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 Motion Seq. No. 1. (Freed, J.)

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

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Defendants respectfully submit this memorandum of law in further support of their motion to dismiss the complaint in this action.[1]

PRELIMINARY STATEMENT

Plaintiffs' defamation claims arise out of statements made in a fictional episode of the noted TV drama *Billions*, concerning the fictional character Jane, portrayed as a council member of the Cayuga Nation in a fictional plot line. On this motion, Defendants established that these claims fail for several independent reasons: (1) the Cayuga Nation, as a sovereign nation, cannot sue for defamation; (2) it is not defamatory to depict the Nation as participating in a land deal "surrounding" what became a casino or for its tribal representative to threaten political action in order to obtain more effective voting rights for the tribe; and (3) this entirely fictional episode does not begin to meet the heightened standard of establishing that it is reasonable to assume that fictional Jane was in fact Plaintiff Clint Halftown or that actual facts are depicted about the Plaintiffs in the Episode.

In opposition, Plaintiffs do not contest that the Cayuga Nation is a governmental entity or that governmental entities are prohibited from bringing libel suits. Instead, because Indian Nations have a unique relationship with the U.S. government, Plaintiffs ask this Court to disregard the Supreme Court's clear directive prohibiting such claims and to ignore that for decades this prohibition has been applied to all types of governments. The law is clear: under *New York Times Co. v. Sullivan*, each and every type of government entity is barred from bringing libel claims – including Indian tribes. 376 U.S. 254 (1964); *Lazore v. NYP Holdings, Inc.*, 61 A.D.3d 440, at *1 (1st Dep't 2009).

[1] All defined terms herein have the same meanings as given to them in the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint (Dkt. 6) ("Op. Mem.")

Nor do Plaintiffs begin to establish that the Episode depicts defamatory actions by Jane (as opposed to Chuck or his father Charles) or that the Episode actually identifies Plaintiff Clint Halftown or conveys actual facts about him. Plaintiffs first seek to avoid this inquiry altogether and suggest that it is somehow extraordinary for a court to decide defamatory meaning on a motion to dismiss. But they ignore the well-settled law stating that defamatory meaning is a question of law for this Court, and it is a court's duty to dismiss defamation claims up front when, as here, they are based on a strained and artificial interpretation. Next, reaching to find a defamatory meaning in this fictional story, Plaintiffs try to conflate the undeniable "bad acts" of Charles and his son with the actions of Jane, who simply tries to use her political clout to right past wrongs and engages in no wrongdoing, particularly any criminal acts. The First Department has made it clear that an allegation of criminality must be express, and cannot be presumed as Plaintiffs argue. *See, e.g.*, *Suozzi v Parente,* 202 A.D.2d 94, 100 (1st Dep't 1994). Finally, to support their defamatory implications, Plaintiffs urge the Court to consider the events depicted in the Episode in "context." Opp. at 10-12. But the actual context is what dooms their claims: *Billions* is a fictional television drama. The show, the Episode, and the particular scenes at issue are all entirely and indisputably fiction. And in the context of this fictional episode, where the common traits between Jane and Plaintiff Clint Halftown are only a shared last name and occupation, the Episode cannot be reasonably seen to identify Plaintiff Halftown or to convey facts about him. The defamation claims should be dismissed.

That leaves Plaintiffs' statutory commercial misappropriation claim. There is no dispute that New York's statutory misappropriation claim only applies to "trade or advertising" or that case after case makes clear that litigation involving fictional and entertainment works, such as *Billions*, does not state a claim. *See, e.g.*, *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't

2001) (Section 51 claim over use of plaintiff's name in the *Seinfeld* television series dismissed). Plaintiffs' citation to decades-old cases that pre-date the controlling law interpreting Section 51 clearly cannot salvage their claim.

For all these reasons, Plaintiffs' Complaint should be dismissed in its entirety.

ARGUMENT

I.

CAYUGA NATION IS A GOVERNMENT ENTITY THAT CANNOT SUE FOR LIBEL

Plaintiffs admit, as they must, that the Cayuga Nation is a sovereign government entity. Opp. at 4-5 (discussing the "Nation's sovereign status" and its "direct government-to-government relationship with the federal government"). And Plaintiffs concede that in *New York Times Co. v. Sullivan*, the Supreme Court expressly prohibited libel claims brought by governmental entities. 376 U.S. 254, 291-92 (1964).

Instead, Plaintiffs contend that this absolute prohibition should not apply to the Cayuga Nation because, more than a hundred years before *Sullivan*, the Supreme Court acknowledged the unique nature of Indian tribes. But the cases Plaintiffs rely on, which plainly establish that Indian tribes are considered "state[s]" and "government[]s," only reinforce that the Cayuga Nation is a government entity. *See* Opp. 4-5 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) ("The acts of our government plainly recognize the Cherokee nation as a state."); *Worcester v. Georgia*, 31 U.S. 515, 580 (1832) ("All the rights which belong to self government have been recognized as vested in [the Indian tribes]."). While it is undoubtedly true that Indian tribes are a unique kind of government entity, and the historical relationship between them and the U.S. government is complex, all types of government entities are barred from bringing defamation suits, whether it be a school board, state, municipality, fire district, public benefit

corporation, or foreign state-owned airline.[2] The Cayuga Nation offers no basis for it to be treated differently and to be the exception to this well-established rule.

In fact, Plaintiffs are simply wrong when they claim that *Sullivan*'s constitutional prohibition has never been applied to an Indian tribe. Opp. 5. To the contrary, in dismissing a defamation action in *Lazore*, the First Department implicitly held that an Indian tribe is a government entity, which would be precluded from bringing a defamation case. 61 A.D.3d 440. In *Sullivan* the Supreme Court articulated two key interrelated propositions to support its prohibition of governments bringing libel actions. *Sullivan*, 376 U.S. at 291-92. The first is the overarching principle at issue here: a government entity cannot bring a suit for defamation. *Id.* at 291 ("[N]o 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.") (citation omitted). In the very same paragraph, the *Sullivan* Court went on to articulate the second key proposition: an individual governmental official may not "sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed." *Id.* at 292. On the basis of the second proposition, and specifically citing the relevant paragraph in *Sullivan*, the First Department held in *Lazore* that the individual members of the St. Regis Mohawk tribal government could not bring a defamation claim on the theory that statements about the tribe

[2] *Port Arthur Indep. Sch. Dist. v. Klein & Assocs. Political Relations*, 70 S.W.3d 349 (Tex. Ct. App. 2002) (school district was government entity barred from bringing libel action); *Louisiana v. Time, Inc.*, 249 So. 2d 328 (La. Ct. App. 1971) (state barred from suing in defamation); *City of Philadelphia v. Wash. Post Co.*, 482 F. Supp. 897 (E.D. Pa. 1979); *Southampton Fire Dist. v. Vill. 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); *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. Chi. Trib. Co.*, BC 227735 (Cal. Super. Ct. Aug. 24, 2000) (airline owned by Zimbabwe was a government entity precluded from pursuing defamation claim).

referred to them, *because* the tribe was a government entity. *Lazore*, 61 A.D.3d 440 (citing *Sullivan* and finding that "the offending statements were directed against a governing body and how it governed, rather than against its individual members"). Thus, just as the individual member of a tribal government in *Lazore* could not bring a defamation suit based on statements about the tribe since it was a government entity, here, too, the Cayuga Nation is prohibited from bringing a defamation suit, because it is a government entity. For this controlling reason, the defamation claims brought by the Cayuga Nation must be dismissed.[3]

If that were not sufficient – and it is – the Cayuga Nation's claims are also barred by the group libel doctrine. Plaintiffs do not dispute that the group libel doctrine bars claims based on statements about large groups. They also do not dispute that the Cayuga Nation has approximately 500 members. And, tellingly, they cite no cases where a statement about a group even half that size was large enough to support a defamation claim. Opp. 6 n.2. In fact, Plaintiffs' whole argument concerning group libel rests on a misleading citation to *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337, 343 (S.D.N.Y. 2008), *aff'd*, 337 F. App'x 94 (2d Cir. 2009). To be sure, *Diaz* does in fact state that "The New York Courts have not set a particular group number above which defamation of a group member is not possible." Opp. 6 n.2. But Plaintiffs omit the very next sentence, which specifically observes that a "court in this district has noted the absence of any cases where individual members of groups larger than sixty have been permitted to go forward with a libel claim." *Diaz*, 536 F. Supp. 2d at 343 (citation, internal quotation marks and alteration omitted).[4] With its concession that the Cayuga Nation has over

[3] Plaintiffs' contention that the government entity bar should not apply here because the statements at issue do not arise "as the result of a political movement, protest, or any other moving force of social upheaval" (Opp. 5) is wrong as a matter of law and fact. Opp. 5. Plaintiffs do not cite a single case for their proposed bar – because there is none. And, in fact, the fictional statements at issue in the Episode are clearly related to a political protest – the Cayuga Nation's attempt to provide voting access to its members.

[4] *See, e.g.*, *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005) (affirmed dismissal of a Section 1983 action brought by twenty-three current and former members of the Wallkill, New York police department); *cf. Elias*

500 members, under any application of the group libel doctrine, it is too large to sue. In short, even if the Cayuga Nation were not a governmental entity, its claim *still* fails under the group libel doctrine.

II.

PLAINTIFFS RELY ON A STRAINED CONSTRUCTION OF THE EPISODE AND EXTRINSIC FACTS IN AN EFFORT TO FIND ANY DEFAMATORY MEANING

On this motion, Defendants established that the fictional statements at issue were not susceptible of a defamatory meaning. Indeed, the Episode can only reasonably be understood as showing how Charles duped the Cayuga Nation into entering into a bad land deal, impregnated a young Nation member, leaving her alone to raise the baby, and how Council member Jane sought to rectify these wrongs while also obtaining access to voting for the Cayuga Nation. There is nothing defamatory about the portrayal of Jane – or even the Cayuga Nation as a whole.

In response, while they claim a dismissal for lack of defamatory meaning is somehow extraordinary, Plaintiffs do not dispute that it is the province of the court to dismiss those claims where the statements at issue are not reasonably susceptible of a defamatory connotation – nor can they, as courts routinely grant motions to dismiss in such cases. *See, e.g.*, *Cassini v. Advance Publ'ns, Inc.*, 125 A.D.3d 467 (1st Dep't 2015); *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 414 (1st Dep't 2009). Nor do Plaintiffs dispute that the court may not strain to find defamatory meaning where none exists. Opp. 7. Instead, they ask this Court to adopt an unstated reading of the actual dialogue and events in the Episode, one that does not comport with the plain meaning of the events and one that requires the viewer (and this Court) to be familiar with arcane facts concerning the Cayuga Nation's restrictions on gambling. The law expressly abhors such

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v. Rolling Stone LLC, 872 F.3d 97, 101 (2d Cir. 2017) (fraternity with 53 members where all members were publicly implicated in a gang rape could maintain libel claim).

strained readings. Absent a clear and obvious defamatory meaning in the events depicted in the Episode, Plaintiffs' defamation claims fail.

A. The First Scene

Plaintiffs' opposition reaffirms that they only find defamatory meaning in the land deal statements by straining beyond what the characters in the Episode actually say and by relying on extrinsic facts – without pleading special damages.[5] Specifically, Plaintiffs contend that the fictional land deal at issue must necessarily involve the illegal sharing of gambling revenue. But this notion comes from Plaintiffs' imaginations, not from the Episode.

This conclusion is evident when one considers the facts at issue in the seminal Court of Appeals decision on defamatory meaning, *James v. Gannett Co.*, 40 N.Y.2d 415 (1976), inexplicably relied on repeatedly by Plaintiffs. Opp. 7, 9, 13. In *James*, the statement at issue from a non-fiction news article, was that plaintiff, a belly dancer, "admits 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.'" *James*, at 418. The plaintiff contended this statement was susceptible to the defamatory construction that she was a prostitute. *Id.* at 420. Although a woman who is a prostitute sells her time to "lonely men," the Court of Appeals noted that many professional women, including lawyers, also charge for their professional time. *Id.* at 421. Because women selling their time occurs both in the context of prostitution and in non-sexual contexts and the article did not go so far as to actually say that plaintiff sold anything more than her time, the

[5] Plaintiffs also rely on inapplicable dictionary definitions to support their misguided argument that the land "surrounding" and "around" the casino in fact refers to the land the casino is built on. Plaintiffs try to define "surrounding" as "to be closely related or connected to," while the very definition they cite makes it clear that the more common definition – especially in the spatial sense, is "to be on every side of" someone or something. Merriam-Webster Online Dictionary (2019), https://www.merriam-webster.com/dictionary/surrounding. Similarly, while Plaintiffs would define "around" as "so as to have a center or basis in," the dictionary they cite makes it clear that a more common definition is "on all sides of." https://www.merriam-webster.com/dictionary/around.

Court of Appeals declined to find the article was reasonably susceptible of the defamatory connotation that plaintiff was a prostitute. *Id.*

The Court of Appeals' reasoning in *James* dictates the dismissal of Plaintiffs' claim arising out of the First Scene in this action. Here, Plaintiffs' claim rests on Jane's observation that there would be no reason for the Cayuga Nation to help Chuck on the pilot voting program when it was previously "chiseled [by his father Charles] on a land deal surrounding the casino." Plaintiffs' claim turns on a much further attenuated reach than the possibility of prostitution that the language in *James* (in a non-fiction article) could suggest. Plaintiffs argue that this one sentence necessarily implies that the fictional land deal must have involved the sharing of gambling revenue with the Cayuga Nation. To the contrary, the most logical conclusion is that the Cayuga Nation was "chiseled" in the deal because Charles acquired the land at a low price by failing to disclose the impending casino license. When Charles' misdeeds were uncovered – namely that he gave the Cayuga Nation a bad deal on the land and even fathered a child with a Cayuga Nation member young enough to be his granddaughter – Jane was able to get Charles to "sweeten" the deal, i.e., that Charles would pay something closer to the actual value of the land had it been revealed that it would "surround[]" a casino. There is no reasonable basis for this Court to strain to find an "ongoing revenue stream" involving casino revenues, as Plaintiffs urge this Court to find. Opp. 9. And without such a statement, *James* mandates that this Court reject Plaintiffs' strained meaning.[6]

[6] Plaintiffs make clear in their opposition their view that the statements about the land deal are defamatory of the Cayuga Nation, and are thus *by extension* defamatory of Clint Halftown because he is a leader of the Nation. Opp. 10 ("And it would be damaging to Mr. Halftown's reputation and standing both with the Nation's citizens and the federal government."). As discussed above, a government official cannot bring a claim for defamation on the theory that a statement about the government of which he is part also harms him personally. *See supra* 4-5.

Even if the scene could imply that the Cayuga Nation was meant to share in the gaming revenue, it is an even further stretch to claim that sharing is illegal or otherwise wrong. In fact, Plaintiffs concede that ordinarily there is nothing defamatory about sharing in gaming revenue; it is just that "for the Nation, there is." Opp. 10. But that is only true for those that have a deep understanding of the complex legal and regulatory scheme surrounding Indian tribes' gaming operations set forth in Plaintiffs' Complaint. *Id.* Because Plaintiffs concede their defamation claim rests on these extrinsic facts, their claim here is unquestionably one for defamation per quod, for which Plaintiffs were required to plead special damages. *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 92-93 (1st Dep't 2015) ("The only way plaintiff alleges that these statements are susceptible to a defamatory meaning is by reference to extrinsic facts. No reasonable juror could interpret the alleged defamatory statements in the manner urged by plaintiff without knowing [employers' expectations for DJs at trendy clubs] . . . [thus] plaintiff is required to plead special damages"). But Plaintiffs do not deny that they have wholly failed to plead special damages. For this simple and independent reason, Plaintiffs' claim based on the First Scene must be dismissed.

Perhaps recognizing that their claim arising from the statements about the fictional land deal has no merit, Plaintiffs attempt to buttress their defamation claims by injecting into the analysis the "degrad[ing]" actions made by Charles. Thus, Plaintiffs chastise Defendants for "ignor[ing]" and not "attempt[ing] to justify the 'tasted the fruits of our tribe' degradation," but the contemptible behavior depicted is by Chuck's father, Charles, *not* the Cayuga Nation or Jane. Opp. 8. For this obvious reason, Plaintiffs never allege, nor could they, that Charles' impregnating a young tribal member (and not caring for his offspring) was defamatory of the Plaintiffs. Plaintiffs center their claims arising out of the First Scene on the language concerning

the "land deal," *see* Compl. ¶ 44, and, understandably, Defendants' motion does the same. As a matter of law, the Cayuga Nation and Clint Halftown cannot be defamed by a depiction of another person's bad behavior. *See*, *e.g.*, *Suozzi v. Parente*, 202 A.D.2d 94, 100 (1st Dep't 1994) (article was "rife with the suggestion of corruption" regarding plaintiff's brother but was not defamatory of plaintiff). The First Scene simply does not depict the Cayuga Nation or Jane in a defamatory way, and the claim based on this scene fails as a matter of law.

B. The Second Scene

Plaintiffs' misapprehension that mere proximity to another person's bad acts defames *them* carries over to their argument about the Second Scene. In the Second Scene, Jane and Chuck team up to put pressure on Commissioner Halloran to greenlight a pilot mobile voting program. There, it is Chuck – but not Jane – who has a private conversation with the commissioner and secretly hands him tickets to Aruba. As explained on this motion, Jane is applying political pressure to obtain greater voting access for her constituents – threatening that the Cayuga Nation will protest in "full regalia" and "stage a sit-in at your office" – and it is this perfectly legal political pressure that causes Halloran to agree to the pilot voting program. As is clear from the scene, it is only *after* Halloran has made this commitment that Chuck is depicted crossing the room to have a private conversation with Halloran and slipping him tickets to Aruba. Jane is *not* pictured in this exchange; Jane is *not* part of this conversation; and she is not otherwise depicted as participating in any way with Chuck's unethical behavior. Plaintiffs make no attempt to explain how a viewer is supposed to reasonably understand that Jane was party to Chuck's bad acts. Instead, Plaintiffs only note that "in reality, the scene paints a very different picture" but do not explain what that picture is. Opp. 13.

In the end, Plaintiffs resort to arguing that Jane is not as noble as Defendants claim. They claim that the fictional Jane character "colludes" with Chuck in order to get him to

"sweeten [her] piece," agreeing to a "*quid pro quo*" after "weaponizing" the young mother in the First Scene as "capital" to get the money the Cayuga Nation deserved on the land deal. Opp. 11, 13. But, the "*quid pro quo*" that Plaintiffs identify Jane partaking in – consistent with what is depicted in the Second Scene – is nothing more than threatening political action in order to achieve her tribe's goal to obtain the mobile voting program. There is nothing improper, let alone illegal, to raise the specter of a protest or a sit-in when negotiating for voting rights.[7] A simple viewing of the Second Scene readily reveals that Jane was not in any way complicit in Chuck's payoff of Halloran. The misdeeds depicted are misdeeds by Charles and his son, Chuck, not Jane. In other words, if *Billions* were depicting real events, involving real people – which it plainly is not – then the depiction of Charles and Chuck could be deemed defamatory of one or both of them. The depiction of Jane's conduct cannot reasonably be construed as defamatory per se.

Indeed, New York courts hold time and time again that "[i]n the absence of some clear assertion of criminality, accusations of the use of political influence to gain some benefit from the government," as Jane uses in *Billions*, "are not defamatory." *Arrigoni v Velella*, 110 A.D.2d 601, 603 (1st Dep't 1985). That is, even where the language at issue "may perhaps be susceptible of an interpretation that it charged plaintiffs with a crime and political corruption" the statements are still not defamatory where the criminality "is not at all clear." *Id.* at 602. The court's decision in *Greene v. Health & Hospitals Corp. of City of New York*, No. 113897/94, 1995 WL 661111, at *3 (Sup. Ct. N.Y. Cty. Mar. 23, 1995), is particularly instructive. There, the court found that a news article that made reference to "corruption," and "bid-rigging," only

[7] Charles impregnated a young woman and left her to raise the child on her own. He is the one with the misdeeds here. Jane's use of her clout to get Charles to pay for that conduct is not defamatory; it is not wrong – it is the right thing to do.

implied that the plaintiff "has various political connections and these connections helped him obtain [government] contracts." *Id.* But "[t]he use of political influence to advance one's interests or to enable one to reap a governmental benefit are not defamatory per se." *Id.* at *3. The court recognized that under well-settled law, "the beneficiary of the governmental benefit is not the party accused of criminality but rather the party charged with overseeing the alleged 'corruption.' Thus, Plaintiff would not be placed with those responsible for overseeing the bidding process, instead deemed a 'beneficiary' of the benefit." *Id.* (citing *Suozzi*, 202 A.D.2d at 100).

Here, fictional Jane is not responsible for greenlighting a voting project – she just uses the clout she has to try and get that benefit for her tribe. Similarly, Jane knows that Chuck wants her support to get the program greenlit. Rather than using the young mother as "capital," Jane takes the opportunity – the clout she has – to right a wrong and get the money the Cayuga Nation was owed on the land deal *and* to see that the young child is taken care of. There is nothing in the Episode to suggest that Jane's actions were criminal, and there most certainly is nothing expressly stated that supports any assertion of criminal acts. Without an accusation that any of Jane's actions is criminal, which *Billions* does not come close to making, the law is clear that Plaintiffs' strained interpretation of the Second Scene cannot support a defamation claim.

In sum, over the years, *Billions* has displayed almost all of the deadly sins – greed, adultery, envy and more. But those attributes are displayed by the main protagonists of the show – here, by Charles and his son. The portrayal of Jane in one episode shows nothing but a tribal member using the cards she has been dealt to get the money her tribe is owed on a land deal and greater access to voting for her constituents. To argue otherwise, Plaintiffs' claims rest on a strained and artificial construction of the Episode to establish defamation claims, which is

prohibited under New York law. Plaintiffs' defamation claims should be dismissed as they do not allege defamatory actions, especially in a fictional setting.

III.

THE CHALLENGED STATEMENTS DO NOT DEPICT FACTS ABOUT PLAINTIFF CLINT HALFTOWN

As Defendants explained in their moving papers, because this defamation action indisputably arises out of statements made in a fictional work with fictional characters, Plaintiffs are required to meet a "heightened standard" and must show not only that the Episode's depiction of the fictional Jane referred to Clint Halftown, but also that a reasonable viewer would perceive the Episode as conveying *actual facts* about Clint Halftown. Op. Mem. at 19-20; *Welch v. Penguin Books USA, Inc.*, 1991 N.Y. Misc. LEXIS 225, at *9-10 (Sup. Ct. Kings Cty. 1991). Plaintiffs do not challenge the burden they carry. Nor does Plaintiffs' opposition even begin to establish that viewers would reasonably understand Jane to actually be Plaintiff Clint Halftown or that the Episode is depicting actual facts about him.

On the first prong, relying on a long line of New York court cases, Defendants established that the Episode's depiction of Jane is not "of and concerning" Clint Halftown merely because the two share a last name and position – as a Cayuga Nation council member. Op. Mem. at 22-25 (citing cases). In response, Plaintiffs contend that all of these cases should be disregarded because a single federal district court observed that New York courts have not carved out consistent guidelines for how similar a plaintiff and a fictional character may be. Opp. 14-15. But Plaintiffs miss the point. Whether consistent guidelines are used or not, time and again courts in New York dismiss actions with facts virtually identical to those at issue here. Consider, for example, the First Department's holding that, despite plaintiff's status as the *only* psychiatrist named "Dr. Allen" in Manhattan, a fictional Manhattan psychiatrist named Dr. Allen

was not "of and concerning" plaintiff because in context there was nothing else to support a conclusion that the fictional Dr. Allen was real. *Allen v. Gordon*, 86 A.D.2d 514 (1st Dep't 1982); *accord Lyons v. New Amer. Lib.*, 78 A.D.2d 723 (3d Dep't 1980) (depiction of fictional sheriff in Malone, New York did not refer to only sheriff with an office in Malone). In short, the mere fact that Jane (a female) has the same last name and arguably the same position as Plaintiff Clint Halftown (a male) is not sufficient to state a claim in the context of the entirely fictional *Billions*. [8]

Turning to the second prong, even if Plaintiffs had established that there are more than superficial similarities between Jane and Clint Halftown, they have failed to sufficiently allege that the Episode's depiction of Jane would be understood by the average viewer as conveying actual facts about Clint Halftown. Plaintiffs argue that simply because Mr. Halftown is a real person, a viewer could reasonably conclude the Episode's depiction was factual. Opp. 16. But again Plaintiffs miss the point. Every plaintiff that brings a libel-in-fiction claim is a real person. Courts routinely recognize that it is entirely possible for a work to depict a real person, but not actually convey facts about them. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (parody depiction of Jerry Falwell would not be understood as conveying facts about him); *Frank v. Nat'l Broad. Co.*, 119 A.D.2d 252, 256, 261 (1st Dep't 1986) (even assuming Saturday Night Live skit depicted plaintiff, skit was obviously parody and no person would take the statements seriously).

Here, however, *Billions* and the Episode are pure fiction. Plaintiffs do not dispute that there is no blockchain mobile voting pilot program in New York, there is no casino in Kingsford,

[8] While Plaintiffs' claim that the name "Halftown" is "unique", Opp. at 16, the name is, in fact, a well-known name among Indian tribes dating back all the way to the days of George Washington. Indeed, a chief named "Half Town" was a signatory to a 1790 letter from the chiefs of the upstate New York Indian tribes to President George Washington. *See* Letter to George Washington From The Seneca Chiefs, 1 December 1790, Archives.gov, available at https://founders.archives.gov/documents/Washington/05-07-02-0005.

no town of Sandicot, no Commissioner Halloran whose wife misses her trip to Aruba, no Chuck, no Jock Jeffries, and no Charles who fathered a baby with a woman from the Cayuga Nation. In this context, what Plaintiffs were required to establish, but did not, is that the fictional depiction of Jane is so closely related to Plaintiff Clint Halftown that it "overcome[s]" the "fictional work's presumption that all the material is untrue." *Welch*, 1991 N.Y. Misc. LEXIS 225, at *9-10. This presumption can be overcome when there is a strong connection between the events in the fictional work and events relating to the actual plaintiff. This connection – entirely absent here – exists in every case Plaintiffs rely on. In *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966), for example, both the fictional character and the plaintiff had a Russian Protestant minister father, journeyed through Europe with their family of thirteen children ten of whom are boys, performed in a family band, among other similarities, and the author (plaintiff's brother) told plaintiff the book depicted their family. *Id.* at 651. In *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226 (E.D.N.Y. 2015), the plaintiff worked with the real "Wolf of Wall Street" and sued over the movie depicting a scandal in which he was actually involved. *Id.* at 229.

The *Batra* case, on which Plaintiffs also rely, illustrates this clear distinction and Plaintiffs' high burden. Evaluating a claim arising out of an episode of *Law & Order,* the court correctly noted that, "[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 of the plaintiff or suggestive of the plaintiff in significant ways. Identification alone is insufficient." The *Batra* court allowed the case to pass a motion to dismiss, but *only* because the episode was, in fact, "ripped from headlines" of an actual judicial bribery scandal in the Brooklyn Supreme Court in which the plaintiff – Ravi Batra – was "inextricably intertwined." Thus, "because of the widespread media coverage of the [judicial]

scandal, . . . it would be reasonable for a viewer to associate [plaintiff Ravi] Batra with [fictional Ravi] Patel." *Batra v. Wolf*, 2008 WL 827906 (Sup. Ct. N.Y. Cty. Mar. 14, 2008).

But the allegations here are nothing like *Batra* – or any of the cases that involve actual events. Here, there is no Charles, there is no young mother he left, and there is no threat of political action to achieve a mobile voting pilot program. Plaintiff Clint Halftown cannot claim that he was "inextricably intertwined" with any of the "scandals" portrayed in the Episode because the Episode is entirely fictional and not ripped from any headlines or even based on true events. Instead, this case is akin to the situation in *Lyons*, where plaintiff and the fictional character both were sheriffs in Malone, New York, but the plaintiff was not linked to the events depicted in the book at issue, or *Allen*, where the plaintiff had the same last name and same occupation, but otherwise had no connection to the events in the work. For those reasons, the courts found that no reasonable viewer could find that the fictional accounts in question conveyed facts about the plaintiff in those cases. *Lyons*, 78 A.D.2d 723; *Allen*, 86 A.D.2d 514. As in *Lyons* and *Allen*, Plaintiffs have not overcome the presumption that the Episode's portrayal of the fictional Jane could be viewed as conveying facts about Clint Halftown. Plaintiffs' defamation claims fail for this additional and wholly independent reason.

IV.

PLAINTIFFS' MISAPPROPRIATION CLAIMS FAIL AS A MATTER OF LAW

Finally, Plaintiffs concede that the only "misappropriation" cause of action they can have is under Section 51 of the New York Civil Rights Law ("Section 51"), yet they continue to press the claim without any support under the law applying Section 51.

First, Plaintiffs do not – and cannot – distinguish any of the First Department cases that hold time and again that a Section 51 claim cannot arise from works of fiction, like *Billions.* Op.

Mem. at 25-28 (citing cases).[9] Instead, they claim that the First Department "leaves open the door" by citing to a decades-old case that actually dismissed a Section 51 claim. Opp. 19 (citing *Stillman v. Paramount Pictures Corp.*, 2 A.D.2d 18 (1st Dep't 1956)). But, as the First Department more recently squarely held, "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'" for the purposes of Section 51. *Costanza*, 279 A.D.2d at 255 (refusing to apply statute to use of plaintiff's name in the *Seinfeld* television series); *see also Hampton*, 195 A.D.2d at 366. While the door may have been left open in 1956, that door is now firmly closed and has been for years. As Plaintiffs' Section 51 claim is predicated on the fictional Episode, their claim fails entirely for this reason alone.

Second, Plaintiffs have not rebutted Defendants' argument that their claim for misappropriation of Clint Halftown's likeness fails for the independent reason that the Episode does not use his name, portrait, picture, or voice. In response, Plaintiffs point to a case with entirely different facts, where the court found that the use of a specific, personal family crest in conjunction with the plaintiff's last name on commercial products, was a sufficient identification of the plaintiff to survive a motion to dismiss. *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 236 (Sup. Ct. N.Y. Cty. 1947). But such a highly particularized identification like a family crest – on merchandise no less – is not at issue here, and in the absence of such a specific identification, the First Department has upheld dismissals of Section 51 claims. See Op. Mem. 27. In *Allen*, 86 A.D.2d at 515, the case where the plaintiff and fictional character shared the same name and occupation, the First Department also affirmed dismissal of the Section 51 claim. Here, the

[9] Defendants also cite to a 1982 Second Department case observing that "[u]se for the 'purposes of trade' is not susceptible to ready definition." *Davis v. High Soc'y Magazine, Inc.*, 90 A.D.2d 374, 379 (2d Dep't 1982) (citations omitted). But the Second Department has subsequently followed the First Department's ruling in *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dep't 1993), that works of fiction and satire do not fall into the scope of Section 51. *Sondik v. Kimmel*, 131 A.D.3d 1041, 1042 (2d Dep't 2015) (dismissing Section 51 claim arising from use of plaintiff's image in a satirical piece on *Jimmy Kimmel Live*!) (citing *Hampton*, 195 A.D.2d at 366). Again, Plaintiffs' reliance on outdated authority cannot save their claim.

similarities parallel those in *Allen* – Clint and Jane share a last name, and are the only "Halftowns" who are members of the Cayuga Nation council. As in *Allen*, this is insufficient to identify Clint Halftown for purposes of establishing a Section 51 claim.[10]

CONCLUSION

For all the foregoing reasons, and the reasons stated in Defendants' Opening Memorandum, Defendants respectfully request that Plaintiffs' Complaint be dismissed with prejudice.

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Respectfully submitted,

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[10] Plaintiffs do not dispute that the Cayuga Nation cannot bring a misappropriation claim under Section 51, because N.Y. Civ. Rights Law § 51 limits the cause of action to appropriation of "the name, portrait or picture of any *living person*". This claim for misappropriation must also be dismissed.