, even if the defendant maliciously publishes the defamatory statements, knowing them to be false . . . ." *See Right of Governmental Entity to Maintain Action for Defamation*, 45 A.L.R. 3d 1315 (citing a study of 15 cases).

This prohibition applies to all types of government entities, both within and outside the territory of the United States. *See, e.g., Southampton Fire Dist. v Village of Southampton,* No. 0021104/2007, 2008 WL 1766381 (Sup. Ct. Suffolk Cty. Mar. 25, 2008) ("The Southampton Fire District is a governmental entity and is incapable of being libeled."); *Capital Dist. Reg'l Off-Track Betting Corp. v. Ne. Harness Horsemen's Ass'n,* 92 Misc. 2d 232 (Sup. Ct. Schenectady Cty. 1977) ("public benefit corporation organized under" New York law could not maintain defamation action); *Louisiana v. Time, Inc.*, 249 So. 2d 328 (La. Ct. App. 1971) (state barred from suing in defamation); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 555 (S.D.N.Y. 1984) (indicating defamation claim brought by Israeli government entity would be barred); *Air Zimbabwe v. Chicago Trib. Co.*, BC 227735 (Cal. Super. Aug. 24, 2000) (airline owned by Zimbabwe was a government entity precluded from pursuing defamation claim).

As Plaintiffs correctly allege, the Cayuga Nation is a sovereign nation that "enjoys a direct government-to-government relationship with the federal government." Compl. ¶ 2. Its status as a separate sovereign government is recognized by the United States federal government and the State of New York. *Id.*; *see also Cayuga Indian Nation New York v. Seneca Cty.*, 761 F.3d 218 (2d Cir. 2014) (per curiam) (affirming grant of injunction barring suit against Cayuga Nation based on its sovereign immunity). For this reason, the First Amendment entirely bars Plaintiff Cayuga Nation's defamation claims.[6]

[6] Alternatively, Plaintiff Cayuga Nation's claims fail under the group libel doctrine. "Under the group libel doctrine, when a reference is made to a large group of people, no individual within that group can fairly say that the statement is about him, nor can the 'group' as a whole state a claim for defamation." *Diaz v. NBC Universal, Inc.*, 536 F Supp 2d 337, 343 (S.D.N.Y. 2008) (barring claim from group with 400 members), *affd*, 337 Fed. App'x 94 (2d Cir 2009). Here, the Cayuga Nation comprises at least 500 individuals. Administrative Record-003616-17, *Cayuga Nation v. Bernhardt*, No. 17-cv-1923 (D.D.C. Sept. 20, 2017), ECF No. 46-43. A group with 500 members is simply too large to assert a defamation claim as a matter of law.

POINT III

PLAINTIFF CLINT HALFTOWN'S DEFAMATION CLAIMS ALSO FAIL AS A MATTER OF LAW

Under New York law, the elements of a defamation claim are: a false statement of fact that is "of and concerning" the plaintiff, published to a third party, which either causes special harm to the plaintiff or is defamatory *per se*, and was published with constitutional malice or gross irresponsibility. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 198-99 (1975); *Dillon v. City of N.Y.*, 261 A.D.2d 34, 38 (1st Dep't 1999). Here, Clint Halftown's libel claims fail as a matter of law for two independent reasons. First, he bases his claims on the portrayal of a fictional character Jane Halftown, whose actions are far from defamatory – if anything, she is the most laudable character in the Episode. Alternatively, and more fundamentally, *Billions* is a work of fiction and no reasonable viewer would believe the words and actions of "Jane" were really the words and actions of Clint.

A. The Challenged Statements Are Not Defamatory

Plaintiffs' Complaint fails and must be dismissed for the basic of reasons: none of the statements at issue here is defamatory. To state a claim for defamation, the statement complained-of must, on its face, "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977) (citation and internal quotation marks omitted). "It is for the court . . . to decide whether a publication is capable of the meaning ascribed to it," *Tracy v. Newsday, Inc.*, 5 N.Y.2d 134, 136 (1959), which is routinely determined at the pleading stage. *Jacobus v. Trump*, 156 A.D.3d 452 (1st Dep't 2017) (upholding grant of motion to dismiss for lack of defamatory meaning); *accord Aronson v. Wiersma*, 65 N.Y.2d 592 (1985) (same); *Ava v. NYP Holdings,*

Inc., 64 A.D.3d 407 (1st Dep't 2009) (reversing failure to dismiss defamation claim for lack of defamatory meaning).

On a motion to dismiss, a court must evaluate challenged statements "in the context of the entire statement or publication as a whole," and "if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Aronson*, 65 N.Y.2d at 594; *see also Rappaport v. VV Publ'g Corp.*, 163 Misc. 2d 1, 5 (Sup. Ct. N.Y. Cty. 1994) ("A defamatory implication must be present in the plain and natural meaning of the words used.") (citation omitted), *aff'd*, 223 A.D.2d 515 (1996). "[C]ourts will not strain to find [defamation] where none exists." *Cohn v. Nat'l Broad. Co.*, 50 N.Y.2d 885, 887 (1980) (internal quotation marks omitted).

Here, Clint Halftown's claims that the Episode somehow defames him depend entirely on interpreting two scenes of the Episode with the precise type of "strained or artificial construction" that is prohibited under New York law.

1. No reasonable viewer would find the Episode stated as fact that the Cayuga Nation "owns casino land" or "participated in an illegal casino land deal" or "illegal revenue-sharing arrangement"

Plaintiffs' Second Cause of Action for defamation arises out of a conversation among "Chuck Rhoades," "Jane Halftown," and "Charles" in the First Scene. The dialogue in this Scene is as follows:

> Jane Halftown: Mr. Rhoades, you want me to lobby the elections board for you. Why would I do that for the people who chiseled us on the land deal surrounding the casino?
>
> Chuck: Chiseled? I thought partnership was more—"
>
> Jane Halftown: Your father has tasted the fruits of our tribe in a way that makes us disinclined to trust either him or you. [on screen, Jane Halftown motions for a Cayuga woman to carry over a baby fathered by Charles, and Charles coos over the baby].
>
> Chuck: My father will sweeten your piece on Kingsford to what you feel is fair.

Charles: Fine. Whatever my overly generous son needs.

Compl. ¶ 43.

Based on this First Scene, Plaintiffs claim the Episode falsely states that "the Cayuga Nation owns casino land," and "participated in an illegal casino land deal," and "an illegal revenue-sharing arrangement." Compl. ¶¶ 44, 65, 67. But in reviewing the actual First Scene, in context, none of the statements is reasonably susceptible of Plaintiffs' defamatory interpretation.[7]

First, no statement in the First Scene, or anywhere else in the Episode, can be reasonably understood to convey that the Cayuga Nation "owns casino land" or that it participated in an "illegal casino land deal." Instead, Plaintiffs' claim relies exclusively on the fictional Jane's question "[w]hy would I do that for the people who chiseled us on the land deal ***surrounding*** the casino?" On its face, this statement refers to a deal for land "*surrounding*" a casino, not the land on which the casino is actually built. And, because the Episode never says or even hints that "Jane Halftown" (or the Cayuga Nation as a whole) runs a casino, it clearly did not state that she was involved in sharing gaming revenue with outsiders. Underscoring this conclusion, the First Scene is entirely consistent with a prior statement in the Episode, which explains that Charles "partnered with [the Cayuga Nation] on ***the land around the casino*** in Kingsford" (emphasis

[7] To the extent that Plaintiff Clint Halftown bases his claims on statements about the Cayuga Nation as a whole, rather than on the portrayal of Jane Halftown as an individual, his claims are barred by *New York Times v. Sullivan*. *See* Point II, *supra*. *See also Lazore v. NYP Holdings, Inc.*, 61 A.D.3d 440, 440 (1st Dep't 2009) ("the three lone voting members of the Tribal Council of the St. Regis Mohawk Tribe" could not maintain libel suit against the *New York Post* where the statements at issue "were directed against a governing body and how it governed, rather than against its individual members; there were no statements that the Tribal Council members were individually corrupt or individually promoting a criminal enterprise").

added). Exhibit D 20:38-41.[8] At no time does *Billions* ever state or intimate that the Cayuga Nation runs or owns a casino.

Second, even if the Episode could be understood to mean the Cayuga Nation is involved with a casino (which it does not), there is simply nothing wrong – or defamatory – about running a casino or collaborating on a land deal. Plaintiffs' lengthy pleadings about the technical definition of "casino" under federal statutes and their contention that it would be damaging to Clint Halftown's reputation to mischaracterize the Cayuga Nation's existing gambling operations merely underscore how convoluted Plaintiffs' interpretation of the First Scene is. This Court is obligated to construe the statements at issue here "not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed." *November v. Time, Inc.*, 13 N.Y.2d 175, 178-79 (1963) (denying dismissal of libel claim arising out of statement where a lawyer told someone to ignore a subpoena and the context of article would make it clear to non-legal professionals it was for personal gain). *Cf. Alvarado v. K-III Magazine Corp.*, 203 A.D.2d 135, 137 (1st Dep't 1994) (even if "New York Magazine article denotes participation in underage drinking in violation of Alcoholic Beverage Control Law § 65–c . . . plaintiffs' ages are not stated or otherwise apparent in the article. This information therefore constitutes extrinsic fact not 'presumably known to its readers' which, even if pleaded and proved, does not make the article libelous on its face") (citation omitted). An average and reasonable viewer, without a full understanding about the intricacies of "Class II" or "Class III" gaming operations (Compl. ¶¶ 22-23) or the laws concerning "gaming revenue

[8] "Jane" makes it clear that the Cayuga Nation was "chiseled" by the deal for the land surrounding the casino. As viewers would recognize, this is because back in season two, when Charles was buying up the land in Kingsford, only he knew it was about to become quite profitable when a gaming license was granted on land nearby.

sharing arrangements" (*id.* ¶ 26), could not find any defamatory meaning in an Indian nation running a casino in New York.[9]

At bottom, Plaintiff Halftown wants this Court to believe that the First Scene implies that he committed a crime simply because "Jane Halftown" says that Charles "chiseled us on the land deal surrounding the casino." But New York courts have repeatedly refused to stretch and strain the actual language in a work to somehow create an inference of illegal activity. In *James v. Gannett Co.*, 40 N.Y.2d 415, 420 (1976), for example, the Court of Appeals addressed an article about the plaintiff, an exotic dancer, titled "Samantha's belly business," which included a statement that the plaintiff "admitt[ed] to selling her time to lonely old men with money, for as much as $400 an evening in one case, 'just to sit with him and be nice to him'." Plaintiff claimed that the statement was reasonably understood to mean that "she was acting as a prostitute who was offering her body and her time for sale at a price." *Id.* at 419. But, the New York Court of Appeals rejected plaintiff's reading of the article – finding that it was not defamatory as a matter of law. *Id.* The Court reasoned that "the publication does no more than allege that the plaintiff accepted money in return for providing a few hours of companionship to lonely men. There is nothing in the sentence complained of to support an inference that the sale

[9] In fact, to the extent Plaintiffs' claim rests on a detailed knowledge of the Cayuga Nation's gaming license status or the laws on whether the Cayuga Nation can "enter into 'land deals' or gaming revenue sharing arrangements with outsiders," (Compl. ¶¶ 22-23, 26), Plaintiffs' claim is one for defamation per quod (as opposed to defamation per se). *See Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 92 (1st Dep't 2015) ("The need for extrinsic facts to render the statement defamatory conclusively dictates that it cannot be libel per se."). But to support such a claim Plaintiffs would have had to specifically plead special damages. *Id.* at 92-93. The Complaint here does not do so. "Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation." *Id.* at 93. Pleading round figures without attempt at itemization is insufficient to state special damages. *Id.* Here, Plaintiffs merely allege that they have been "damaged in an amount to be determined by this Court," Compl. ¶¶ 63, 68, 74, which is insufficient as a matter of law. And for this reason, the second claim for defamation must be dismissed.

of anything more was involved." *Id.* at 421. Here, Clint Halftown's claim rests on an even more strained construction since it involves a fictional character in a fictional episode.

Following *James,* a long line of cases rejects claims that call for the court to "strain to place a particular interpretation on the published words." *Id.* at 420; *see, e.g., Bement v N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 88, 92 (1st Dep't 2003) (statement that former beauty queen "slept with foreign government officials in order to plant electronic eavesdropping devices in their offices and private homes" did not imply that she committed a crime, namely espionage, or that she was unchaste because "the article conveyed the view that her alleged conduct amounted to a sacrifice for the good of her country"); *Cassini v. Advance Publ'ns, Inc.*, 125 A.D.3d 467 (1st Dep't 2015) (statement that plaintiff associated with wealthy older men "looking for action" did not imply she was a prostitute); *Seymour v. Lakeville Journal Co.*, 150 Fed. App'x 103 (2d Cir. 2005) (statement that plaintiff failed to pay taxes due to an error did not give rise to inference that plaintiff deliberately evaded taxes).[10]

Clint Halftown's claim that the Second Scene states that he engaged in illegal profit-sharing with outsiders or illegally ran a casino fails for the same reason the plaintiff's claim was dismissed in *James*: it calls for a strained reading of the actual language used. The First Scene has "Jane" observing only that Chuck's father "chiseled [the Cayuga Nation] on the land deal surrounding the casino." As stated, and in context, it is never stated that the Cayuga Nation

[10] *See also Greene v. Health & Hosps. Corp. of City of New York*, 1995 WL 661111, at *3 (Sup. Ct. N.Y. Cty. Mar. 23, 1995) (refusing to strain to find defamatory meaning where there is no "clear allegation of any criminal conduct") (citation omitted); *Alfajr Printing & Publ'g Co. v. Zuckerman*, 230 A.D.2d 879, 880 (2d Dep't 1996) (statement that plaintiffs published words of extremists did not suggest that plaintiffs supported the extremists); *Ava*, 64 A.D.3d at 412 (statement that plaintiff has "masturbatory fantasy" of "being with multiple men and then multiple women" does not imply that plaintiff is promiscuous because the statement said it was a fantasy).

owned the casino or operated a casino in an inappropriate way.[11] Plaintiff Clint Halftown's claim for defamation based on the First Scene must, therefore, be dismissed.

2. No reasonable viewer would find the Episode depicted Jane Halftown committing any crimes.

Clint Halftown's claim for defamation *per se* (First Cause of Action) is based on a similar strained and artificial construction of the actual events in the Episode. The Second Scene involves a conversation among fictional characters Jane Halftown, Chuck Rhoades, and Board of Elections Commissioner Halloran. Although Plaintiff Clint Halftown alleges this Scene shows Jane committing crimes, no reasonable viewer could agree.

In the Second Scene, Jane and Chuck meet with Halloran "to persuade him to launch the mobile voting pilot program." Compl. ¶ 46. Jane tells Halloran that if he does not approve the program, the Cayuga Nation will stage a protest in "full regalia" and she will "give interviews about how [Halloran is] refusing us the vote." Compl. ¶ 47; Exhibit D 34:45. With that, Halloran agrees to approve the program.

After the Commissioner already approves the program, Chuck stands up and walks across the room to engage the Commissioner in a private conversation – out of Jane's earshot. The camera zooms in on Chuck and Halloran – leaving Jane out of the shot – as Chuck lowers his voice and privately tells the Commissioner, "In this envelope you'll find tickets and hotel confirmations for you and the missus. Aruba. All expenses paid." The Commissioner takes the

[11] If Plaintiffs seek to state a libel by implication claim, the claim fails for an independent reason. (Compl. ¶ 44 (identifying the "implicit" and "explicit" "false and defamatory narrative that the Nation and Council Member Halftown had previously been engaged in a casino land deal and an illegal revenue-sharing arrangement"). Plaintiffs' allegations fail to make "a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." *Stepanov*, 120 A.D.3d 28, 37-38 (1st Dep't 2014). Plaintiffs have not pled that Defendants intended or endorsed the defamatory implications they strain to find, nor is there anything in the Episode that suggests Defendants intended Plaintiffs' artificial and strained construction of the Episode.

envelope and exits. Jane remains seated on the other side of the room, and is deliberately excluded from the shots of Chuck's private conversation with the Commissioner.

Although Jane again comes off as the only ethical person in this Scene, Clint Halftown claims the Scene somehow depicts that Jane committed the crimes of honest services fraud, receiving unlawful gratuities, and coercion. Compl. ¶¶ 50-56. While he is right that the Scene depicts unethical behavior, it is Commissioner Halloran and Chuck that are acting unethically, not Jane. All Jane does is inform the Commissioner that the Cayuga people will protest if he does not approve their participation in the mobile voting pilot program. The idea that a representative of a group of disenfranchised voters somehow commits a crime by communicating their plans to protest until their access to voting is improved is patently unreasonable.

Again, Plaintiffs have scoured the New York Penal Code to find an obscure offense (coercion) to attempt to twist Jane Halftown's declaration of plans to stage a protest into a commission of a crime. But that cynical view of the Episode cannot change the reality that the average viewer would simply not perceive Jane as doing anything wrong; far from it, she's clearly looking out for her people. And for this reason, Plaintiff Clint Halftown's claim for defamation *per se* should also be dismissed.

B. In The Alternative, The Challenged Statements Are Not Statements of Fact that Depict Plaintiff Clint Halftown

Plaintiff Clint Halftown's libel claim also fails for a second, independent reason: no reasonable viewer would believe that the Episode's depiction of the fictional Jane was actually depicting Clint Halftown.

Courts have long recognized that a libel claim based on a work of fiction, which by its very nature is not factual, poses unique issues and so must be analyzed differently from the more usual libel claim that arises from a news story or other non-fiction material. *See, e.g.*, *Springer v.*

Viking Press, 90 A.D.2d 315, 319-20 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916 (1983) ("*Springer*"). Because explicit works of fiction do not purport to state facts about actual people, they are accorded, under the First Amendment, significant protection from claims of libel:

> It is absolutely crucial that, for the purposes of evaluating first amendment claims, courts distinguish analytically between intentionally false statements of facts on the one hand and narrative fiction on the other. The analytic distinction, of course, is that a statement of fact purports to be true, even when it is false, while narrative fiction does not purport to describe events that have actually happened. Narrative fiction, unlike an intentionally false statement of facts, deserves considerable first amendment protection.

American Postal Workers Union v. U.S. Postal Serv., 830 F.2d 294, 306 (D.C. Cir. 1987). Because of the counterintuitive nature of a libel-in-fiction claim – where a plaintiff claims that something that is fictional is not factually accurate – two separate elements to the traditional defamation claim converge (and are often blended by courts), resulting in a heightened constitutional analysis. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 439-40 (10th Cir. 1982); *Welch v. Penguin Books USA, Inc.*, 1991 N.Y. Misc. LEXIS 225, at *8-10 (Sup. Ct. Kings Cty. 1991). Any libel plaintiff must show that the allegedly defamatory statement is "of and concerning" the plaintiff, and that the statement is a false statement of *fact*. In the fiction context, it is not enough for a plaintiff to show (as he must) that the fictional depiction of the character is "of and concerning" plaintiff; he also must show that the fictional depiction is "not fiction at all," but rather, factual. *Id.* at *9-10; *Pring*, 695 F.2d at 439.

A plaintiff – like Clint Halftown – shoulders a heavy burden under this standard. The plaintiff must establish that reasonable viewers would believe that the fictional character *is*, in fact, the plaintiff. *Springer*, 90 A.D.2d at 319-20. "Given the obvious and implied constitutional repercussions of a libel-in-fiction claim as well as the accepted fact that writers create their fictional works based on their own experiences, it must be a requirement of an action for

defamation that the reader be totally convinced that the book in all its aspects as far as the plaintiff is concerned is not fiction at all." *Welch*, 1991 N.Y. Misc. LEXIS 225, at *9-10; *see also Summerlin v. Washington Star*, 7 Media L. Rep. 2460, 2461, 1981 BL 230 (D.D.C. 1981) ("the surrounding circumstances must leave *no doubt* in the reader's mind as to the person's identity . . . [and] there must be proof of certainty as to the person defamed before liability can be imposed").

Even if a plaintiff can overcome this initial hurdle and demonstrates that reasonable viewers would understand that a fictional character is "of and concerning" plaintiff, he must still show that fictional scenes are reasonably understood by viewers as "describing actual facts . . . or actual conduct of the plaintiff." *Pring*, 695 F.2d at 439; *see also Silberman v. Georges*, 91 A.D.2d 520 (1st Dep't 1982) (while plaintiff is clearly depicted in a painting titled "Mugging the Muse," painting cannot be understood as making any statement of fact). In short, "the biggest hurdle for the plaintiff . . . [is] overcoming a fictional work's presumption that all the material is untrue." *Welch*, 1991 N.Y. Misc. LEXIS 225, at *9-10.

The interplay between the "of and concerning" and "factual statement" elements in libel-in-fiction cases plays out in the analysis of the degree of required similarity between the fictional character and the plaintiff. As expressed by the First Department in *Springer*, 90 A.D.2d at 320:

> The teaching of these cases is that for a defamatory statement or statements made about a character in a fictional work to be actionable the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two.

See also Carter-Clark v Random House, Inc., 17 A.D.3d 241, 241 (1st Dep't 2005) (same).

This conclusion is by no means different simply because a fictional work incorporates a name that is the same or similar to a plaintiff's name. As a New York court explained over 50 years ago:

> Persons whose names [or other traits] are similar to those used in fiction are, perhaps, unduly sensitive about anything that is written concerning the portrayed character and are quick to attribute such references to themselves. As long as fiction is written, this is often unfortunate but nevertheless impossible of complete avoidance. A person with such sensitivities has, nevertheless, no legal basis for complaint unless not only does the name used completely and accurately coincide with his, but also the context singles him out and points to him, as does a portrait or picture, as the person referred to.

People v. Charles Scribner's Sons, 205 Misc. 818, 824 (City Ct. Brooklyn 1954).

In sum, to state a libel-in-fiction claim, it is not sufficient that a character suggests the plaintiff or that there is a similarity between the character's name and the plaintiff's. Instead, "[i]n order to overcome the ironies inherent in a libel-in-fiction claim, the identity of the real and fictional personae must be *so complete* that the defamatory material becomes a plausible aspect of the real life plaintiff . . ." *Welch*, 1991 N.Y. Misc. LEXIS 225, at *7.

Here, on the face of the facts pled and incorporated in the Complaint, Plaintiff Clint Halftown cannot begin to meet this daunting standard and his defamation claims must be dismissed. *Billions*, and this Episode in particular, is indisputably fiction. As Plaintiffs concede, *Billions* is fiction and it carries a clear fiction disclaimer. Compl. ¶ 34. Indeed, on this basis alone, claims similar to Plaintiff Clint Halftown's have been dismissed outright. *Lyons v. New Am. Library*, 78 A.D.2d 723, 724 (3d Dep't 1980) (granting motion to dismiss libel claim where work "clearly states that it is fiction" and plaintiff had not participated in the investigation that was the subject of the novel). *See also Dauer & Fittipaldi, Inc. v. Twenty-First Century Commc'ns*, 43 A.D.2d 178, 179 (1st Dep't 1973) ("viewed in its context of fiction," article could

not have libelous meaning; it "does not purport to relate to actual events or depict real persons or places").[12]

And more than the disclaimer, the events in the Episode are plainly fictional. This is not a case where the depicted events are based on a true story. *Cf. Batra v. Wolf*, No. 0116059/2004, 2008 WL 827906 (Sup. Ct. N.Y. Cty. Mar. 14, 2004) (finding *Law & Order* character "of and concerning" plaintiff where the episode closely tracked a real-life scandal in which plaintiff was involved). Here, the Episode concerns a mobile voting program in New York that does not exist, winning over a Commissioner who does not exist, a town of Sandicot which does not exist, and warring political rivals, who are fictional. None of these events happened. None of these characters is remotely real. It is a fictional drama, and the Episode appears in the fourth season. Indeed, Plaintiff Clint Halftown does not allege, nor could he, that anyone reasonably believed he was involved in negotiating a mobile voting program, or that "Jane" was actually him.

In case after case, courts in New York and elsewhere routinely dismiss libel-in-fiction claims when there was significantly more similarity between the plaintiff and the fictional character than exists here. In the leading New York case, *Springer*, 60 N.Y.2d 916 (1983), for example, the Court of Appeals upheld the dismissal of a libel-in-fiction claim based on the author's use of his former girlfriend's actual first name and numerous additional identifying characteristics. "[T]he similarity of given name, physical height, weight and build, incidental grooming habits and recreational activities of plaintiff [Lisa Springer] and Lisa Blake, a minor character in a work of fiction, are insufficient to establish that the publication was 'of and

[12] *See, e.g.*, *Allen v. Gordon*, 86 A.D.2d 514 (1st Dep't 1982) (dismissing libel-in-fiction claim and noting the novel's explicit disclaimer that it was fictional), *aff'd*, 56 N.Y.2d 780 (1982); *Netzer v. Continuity Graphic Assocs.*, 963 F. Supp. 1308, 1324-25 (S.D.N.Y. 1997); *Smith v. Huntington Publ'g Co.*, 410 F. Supp. 1270 (S.D.N.Y. 1975); *Brafman v. Houghton Mifflin*, 11 Media L. Rptr. 1354, 1984 BL 92 (Sup. Ct. N.Y. Cty. 1984).

concerning' plaintiff." *Id*. at 917. There – unlike here – the similarities were very specific and numerous: the character and the plaintiff had both lived on 114th Street Manhattan, both had a boyfriend of Iranian ancestry with whom they vacationed in the Bahamas, both skied in Switzerland, both attended the same college, majored in the same subject, wore the same jewelry and plucked their eyebrows daily. Despite such detailed similarities, the Appellate Division held, and the Court of Appeals affirmed, that the differences between plaintiff and the fictional character were sufficient to bar, as a matter of law, plaintiff's defamation claim. *Springer*, 90 A.D.2d at 319-20.

Here the differences between "Jane" and Plaintiff Clint Halftown are numerous and significant. Most obviously, Clint Halftown is a man, and "Jane" is a woman. Clint does not claim – nor could he – that he partnered with the New York State Attorney General in any way, that he participated in a mobile voting program, that he felt duped in any land deals, that he has won over any commissioner – or that he took part in any of the events that even remotely compare to the events of the Episode.

At bottom, Plaintiff Clint Halftown's claim rests on his contention that simply because the last name of the fictional character (Halftown) is the same as his, and because the character is a council member of the Cayuga Nation, viewers would assume "Jane Halftown's" actions were his. But, this is far from sufficient. In *Springer*, the character had the same first name as the plaintiff, along with any number of other detailed similarities. Yet, those similarities were insufficient to state a claim. Consider also *Middlebrooks v. Curtis Publishing Co.*, 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969), involving a short story about a number of thefts by two teenage boys around Columbia, South Carolina during the early 1940s. *Id*. at 2. One of the characters was named "Esco Brooks" and the plaintiff, Larry Esco Middlebrooks, was

known as "Esco" in his youth and was, in fact, a friend of the author in Columbia during the early 1940s. Although minor compared to the significant differences between the fictional "Jane Halftown" and Plaintiff Clint Halftown, the trial court in *Middlebrooks* concluded the dissimilarities "far outweigh the few inconclusive similarities that may be found to exist and no reader would have been able to conclude on any reasonable basis that the fictional character was in fact the plaintiff or intended to be him." *Id.* at 6.

Courts repeatedly hold that the mere confluence between the names of the plaintiff and a character and other abstract characteristics (like occupation) is not sufficient to state a libel claim in a work of fiction. *See, e.g.*, *Charles Scribner's Sons*, 205 Misc. 818 ("[T]he name must be used in such a context as to *unequivocally* point to and identify the complainant. . . . [T]his can be established only by a clear showing that the details surrounding the fictional character portrayed are such as to identify the complainant as the person of that name in that particular setting. If they do not, then taken with the statement of the author that all characters portrayed are wholly fictional, the identity of name must be set down as a pure coincidence, since there always will be persons with similar names and writers of fiction could not give names to their characters without violating the statute."); *Brafman v. Houghton Mifflin*, 11 Media L. Rep. 1354, 1984 BL 92 (Sup. Ct. N.Y. Cty. 1984) (action dismissed even though plaintiff shared the same last name with fictional character); *Allen v. Gordon*, 86 A.D.2d 514 (1st Dep't 1982) (statements about fictional Manhattan psychiatrist "Dr. Allen" not "of and concerning" sole psychiatrist in Manhattan named "Dr. Allen"); *Milo v. CBS, Inc.*, 14 Media L. Rep. 1982, 1987 BL 76 (Sup. Ct. N.Y. Cty. 1987) (non-fiction book which used plaintiff's distinctive last name (Milo), occupation (printer) and exact address (12th Street and Avenue A) not "of and concerning" plaintiff), *aff'd*, 106 A.D.2d 927 (1st Dep't 1984); *Frank v. National Broad. Co.*, 119 A.D.2d 252 (2d Dep't

1986) (plaintiff, a tax consultant named Maurice Frank, could not assert claim over a *Saturday Night Live* skit featuring a tax consultant with the exact same name.).

In short, the Episode is plainly and indisputably fiction and the events depicted in the Episode did not occur. The law and common sense dictate that viewers of the Episode could not reasonably conclude that the fictional Jane character was in fact Plaintiff Clint Halftown, and, therefore, his defamation claims must be dismissed.

POINT IV

PLAINTIFFS' MISAPPROPRIATION CLAIM FAILS AS A MATTER OF LAW

Finally, Plaintiffs claim the depiction of Jane and references to the Cayuga Nation in the Episode constitute misappropriation of their likenesses for commercial purposes. Compl. ¶ 70. Because New York does not recognize any action at common law for commercial misappropriation or other invasions of the right of privacy, *Stephano v. News Grp. Publ'ns*, 64 N.Y.2d 174 (1984), Section 51 of the New York Civil Rights Law ("Section 51") is the only potential remedy for this claim.

Section 51 "provide[s] a limited statutory right of privacy" by prohibiting the use of the "name, portrait, picture or voice of a living person for advertising purposes or for the purposes of trade without the written consent first obtained." N.Y. Civ. Rights Law § 51; *see also Messenger ex. rel. Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441 (2000) (citations omitted). To state a claim "a plaintiff must show that the defendant (1) used his name, portrait, picture, or voice, (2) for advertising or trade purposes, and (3) without his written consent." *Burck v. Mars, Inc*., 571 F. Supp. 2d 446, 451 (S.D.N.Y. 2008). Section 51 must be "narrowly construed" and "strictly limited to nonconsensual commercial appropriations of the name, portrait [voice], or picture of a living person." *Messenger*, 94 N.Y.2d at 441 (citation omitted). Here, Plaintiffs' claim fails for several independent reasons.

First, Plaintiffs' Section 51 claim must be dismissed because *Billions* is a television series and is an expressive work that does not fall within the narrow confines of the statute's definition of "advertising or trade." Courts have repeatedly made clear that even actual uses of a person's image or likeness in entertainment works, like *Billions*, simply do not amount to uses for "advertising purposes, or for the purposes of trade" under Section 51. *See Lemerond v. Twentieth Century Fox Film Corp.*, No. 07 Civ. 4635 (LAP), 2008 WL 918579, at *3 & n.1 (S.D.N.Y. Mar. 31, 2008) (finding use of plaintiff's image in satirical and comedic movie not purely commercial, even though there is a "profit motive"); *Costanza*, 279 A.D.2d at 255 (affirming dismissal of plaintiff's Section 51 claim for misappropriation of his likeness for the "character of George Costanza from the Seinfeld television program" because "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade'") (citation omitted). Because the television series *Billions* is manifestly an expressive work, any use of Plaintiffs' names or likenesses is not for "advertising purposes, or for the purposes of trade" within the meaning of Section 51.[13]

Second, Plaintiff Cayuga Nation's claim fails because Section 51 is limited to the use of "the name, portrait or picture of any living person." N.Y. Civ. Rights Law § 51. Entities, like the Cayuga Nation, therefore cannot assert a Section 51 claim. *See, e.g.*, *Dauer Fittipaldi v. 21st*

[13] Plaintiffs' conclusory allegation that the alleged use was "essential to the development of the plot, and thus the Defendants' depictions were profit-oriented and necessary for the marketability of *Billions*" cannot save their claim. Compl. ¶ 73. It is a fundamental principle that the fact that "books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Lohan v. Perez*, 924 F. Supp. 2d 447, 455 (E.D.N.Y. 2013) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967)); s*ee also Stephano*, 64 N.Y.2d at 184-85 ("The fact that defendants may have included this item in its column solely or primarily to increase the circulation of its magazine and therefore its profits … does not mean that the defendant has used the plaintiff's picture for trade purposes ….").

Century Commc'ns, 43 A.D.2d 178, 180 (1st Dep't 1973) ("[I]t is settled that corporations do not have a legally protected right of privacy in New York.").

Finally, Plaintiff Clint Halftown's claim for misappropriation fails because the Episode does not use his name, portrait, picture, or voice. No claim lies under the statute unless the use "singles out [the plaintiff] and points to him." *Antonetty v. Cuomo*, 131 Misc. 2d 1041, 1046 (Sup. Ct. Bronx Cty. 1986); *see also, e.g.*, *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 384 (1984) (statute "implicitly requires that plaintiff be capable of identification from the objectionable material itself."). As with his defamation claim, it is not enough for Clint Halftown to claim that he and fictional Jane Halftown happen to share a last name. The same last name and occupation, in conjunction with a physical likeness of a female character in a fictional expressive work who bears no resemblance to Mr. Halftown, does not identify him for purposes of Section 51. *See, e.g.*, *Allen*, 86 A.D.2d at 515 (novel's reference to Manhattan psychiatrist named Dr. Allen did not use plaintiff's name, even though plaintiff was the only Manhattan psychiatrist with that name, because "there is no clear identification of plaintiff in the portrayal of the character 'Dr. Allen' in the book which would prompt a rational reader to conclude that plaintiff was being described"); *Cohen*, 63 N.Y.2d at 384 ("Manifestly, there can be no appropriation of [a] plaintiff's [likeness] for commercial purposes if he or she is not recognizable from the [image in question].").

Accordingly, because Plaintiffs do not as a matter of law establish that any alleged use of their likenesses in *Billions* was for purposes of advertising or trade, Plaintiffs' Section 51 claim should be dismissed.

CONCLUSION

For all these reasons, Defendants respectfully request that Plaintiffs' Complaint be dismissed with prejudice.

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Respectfully submitted,

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