

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL A. HAYDEN, :  
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 Plaintiff, : Civil Action No. 1:21-cv-10249 (TMR)  
 :  
 :  
 -against- :  
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 :  
 JEFF KOONS and JEFF KOONS LLC, :  
 :  
 :  
 Defendants. :  
-----X

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’  
CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
I. SUMMARY OF THE <i>WARHOL</i> DECISION .....	1
A. The Narrow Scope of the Ruling .....	1
B. The De-emphasis of “Expression, Meaning, and Message” .....	2
C. Transformativeness vs. Commercialism .....	3
D. The Role of Justification .....	5
E. Discerning the Purpose of the Use .....	6
II. APPLYING THE <i>WARHOL</i> DECISION TO THIS CASE .....	7
CONCLUSION .....	12

## TABLE OF AUTHORITIES

### Cases

<i>Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith</i> , 382 F. Supp. 3d 312 (S.D.N.Y. 2019).....	11
<i>Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith</i> , 598 U.S. ___, 143 S. Ct. 1258 (2023) .....	<i>passim</i>
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015).....	4, 10
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006).....	11
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006).....	11
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994) .....	<i>passim</i>
<i>Cariou v. Prince</i> , 714 F.3d 694 (2d Cir. 2013).....	11
<i>Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.</i> , 150 F.3d 132 (2d Cir. 1998).....	11
<i>Chambers v. Time Warner, Inc.</i> , 282 F.3d 147 (2d Cir. 2002).....	9
<i>Google LLC v. Oracle America, Inc.</i> , 593 U.S. ___, 141 S. Ct. 1183 (2021) .....	4, 6
<i>Ringgold v. Black Entm’t Television, Inc.</i> , 126 F.3d 70 (2d Cir. 1997).....	11
<i>TCA Television Corp. v. McCollum</i> , 839 F.3d 168 (2d Cir. 2016).....	11

### Statutes

17 U.S.C. § 101.....	3
----------------------	---

17 U.S.C. § 107 ..... 4

17 U.S.C. § 107(1) ..... 1, 3

**Other Authorities**

Pierre N. Leval, *Toward a Fair Use Standard*,  
103 Harv. L. Rev. 1105 (1990) ..... 2, 3

## **PRELIMINARY STATEMENT**

Pursuant to the Court’s order dated June 1, 2023 (ECF No. 73), defendants Jeff Koons and Jeff Koons LLC respectfully submit this supplemental memorandum of law addressing the question of the impact on this case of the decision of the United States Supreme Court in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. \_\_\_, 143 S. Ct. 1258 (2023). The short answer is that, both before and after the *Warhol* decision, Jeff Koons’s use of plaintiff’s stage prop as raw material in the furtherance of creative and communicative objectives entirely distinct from plaintiff’s utilitarian purpose of creating a platform for sexually explicit performances by a famous porn star had a transformative purpose, did not serve as a competing substitute for plaintiff’s work or interfere with plaintiff’s ability to earn a living, and weighed strongly in favor of fair use.

### **I. SUMMARY OF THE WARHOL DECISION**

#### **A. The Narrow Scope of the Ruling**

The *Warhol* case involved silkscreens of the musical artist Prince created by Andy Warhol based upon a black-and-white photograph of Prince taken and copyrighted by the photographer Lynn Goldsmith. The narrow holding is that the first fair use factor (“the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes” (17 U.S.C. § 107(1))) weighed against fair use because the Andy Warhol Foundation’s challenged use (the commercial licensing of one of the Prince Series silkscreens to Condé Nast, after Prince’s death, as an illustration for a commemorative magazine about Prince’s life) had substantially the same purpose as that of Goldsmith’s original photograph and its likely derivative uses. *Warhol*, 143 S. Ct. at 1278. “Both are portraits of Prince used in

magazines to illustrate stories about Prince.” *Id.* The Court expressed no opinion as to whether Warhol’s creation, display, or sale of any of the Prince silkscreens was fair use. *Id.*

As the Court explained, Goldsmith had licensed her photographs of Prince to illustrate stories about Prince in magazines such as *Newsweek*, *Vanity Fair*, and *People*, including after Prince’s death in 2016. *Id.* “Such licenses, for photographs or derivatives of them, are how photographers like Goldsmith make a living. They provide an economic incentive to create original works, which is the goal of copyright.” *Id.* The first fair use factor “relates to the problem of substitution – copyright’s *bête noire*. The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or ‘supplan[t],’ the work.” *Id.* at 1274 (citation omitted). The Andy Warhol Foundation’s licensing of the Prince silkscreen to a magazine about Prince “thus ‘supersede[d] the objects,’” [citation omitted], *i.e.*, shared the objectives, of Goldsmith’s photograph, even if the two were not perfect substitutes.” *Id.* at 1279. This weighed against fair use. *Id.* at 1280.

## **B. The De-emphasis of “Expression, Meaning, and Message”**

By way of background, twenty-nine years ago, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court enunciated a transformative use standard that applied to the first fair use factor. As the Court stated: “The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation [citations and parenthetical omitted], or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)) (“Leval”).

In *Warhol*, the Supreme Court cautioned that *Campbell* “cannot be read to mean that § 107(1) [the first fair use factor] weighs in favor of any use that adds some new expression, meaning, or message.” *Warhol*, 143 S. Ct. at 1282. “Otherwise, ‘transformative use’ would swallow the copyright owner’s exclusive right to prepare derivative works[,]” many of which, by statutory definition (17 U.S.C. § 101), “recast, transfor[m] or adap[t]” the original. *Id.* As the *Warhol* Court further explained, in *Campbell*, “meaning and message was simply relevant to whether the new use served a purpose distinct from the original, or instead superseded its objects. That was, and is, the ‘central’ question under the first factor.” *Id.* at 1282-83. Stated otherwise, “meaning or message is relevant to, but not dispositive of, purpose.” *Id.* at 1283; *see also id.* at 1273 (“Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.”)

### **C. Transformativeness vs. Commercialism**

The first fair use factor “focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism.” *Id.* at 1273. “A use that has a further purpose or different character is said to be ‘transformative.’” *Id.* at 1275 (quoting Leval, 103 Harv. L. Rev. at 1111). “As before, ‘transformativeness’ is a matter of degree.” *Id.* “[T]he fact that a use is commercial as opposed to nonprofit is an additional” element of the first factor. *Id.* at 1276. The commercial nature of a use “is not dispositive[,]” but “it is relevant.” *Id.* “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* at 1276 (quoting *Campbell*, 510 U.S. at 579). Given that Goldsmith’s photograph and the Andy Warhol Foundation’s licensing of the silkscreen “share[d] substantially the same purpose,” and that the Foundation’s

“use of Goldsmith’s photo was of a commercial nature[,]” both elements weighed against fair use. *Id.* at 1280. “That is, although a use’s transformativeness may outweigh its commercial character, here, both elements point in the same direction.” *Id.*

The *Warhol* Court held that “a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create.” *Id.* at 1276. Explaining why, the *Warhol* Court quoted with approval Judge Leval’s formulation in *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.”). *Id.* The *Warhol* Court added that, on the other hand, a “use that shares the purpose of a copyrighted work, by contrast, is more likely to provide ‘the public with a substantial substitute for matter protected by the [copyright owner’s] interests in the original wor[k] or derivatives of [it], which undermines the goal of copyright.” *Id.* at 1276, quoting *Authors Guild*, at 207 (internal citation omitted).

Fair use, “and the first factor in particular, requires an analysis of the specific ‘use’ of a copyrighted work that is alleged to be ‘an infringement.’” *Id.* at 1277, citing 17 U.S.C. § 107. “The same copying may be fair when used for one purpose but not another.” *Id.* For that reason, the Court confined its analysis to the use that Goldsmith challenged – the commercial licensing of Warhol’s Prince silkscreen to Condé Nast – and “expresse[d] no opinion as to the creation, display, or sale of any of the original Prince Series works.” *Id.* at 1278.

Alluding to language in its recent decision in *Google LLC v. Oracle America, Inc.*, 593 U.S. \_\_\_, \_\_\_, 141 S. Ct. 1183, 1203 (2021), the Court stated that even if a follow-on work



“borrow[s] heavily from an original[,]” it may “fall within the scope of fair use even though it precisely replicates a copyrighted [work]” if it has a distinct and transformative purpose. *Id.* at 1280. Thus, unlike the Andy Warhol Foundation’s licensing of the Warhol silkscreen to a magazine for a story about Prince’s life, which had a purpose similar to Goldsmith’s original photo and its likely derivative uses, in the case of Andy Warhol’s iconic Campbell’s Soup Cans, which precisely replicated a copyrighted advertising logo “to make a comment about consumerism[,]” the secondary use had a different purpose than the original. *Id.* at 1280-81. The Court explained why “not all of Warhol’s works, nor all uses of them, give rise to the same fair use analysis.” *Id.* at 1281. As the Court put it: “The purpose of Campbell’s logo is to advertise soup. Warhol’s canvases do not share that purpose. Rather, the Soup Cans series uses Campbell’s copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup. The use therefore does not supersede the objects of the advertising logo.” *Id.*

#### **D. The Role of Justification**

As noted above, “a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create.” *Id.* at 1276. If, however, the secondary use shares the same purpose as the original work, another, independent, justification (other than having a different purpose) is needed in order to tilt the first fair use factor in favor of fair use. “An independent justification . . . is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it.” *Id.* at 1277. As the Court put it: “If an original work and a secondary use share the same or highly similar

purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.” *Id.* In the *Warhol* case, Goldsmith’s original photo of Prince and the Andy Warhol Foundation’s copying use of that photo in an image licensed to a magazine devoted to Prince shared substantially the same purpose, and the use was of a commercial nature. *Id.* at 1287. The Foundation had “offered no other persuasive justification for its unauthorized use of the photograph.” *Id.* Therefore, the first fair use factor weighed in Goldsmith’s favor (and against fair use). *Id.*

The Court provided examples of independent justification. In some cases, “a use may be justified because copying is reasonably necessary to achieve the user’s new purpose. Parody, for example, ‘needs to mimic an original to make its point.’” *Id.* at 1276 (quoting *Campbell*, 510 U.S. at 580-81). As another example of justification, the Court cited its recent decision in *Google v. Oracle*, 141 S. Ct. at 1193-94, where Google’s copying of Oracle’s familiar computer code was necessary to enable programmers to feel comfortable using the new system to create applications for mobile devices. *Id.* at 1277, n.8. As with transformativeness, “the question of justification is one of degree.” *Id.* at 1277.

#### **E. Discerning the Purpose of the Use**

To evaluate whether a secondary work has a purpose that is sufficiently distinct from the purpose of the original work to be transformative, it is necessary to determine what the secondary user was attempting to achieve by borrowing from the original work. The Court endorsed the Second Circuit’s observation, in *Warhol*, that whether a secondary work has a purpose that is transformative “cannot turn merely” on the stated intent of the artist. *Id.* at 1284. “Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made, *i.e.*, what the user does with the original work.” *Id.* Thus, in

discussing *Campbell* – where the alleged infringer, 2 Live Crew, had specifically asked for permission from the rights holder of the Roy Orbison song “Oh, Pretty Woman” to create a parody version of that song prior to producing and releasing that parody after permission was refused (*Campbell*, 510 U. S. at 572-73) – the *Warhol* Court emphasized that it was still necessary “to determine whether parody ‘reasonably could be perceived.’” *Warhol*, 143 S. Ct. at 1282 (quoting *Campbell*, 510 U. S. at 583). In other words, while the artist’s stated subjective intent may be taken into account, it alone is not dispositive of the “‘central’ question under the first factor,” *i.e.*, whether, viewed objectively, “the new use serve[s] a purpose distinct from the original, or instead supersede[s] its objects.” *Id.* (citation omitted).

## II. APPLYING THE WARHOL DECISION TO THIS CASE

Plaintiff Michael A. Hayden, an American working as a set designer in Italy in the 1980’s, asserts a copyright infringement claim against defendant Jeff Koons for appropriating his sculptural work, made from Styrofoam, depicting a serpent wrapped around a rock pedestal that he created for and sold to a famous Italian adult film star and member of Parliament, Ilona Staller, known as Cicciolina, for use as a flat, easy-to-step-onto platform on which she would perform sexually explicit scenes, both live and on film. Complaint, ECF No. 44, ¶¶ 4-5, 28, 30; Hayden Depo., ECF No. 62, Exs. A-1, at 27; A-2, at 56, 60-61. Unlike Lynn Goldsmith, the copyright owner in the *Warhol* case, who made a living by licensing her photographs or derivatives of them, including her photograph of Prince which Warhol copied and which the Andy Warhol Foundation licensed to Condé Nast, Hayden never licensed any rights to his platform (or any other of his works) to anyone, not even for tee-shirts or coffee mugs, never tried to exploit any existing or potential market for that work or its derivatives, and could not even identify any such market. Hayden Depo., ECF No. 62, Ex. A-2, at 78-81, 84.

Hayden's complaint accuses Jeff Koons of creating, displaying, and selling three artworks that incorporate partially-obsured and modified portions of Hayden's platform: a giant lithograph billboard initially commissioned by the Whitney Museum in 1989 that towered over downtown Manhattan entitled *Made in Heaven*; a polychromed wood sculpture entitled *Jeff and Ilona* that premiered at the Venice Biennale in 1990; and an oil on canvas entitled *Jeff in the Position of Adam* (1990). Complaint, ECF No. 44, ¶ 11 & Ex. B thereto. That is the sum and substance of Hayden's complaint. Hayden Depo., ECF No. 62, Ex. A-2, at 85-86. There is no claim that Koons harmed Hayden's actual or potential markets by licensing any of those three artworks. There is no alleged (or conceivable) claim that Koons's challenged artworks could in any way have substituted for Hayden's platform – "copyright's bête noire." *Warhol*, 143 S. Ct. at 1274. While Goldsmith's likely market was usurped by the Andy Warhol Foundation's licensing of the Prince silkscreen to a magazine, Hayden admitted that Koons's *Made in Heaven* series did not interfere in any way with Hayden's ability to earn a living, or to license or sell replicas of his work (which he was not even interested in doing), or with his career. Hayden Depo., ECF No. 62, Ex. A-2, at 88-90, 92-93.

Hayden's purpose in creating a sculptural but utilitarian work intended to serve as a platform on which Cicciolina could perform sex acts on film and before paying audiences could not have been more distinct from Koons's purpose in creating the three allegedly infringing artworks incorporating Hayden's platform and juxtaposing it with other, far more dominant, images. Koons testified in this case, and explained in interviews given over thirty years ago, that his purpose in creating the *Made in Heaven* artworks was to use images of Staller and himself, photographed in her studio, with her costumes, backdrops, sets and props, including, in some of the works, Hayden's platform, to depict a contemporary Adam and Eve emancipated from the

guilt and shame normally associated (as exemplified in Masaccio's classic fresco, *Banishment from Paradise*) with their expulsion from the Garden of Eden. See Defendants' Memorandum of Law, ECF No. 65, at 7-12. This was a transformative purpose, entirely distinct from Hayden's. Even the use of Hayden's serpent, with its head obscured in the *Jeff in the Position of Adam* painting (Hayden Depo., ECF No. 62, Ex. A-3, at 121-22), and radically altered in the *Jeff and Ilona* wood sculpture (complaint, ECF No. 44, Ex. B), repurposed Hayden's original, which was not intended to represent the serpent in the Garden of Eden. Hayden Depo., ECF No. 62, Ex. A-3, at 142.

Significantly, moreover, the complaint itself quotes from and cites to the Whitney Museum's website and exhibition catalogue in alleging what Koons's purpose supposedly was in creating the *Made in Heaven* artworks (e.g., ¶ 8, noting that the catalogue described a naked Koons staring, without shame, at the camera). See Complaint, ECF No. 44, ¶¶ 8, 38(b), 39. By referencing the Whitney Museum website and exhibition catalogue in his complaint, Hayden incorporated those documents into his complaint in their entirety and for all purposes, including on these summary judgment motions. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). Thus, the complaint is deemed to include the assessment of the Whitney Museum's curator that, because the famous porn star had become the artist's lover, the line between art, life, and the media had been blurred, and the boundaries between art and mass culture and the relationship of artists to celebrity had been tested. Defendants' Memorandum of Law, ECF No. 65, at 21. This, too, served a transformative purpose light years from Hayden's functional purpose in creating his platform.

To be sure, Koons's statements of his subjective intent in creating the *Made in Heaven* artworks, and the assessment of his intent by experts, are not dispositive. Koons's

transformative purpose, just like 2 Live Crew’s claimed parodic purpose in *Campbell*, must also be objectively perceivable. One need look no further than the contents and titles of Koons’s artworks for confirmation of his transformative creative purpose of depicting a modern Adam and Eve. Who, after all, in biblical terms, was “made in Heaven”? The answer is Adam and Eve. And in the work entitled *Jeff in the Position of Adam*, with Ilona-as-Eve emerging from Jeff-as-Adam’s rib (literally being “made in Heaven”), the allusion is clearly to Genesis 2:21-22. See Declaration of Jeff Koons, ECF No. 63, ¶ 4.

The transformative purpose of Koons’s use of Hayden’s platform in the creation of the three challenged artworks advances copyright’s goal of enriching public knowledge without any risk of serving as a substitute for Hayden’s original or its plausible derivatives. *Warhol*, 143 S. Ct. at 1276 (citing *Authors Guild*, 804 F.3d at 214). The highly transformative nature of the *Made in Heaven* artworks renders less significant their commerciality. *Id.* Given that the transformativeness of the *Made in Heaven* works outweighs their commerciality, there is no need for any additional justification for these secondary works; the transformative purpose alone justifies the copying. *Id.* at 1276-77. It is only where the secondary work shares the same or a highly similar purpose with the original, and where the secondary work is of a commercial nature, that some other independent justification is required for the copying. *Id.* at 1277.

Even assuming, however, that some justification is required above and beyond the clearly distinct purposes of the original work and Koons’s follow-on works, such a justification plainly exists. After all, who better to represent Eve in a depiction of Adam and Eve emancipated from guilt and shame than a famous porn star? And while Cicciolina could have been posed on another one of her props – just as Andy Warhol could have used the emblem of a different product (such as a Coca-Cola bottle) rather than a Campbell’s Soup Can to make a

transformative comment on consumerism (*Warhol*, 143 S. Ct. at 1280-81) or Koons himself could have used another set of legs from a different advertisement in a glossy fashion magazine in his transformative collage in *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) – it was necessary to use Cicciolina’s actual costumes, backdrops, sets, and one of her actual props to convey “a certain authenticity or veracity” and to “ensure that the viewer will understand what [he was] referring to.” *Blanch*, at 255; Declaration of Jeff Koons, ECF No. 63, ¶ 7.<sup>1</sup>

Accordingly, under the *Warhol* decision, the distinctly different purpose and character of Koons’s use of Hayden’s platform weighs heavily in favor of fair use. Because, as briefed previously, the remaining fair use factors also tilt toward fair use, the complaint should be dismissed.

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<sup>1</sup> Although beyond the scope of the Court’s June 1 Order, it is worth considering the impact of the *Warhol* decision on this Circuit’s fair use jurisprudence, which, to the extent not abrogated in *Warhol*, remains binding here. It appears that a case such as *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), which finds transformativeness whenever there is a change in aesthetics or expression and represents the “high-water mark of our court’s recognition of transformative works” (*TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016)), and which led the district court astray in the *Warhol* case (*Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019) (relying on *Cariou* to find fair use)), may no longer be good law. On the other hand, cases finding transformative use where the secondary user borrows the original work in the furtherance of a different purpose appear still to be valid after *Warhol*. See *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (as he did here, Jeff Koons transformatively used the copyrighted work as “raw material” in the “furtherance of distinct creative or communicative objectives”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use of creative and iconic Grateful Dead concert posters as “historical artifacts” in a biography of the legendary band was transformative); cf. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142-43 (2d Cir. 1998) (quiz book called the “*Seinfeld* Aptitude Test” not transformative when its purpose was “to repackage [the television show] *Seinfeld* to entertain *Seinfeld* viewers”); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (copy of plaintiff’s painting used as decoration for a television program’s set not transformative because it was used for “the same decorative purpose” as the original).

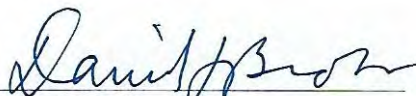
**CONCLUSION**

For the foregoing reasons, and those set forth in Defendants' prior filings, the complaint should be dismissed.

Dated: New York, New York  
June 30, 2023

Respectfully submitted,

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