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

PHOEBE JONAS, Plaintiff, –against– BAYER CORPORATION and BAYER U.S. LLC, d/b/a PHILLIPS', Defendants.	Index No. 155925/2018 Motion Sequence

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Bayer Corporation and Bayer U.S. LLC, d/b/a/ Phillips' (together "Defendants" or "Bayer") move to dismiss with prejudice the Complaint of Plaintiff Phoebe Jonas for failure to state a cause of action, pursuant to sections 3211(a)(1) and (a)(7) of the New York Civil Practice Law & Rules ("CPLR").[1]

PRELIMINARY STATEMENT

This is a clear cut case of mistaken identity and overreach. Since 2008, Bayer Consumer Health, a division of Bayer Corporation has used advertising to promote its Phillips brand products featuring a so-called "Phillips' Lady," represented by several actors, as well as a "bobblehead," a popular type of plastic figurine. Starting in 2015, Plaintiff played the Phillips' Lady in approximately four commercials that Phillips' used (after another actor had played the Phillips' Lady in nearly 20 commercials). Plaintiff now wrongly asserts that Defendants' subsequent use of this bobblehead in a television commercial violates her right of publicity or privacy because, according to Plaintiff, the bobblehead is a "replica" of her—but fails to allege, as Civil Rights Law §§ 50 and 51 require, that Defendants used her "picture," "portrait," "name" or "voice."

Tellingly, Plaintiff's complaint does not include *any* images of Plaintiff, or of the supposed "replica" bobblehead, for side-by-side comparison. And this is no surprise. Upon examination, it is clear that Ms. Jonas is not "recognizable" from the bobblehead, as is required under Sections 50 and 51 of the Civil Rights Law. *See Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 395-96 (N.Y. 2018). The Court can make this determination on this motion

[1] In support of their motion, in addition to this memorandum of law, Defendants submit the accompanying Affidavit of Thomas Moody, Senior Brand Manager of Defendants' Phillips' Brand ("Moody Aff."), Affidavit of Kathryn Gilson, Client Services Director of Defendants' advertising agency Hogarth Worldwide Ltd. ("Gilson Aff."), and Affirmation of Paul C. Llewellyn, Esq. ("Llewellyn Aff.").

to dismiss, just as the Court of Appeals recently did in dismissing a right of publicity claim after undertaking an evaluation of the "quality and quantity of the identifiable characteristics' present in the purported portrait." *Lohan*, 97 N.E.3d 389 at 395.

The bobblehead in fact was modeled upon another person, Ms. Haydee Shea, who provided her consent to use her appearance and who does not look anything like Ms. Jonas. A comparison of the bobblehead to Ms. Jonas confirms that the bobblehead resembles Ms. Shea and, at most, there is generic similarity (*e.g.*, female) of precisely the type that the Court of Appeals held in *Lohan*, only a few months ago, is insufficient as a matter of law to state a claim under Sections 50 and 51 of the Civil Rights Law.

In effect, Plaintiff is seeking to assert purported rights in the Phillips' Lady character which she represented in a handful of commercials for Bayer's longstanding advertising campaign. It is settled Civil Rights Law that such a claim is prohibited. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 453 (S.D.N.Y. 2008). Nor would such a claim make any sense: For the past ten years, Defendants have marketed their Phillips' brand products by using the Phillips' Lady character that they created. Until 2015, and in at least eighteen commercials, the Phillips' Lady was played by an actor named Marge Royce. Ms. Royce died in 2015, and Plaintiff stepped into the role for a handful of commercials. Still another actor plays the Phillips' Lady on videos on Defendants' website. If anyone is identified as the Phillips' Lady, it is Ms. Royce, who appeared in the role in more than four times as many commercials as Plaintiff. And, should there be any doubt that Ms. Jonas does not own the Phillips' lady role, her agreements with Defendants' advertising agencies expressly state that she does not.

In sum, Ms. Jonas' Sections 50 and 51 claim fails as a matter of law for several independent reasons and, thus, should be dismissed by this Court.

As for Plaintiff's unjust enrichment claim, which is premised on the same allegations as her right of publicity claim, it is settled that such a claim is preempted by Sections 50 and 51. *See, e .g, Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 365 (S.D.N.Y. 1988). In any event, New York has never recognized a common law right to privacy or publicity.

On the face of the Complaint and by virtue of the undisputed facts shown in the documents submitted by Defendants, it is clear that both of Plaintiff's claims fail. Moreover, there is no conceivable argument that could fix the defects in these claims. Accordingly, the Court should dismiss the Complaint with prejudice.

FACTUAL BACKGROUND

A. The Filing of the Summons and Complaint

On June 25, 2018, Plaintiff filed the Complaint in this action, alleging a single claim under Civil Rights Law Sections 50 and 51, as well as an unjust enrichment claim. *See* Llewellyn Aff. Ex. A. Ms. Jonas thereafter served the Complaint on both Defendants on July 2, 2018.[2]

B. Ms. Jonas' Allegations

Ms. Jonas is a professional actor who worked with Defendants as the Phillips' Lady in their advertisements from June 2016 to March 2018. Compl. ¶¶ 5, 8. According to the Complaint, Ms. Jonas "became known as the Phillips' Lady due to her frequent appearances in Bayer commercials." *Id.* ¶ 9. (In fact, as explained below, Jonas was only one of multiple actors who has played the role, appearing in four of over 20 Phillips' Lady commercials.) After Plaintiff's contract for the Phillips' Lady commercials expired, Defendants began using in their

[2] Counsel for the parties agreed by written stipulation that Defendants would file by August 13, 2018 to respond to the Complaint. Llewellyn Aff., Ex. B.

Phillips' advertisements a bobblehead that, according to the Complaint "looks identical to Plaintiff." *Id.* ¶¶ 10, 11.

The crux of Ms. Jonas' Complaint appears to be that Defendants created a "Bobble Head replica of Plaintiff without her consent . . . [and, by use of the bobblehead,] knowingly and willfully used Plaintiff's likeness without consent, permission or authority." *Id.* ¶ 28. The Complaint does not provide the Court with any images of Ms. Jonas or the allegedly "identical" bobblehead.[3]

After discovering Defendants' use of the bobblehead, Ms. Jonas sent a demand letter to Defendants in which Ms. Jonas claimed Defendants were using her likeness without her consent and demanded that the use of the bobblehead cease. *Id.* ¶ 19. Defendants did not cease use of the bobblehead in their advertisements, leading to the commencement of this suit. *Id.* ¶¶ 19, 21.

Ms. Jonas' first cause of action claims that Defendants' use of the bobblehead in advertisements is a violation of Sections 50 and 51. *Id.* ¶ 26. Ms. Jonas' second cause of action is a common law unjust enrichment claim based on the same allegations regarding Defendants' use of the bobblehead. *Id.* ¶¶ 39-42.

[3] The Complaint also contains certain allegations regarding Defendants' alleged continued use of commercials in which Ms. Jonas actually appeared, beyond the alleged agreed-upon term. *See, e.g.,* Compl. ¶¶ 10, 13-16. The allegations in the Complaint's Causes of Action, however, are limited to the use of the bobblehead. Moreover, any claims arising from or in connection with the Standard Employment Contract for Television Commercials that Ms. Jonas entered into for her performances in Bayer's television commercials would be "subject to arbitration as provided in the SAG/AFTRA Commercials Contracts." *See* Standard Provision 4 in Moody Aff. Ex. 4, and Gilson Aff. Exs. 1 & 2. The Complaint does not assert any claims relating to the use of Ms. Jonas's actual image from her performances for Bayer's television commercials. In the event that Plaintiff *does* rely on any such alleged uses in this case, or otherwise asserts claims arising from or in connection with the Standard Employment Contracts for Television Commercials to which Ms. Jonas is a party, Defendants reserve the right to move to compel arbitration pursuant to the agreements.

C. Additional Documentary Evidence Before The Court

With this motion, Defendants also submit affidavits from Kathryn Gilson of Hogarth Worldwide Ltd., the agency that created two of the Phillips' Lady television commercials featuring Plaintiff and also created the commercial featuring the bobblehead; and Thomas Moody, Senior Brand Manager of Defendants' Phillips' brand. These affidavits provide documentary evidence including, among other things, a history of the Phillips' Lady advertising campaign, featuring various actors representing the Phillips' Lady; Ms. Jonas' agreements relating to her work on Phillips commercials; images of Ms. Jonas from Phillips commercials; an image of the at-issue bobblehead from a Phillips commercial; and an image of the person upon whom the bobblehead was modeled, Haydee Shea, as well as Ms. Shea's written consent. This documentary evidence confirms that Plaintiff's claims are without merit.[4]

The Moody Affidavit shows Ms. Jonas was only one of multiple Phillips' Ladies, and provides images from various Phillips' advertisements. Moody Aff. ¶¶ 2-4, 6 & Exs. 1-3, 5. In particular, it cannot be disputed that Ms. Jonas appeared in only four Phillips commercials, *after* another actor had appeared in at least eighteen commercials. Moody Aff. ¶¶ 2-4 & Ex. 3. The Gilson Affidavit confirms that the bobblehead was not modeled on Ms. Jonas' appearance, but instead on the appearance of third party, Haydee Shea, who signed an Image and Likeness

[4] On a motion to dismiss pursuant to CPLR 3211(a)(1) or (7), "it is undisputed that the Court . . . may consider documents referred to in a Complaint" (*Deer Consumer Prods., Inc. v. Little*, No. 650823/2011, 2011 WL 4346674, at *4 (Sup. Ct., N.Y. Cnty. Aug. 31, 2011)), as well as "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 Inc.*, No. 007686-04, 2006 WL 1408419, at *2 (Sup. Ct., Nassau Cnty. May 23, 2006) (internal quotation omitted); 6A CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS, § 38:161 (2011) ("[O]n a motion to dismiss the complaint for failure to state a cause of action, the court is not limited to a consideration of the pleading itself, but may consider extrinsic matters submitted by the parties in disposing of the motion.").

Release in which she consented to the creation and use of the bobblehead that embodies her image. Gilson Aff. ¶¶ 6-8 & Exs. 4, 5, 6. Photos in the affidavits demonstrate that the bobblehead is not a portrait or picture of Plaintiff, but of Ms. Shea. *See* Gilson Aff., ¶ 9 & Exs. 3, 4, 5; Moody Aff. Ex. 2. And, Ms. Jonas' agreements relating to the Phillips commercials in which she appeared explicitly state that Ms. Jonas does not own any right in the commercials or in any role created by the producer of the commercials. Moody Aff., Ex. 4, p. 2; Gilson Aff., Ex. 1, p. 2 & Ex. 2, p.2.

LEGAL STANDARD

Under CPLR 3211(a)(1), dismissal is warranted "where documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense." *Zanett Lombardier, Ltd. v. Maslow*, 815 N.Y.S.2d 547, 548 (1st Dep't 2006). Under CPLR 3211(a)(7), a claim will be dismissed if "the plaintiff has not stated a claim cognizable at law" or "failed to assert a material allegation necessary to support the cause of action." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 26 (1st Dep't 2014).

Although a motion to dismiss under CPLR 3211 is generally decided based upon the allegations of a complaint, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v. Chi. Tribune-N.Y. News Syndicate*, 612 N.Y.S.2d 146, 146–47 (1st Dep't 1994); *accord Godfrey v. Spano*, 920 N.E.2d 328, 334 (N.Y. 2009); *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996). The moving party may "submit evidence in support of the motion attacking a well-pleaded cognizable claim." *Basis Yield Alpha Fund*, 980 N.Y.S.2d at 134; *accord Wilhelmina Models, Inc. v. Fleisher*, 797 N.Y.S.2d 83, 85 (1st Dep't 2005) ("Factual allegations presumed to be true on a motion pursuant to CPLR 3211 may

properly be negated by affidavits and documentary evidence."). Further, on a motion to dismiss, the Court may review images of the plaintiff and the accused material and decide Sections 50 and 51 claims on the pleadings, as the Court of Appeals recently did in *Lohan*, 97 N.E.3d at 395−96.

ARGUMENT

Civil Rights Law Sections 50 and 51 codify the torts relating to the right of privacy and publicity and eliminate any common law right to privacy or publicity; therefore, Sections 50 and 51 provide the only remedy for such claims. *Burck*, 571 F. Supp. 2d at 450. As applicable here, Section 51 of the New York Civil Rights Law ("Section 51") provides:

> Any person whose ***name, portrait, picture or voice*** is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in Section 50] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use[.]

N.Y. Civil Rights Law § 51 (emphasis added).[5] To adequately state a Section 51 claim, "a plaintiff must prove: (1) use of plaintiff's name, portrait, picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent and (4) within the state of New York[.]" *Lohan*, 97 N.E.3d at 394.

What is more, as the Court of Appeals recently held, "there can be no appropriation" under Sections 50 and 51 if plaintiff:

[5] Section 50 of the Civil Rights Law, although cited in the Amended Complaint along with Section 51, does not provide a private right of action. Rather, it authorizes criminal prosecution for unauthorized use by the appropriate authorities, and is inapplicable here. *See Mother v. The Walt Disney Co.*, No. 103662/2012, 2013 WL 497173, at *1 (Trial Order) (Sup. Ct., N.Y. Cnty. Feb. 6, 2013); N.Y. Civ. Rights Law § 50 (making it a misdemeanor to use a person's name, portrait or picture without consent for purposes of trade or advertising). "Section 51 creates a cause of action for the invasion of the 'right of privacy' granted by section 50." *Burck*, 571 F. Supp. 2d at 451.

> is not recognizable from the [image in question]. . . . [B]efore a factfinder can decide that question, there must be a basis for it to conclude that the person depicted 'is capable of being identified from the advertisement alone' as plaintiff. That legal determination will depend on the court's evaluation of the 'quality and quantity of the identifiable characteristics' present in the purported portrait.

Lohan, 97 N.E.3d at 395 (citing *Cohen v. Herbal Concepts,* 472 N.E.2d 307, 309 (N.Y. 1984)) (alterations in original).

Here, dismissal is required under section 3211(a)(7) of the CPLR for failure to state a cause of action, and under section 3211(a)(1), based upon documentary evidence, *i.e.*, documents confirming that the Plaintiff is not recognizable from the bobblehead, that the bobblehead actually is based upon another person, and that Plaintiff cannot claim any rights to the character of the Phillips' Lady. None of the defects in the Complaint can be cured, making dismissal with prejudice appropriate. *See Abakporo v. Daily News*, 102 A.D.3d 815, 817 (2d Dep't 2013) (affirming dismissal of claim under N.Y. Civ. Rights Law Section 51, and denying leave to replead because plaintiff's proposed repleading was "palpably insufficient as a matter of law and [] totally devoid of merit").

I. PLAINTIFF HAS NO RIGHT OF PUBLICITY CLAIM UNDER NEW YORK LAW.

To begin with, Ms. Jonas does not and cannot properly plead the core element of any claim under Civil Rights Law Sections 50 and 51, namely, that Defendants used her "name," "portrait," "picture," or "voice," merely alleging in conclusory terms that Defendants used her "likeness", without even attempting to identify any alleged distinguishing features of plaintiff that Defendants allegedly used. What is more, a comparison of Ms. Jonas' image and the bobblehead—which it is settled that the Court is permitted to undertake on a motion to dismiss—shows that the bobblehead is not recognizable as a portrait of Ms. Jonas, as is required for there to be any appropriation of the right of publicity.

Rather, Ms. Jonas appears to claim rights in a "character," which is not protected by the statute. And it is settled law and Ms. Jonas' agreements confirm that Ms. Jonas cannot claim any rights in the Phillips' Lady character.

A. Ms. Jonas Does Not Allege Use Of Her Name, Portrait, Picture, Or Voice.

Sections 50 and 51 prohibits the nonconsensual use of a person's "name, portrait, picture or voice" for advertising purposes. Civil Rights Law § 51. Plaintiff does not allege that Defendants use Ms. Jonas' "name, portrait, picture or voice," as required by the statute, and merely alleges general similarities to Ms. Jonas' physical appearance (her "likeness," Comp. ¶ 21), which does not state a claim. *See generally Burck*, 571 F. Supp. 2d at 452 ("[*m*]*erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait, or picture, is not actionable under the statute*"; granting motion to dismiss Section 51 claim) (citation omitted) (emphasis added); *Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47 (1st Dep't 1977) (dismissing Section 51 claim "because the motion picture and books do not utilize the name, portrait or picture of any plaintiff and such is the statutory test of identification") (citation and quotation marks omitted)). Indeed, Plaintiff does not even attempt to allege what supposedly recognizable features of Plaintiff, if any, are allegedly shared by the bobblehead. Accordingly, the Complaint fails to state a claim and should be dismissed for this reason alone.

B. Documentary Evidence Confirms That Defendants Did Not Use Ms. Jonas' "Name, Portrait, Picture Or Voice" As Required By The Statute.

i. The Bobblehead Created by Defendants Is Based on a Third Party Who Consented to the Use of Her Image.

Unable to plead that her "name, portrait, picture, or voice" was actually used by Defendants, Ms. Jonas repeatedly alleges in vague terms that Defendants used her "likeness." *See* Compl. ¶¶ 11-12, 14, 19, 21-25. However, these allegations are contradicted by documentary evidence that confirms that the bobblehead is in fact a portrait of someone else, not

of Ms. Jonas.

First, as shown by the documents submitted by Defendants, the bobblehead is a portrait of a third party, Haydee Shea, with whom Defendants' agency contracted for the specific purpose of the bobblehead commercial. Gilson Aff. ¶¶ 6-7 & Exs. 4, 5. Ms. Shea consented to the use of her image as embodied in the bobblehead in advertising for Defendants, and images of Ms. Shea were provided to the company that handled creation of the bobblehead. *Id.* ¶¶ 7-8 & Exs. 5, 6. And, as a comparison of Ms. Shea's image and the bobblehead demonstrates, the bobblehead in fact resembles Ms. Shea:

Ms. Haydee Shea

Bobblehead

Therefore, wholly apart from the fact that Ms. Jonas is clearly not recognizable from the bobblehead, the Complaint is without merit because the bobblehead is the "portrait" of another person, not Plaintiff.

ii. A Comparison of Ms. Jonas' Appearance and the Bobblehead Demonstrates, as a Matter of Law, that the Bobblehead Is Not a Portrait or Picture of Ms. Jonas.

It also is clear on the documentary evidence that the bobblehead does not present a "recognizable likeness" of Ms. Jonas, as required under New York law. *See Lohan*, 97 N.E.3d at

394-95 (affirming motion to dismiss because image in question was "not recognizable as plaintiff"); *Compare* Gilson Aff., Ex. 3 (images of Ms. Jonas) and Moody Aff., Ex. 2 (images of Ms. Jonas) *with* Gilson Aff., Ex. 4 (image of bobblehead). It is undisputed that Defendants' commercial has not used an actual photograph of Plaintiff, or used her name. As the Court of Appeals recently held, for a plaintiff to claim that an image is a picture or portrait of her, she must be "recognizable" in the purported portrait or picture. *Lohan*, 97 N.E.3d at 395. And, as other courts have explained, the image "must be a 'close and purposeful resemblance to reality' of the actual person." *Burck*, 571 F. Supp. 2d at 453-54 (quoting *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 261 (Sup. Ct., N.Y. Cnty. 1984)). And, "before a factfinder can decide [whether an image presents a recognizable likeness], . . . there must be a basis for it to conclude that the person depicted is capable of being identified from the advertisement alone as plaintiff" —a "*legal* determination" that requires the court to evaluate the "quality and quantity of the identifiable characteristics present in the purported portrait." *Lohan*, 97 N.E.3d at 395 (emphasis added) (internal quotations omitted). As *Lohan* demonstrates, this determination should be made as a matter of law on a motion to dismiss. *Id.* at 395−96.

In *Lohan*, the Court of Appeals made precisely such a determination as a matter of law in dismissing a Section 51 claim after comparing the appearances of a fictional video game character and actor Lindsay Lohan. Lohan alleged that an "avatar" (a digital representation of a person) in a video game was her "look-a-like" and that the defendant had misappropriated her portrait and voice in violation of Civil Rights Law Sections 50 and 51. 97 N.E.3d at 391-92. In granting defendant's motion to dismiss, the Court of Appeals evaluated images of Lohan and the avatar, noting that "a privacy action [cannot] be sustained . . . because of the nonconsensual use of a [representation] without identifying features." *Id.* at 395 (quoting *Cohen,* 472 N.E.2d at

309) (alterations in original). After this review, the court found that the avatar was "a generic artistic depiction of a 'twenty something' woman without any particular identifying physical characteristics" and that the images of the character were "indistinct, satirical representations of the style, look, and persona of a modern . . . young woman," and affirmed the dismissal of the complaint. *Id.* at 395.

Other courts have similarly compared side-by-side images of plaintiffs and their purported look-a-likes and dismissed Section 51 claims as a matter of law. *See, e.g., Burck*, 571 F. Supp. 2d at 452 (dismissing Section 51 claim and holding that defendants did not use a portrait or picture of plaintiff because characters at issue looked different).

Applying the same analysis used in *Lohan*, it is clear from the documentary evidence that the bobblehead is not a portrait or picture of Ms. Jonas, including as confirmed by this comparison of Plaintiff to an image of the bobblehead:

Ms. Jonas

Bobblehead

Thus, a review of Plaintiff's specific physical features as compared to those of bobblehead reveal at least the following differences:

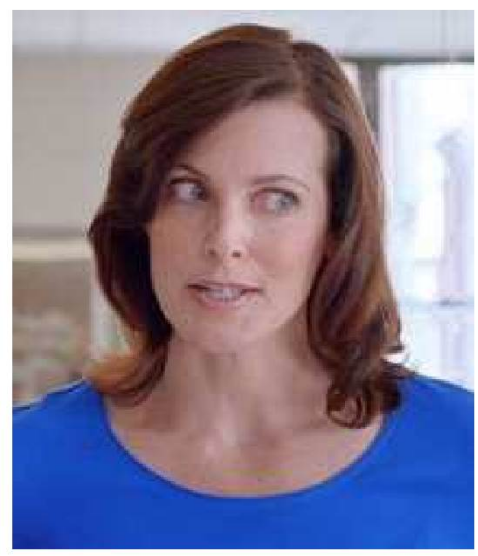
Ms. Jonas	Bobblehead
Thin eyebrows	Thick eyebrows
High arch in thin eyebrows	Low arch in thick eyebrows
Average forehead	Wider, higher forehead
Narrow, slightly upturned nose	Wider, downturned nose
High, pronounced cheekbones	Average cheekbones
Shoulder length hair	Below-the-shoulder length hair
Hair covers part of forehead	More forehead showing
Auburn hair	Light brown hair
Thinner hair	Thicker hair
Light green eyes	Dark brown/black eyes
Dimpled chin	Undimpled chin
No smile lines under eyes.	Smile lines under eyes.
Undimpled smile and cheeks.	Dimpled smile and cheeks.
Nude lipstick (close to the shade of natural skin / lip tone)	Coral lipstick
Circular face shape	Oval face shape

In the words of the Court of Appeals, an "evaluation of the 'quality and quantity of the identifiable characteristics' present in the purported portrait" demonstrates that, as a matter of law, the bobblehead is not recognizable as plaintiff. *Lohan*, 97 N.E.3d at 395. This conclusion is bolstered by the comparison of the bobblehead and the bobblehead model (Ms. Shea), *supra* p.11, where the similarities are readily apparent.

Notably, the Complaint contains no allegations regarding what specific features of Ms. Jonas are alleged to be shared by the bobblehead, merely alleging in conclusory terms that the bobblehead "looks identical to Plaintiff" (and, as noted, fails to provide any images of this supposedly "identical" bobblehead). Compl. ¶ 11. However, the foregoing comparison shows that, at most, the bobblehead and Plaintiff share some generic, indistinct features, such as both being females with (different shades of) brown hair. As in *Lohan*, the use of such generic features is not actionable, and the bobblehead is decidely not recognizable as Ms. Jonas, possessing physical characteristics that are distinct from those of Plaintiff—namely, the physical characteristics of Ms. Shea, the bobblehead's model, as this side-by-side comparison shows:

Ms. Shea

Bobblehead



Ms. Jonas

Is it enough to survive dismissal to show that the bobblehead and Plaintiff's image share an attenuated common characteristic, as women (in blue shirts)? It is not. Nuance—and obvious differences—matter. Case law and common sense dictate as much. Obviously, all women do not look alike. That truism is demonstrated here. Plaintiff's claim must fail.

C. New York Law Does Not Recognize Right Of Publicity Claims Based On Claimed Rights In Fictional Characters.

Fundamentally, Plaintiff appears to be complaining that another "actor" —here, a bobblehead figure—is now playing the role of the Phillips' Lady rather than Plaintiff. The Complaint asserts, for example, that Ms. Jonas "became known as the Phillips' Lady [character] due to her frequent appearances in Bayer commercials." Compl. ¶ 9. It is well settled, however, "that the statutory right to privacy does not extend to fictitious characters . . . . Section 51 protects 'any person,' and section 50 limits the statutory protection to 'any living person'" and that "[m]erely evoking certain aspects of another's character or role does not violate sections 50 and 51." *Burck*, 571 F. Supp. 2d at 452-53. The Phillips' Lady is not a living person, but only a character that Ms. Jonas, among others, has played in commercials. (Indeed, if anyone is identified as the Phillips' Lady, it is Marge Royce, who appeared in the role in more than four times as many commercials as Plaintiff, over a time period almost four times as long.) Thus, any use by Bayer of the Phillips' Lady character cannot be a violation of the Civil Rights Law. *See id.* at 453−54 (dismissing a cause of action brought under Section 51). What is more, Plaintiff's contract makes clear that she does not own the Phillips' Lady character. Moody Aff., Ex. 4, p. 2 ("Performer acknowledges that performer has no right, title or interest of any kind or nature whatsoever in or to the commercial(s). A role owned or created by Producer belongs to Producer and not to the performer."); Gilson Aff., Ex. 1, p. 2 (same); Gilson Aff., Ex. 2, p.2 (same).

As shown above, Defendants' bobblehead did not capture Ms. Jonas' physical features but instead Ms. Shea, who consented to the use of her image. The bobblehead is the newest representation of the Phillips' Lady character, which is not owned by Plaintiff. Both Ms. Jonas and the bobblehead (and others) have represented the fictitious Phillips' Lady used in Defendants' ten-year advertisement campaign. It is not enough that the bobblehead "merely

personifi[es]" the Phillips' Lady, a role that Ms. Jonas performed four times. *Burck*, 571 F. Supp. 2d at 453. Without Defendants actually depicting Ms. Jonas, Plaintiff's claim does "not fall within the literal meaning of 'portrait' or 'picture' of a person[,]" and therefore is not protected under the privacy statutes. *Id*.

II. PLAINTIFF'S UNJUST ENRICHMENT CLAIM IS PREEMPTED BY SECTION 51.

In her second cause of action, Plaintiff asserts a common law claim for unjust enrichment stemming from the identical facts alleged in the Section 51 claim, *i.e.*, the alleged misappropriation of her "likeness." Complaint ¶¶ 39-42. However, it is settled that such a claim is preempted by Section 51, which provides the only basis under New York law to protect the right of publicity or privacy. *See, e.g., Stephano v. News Group Publ'ns, Inc.*, 64 N.Y.2d 174, 183 (1984).

One court explained the duplicative nature of claims brought under Section 51 and unjust enrichment claims by stating:

> The New York Civil Rights law preempts all common law claims based on unauthorized use of name, image, or personality . . . . The Civil Rights Law does not simply cover or define common law claims, it provides an *exclusive cause of action* for cases such as the one at bar. That is to say, there is *no cause of action in New York for unjust enrichment* arising from [the] alleged unauthorized use of personal image.

Zoll v. Ruder Finn, Inc., No. 02 Civ. 3652 (CSH), 01 Civ. 1339 (CSH), 2004 WL 42260 , at *4 (S.D.N.Y. Jan. 7, 2004) (emphasis altered) (dismissing unjust enrichment claim based on the alleged unauthorized use of plaintiff's image in two videotapes). Indeed, courts routinely dismiss unjust enrichment claims that are based on the same facts as Section 51 claims. *See Myskina v. Conde Nast Publ'ns*, 386 F. Supp. 2d 409, 420 (S.D.N.Y. 2005) ("Under New York law, common law unjust enrichment claims for unauthorized use of an image or likeness are subsumed by Sections 50 and 51."); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 365

(S.D.N.Y. 1988) (dismissing an unjust enrichment claim because "the Civil Rights Law preempts any such common law cause of action[.]"); *Hampton v. Guare*, 600 N.Y.S.2d 57, 58−59 (1st Dep't 1993) (common law claims barred because "plaintiff has no property interest in his image, portrait or personality outside the protections granted by the Civil Rights Law").

Here, Ms. Jonas' Civil Rights Law claim and her unjust enrichment claim stem from the exact same set of facts regarding Defendants' use of the bobblehead as a representation of the Phillips' Lady. The law is clear that the only claim based on the unauthorized use of a plaintiff's image is under Section 51. "'Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory in this State, [Ms. Jonas] cannot claim an independent common-law right of publicity.'" *Men's World Outlet, Inc.*, 679 F. Supp. at 365 (quoting *Stephano*, 64 N.Y.2d at 183). For these reasons, Ms. Jonas' unjust enrichment claim is duplicative of her Civil Rights Law claim and should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety with prejudice.

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Respectfully submitted,

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