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

PHOEBE JONAS,	:	Index No.: 155925/2018
Plaintiff,	:	Hon. Andrea Masley
-against-	:	Motion Seq. No. 1
	:	Date Returnable:
BAYER CORPORATION and BAYER U.S. LLC, d/b/a PHILLIPS',	:	September 21, 2018
Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

MINTZ & GOLD LLP
Steven G. Mintz
Ryan W. Lawler
Timothy J. Quill, Jr.
600 Third Avenue, 25th Floor
New York, New York 10016
Tel: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
lawler@mintzandgold.com
quill@mintzandgold.com

Attorneys for Plaintiff Phoebe Jonas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Plaintiff Phoebe Jonas ("Plaintiff" or "Ms. Jonas"), by and through her attorneys Mintz & Gold LLP, respectfully submits this memorandum of law in opposition to the motion of Defendants Bayer Corporation and Bayer U.S. LLC, d/b/a Phillips' (together, "Defendants" or "Bayer") to dismiss the Complaint pursuant to CPLR 3211.

PRELIMINARY STATEMENT

Defendants, members of a global conglomerate with vast advertising resources, unlawfully misappropriated the likeness of Ms. Jonas to sell their consumer products, in violation of Section 51 of the New York Civil Rights Law. Specifically, Ms. Jonas appeared for years in Defendants' commercials as the Phillips Lady, promoting their products in what became—thanks in no small part to Ms. Jonas—a wildly successful national advertising campaign. However, as the expiration of Defendants' right to feature Ms. Jonas in their commercials approached, they created a Bobblehead replica of Ms. Jonas, without her authorization, and used the Bobblehead version of her in their commercials instead. Apparently, Defendants decided that featuring a Bobblehead of Ms. Jonas in commercials was less expensive than continuing to compensate her for promoting Defendants' products. In short, Defendants wanted to continue to benefit from the goodwill that Ms. Jonas had developed with customers as the Phillips Lady, but they wanted to avoid the obligation to pay her fair compensation. Their solution? Create a Bobblehead replica of Ms. Jonas, thereby continuing their successful marketing campaign by exploiting her likeness at a cheaper rate.

Ms. Jonas, seeking to protect the means by which she earns a living as an actor, filed the instant lawsuit both to prevent Defendants from continuing to unlawfully misappropriate her likeness and to seek compensation for their use of her Bobblehead in their commercials.

Now, in a desperate attempt to avoid discovery and all-but-certain liability for their wrongful conduct, Defendants have filed a motion to dismiss in which they ask the Court to ignore established principles of law. Apparently unfamiliar with New York State practice, Defendants raise endless factual issues in their papers, disregarding the fundamental rule that questions of fact are for the factfinder, not the Court, and are inappropriate for a motion to dismiss.

Instead of making legal arguments, Defendants ask the Court to compare the features of Ms. Jonas and the Bobblehead and determine—as a matter of law—whether the Bobblehead resembles Ms. Jonas. But the Court's role, particularly at this stage of the case, is not to engage in a factual analysis to decide whether the Bobblehead and Ms. Jonas look alike. Further, Defendants resort to the submission of self-serving affidavits, which they remarkably ask the Court to consider as "documentary evidence." But the affidavits and other documents upon which Defendants rely fail to establish a defense as a matter of law. Indeed, their affidavits establish only that this case demands discovery. Moreover, Defendants lead with their chin because the case on which they rely as purported justification for ignoring fundamental legal principles is entirely distinguishable from the instant action and therefore does not support their argument.

The Court should not countenance Defendants' wrongful conduct and their feeble attempts to short-circuit the judicial process through a frivolous motion to dismiss. Defendants' motion should be denied.

BACKGROUND FACTS[1]

Plaintiff Phoebe Jonas is a professional actor who has appeared in major motion pictures, television shows, and numerous commercials which air in theaters, on television, over the internet, and in other forms of media. Compl. ¶¶ 5-6. Between 2016 and 2018, Ms. Jonas appeared as the "Phillips Lady" in numerous nationally-televised commercials promoting several products for Defendants, part of a global conglomerate with multiple affiliates. Compl. ¶¶ 2, 8. Because of her frequent appearances in Defendants' commercials, Ms. Jonas became known as the "Phillips Lady" to Defendants' customers and the general public. Compl. ¶ 9.

Defendants' right to run the commercials featuring Ms. Jonas as the Phillips Lady expired on March 28, 2018. Compl. ¶ 10. Rather than discontinuing use of the ads or renewing the parties' agreement, however, Defendants continued to use Plaintiff's commercials on their website without her consent for nearly a month, until April 20, 2018. Compl. ¶ 10. Meanwhile, at some point in January or February of 2018, unbeknownst to Plaintiff at the time, Defendants began airing a Phillips commercial featuring a bobblehead figure that looks identical to Ms. Jonas (the "Bobblehead"). ¶ 11. Defendants appear to have created and aired the commercials featuring the Bobblehead replica of Ms. Jonas in order to maintain brand continuity in their national advertising campaign for Phillips, while at the same time avoiding the obligation to compensate Ms. Jonas for the right to continue using her commercials. Compl. ¶ 12.

---

[1] The facts herein are adopted from the Complaint filed on June 25, 2018 (Dkt. 1) (the "Complaint" or "Compl."). Because this matter is before the Court on a motion to dismiss, these facts are to be accepted as true for purposes of Defendants' motion. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

On April 20, 2018, Defendants removed the commercial in which Ms. Jonas, herself, appeared from their website. Following a demand by Ms. Jonas and subsequent negotiations between the parties, Defendants paid Ms. Jonas for the improper use of her likeness in Phillips commercials between March 28, 2018 and April 26, 2018. Compl. ¶ 14. However, from April 20, 2018 through April 26, 2018, Defendants kept on their website a still image of Ms. Jonas from that same commercial – a still image which, when clicked by the viewer, immediately transitioned into a commercial featuring the Bobblehead. Compl. ¶ 16. Specifically, Ms. Jonas's face appeared as the cover image of a video on the Phillips main website and eight Phillips product webpages, but when the viewer clicked "play" on that video, the commercial featuring the Bobblehead replica of Ms. Jonas played. Compl. ¶ 16.

On April 26, 2018, Defendants removed the still image of Ms. Jonas from one of her commercials from the Phillips website, but did not remove the commercial featuring the Bobblehead look-alike of Ms. Jonas. Compl. ¶¶ 17-18. Accordingly, on May 18, 2018, Plaintiff sent Defendants a letter demanding that they remove the commercial and placing them on notice that their commercial featuring the Bobblehead replica of Ms. Jonas without her consent is an unlawful misappropriation of Ms. Jonas's likeness. Compl. ¶ 19. Despite Plaintiff's demand and her repeated objections to Bayer's unauthorized use of her likeness, Defendants have failed to remove the Bobblehead commercial from their website. Compl. ¶¶ 21-23. The commercial remains available on Defendants' website today, promoting for Defendants the same products Ms. Jonas previously promoted herself as the Phillips Lady. *Id.*

ARGUMENT

Section 51 of the New York Civil Rights Law provides, in pertinent part, "any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the

purposes of trade without . . . written consent . . . may sue and recover damages for any injuries sustained by reason of such use[.]" N.Y. Civ. Rights Law § 51 ("Section 51"). Thus, the statute protects hard-working actors from the efforts of multi-million-dollar companies who seek to exploit the actors' likenesses in order to increase sales and profits. Indeed, "the statute was born of the need to protect the individual from selfish, commercial exploitation of his personality." *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 358 (1952). Here, Ms. Jonas was the Phillips Lady in Defendants' national advertising campaign for more than two years. As the expiration of the contract permitting Defendants to use her in their advertisements approached, Defendants apparently decided that it would be less expensive to create a Bobblehead replica of Ms. Jonas for their commercials, rather than to continue paying her to appear as the Phillips Lady.

Recognizing that their actions are a perfect example of the "selfish, commercial exploitation" that Section 51 was enacted to prevent, Defendants now attempt to evade discovery and liability by moving to dismiss the Complaint. Defendants rely on two subsections of the CPLR in support of their motion to dismiss: CPLR 3211(a)(7), failure to state a cause of action; and CPLR 3211(a)(1), a defense founded on documentary evidence. As explained below, however, neither CPLR 3211(a)(7) nor CPLR 3211(a)(1) apply here. Therefore, Defendants' motion should be denied.

I. PLAINTIFF HAS STATED A VIABLE RIGHT TO PUBLICITY CLAIM UNDER NEW YORK CIVIL RIGHTS LAW SECTION 51

Defendants first argue that the Complaint fails to state a cause of action and should be dismissed under CPLR 3211(a)(7) because the Bobblehead replica of Ms. Jonas in Defendants' commercials is not Plaintiff's "name, portrait, picture or voice." *See* Dft. Memorandum of Law ("Dft. MOL") at 9. Defendants are simply wrong. Case law makes clear that a Bobblehead replica of Ms. Jonas provides as adequate a basis for a Section 51 claim as would an actual

picture. Indeed, the Court of Appeals first held more than a century ago that "[a] picture within the meaning of [Section 51] is not necessarily a photograph of the living person, but includes any representation of such person." *Binns v. Vitagraph Co. of America*, 210 N.Y. 51, 57 (1913) (emphasis added). Relying on *Binns*, the Supreme Court, New York County, held in 1941 that the creation of a mannequin in plaintiff's likeness supported a Section 51 claim:

> The statute is not confined to the use of photographs. The words "picture" and "portrait" are broad enough to include any representation, whether by photograph, painting or sculpture. The use of a three-dimensional representation is just as violative of the statute as that of a two-dimensional one.

Young v. Greneker Studios, Inc., 175 Misc. 1027, 1028, 26 N.Y.S.2d 357, 358 (Sup. Ct., N.Y. Co. Mar. 25, 1941) (emphasis added).

Even the case law Defendants cite in their motion papers recognizes that the "name, portrait, picture, or voice" language of Section 51 is broad enough to encompass any identifiable representation of Ms. Jonas. In *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111 (2018), which Defendants rely on throughout their brief, the New York Court of Appeals noted "that the term 'portrait' embraces both photographic and artistic reproductions of a person's likeness," and concluded that "an avatar may constitute a 'portrait' within the meaning of Civil Rights Law article 5." *Lohan*, 31 N.Y.3d at 121-22 (citations omitted). In *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008), which Defendants also repeatedly cite, the court explained:

> Over the years there has been much litigation over what constitutes a person's "portrait" or "picture" for purposes of sections 50 and 51. It is settled that any recognizable likeness, not just an actual photograph, may qualify as a portrait or picture.

Burck, 571 F. Supp. 2d at 451 (internal quotations and citation omitted); *see Allen v. National Video, Inc.*, 610 F. Supp. 612, 622 (S.D.N.Y. 1985) ("A painting, drawing or [mannequin] has no

existence other than as a representation of something or someone; if the subject is recognizable, then the work is a 'portrait.'"); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (noting that the phrase "portrait or picture," as used in Section 51, "is not restricted to photographs, . . . but generally comprises those representations which are recognizable as likenesses of the complaining individual.") (citations omitted).

Therefore, notwithstanding Defendants' assertions to the contrary, alleging "likeness"—whether in the form of an avatar, a mannequin, or, in this case, a Bobblehead—is sufficient to state a claim for relief under Section 51. Including the precise terms "name," "portrait," "picture," or "voice" is not a necessary condition to asserting a viable claim. Accordingly, Defendants' argument—that Ms. Jonas does not specifically allege use of her name, portrait, picture, or voice—easily can be rejected and does not provide a ground on which to dismiss the Complaint.[2]

II. THE COURT SHOULD REJECT DEFENDANTS' IMPROPER REQUEST TO RESOLVE QUESTIONS OF FACT ON A MOTION TO DISMISS

In ruling on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must "accept the facts [] alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Thus, factual disputes are not

[2] Nonetheless, if the Court determines that Plaintiff's Complaint is deficient because it does not expressly allege that Defendants used Ms. Jonas's "portrait" or "picture," Plaintiff is prepared to amend the Complaint to include those magic words. As the Court is aware, Plaintiff may amend her Complaint, as of right, within twenty days after Defendants file their answer. CPLR 3025(a).

appropriate subjects for a motion to dismiss. If there is any material factual dispute between the parties, a CPLR 3211(a)(7) motion must be denied. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 318 (1995) ("If we determine [on a motion to dismiss] that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient.").

Defendants, apparently unfamiliar with New York State practice, ask the Court to disregard this basic principle and ignore the current procedural posture of the litigation. In their motion to dismiss, they ask the Court to decide, as a matter of law, a clearly factual question – whether the Bobblehead resembles Ms. Jonas.

A. Whether The Bobblehead Resembles Ms. Jonas Is A Question Of Fact

Defendants' argument for dismissal stems from the flawed premise that whether the Bobblehead sufficiently resembles Ms. Jonas is a question of law for the Court to decide, rather than an issue of fact for a jury. *See* Dft. MOL at 8, 10-14. Based on that premise, Defendants contend that it is the Court, rather than a jury, that should compare the facial features and characteristics of the Bobblehead and Ms. Jonas – and that such a comparison should be done at the motion to dismiss stage, rather than at summary judgment or trial. In advancing this position, Defendants seek to reverse the typical roles of a court and a factfinder. Even *Lohan v. Take-Two Interactive Software, Inc.*—the New York Court of Appeals case which Defendants cite nearly a dozen times in their brief—recognizes that "[w]hether an image or avatar is a 'portrait' because it presents a 'recognizable likeness' typically is a question for a trier of fact." *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 122 (2018) (quoting *Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 384 (1984)) (emphasis added). Thus, the question Defendants ask this Court to decide as a matter of law—whether the Bobblehead constitutes a "recognizable likeness" of Ms.

Jonas—generally is not an appropriate subject for a motion to dismiss. This alone warrants denial of Defendants' motion.

Defendants lead with their chin, grounding their specious argument on a case that has nothing to do with the facts Plaintiff alleges here. Specifically, in support of their motion, Defendants rely almost entirely on the Court of Appeals' decision in *Lohan*. But the underlying facts in *Lohan* are fundamentally different from those in the instant action, and the analysis that led the Court of Appeals to dismiss the complaint in *Lohan* has no application here. In *Lohan*, the plaintiff, celebrity Lindsey Lohan, alleged that the defendants, producers of a video game, misappropriated her likeness for a character in the game. Screens in the video game contained images of "a blonde woman . . . in denim shorts, a fedora, necklaces, large sunglasses, and a white T-shirt" and "wearing a red bikini and bracelets, taking a 'selfie' with her cell phone, and displaying the peace sign with one of her hands." *Lohan*, 31 N.Y.3d at 118. In addition to the two images appearing in the video game itself, the images also were included on various promotional materials. *Id.* Lohan alleged that the character in the images was her "look-a-like," and that the images cumulatively evoked her "images, portrait, and persona." *Id.*

Although the Court of Appeals acknowledged the general rule that whether a depiction sufficiently resembles a plaintiff is a factual question, the *Lohan* court held that the images in the video game were an exception to the general rule, finding, as a matter of law, that the video game character was "not recognizable" as the plaintiff. *Lohan*, 31 N.Y.3d at 122. The video game's "artistic renderings [were] indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman that [were] not reasonably identifiable as [Lindsey Lohan]." *Id.* at 121. Rather than a depiction of a specific person, the character in the

video game was "merely . . . a generic artistic depiction of a 'twenty something' woman without any particular identifying physical characteristics." *Id.* at 122-23.

Critically, in reaching its conclusion that the complaint should be dismissed, the Court of Appeals in *Lohan* relied on the undisputed facts that the defendants did not refer to the plaintiff, did not use her name, and did not use her photograph. *Lohan*, 31 N.Y.3d at 123. The absence of any specific prior dealings between Lohan and the video game had led the Appellate Division, First Department, to reach the same conclusion two years earlier. *See Gravano v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776, 777 (1st Dep't 2016) (noting that defendants "never used [Lindsey Lohan] herself as an actor for the video game"). Thus, in *Lohan*, the plaintiff had never been hired to appear in the video game, and never interacted with and never had any identifiable relationship with the defendant video game producers. She was effectively a stranger to the defendants and the video game they produced, and thus no reasonable factfinder could conclude that the video game character represented Lindsey Lohan.

The facts in the instant case are strikingly different from those in *Lohan*. Here, Ms. Jonas is not a stranger to Defendants nor to the Phillips commercials in which the Bobblehead appears. To the contrary, Ms. Jonas was hired by Defendants and appeared in several commercials in Defendants' national advertising campaign over the course of more than two years as the Phillips Lady. Compl. ¶¶ 8, 10. Further, Ms. Jonas appeared in Defendants' commercials as the Phillips Lady during the period immediately before, and even during, Defendants' use of the Bobblehead in its commercials. Compl. ¶¶ 11-12, 16. And if that were not enough, for at least six days in April 2018, Defendants used a still image of Ms. Jonas's face on the Phillips website immediately before the Bobblehead commercial began playing. Specifically, Ms. Jonas's face

appeared as the cover image of a video on Defendants' website, but when the viewer clicked "play" on that video, the Bobblehead commercial played. Compl. ¶ 16.

Accordingly, the very reason that *Lohan* was an exception to the general rule—the absence of any nexus between the alleged portrait of the plaintiff in the video game and the plaintiff herself—does not apply here. In *Lohan*, the Court of Appeals ruled that there was no basis for a factfinder to conclude that the character in the video game could be identified as Lindsey Lohan because there was no nexus between the video game and Ms. Lohan. Here, in contrast, a factfinder easily could conclude that the Bobblehead is identifiable as Ms. Jonas, because Ms. Jonas played the Phillips Lady before Defendants replaced her with the Bobblehead. Indeed, given Defendants' use of Ms. Jonas's still image on the Phillips website and the seamless transition from Ms. Jonas's image into a commercial featuring the Bobblehead identical to Ms. Jonas, it would be reasonable for a factfinder to conclude that it was Defendants' very intent for potential Bayer customers to identify the Bobblehead as Ms. Jonas. That way, Defendants could exploit the goodwill that Ms. Jonas had developed with customers during the time she served as the face of Phillips products, even after the contract permitting Defendants to use Ms. Jonas's likeness to sell their products had expired.

The facts in *Lohan* are further distinguishable from those in the instant case because the Bobblehead replica of Ms. Jonas has detailed facial features and characteristics, unlike the image in the video game. As noted above, the "artistic renderings" in *Lohan* were "indistinct," merely representing a "'twenty something' woman without any particular identifying physical characteristics." *Lohan* at 121, 123. Effectively, Lohan argued that the character in the video game must be her merely because the character was blonde and wore the same color bikini as Lohan.

Here, in contrast, the Bobblehead has specific facial features and characteristics that are identical to those of Ms. Jonas.[3] That is not at all surprising, as we expect discovery in this case will yield documents proving that Defendants created the Bobblehead in Ms. Jonas's image in order to maintain brand continuity in their advertising campaign. In any event, the similarities between the Bobblehead and Ms. Jonas, and the question whether Defendants modeled the Bobblehead after Ms. Jonas, are factual matters that will be developed during discovery. Such arguments can, and should, be presented to a factfinder after the parties have engaged in discovery; they should not be considered by the Court on a motion to dismiss.[4]

In arguing that the Bobblehead does not look sufficiently like Ms. Jonas to support Plaintiff's claim, Defendants also rely on *Burck v. Mars, Inc.*, 571 F.Supp.2d 446 (S.D.N.Y. 2008). However, that case, like *Lohan*, is inapposite. In *Burck*, the court dismissed a Section 51

---

[3] Defendants spill lots of ink on pages 9 through 14 of their brief, comparing the Bobblehead to Ms. Jonas, arguing that it is not recognizable as her, and arguing that it was not modeled after her, but rather was modeled after a random employee of their advertising agency. All of these arguments are meaningless for purposes of Defendants' motion because they raise factual questions that cannot be decided at this stage of the case.

[4] Defendants complain that Ms. Jonas's pleading does not include photographs and does not allege which "specific features" are shared by Ms. Jonas and the Bobblehead. *See* Dft. MOL at 14. This argument is easily dispensed with. New York follows the notice pleading standard, *see* CPLR 3013, and Defendants do not cite a single case suggesting that either a photograph of the plaintiff or an itemized list of characteristics the plaintiff shares with the portrait must be included in a complaint in order to sufficiently state a Section 51 claim.

claim by New York City's famous "Naked Cowboy" arising out of an advertisement for M & Ms in which a blue M &M appeared in the Naked Cowboy's costume. The court found that the M & M did not constitute a portrait of the Naked Cowboy because "no viewer would have thought that the M & M Cowboy characters were actually [the plaintiff] or were intended to be him." *Burck*, 571 F.Supp.2d at 452.

Here, in contrast, it appears that Defendants' objective was to convince viewers and potential Phillips customers that the Bobblehead was intended to be Ms. Jonas.[5] Lest there be any doubt that this was Defendants' intent, the Court need only look to Defendants' actions. As noted above, between April 20, 2018 and April 26, 2018, Defendants' website included a video of the Bobblehead commercial, a video whose cover image was a screenshot of Ms. Jonas as the Phillips Lady. Clearly, then, Defendants' purpose was to encourage potential Phillips customers to believe that the Bobblehead was representative of Ms. Jonas and that Ms. Jonas was still the Phillips Lady. To that end, Ms. Jonas's claim is not merely that the Bobblehead is dressed like

[5] Not only was this Defendants' apparent objective, but their effort appears to have been effective because at least some viewers of the commercial featuring the Bobblehead believe that it was intended to be Ms. Jonas. Several witnesses are willing to submit affidavits stating that when they saw Defendants' commercial, they recognized the Bobblehead as Ms. Jonas. We have not included those affidavits in our opposition papers as the procedural posture of this case is a motion to dismiss. However, if the Court believes those affidavits would be helpful in reaching a decision on Defendants' motion, we are more than happy to submit them.

her (as the court found was the case in *Burck*), but rather that the Bobblehead looks like her and was created by Defendants to represent her. Thus, *Burck* does not help Defendants' argument.[6]

In sum, because the facts in *Lohan* and *Burck* are distinguishable from those here, there is no reason for the Court to depart from the general rule in this case. Determining whether the Bobblehead presents a recognizable likeness to Ms. Jonas is a question of fact, not a question of law, and therefore Defendants' motion to dismiss should be denied.

B. Defendants' Submissions Do Not Constitute Documentary Evidence

As explained in Section II.A, *supra*, Defendants' motion to dismiss should be denied because it rests on factual arguments that are inappropriate at this stage of the litigation. But their motion should be denied for an additional reason – the purported "documentary evidence" upon which they rely to support their factual averments is also insufficient. Although Defendants contend that the Complaint should be dismissed pursuant to CPLR 3211(a)(1) because they have a defense purportedly founded upon documentary evidence, none of the documents Defendants have submitted in support of their motion constitute documentary evidence under the CPLR.

A motion to dismiss premised on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's allegations, conclusively

[6] Defendants also cite *Burck* to support their argument that "New York law does not recognize right of publicity claims based on claimed rights in fictional characters." This argument, however, is simply a red herring. *See* Dft. MOL at 15. Unlike the plaintiff in *Burck*, who sought to recover for Mars, Inc.'s use of his trademarked character, the "Naked Cowboy," Ms. Jonas is not claiming rights in a character. Rather, she seeks to recover for Defendants' unauthorized exploitation of her likeness in commercials to sell Phillips products.

establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *see Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dep't 2004) ("Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.") (internal quotations and citations omitted).

Again, apparently unfamiliar with New York State court practice, Defendants rely on various documents that are not appropriate submissions on a pre-answer motion. For example, the self-serving Affidavits of Kathryn Gilson and Thomas Moody are meaningless for purposes of their 3211(a)(1) motion to dismiss. The affidavits are testimonial in nature and cannot "utterly refute" an allegation because deciding their accuracy relies on a determination of the credibility of the affiant. Thus, it is well-settled that affidavits do not constitute documentary evidence. *See, e.g.*, *Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 432 (1st Dep't 2014) ("affidavits that do no more than assert the inaccuracy of plaintiffs' allegations . . . may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint") (quotations and citations omitted); *Fontanetta v. Doe*, 73 A.D.3d 78, 86 (2d Dep't 2010) ("[I]t is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss."); *Crepin v. Fogarty*, 59 A.D.3d 837, 838 (3d Dep't 2009) ("affidavits submitted by a defendant do not constitute documentary evidence upon which a proponent of dismissal can rely") (citations omitted). Similarly, Defendants provide images of the Bobblehead, Ms. Jonas, and Ms. Shea solely for the purpose of convincing the Court that the Bobblehead looks less like Ms. Jonas than Ms. Shea. As noted in Section II.A, *supra*, however, comparing images is a task for a finder of fact, not a question of law for the Court.

Finally, Defendants rely on a release which Defendants contend permits their advertising agency to model a Bobblehead after Haydee Shea (the "Shea Release"). The Shea Release, however, also fails to meet the standard of documentary evidence because it does not "conclusively establish a defense as a matter of law." *Goshen*, 98 N.Y.2d at 326. The mere fact that Ms. Shea may have signed a release does not prove that Defendants actually used Ms. Shea as a model for the Bobblehead pursuant to that release. And it certainly does not "utterly refute" Plaintiff's allegation that Defendants modeled the Bobblehead after and intended it to look like Ms. Jonas. *Id.*

From Plaintiff's perspective, the idea that the Bobblehead was modeled after Ms. Shea (a randomly selected employee of Defendants' advertising agency), rather than Ms. Jonas (the woman who appeared as the Phillips Lady in Defendants' commercials for more than two years) is patently absurd. But the only way for Plaintiff to prove that Ms. Jonas was, in fact, the basis for the Bobblehead is through discovery. The Court should reject Defendants' feeble attempts to dispose of this case before Plaintiff is able to obtain discovery to prove her allegations. Defendants' motion to dismiss should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully submits that Defendants' motion to dismiss must be denied.

Dated: New York, New York
September 5, 2018

MINTZ & GOLD LLP

By: _____
Steven G. Mintz, Esq.
Ryan W. Lawler, Esq.
Timothy J. Quill, Jr., Esq.

600 Third Avenue, 25th Floor
New York, NY 10016
Tel: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
lawler@mintzandgold.com
quill@mintzandgold.com
Attorneys for Plaintiff

To (via ECF):

ARNOLD & PORTER KAYE SCHOLER LLP
Paul C. Llewellyn
250 West 55th Street
New York, NY 10019-9710
(212) 836-7828
(212) 836-6463
paul.llewellyn@arnoldporter.com
Attorneys for Defendants