

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

LUCIANNE M. WALKOWICZ,

Plaintiff,

v.

AMERICAN GIRL, LLC, AMERICAN GIRL
BRANDS, LLC, and MATTEL, INC.,

Defendants.

Civil Action No.: 3:20-cv-00374-jdp

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)**

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Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants, American Girl, LLC, American Girl Brands, LLC, and Mattel, Inc. (collectively, “American Girl”), respectfully submit this brief in support of their Motion to Dismiss Plaintiff Lucianne M. Walkowicz’s Amended Complaint, for failure to state a claim to which relief can be granted.

INTRODUCTION

Plaintiff Lucianne M. Walkowicz (“Walkowicz”) complains that a fictional 11-year-old character with a different name, different appearance, and different biography infringes Walkowicz’s state law privacy rights and federal Lanham Act rights when featured in dolls, books, and accessories, and she accuses American Girl of both “negligence” and “negligent supervision” in allegedly violating those rights. Walkowicz’s Amended Complaint suffers from the same flaws as the original Complaint, and in some instances makes the inadequacy of her claims even clearer. Despite having the benefit of American Girl’s original motion to dismiss (Dkt. 17), Walkowicz has not improved the original pleading’s defects or comported the alleged facts with the pled causes of action. Walkowicz’s own admissions and allegations, documents referenced in the Amended Complaint, and judicially noticeable records establish that American Girl independently created the name and facial features of the fictional character and therefore is

not liable on any theory as a matter of law.¹ Walkowicz’s Amended Complaint should be dismissed with prejudice, as described below.

WALKOWICZ’S AMENDED COMPLAINT AND JUDICIALLY NOTICABLE FACTS

The Amended Complaint alleges that “Lucianne M. Walkowicz” or “Lucianne Walkowicz” is an astronomer at the Adler Planetarium and TED Senior Fellow. (Am. Compl. Introduction, ¶ 17.) It claims Walkowicz has been involved in the NASA Kepler mission and has given TED talks that, *inter alia*, argue against human colonization of Mars. (Am. Compl. ¶¶ 18–19, 22–41.) It alleges that Walkowicz is “affiliated” with the planet Mars, the constellation Lyra, and the star Vega because “she has publicly discussed [Mars and] Vega numerous times.” (Am. Compl. ¶¶ 35–45.) Walkowicz also claims to have adopted distinctive dress, look and style in the form of a purple hairstreak, space-themed dress, and holographic shoes, although she displays different hairstyles, dress, and shoes in the “TED talks” she references in the Amended Complaint and fails to plead facts to support her conclusory statement that she is somehow “known” by those characteristics. (Am. Compl. ¶¶ 46–48, 108–122; *Cf.* the TED talks cited in the Amended Complaint and referenced below, which depict Walkowicz with

¹ This Court can consider the allegations of Walkowicz’s Amended Complaint, the contents of exhibits and other documents referenced in the complaint, and judicially noticeable government records in deciding a motion to dismiss. *Bogie v. Rosenberg*, 705 F.3d 603, 608–09 (7th Cir. 2013) (trial court properly considered and ruled controlling a video referenced in complaint to grant motion to dismiss right of privacy claim); *Peterson v. Artisan and Truckers Cas. Co.*, No. 19-cv-102-WMC, 2019 WL 2717099, *4, n.2 (W.D. Wis. June 28, 2019) (considering documents referenced in complaint and judicially noticeable matters to grant motion to dismiss); *Ambrosetti v. Oregon Catholic Press*, No. 3:19-cv-00682-JD-MGG, 2020 WL 2219172, *2, n.1 (N.D. Ind. May 7, 2020) (taking judicial notice of copyright registration records to grant motion to dismiss); *Slep-Tone Ent. Corp. v. Kalamata, Inc.*, 75 F. Supp. 3d 898, 904 (N.D. Ill. 2014) (granting motion to dismiss in part based on facts in judicially noticeable trademark application).

different characteristics.)² Walkowicz claims to have engaged in these activities from July 2011 through July 2018. (Am. Compl. ¶¶ 22, 41; *see also* ¶¶24–25, 27, 29–30, 32–34, 36–37, and 39.)

To plead American Girl’s exposure to Walkowicz and her alleged characteristics, the Amended Complaint claims that “quite possibly” and “at least one” American Girl employee or consultant “may have” attended Walkowicz’s 2013 TED talk at the Monona Terrace, purportedly based on the unremarkable fact that they live within three miles from Monona Terrace, as does a large percentage of the population of Madison, Wisconsin. Walkowicz also alleges that “at least one” American Girl representative “may have” attended other events at which she spoke, though she never claims that any American Girl representative actually saw or heard Walkowicz at any such event, or at any other time. (Am. Compl. ¶ 75–80).

Walkowicz’s Amended Complaint admits facts, which were previously established by judicially noticeable documents,³ that Mattel filed trademark applications for LUCIANA for dolls in 2006 and 2010 and obtained a trademark registration for PRINCESS LUCIANA in dolls in 2008, years before Walkowicz allegedly began the activities she claims gave her prominence in 2011 or American Girl “may have” learned of her in 2013. (*See* Am. Compl. ¶¶ 22–41, 49–59; Second Declaration of Mark S. Lee (“Second Lee Decl.”), Exs. 5–7, filed concurrently herewith.)

² *See* https://www.ted.com/talks/lucianne_walkowicz_finding_planets_around_other_stars, in which Walkowicz has black hair with no noticeable purple stripe, and wears a black top, blue jeans, and heels; https://www.ted.com/talks/lucianne_walkowicz_look_up_for_a_change, in which she has black hair with no noticeable purple stripe, and wears a black dress with red, violet and yellow vertical stripes on the skirt, and leather heels. Finally, in the TED talk entitled “Let’s Not Use Mars As A Backup Planet,” which argues against human colonization of Mars, she again does not have a discernible purple streak in her dark hair and wears black leather shoes rather than “holographic” shoes, but does wear a dress that could be characterized as “space themed.”

https://www.ted.com/talks/lucianne_walkowicz_let_s_not_use_mars_as_a_backup_planet.

³ *See* the Declaration of Mark S. Lee filed July 13, 2020, Exs. 5–7 (Dkt #18).



Walkowicz also adds allegations that the American Girl “Girl of the Year” dolls have had similar facial features since 2001, and claims that “[a]part from differences in skin tone, hair, and doll clothing and accessories, the American Girl ‘Girl of the Year’ dolls were, essentially, the same model doll” and “physically identical or, if not entirely identical, nearly identical to each other[,]” thus effectively admitting that American Girl independently created those features in 2001 and that those features were not based on Walkowicz. (Am. Comp. ¶¶ 60–64 and ¶¶104–105.) Judicially noticeable government records confirm that American Girl registered the three-dimensional rendering of a doll head and face used on the “Luciana Vega” doll as a sculptural work in 1997. (Second Lee Decl. ¶¶ 10–11, Exs. 3 and 4.) Similar records confirm that Mattel has created other girl-oriented aspirational dolls and toys with space themes, including the 1986 Astronaut Barbie, long before Walkowicz claims American Girl “may have” learned of her. (Second Lee Decl. ¶¶ 12–14, Exs. 9 and 10.)

Having effectively admitted that American Girl did not take her facial appearance, as described above, Walkowicz’s Amended Complaint instead alleges that American Girl used her “image, likeness and persona” through other characteristics she claims are associated with her, such as Walkowicz’s “uniquely colored” dark brown hair, an alleged purple streak in her hair, “unique holographic style shoes, and space themed clothing, particularly space patterned dresses.” (Am. Compl. ¶¶109–114 and ¶152.) Walkowicz alleges that “Luciana Vega” is identifiable as Walkowicz through that character’s use of those allegedly similar characteristics. (Am. Comp. ¶¶ 128–135.)

American Girl launched the fictional character Luciana Vega, which they use in dolls, books and accessories, in 2018.⁴ (Am. Compl. ¶¶ 94–97, 99–101, 122.) As depicted in those works, Luciana Vega is an 11-year-old girl of Chilean descent who goes to Space Camp and dreams of becoming the first astronaut to Mars. (Am. Compl. ¶ 98; Second Lee Decl., ¶¶ 8–9 and Ex. 1 at 1, 3, 5, 6, 8, 14, 16 and 22.) The “accessories” Walkowicz references include a toy “Telescope Projector Set,” toy “Mars Habitat,” a flight suit, and other space-related toys and costumes promoting Mars exploration, accessories that are antithetical to Walkowicz’s advocacy against human colonization of Mars. (Am. Compl. ¶¶ 100–101, 117, 119, 121, 123, and Second Lee Decl. ¶ 12, Ex. 2.)

The Amended Complaint thus now claims the following alleged uses of Walkowicz’s “image, likeness, and persona” (Am. Compl. ¶¶ 97, 150–152) in American Girl’s LUCIANA VEGA character:

⁴ That fictional character is protectable by copyright law. *Gaiman v. McFarlane*, 360 F. 3d 644, 661 (7th Cir. 2004). The “Luciana” book referenced in the Amended Complaint was registered for copyright as a literary work in 2018. (Second Lee Decl. ¶¶ 8–9, Exs. 1 and 8.)

	Walkowicz	American Girl's Character
Name (Am. Compl. ¶¶ 18, 94.)	Lucianne Walkowicz	Luciana Vega
Likeness/Image (Am. Compl. ¶¶ 23, 28, 94, 108–127, 152.)		
Characteristics/Biography/Profession/Persona (Am. Compl. ¶¶ 17–18, 27–45, 94, 98–127, 151, 152, Second Lee Decl. Ex. 9.)	Adult astronomer of Polish descent who works at the Adler Planetarium and gives TED talks arguing that we should not colonize Mars.	Eleven year-old girl of Chilean descent, who aspires to be an astronaut, goes to Space Camp, and dreams of becoming the first astronaut to Mars.

Based on the above, Walkowicz claims that American Girl violated her right of privacy under Wis. Stat. §995.50 (Am. Compl. ¶¶ 145–166), her Lanham Act rights under 15 U.S.C. §1125 (Am. Compl. ¶¶ 167–187), and is separately liable for both “negligence” and “negligent supervision” under Wisconsin law for the alleged violations of those privacy and Lanham Act rights. (Am. Compl. ¶¶ 188–198; 199–209.)

ARGUMENT

I. WALKOWICZ FAILS TO STATE A CLAIM UNDER RULE 12(B)(6).

Federal Rule of Civil Procedure 12(b)(6) requires this Court to dismiss a cause of action that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). While on a motion to dismiss this Court must accept as true any well-pleaded factual allegations in the Amended Complaint, it need not accept as true the “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). As this Court observed: “*Twombly* and *Iqbal* establish two new principles of pleading in

all cases: (1) ‘fair notice’ alone will not suffice; a complaint must be ‘plausible’ as well; and (2) a court may not accept ‘conclusory’ allegations as true.” *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1002 (W.D. Wis. 2009). Further, “[i]f the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief.” *Bogie*, 705 F.3d at 608.

Walkowicz has failed to meet this basic burden. The admissions in Walkowicz’s Amended Complaint, facts established in documents the Amended Complaint references, and U.S. Copyright Office and Patent and Trademark Office records conclusively establish that Walkowicz’s claims are all fatally defective because American Girl independently developed the facial appearance of the “Luciana” character, independently adopted the LUCIANA mark, and independently decided to create “space-themed” dolls and accessories long before it “may have” learned of Walkowicz.

Moreover, Walkowicz’s Amended Complaint fails because it is devoid of the facts needed to give American Girl sufficient notice of the claims she asserts or the basis for them. Walkowicz’s Amended Complaint does not allege that American Girl used Walkowicz’s actual name, portrait or picture, as required by Wisconsin’s right of privacy statute. Wis. Stat. §995.50. Further, Walkowicz’s Amended Complaint references 15 U.S.C. §1125(a) and mentions “unfair competition,” but does not specify whether Walkowicz claims of trademark infringement, false designation of origin, unfair competition, or false endorsement under that statute. Instead, Walkowicz jumbles some (but fatally, not all) of the elements of these various potential causes of action together in a hodge podge that fails to adequately allege any of them. Likewise, the Negligence and new Negligent Supervision claims (Counts Three and Four) are based on a duty

of care that Wisconsin does not recognize. Further, these claims also are devoid of the factual detail needed to adequately plead them.

Walkowicz's prayer for relief underscores the lack of notice pleading provided. It seeks cancellation of the LUCIANA and LUCIANA VEGA marks, but neither includes a fraud on the Trademark Office claim needed to cancel a mark, nor alleges facts sufficient to afford her such relief. Instead, the Amended Complaint merely includes four conclusory paragraphs that assert that American Girl's marks are not valid because American Girl did not disclose that they were allegedly based on a living person. (Am. Compl. ¶¶ 174–177.) Such allegations do not satisfy the notice requirements of Rule 8, much less the heightened Rule 9(b) pleading standards that would apply if this were intended to support the claim for fraud on the Trademark Office. Accordingly, that claim for relief should be struck.

In sum, Walkowicz's lengthy amendments do not remedy the deficiencies that American Girl set forth in its Motion to Dismiss (Dkt. 17), but instead further clarify the legal inadequacy of her claims. Walkowicz's Amended Complaint should be dismissed with prejudice.

II. THE AMENDED COMPLAINT'S ADMISSIONS AND JUDICIALLY NOTICEABLE GOVERNMENT RECORDS ESTABLISH THAT AMERICAN GIRL INDEPENDENTLY CREATED THE LUCIANA DOLL.

Walkowicz's Amended Complaint admits that Mattel first applied for a trademark registration for LUCIANA for dolls and accessories in 2006 and 2010, and obtained a trademark registration for PRINCESS LUCIANA for dolls and accessories in 2008. (Am. Compl. ¶¶ 49, 52–56.) Walkowicz admits that American Girl independently created and began using the facial

features of the “Girl of the Year” dolls in 2001. Judicially noticeable Copyright Office records⁵ confirm that the predecessor of American Girl obtained a copyright registration for the three-dimensional sculpture used to create the LUCIANA VEGA doll’s face in 1997. (Second Lee Decl. Exs. 3–4; Am. Compl. ¶¶ 22, 73.) They also confirm that Mattel independently created aspirational space-themed dolls and toys to inspire children for decades, including in the 1986 Astronaut Barbie. (Second Lee Decl. ¶ 13–14, Exs. 9 and 10.) All those actions took place years before, and in some cases decades before, Walkowicz claims to have begun the activities she claims gave her prominence in 2011, and alleges American Girl “may have” learned of her in 2013. (Second Lee Decl. Exs. 5–7; Am. Compl. ¶¶ 22, 73.)

These admissions and judicially noticeable government records thus establish that American Girl had previously and independently created the head and facial sculpture used for the LUCIANA VEGA doll, previously and independently decided to use the name LUCIANA in connection with dolls, and previously and independently created space-themed dolls and toys up to 25 years before the Amended Complaint alleges that Walkowicz’s public activities even began in 2011 and up to 27 years before American Girl “may have” learned of Walkowicz in 2013. They thus confirm that American Girl independently developed the key elements of the “Luciana Vega” character about which Walkowicz complains. American Girl could not have taken Walkowicz’s “name, portrait or picture,” or violated some unspecified aspect of the Lanham Act,

⁵ As mentioned in footnote 2 above, this Court may take judicial notice of the Copyright Office and Patent and Trademark Office records filed as Exhibits with this motion even though they are not attached to the Amended Complaint because they are public records whose accuracy can be confirmed from an official government website, namely the US Copyright office’s website at <https://copyright.gov/> and the Patent and Trademark Office’s website at <https://www.uspto.gov/>. *Ambrosetti*, 2020 WL 2219172, *2, n.1 (taking judicial notice of copyright office records to grant motion to dismiss); *Slep-Tone Ent.*, 75 F. Supp. 3d at 904 (granting motion to dismiss in part based on facts in judicially noticeable trademark application).

or been “negligent” in doing so under these admitted facts. American Girl independently created the “Luciana Vega” character, and Walkowicz’s Amended Complaint should be dismissed with prejudice accordingly.

III. COUNT ONE FAILS TO STATE A CLAIM FOR VIOLATION OF THE RIGHT OF PRIVACY UNDER WISCONSIN LAW.

A. Walkowicz’s Right of Privacy Claim Fails as a Matter of Law.

Wis. Stat. §995.50 prohibits “the [unauthorized] use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person...” Wis. Stat. §995.50(2)(b). While there is limited Wisconsin precedent construing this statute, New York case law assists interpreting it because “the Wisconsin legislature used New York’s privacy statute as a model...[and] the text of subsection 995.50(2)(b) duplicates nearly verbatim New York Civil Rights Law § 50 [and § 51]. . .” Thus, “[c]ase law under the New York privacy statute may be particularly useful” in construing Wisconsin’s privacy statute and law. *Bogie*, 705 F.3d at 609–10 (internal citations and quotations omitted) (affirming Wisconsin district court’s dismissal on motion of 995.50(2)(b) right of privacy claim based on New York case law).

Wisconsin law and New York case law construing its virtually identical provisions, establish that Walkowicz cannot state a right of privacy claim on the facts alleged here because American Girl has not used Walkowicz’s “name, portrait or picture,” and did not do so “for advertising purposes or for purposes of trade” as a matter of law as shown below.

B. American Girl Has Not Used Walkowicz’s “Name, Portrait or Picture” as a Matter of Law.

American Girl’s independent creation of their fictional character aside, Walkowicz’s privacy claim fails because the Amended Complaint admits facts and includes images, which establish that American Girl has not used her “name, portrait or picture” as required by the right of privacy statute. To qualify for use of a name under the statute, a plaintiff must prove use of

their first and last name, or that a single nickname clearly identifies the plaintiff. Likewise, to qualify for use of a portrait or picture, a plaintiff must prove that defendant actually used a portrait or picture, not merely that a fictional character incorporates some similar features.

1. American Girl Has Not Used Walkowicz’s “Portrait or Picture” as a Matter of Law.

The visual images of Walkowicz and Luciana Vega included in the Amended Complaint are too different to support a claim that American Girl used Walkowicz’s “portrait or picture” as a matter of law, and they conclusively rebut any textual allegation otherwise, as several recent decisions demonstrate.

For example, New York’s highest court in *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 117 (N.Y. 2018), affirmed the grant of a motion to dismiss a right of privacy action brought by actress and singer Lindsay Lohan against the creator of the video game “Grand Theft Auto V.” Lohan alleged that the game used of a fictional character named “Lacey Jonas” who allegedly shared the same profession as Lohan, was followed by the paparazzi like Lohan, had the same level of fame as Lohan, wore a similar bikini and bracelets as Lohan, made the same “peace sign” gesture as Lohan, had a voice like Lohan, and physically resembled Lohan in facial features, hair, and body type, as follows:

EXHIBIT B-1



Lacey Jonas

EXHIBIT B-2



Lindsay Lohan

Gravano v. Take-Two Software, Inc., 37 N.Y.S.3d 20, 21 (N.Y. App. Div. 2016), *aff'd* 31 N.Y.3d 111 (2018); *Lohan v. Take-Two Interactive Software, Inc.*, No. 156443-2014, Doc. 46, Am. Verif. Compl., at Ex. B-1, B-2 (N.Y. Sup. Ct. Oct. 8, 2014).

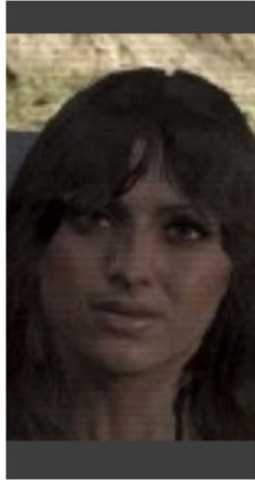
Lohan argued that the allegedly similar physical appearance of and background facts concerning the fictional character at least created an issue of fact as to whether the defendants' images evoked her "images, portrait and persona" and whether they used "her portrait and her voice." *Lohan*, 31 N.Y.3d at 118. Affirming the trial court's grant of the motion to dismiss, the New York Court of Appeals rejected Lohan's arguments and held that the defendants did not take her "portrait or picture" because the "Lacey Jonas" character was not recognizable as Lohan as a matter of law:

Whether an image or avatar is a "portrait" because it presents a "recognizable likeness" typically is a question for a trier of fact. Nevertheless, before 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.

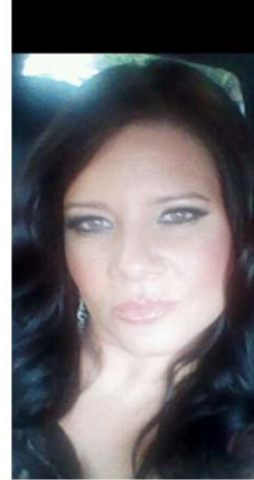
Here, the Jonas character simply is not recognizable as plaintiff inasmuch as it merely is a generic artistic depiction of a "twenty something" woman without any particular identifying physical characteristics. . . Those artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman.

Id. at 122–23 (internal citations omitted).

Similarly, in *Gravano*, the court dismissed the right of privacy claim asserted by "Mob Wives" star Karen Gravano. 37 N.Y.S.3d at 21. Gravano alleged that the same video game at issue in *Lohan* used her "name, portrait, and picture" in another fictional character named Andrea Bottino, who allegedly used the same phrases Gravano used, shared similar biographical details about Gravano and her "Mob Boss" father's life and physically resembled Gravano as follows:



Andrea Bottino



Karen Gravano

Gravano v. Take-Two Interactive Software, Inc., et al, No. 151633-2014, Doc. 24-25, Am. Verif. Compl., Ex. A (N.Y. Sup. Ct. March 28, 2014).

In affirming rejection of the privacy claim on a motion to dismiss, the court held that Gravano’s claim “must fail because defendants did not use her ‘name, portrait or picture.’” *Gravano*, 37 N.Y.S.3d at 22. Why? Because “[d]espite Gravano’s contention that the video game depicts her, defendants never referred to Gravano by name or used her actual name in the video game, never used Gravano herself as an actor for the video game, and never used a photograph of her [in the video game].” *Id.*

Finally, in *Champion v. Take Two Interactive Software, Inc.*, the court granted a motion to dismiss a right of privacy claim involving a different video game on the grounds that, *inter alia*, neither the fictional character’s name nor appearance sufficiently resembled the plaintiff for the defendant to have taken the plaintiff’s “name, portrait or picture” as a matter of law. 100 N.Y.S.3d 838 (N.Y. Sup. Ct. 2019). After discussing the *Lohan* and *Gravano* decisions discussed above, the *Champion* court held regarding the appearance of the fictional character:

In both *Lohan* and *Gravano*, the courts described the plaintiffs, their alleged avatars and the claimed visual similarities between same in notable detail. With both cases having been electronically filed in Supreme Court, New York County,

certain of the images contained in the record on appeal in those cases were available for this court to review to obtain a fuller understanding of the basis for those courts' determinations.

In this case, the avatar in NBA2K18 plaintiff claims is an appropriation of his likeness bears no resemblance to plaintiff whatsoever. The only reasonable commonalities which may be noted between plaintiff and the avatar are that both are male, African-American in appearance, and play basketball. In *Lohan* and *Gravano*, the images of those plaintiffs and their purported avatars were distinctly closer in appearance than here and, yet, were still not actionable as a matter of law. ***In those cases, there were also similarities in clothes, hair, poses, voice, and back stories*** of the avatars that are not present here. Thus, at least from a visual perspective, the avatar in NBA2K18 is not recognizable as plaintiff as a matter of law.

Id. at 845–46 (emphasis added).

Similarly, American Girl has not used Walkowicz's "portrait or picture" here as a matter of law. Just as the images of the fictional characters in *Lohan*, *Gravano* and *Champion* did not constitute the "portrait or picture" of those plaintiffs (despite the *Lohan* and *Gravano* characters' obviously closer resemblances to those plaintiffs than Luciana Vega's "resemblance" to Lucianne M. Walkowicz here), the appearance of the "Luciana Vega" character is different from and not recognizable as Walkowicz. Just as *Lohan*, *Gravano*, and *Champion* properly dismissed those right of privacy claims on motions to dismiss without leave to amend, this Court should dismiss Walkowicz's right of privacy claim without leave to amend because any amendment would be futile in light of the names, images, and biographies admittedly at issue. *Bogie*, 705 F.3d at 608 (affirming a dismissal of a right of privacy claim without leave to amend because "[l]eave to amend need not be granted . . . if it is clear that any amendment would be futile.").

Walkowicz's amendments to her original complaint have made her right of privacy pleading deficiencies even more obvious. Walkowicz's Amended Complaint effectively admits that American Girl independently created "Luciana Vega's" facial appearance in 2001 as described above, but seeks to avoid the consequences of that admission by focusing her

allegations on characteristics such as hair color, shoes, and interest in Mars, etc., which she now alleges is the only way to distinguish between different American Girl “Girl of the Year” dolls. (Am Compl. ¶¶ 60–64, 102–105, 152.)

Yet courts consistently have dismissed on motion privacy claims that alleged use of other characteristics to identify the plaintiff. For example, in *Neri v. Pinckney Holdings, LLC, No.*, the Wisconsin Court of Appeals affirmed dismissal on motion of a right of privacy claim based on a depiction of a sculpture that the plaintiff created and with which he claimed he was identified, because the sculpture did not involve his “name, portrait or picture.” 2013AP1112, 2014 WL 958875, *3 (Wis. Ct. App. Mar. 13, 2014) (unpublished). Similarly, in *Greene v. Paramount Pictures Corporation*, the court granted a motion to dismiss a right of privacy claim that alleged a fictional character’s physical resemblance and use of similar toupees, similar backstory, and similar business position at the same company as the plaintiff, even though the plaintiff claimed that “the [resulting] likeness is so significantly similar as to cause members of the public to recognize the character as [plaintiff][,]” 138 F. Supp. 3d 226, 233 (E.D.N.Y. 2015)(internal citation omitted). Noting that “[i]t is well settled that”... “[m]erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait or picture, is not actionable under the [privacy] statute[,]”, the court dismissed the privacy claim because, notwithstanding the allegedly similar identifying characteristics, defendant did “not use Plaintiff’s name, portrait or picture...” *Id.* (internal citation omitted).⁶

⁶ See also *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 356 (S.D.N.Y. 1998) (holding depiction of the plaintiff in the motion picture *Donnie Brasco* failed to state a right of privacy claim “even assuming [that the plaintiff was] identifiable” as the character in the film); *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 860, 374 N.E.2d 129, 130, 403 N.Y.S.2d 218, 219 (1978) (affirming trial court’s holding that the depiction of the plaintiffs in the motion picture *Dog Day Afternoon* failed to state a right of privacy claim even though they were “portrayed ... in sufficiently detailed accuracy of physical characteristics and activities as to

Thus, American Girl did not use Walkowicz's "portrait or picture" as a matter of law.

2. American Girl Did Not Use Walkowicz's "Name" as a Matter of Law.

Nor has American Girl used Walkowicz's "name" under the right of privacy statute. As a preliminary matter, the first names are different, and the Trademark Office records establish that Mattel independently owned the rights to use the LUCIANA name. Moreover, the right of privacy statute "has been construed nearly literally such that only use of a 'full' name, not just a surname is actionable." *Greenberg v. Perfect Body Image, LLC*, No. 17-CV-5807 (SJF) (SIL), 2019 WL 3485700, *12 (E.D.N.Y. Aug. 20, 2019); *see also Champion*, 100 N.Y.S. 3d at 846–47. A single nickname can qualify as a "name" under the statute, but only if it "clearly identif[ies] the wronged person[.]" *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 397–98 (1979), such that it "has become known to the public and identifies its bearer virtually to the exclusion of his or her true name," *Champion*, 100 N.Y.S.3d at 839. Examples of celebrities who might qualify under this standard include "Cher," *see Cher v. Forum Intern., Ltd.*, 692 F.2d 634 (9th Cir. 1982), or "Heloise," author of the newspaper column "Hints from Heloise," *see Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980).

However, Walkowicz has not even attempted to allege that she has achieved that level of notoriety by her first name "Lucianne" alone, or at all. The allegations about her

result in their effective identification"); *Springer v. Viking Press*, 90 A.D.2d 315, 316, 457 N.Y.S.2d 246, 247 (1st Dep't 1982) (affirming that the plaintiff failed to state a privacy claim even though the character in a novel was based on, shared "some physical similarities" with, and had the same "common first name" as the plaintiff), *aff'd*, 470 N.Y.S.2d 579 (1983); *Waters v. Moore*, 70 Misc. 2d 372, 375, 334 N.Y.S.2d 428, 433 (N.Y.Sup.Ct. Nassau Cnty.1972) (depiction of the plaintiff in the motion picture *The French Connection* failed to state a privacy claim even though the plaintiff's "identity [could] be ascertained from his involvement with the actual event [depicted in the movie]...").

accomplishments are directed to her full name, and in any event do not reach that level of fame. (Am. Compl. ¶¶ 17–34).

Instead, Walkowicz straightforwardly alleges that American Girl has used her “name,” which means her full name under the privacy statute. Because American Girl’s use of “Luciana Vega,” is different from “Lucianne M. Walkowicz,” Walkowicz cannot state a name-based privacy claim as a matter of law. *Greenberg*, 2019 WL 3485700 at *12 (the defendant’s use of “Dr. Greenberg” rather than the plaintiff’s full name “Stephen T. Greenberg” did not violate the plaintiff’s right of privacy because the defendant did not use his full name under New York’s right of privacy statute), *aff’d*, 2019 WL 3927367 (E.D.N.Y Aug. 20, 2019) (district court accepting recommendation); and *Champion*, 100 N.Y.S.3d at 839 (granting motion to dismiss right of privacy claim in which the plaintiff claimed the defendants used his nickname “Hot Sizzle” because he did not and could not sufficiently allege that he was identifiable by that nickname.).

Walkowicz thus admits facts that establish that American Girl has not used her “name, portrait or picture” as a matter of law. The images Walkowicz included with her complaint, her admission that her name is Lucianne M. Walkowicz whereas the American Girl’s character’s name is “Luciana Vega”, her admission that American Girl independently created the visual image of its character in 2001 and decided to use the name “Luciana” to identify dolls in 2006, 2008 and 2010, and her allegations that American Girl took her “likeness” by taking allegedly identifiable “characteristics” “affiliated” with her, make it impossible to allege a valid right of privacy claim under Wisconsin law. This claim should be dismissed with prejudice.

C. **American Girl Did Not Use Any Aspect of Walkowicz For Advertising or Trade Purposes as Required By the Privacy Statute.**

To violate Wis. Stat. §995.50(2)(b), one must use another’s name, portrait or picture “for advertising purposes or for purposes of trade” as described above. This Court should dismiss Walkowicz’s privacy claim for the separate and independent reason that the doll, book, and accessory “uses” she alleges are not “for purposes of advertising or trade” as narrowly defined by case law construing that statute.

In interpreting Wisconsin’s privacy statute, the Seventh Circuit cited and quoted with approval *Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 409–10 (1969), *aff’d* 26 N.Y.2d 806 (1970), which held that the phrases “advertising purposes” and “purposes of trade . . . must be construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed.” *Stayart v. Google Inc.*, 710 F.3d 719, 722–23 (7th Cir. 2013). The Court relied on *Rand* to affirm dismissal of a Wisconsin right of privacy claim and held that the appearance of names in online court documents and Internet search results were not “advertising or trade” uses under the statute.

Walkowicz’s privacy claim should be dismissed for similar reasons. It falls within what might be called a “hey, it’s me” subgenre of unsuccessful right of privacy cases, in which a plaintiff sees a resemblance between herself and a fictional character in an expressive work and claims a right of privacy violation on that basis. Such allegations do not state a claim under the privacy statute because uses in such expressive works are not advertising or trade uses under the statute, even though the expressive works are sold to the public like other items of commerce.

Applying the parallel New York statute, courts routinely grant motions to dismiss right of privacy claims when a person’s “name, portrait or picture” is allegedly used in expressive works

such as television shows, movies, or paintings, on the ground that such works are not sold for “advertising or trade” purposes under the statute. *See, e.g., Lohan v. Perez*, 924 F. Supp. 2d 447, 454 (E.D.N.Y. 2013) (granting motion to dismiss right of privacy claim based on use in a song, because music is “a form of expression and communication”); *Krupnik v. NBC Universal, Inc.*, No. 103249/10, 2010 WL 9013658 (N.Y. Sup. Ct. Jun. 29, 2010) (granting motion to dismiss movie because the plaintiff’s alleged depiction took the form of a fictionalized character). And they grant those motions based on their own independent review of the works at issue to determine whether they are expressive.⁷

For example, *Gravano* held that the privacy claim before it was properly dismissed not only because defendant failed to use plaintiff’s “name, portrait or picture” as a matter of law, but also “because this video game does not fall under the statutory definitions of ‘advertising’ or ‘trade’ ...” *Gravano*, 37 N.Y.S.3d at 22.

Similarly, in *Costanza v. Seinfeld*, the court of appeals affirmed the dismissal of the complaint alleging that the plaintiff was the basis for the Seinfeld character George Constanza because the allegations did not satisfy the right of privacy statutes’ advertising or trade elements. *Costanza v. Seinfeld*, 719 N.Y.S.2d 29 (N.Y. App. Div. 2001). Although the plaintiff alleged that both the plaintiff and the character were named “Costanza,” both resembled each other, and the plaintiff’s personal travails resemble those of the fictional “George Costanza” character, the

⁷ This judicial review can be dispositive, but it is limited. “It is fundamental that courts [] not muffle expression by passing judgment on its [the work at issue’s] skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression....” *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 307 (N.Y. App. Div. 1965), *aff’d* 15 N.Y.S.2d 940 (1965) (citation and quotation marks omitted).

court of appeals affirmed the grant of a motion to dismiss because “works of fiction do not fall within the narrow scope of the statutory definition of ‘advertising’ or ‘trade.’” *Id.* at 30.

Additionally, in *Hampton v. Guare*, the appellate court affirmed dismissal of a right of privacy claim brought by a plaintiff who claimed the main character in the play “Six Degrees of Separation” was a fictional version of himself, holding “works of fiction and satire do not fall within the narrow scope of the statutory phrases ‘advertising’ and ‘trade.’” 600 N.Y.S.2d 57 (N.Y. App. Div. 1993); *accord*, Restatement (Third) of Unfair Competition § 47 (1995) (“use ‘for purposes of trade’ does not ordinarily include the use of a person’s identity in . . . entertainment, works of fiction or nonfiction, or in advertising that is incidental to such use.”).⁸

Given the identical language in and policies supporting Wisconsin’s privacy statute, *see Bogie*, 705 F.3d at 608 and *Stayart*, 710 F.3d at 722–23, Walkowicz’s privacy claim should likewise be dismissed. The American Girl LUCIANA VEGA doll, books, and toy accessories are expressive works. Courts have recognized that dolls are expressive, sculptural works that deserve copyright protection for over 85 years. *See, e.g., Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 825 (11th Cir. 1982) (holding soft sculpture dolls qualified for copyright protection); *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 278 (2d Cir. 1934) (holding three-dimensional doll of the character “Betty Boop” qualified for copyright

⁸ In contrast, cases that involve the actual unauthorized use of a person’s name in business transactions violate the statute. *LoRiggio v. Sabba*, 892 N.Y.S.2d 387 (N.Y. App. Div. 2010) (finding a use to be for purposes of trade when a tax return preparer signed an ex-employee CPA’s name to tax returns submitted to the IRS without permission). As another example, defendants who conspired to use the plaintiff’s name to secure a real estate financing deal without his permission were held to have used it “for purposes of trade.” *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 301, 314 (S.D.N.Y. 2010).

as a “sculptural work”).⁹ Similarly, books have long been recognized as quintessential “expressive works” for privacy purposes. *See, e.g., Univ. of Notre Dame*, 256 N.Y.S.2d at 301 (holding books are expressive works, and therefore alleged use of the plaintiff’s name, portrait or picture in a book not a use for advertising or trade under the right of privacy statute). Finally, LUCIANA VEGA’s toy accessories are also expressive works. *VIP Prods. LLC v. Jack Daniel’s Prods., Inc.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (noting that a dog toy, “although surely not the equivalent of the *Mona Lisa*, is an expressive work”); *Gay Toys, Inc. v. Buddy L. Corp.*, 703 F.2d 970, 972 (6th Cir. 1983) (holding that a toy airplane is a “three-dimensional work of applied art or a model” that qualifies for copyright protection).

As expressive works, the LUCIANA VEGA doll, books, and toy accessories are not used for purposes of advertising or trade under the Wisconsin privacy statute as a matter of law, and Walkowicz’s privacy claim should be dismissed on this separate and independent basis.

IV. COUNT TWO FAILS TO STATE A CLAIM.

Notwithstanding American Girl’s initial motion to dismiss and the resulting opportunity for Walkowicz to amend her complaint, Walkowicz still has not identified what Lanham Act theory she is pursuing, much less adequately pled the elements supporting any such claim under 15 U.S.C. §1125(a), let alone the elements supporting a cause of action for cancellation of a mark for fraud on the Trademark Office. Count Two should be dismissed for this reason alone. *Iqbal*, 556 U.S. at 663.

Moreover, as set forth in more detail below, the Lanham Act claim should be dismissed because Walkowicz has not pled facts that plausibly support the necessary elements of any

⁹ A copyrightable work is by definition expressive because copyright law only protects “original works of authorship *fixed in a tangible medium of expression.*” 17 U.S.C § 102(a) (emphasis added).

Lanham Act theory. Section 1125(a) allows for a cause of action for trademark infringement, false designation of origin, unfair competition and false endorsement. To plead trademark infringement, false designation of origin, or unfair competition, Walkowicz must identify rights in a protectable mark and use of that mark in a manner that is likely to cause confusion. To plead false endorsement, Walkowicz must identify a protectable commercial interest and use of that interest by American Girl in a way that is likely to cause confusion as to endorsement. Walkowicz does not do any of those things, and thus her Lanham Act claims should be dismissed.

Finally, Walkowicz's request for cancellation in the Prayer for Relief should be struck. A claim under 15 U.S.C. §1125(a) is a wholly independent claim from a claim for fraud on the Trademark Office, which has not been pled, nor has Walkowicz alleged facts sufficient to state a claim for fraud under Rule 9.

A. Walkowicz Does Not Plead the Existence or Use of a Mark as Required in Trademark Infringement, False Designation of Origin and Unfair Competition Claims.

To prevail on a theory of trademark infringement, false designation of origin, or unfair competition under §1125(a), a plaintiff must allege that: (1) it has rights to a protectable mark; and (2) the defendant's use of the mark is likely to cause confusion among consumers. *See Packman v. Chi. Tribune Co.*, 267 F.3d. 628, 638 (7th Cir. 2001) (listing the elements of trademark infringement and unfair competition under the Lanham Act); *Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1214 (7th Cir. 1997) (listing the elements of false designation of origin under the Lanham Act).

1. Walkowicz Does Not Plead That She Has Rights to a Valid Trademark.

A trademark infringement, false designation of origin or unfair competition claim must allege that the plaintiff has a protectable mark, either because it is registered or qualifies as a common law mark under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). *Top Tobacco v. Fantasia Distrib. Inc.*, 101 F. Supp. 3d 783, 788 (N.D. Ill. 2015); *see also KJ Korea, Inc. v. Health Korea, Inc.*, 66 F. Supp. 3d 1005, 1013 (N.D. Ill. 2014).

Courts have dismissed §1125 claims where the plaintiff has failed to establish rights to a valid trademark. *Packman*, 267 F.3d at 638; *McGee v. Oshkosh Defense, LLC*, No. 18-cv-705, 2019 WL 4758216 (W.D. Wis. Sept. 30, 2019) (dismissing the plaintiff’s claim for trademark infringement for failing to allege any trademark rights); *Alan Ross Mach. Corp. v. Machinio Corp.*, No. 17-cv-3569, 2018 WL 3344364 (N.D. Ill. July 9, 2018) (dismissing Lanham Act claim where the plaintiff did not have a protectable mark because the plaintiff’s name was not used in “a trademark sense” to distinctively identify goods); *Trombetta v. Novocin*, 414 F. Supp. 3d 625, 630–31 (S.D.N.Y. 2019) (dismissing Lanham Act claim where the plaintiff failed to plausibly allege her name was a valid trademark and entitled to trademark protection).

As trademark law has long recognized, a name-based mark requires a showing of acquired distinctiveness to be enforceable. 15 U.S.C. §1052 (e)(4), (f); *see also* 2 McCarthy on Trademarks and Unfair Competition §13:2 (5th ed.) (explaining that “personal names are placed by the common law into a category of noninherently distinctive terms, which require proof of secondary meaning for protection”).

Here, Walkowicz has pled no facts that suggest she holds a valid trademark right to her name, or that her name has acquired secondary meaning and distinctiveness needed to function as a mark. For example, the Amended Complaint does not claim that Walkowicz owns a

registration, and fails to allege use, or grant of a license to use, her name as a mark in connection with any type of good or service. 15 U.S.C. §1127. This failure is fatal to any Lanham Act claim based on trademark infringement, false association, or unfair competition.

2. Walkowicz Does Not Plead That American Girl's Uses of Its LUCIANA and LUCIANA VEGA Trademarks Are Likely to Cause Confusion.

Walkowicz also fails to allege that American Girl's use of the marks LUCIANA or LUCIANA VEGA is likely to cause confusion among consumers, thus she cannot prevail on a theory of trademark infringement, false designation of origin, or unfair competition.

Likelihood of confusion is established by proving that use of an allegedly infringing mark is likely to cause confusion among consumers regarding the origin, sponsorship, or affiliation of the goods and services sold. *Id.* at 637; *see also Bretford Mfg., Inc. v. Smith Sys. Mfg., Corp.*, 419 F.3d 576, 580 (7th Cir. 2005) (trademark claim arises from a “misrepresentation of the goods’ origin”). Under trademark law, the “origin” of the goods means “the producer of the tangible product sold in the marketplace.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003). The Seventh Circuit has identified seven factors that inform the court’s “likelihood of confusion” analysis: (1) similarity between the marks in appearance and suggestion; (2) similarity of the products; (3) area and manner of concurrent use; (4) degree of care likely to be exercised by consumers; (5) strength of the plaintiff’s mark; (6) actual confusion; and (7) intent of the defendant to “pass off” his product as that of another. *Packman*, 267 F.3d at 643.

One must identify the marks at issue to evaluate their similarity. As the Federal Circuit explained, “one DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.” *Champagne Louis Roederer, S.A. v. Delicanto Vineyards*, 148 F.3d 1373, 1375, 47 U.S.P.Q.2d (BNA) 1459, 1460–61 (Fed.

Cir. 1998) (affirming dismissal of opposition based solely on dissimilarity of CRISTAL and CRYSTAL CREEK). Pursuant to the “anti-dissection rule,” the parties’ marks must be compared as a whole, rather than by their component parts. *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007, 212 U.S.P.Q. (BNA) 233, 234 (Fed. Cir. 1981). Because a mark must be considered as a whole, the mere fact that marks share elements does not compel a conclusion of likely confusion. *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 U.S.P.Q.2d (BNA) 1442, 1445 (8th Cir. 1987) (“[t]he use of identical, even dominant, words in common does not automatically mean that two marks are similar.”)

Courts have dismissed Lanham Act claims when the plaintiff has failed to allege any facts that would show that the defendant’s use of an allegedly infringing mark would plausibly cause confusion among consumers regarding the origin or sponsorship of goods. *See Big Daddy Games, LLC v. Reel Spin Studios, LLC*, No. 12-cv-449, 2012 WL 12995406 (W.D. Wis. Aug. 24, 2012) (dismissing Lanham Act claim where no facts suggested the defendants had taken actions or made misrepresentations that would mislead consumers about the origin of the defendant’s game); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 882–83 (E.D. Wis. 2009) (“[p]laintiff must be able to show that the public believes that the mark’s owner sponsored or otherwise approved of the use of the trademark”) (internal quotations removed). Moreover, courts have repeatedly recognized that “questions about potential affiliation confirm that these sophisticated retailers discern a difference between the marks, or at least put themselves in a position to do so.” *Sterling Jewelers, Inc. v. Artistry Ltd.*, 896 F.3d 752, 758 (6th Cir. 2018) (affirming summary judgement dismissal despite questions about potential affiliation).

Here, Walkowicz has not alleged any facts that would support a finding of a likelihood of confusion as to source under the likelihood of confusion factors in the context of an identified

trademark in which she has rights. Instead, Walkowicz asserts generalized similarities, such as both the doll and Walkowicz have dark brown hair, with no connection between this element and the identity of a protectable mark alleged to be at issue. (Am. Compl. ¶ 108.)

If Walkowicz’s “mark” is her name, the Amended Complaint only contains incomplete allegations. It acknowledges that the first names “Lucianne” and “Luciana” differ slightly, but also alleges that they are “very similar.” (Am. Compl. ¶ 124.) The Amended Complaint largely ignores Plaintiff’s surname, “Walkowicz,” but does not suggest that Walkowicz has risen to the level of fame to be known only by her first name, such as a celebrity like “Cher,” such that “Lucianne” alone could function as a mark. Many very famous individuals, from Michelle Obama to Brad Pitt, require the addition of the last name for their names to be recognized. Given the anti-dissection rule, if the “mark” at issue is the name, the analysis must compare Lucianne Walkowicz to Luciana Vega, notably different last names about which the Amended Complaint is silent.

Nor does the Amended Complaint identify *actual confusion*, much less actual confusion among the purchasing public of dolls or doll accessories. To have actual confusion supporting a claim for trademark infringement, the confusion must be about the source or origin of the good. *Eastland Music Grp., LLC v. Lionsgate Entm’t, Inc.*, 707 F.3d 869, 871–72 (7th Cir. 2013). For example, in *Eastland Music*, the Seventh Circuit affirmed the dismissal of a trademark infringement claim brought by Eastland Music Group, the owner of the “Phifty-50” trademark, against the defendants for using “50/50” as the title of a motion picture. *Id.* at 870. Noting the importance of confusion as to the source, the Court affirmed dismissal with prejudice, holding “this complaint fails at the threshold: it does not allege the use of [the trademark] as a title has caused any confusion about the film’s source -- **and any such allegation would be too**

implausible to support costly litigation.” *Id.* at 871 (emphasis added). As a further illustration of this principle, the “titles of Truman Capote’s novella *Breakfast at Tiffany’s*, and the movie of the same name, do not infringe the rights of Tiffany & Co. because no reasonable reader or moviegoer thinks that the jeweler is the source of the book or movie.” *Id.* at 872.

Instead, of actual confusion about the origin of the dolls, Walkowicz relies exclusively on alleged “messages” from unidentified third parties as to “similarities” between herself and the doll. (Am. Compl., ¶¶ 129–135.) From these general allegations, Walkowicz makes conclusory allegations again parroting the statute that “Defendants’ use of Lucianne’s name and likeness has caused confusion as to the affiliation, connection, or association of Lucianne with the origin, sponsorship, endorsement, and approval of the Luciana Vega doll and accessories.” (Am. Compl., ¶ 181). The Amended Complaint contains no allegations that anyone has ever contacted Walkowicz to purchase a LUCIANA VEGA Doll or complain about the quality of the LUCIANA VEGA Doll. Without any facts that, if accepted as true for the purposes of this motion, could plausibly show that American Girl’s use of LUCIANA VEGA in connection with the marketing and sale of the doll, books and accessories is likely to cause confusion as to the origin, sponsorship or approval of the goods, Walkowicz’s Lanham Act claim fails. *See, e.g., Eastland Music Grp.*, 707 F.3d at 872 (explaining “[o]nly confusion about origin supports a trademark claim”).

B. Walkowicz Cannot Plausibly Allege That American Girl’s Use of its LUCIANA and LUCIANA VEGA Trademarks is Likely to Cause Confusion as to Endorsement.

The Court should dismiss the Lanham Act claim to the extent it is based on a false endorsement theory because Walkowicz has not alleged and cannot plausibly allege that she has a protectable commercial interest, nor that American Girl’s use of its own registered LUCIANA

and LUCIANA VEGA marks is likely to confuse consumers to think Walkowicz endorsed American Girl's products.

To state a claim for false endorsement under the Lanham Act, a plaintiff must show that it has a protectable commercial interest and that the defendant's actions and representations lead to consumers to believe that the plaintiff endorsed the defendant's products. *See* 15 U.S.C. §1125(a)(1)(A). With respect to the first element, a protectable commercial interest, a plaintiff does not have standing if a plaintiff does not have a commercial interest in the plaintiff's name or identity. *Stayart*, 651 F. Supp. 2d at 881.

In determining whether a person or entity has standing under the Lanham Act to bring a claim for false endorsement, the court must determine "whether they have 'a reasonable interest to protect' in a commercial activity." *Stayart v. Yahoo! Inc.*, 623 F.3d 436, 439 (7th Cir. 2010) (quoting *Dovenmuehle v. Gilldorn Mortg. Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989)). Standing is limited to a "purely commercial class of plaintiffs." *Id.* As an example, an individual who has a good reputation due to humanitarian efforts or scholarly writing is not someone with a commercial interest. *Id.* The Lanham Act only protects a "commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor." *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 280 (4th Cir. 2004). Notably, the Seventh Circuit has not adopted the Ninth Circuit's apparent expansion of the Lanham Act's false endorsement claims to cover certain "personas" that have acquired secondary meaning, nor has Walkowicz plead secondary meaning, or any other facts to give her standing under the Seventh Circuit's application of standing in false endorsement claims.

The Amended Complaint does not establish that Walkowicz has a protectable commercial interest. The Amended Complaint does not contain any factual allegations that

would establish Walkowicz as a competitor herself, nor is Walkowicz actively engaged in commercial activity associated with dolls or doll accessories or any company that could be considered a competitor of American Girl. When a complaint lacks such basic facts to support the conclusion that the plaintiff has a commercial interest in a name or identity, then, as here, the complaint fails to establish standing. *Stayart*, 651 F. Supp. 2d. at 881–82; *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, *5 (C.D. Ill. Aug. 3, 2012).

With respect to the second element, a plaintiff must plead facts that, if true, would demonstrate that consumers could believe the plaintiff endorsed the product at issue. *See Stayart*, 651 F. Supp. 2d at 882–83.

Here, the Amended Complaint is silent as to any facts that link the Walkowicz name or identity to dolls, doll accessories, or American Girl, or to the endorsement of any other type of product or service, such that relevant consumers could reasonably believe Walkowicz endorsed the LUCIANA VEGA Doll. In fact, the Amended Complaint is so vague that it is not evident whether the complained of wrong is in connection with the name of the doll or the doll’s clothing or accessories. While the Amended Complaint identifies a variety of alleged similarities, it does not tie those similarities to consumer recognition or product endorsement, or any legal claim. There is no explicit or implicit connection between Walkowicz and American Girl’s doll.

Moreover, Walkowicz has already amended her complaint and any further amendment to Count Two would be futile. Walkowicz does not have a protectable commercial interest and American Girl’s use of the trademarks LUCIANA or LUCIANA VEGA and its use of generic features such as brown hair and space-themed accessories are not likely to cause confusion with Walkowicz, who has a different name and has appeared at public events with a variety of hair styles and accessories. *See Dovenmuehle*, 871 F.2d 697 (affirming dismissal of Lanham Act

claim for lack of standing because the plaintiffs did not have a commercial interest); *Martin v. Wendy's Int'l, Inc.*, No. 15 C 6998, 2017 WL 1545684, at *5 (N.D. Ill. Apr. 28, 2017), *aff'd*, 714 Fed. Appx. 590 (7th Cir. 2018) (affirming dismissal because the plaintiff could not plausibly allege that ordinary consumers would be confused as to source of kids meal). For these reasons, this Court should dismiss the Lanham Act claim for failure to state a claim with prejudice.

C. This Court Should Strike Walkowicz's Request for Cancellation.

Walkowicz has not stated a claim to justify the remedy of cancellation, and thus this remedy should be struck from the Prayer for Relief. A party seeking cancellation of another's trademark must plead fraudulent procurement of the mark and bears a heavy burden of pleading fraud with specificity and proving fraud with clear and convincing evidence that leaves no room for speculation, inference or surmise. Fed. R. Civ. P. 9(b); *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009); *see also Republic Tech., LLC v. BBK Tobacco & Foods, LLC*, 262 F. Supp. 3d 605, 608–09 (N.D. Ill. 2017) (applying Fed. R. Civ. P. 9(b) to a claim seeking cancelation of trademark based on fraudulent procurement). To satisfy this burden at the pleading stage, the “complaint must state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.” *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014).

Walkowicz has done none of those things. She has not even attempted to allege a fraudulent procurement claim. She has not identified the person making allegedly false misrepresentation, nor alleged the time, place and content of any misrepresentation, nor alleged the method by which any misrepresentation was communicated.

Walkowicz appears to base the cancellation sought as relief on the conclusory allegations that American Girl did not disclose that the marks were “based on a living person,” even though

she admits at length elsewhere that American Girl independently began seeking trademark production for LUCIANA in 2006, and that said mark therefore could *not* be based on Walkowicz. (Am. Compl. ¶¶ 49–56, 174–177.) Such allegations fall far short of those required to state a claim for fraud on the trademark office that would justify cancellation of registered marks.

V. COUNTS THREE AND FOUR FAIL TO STATE CLAIMS FOR NEGLIGENCE AND NEGLIGENT SUPERVISION AND SHOULD BE DISMISSED.

A. Count Three Fails to State a Claim For Negligence.

The Negligence claim should be dismissed because Wisconsin has not recognized a duty of care to refrain from using another person’s name and likeness. If Walkowicz has a claim to make, she need to state a claim for the Right of Privacy under Wis. Stat. §995.50, which is an *intentional tort* under Wis. Stat. §893.57. Walkowicz cannot simply supplant the Wisconsin statute’s intent requirement by calling it a claim for “Negligence.”

Plaintiffs bringing a common-law negligence claim must plead sufficient facts to establish all four elements: 1) the existence of a duty of care on the part of the defendant; 2) the defendant breached that duty of care; 3) causation; and 4) an actual loss or damage that resulted from the breach. *Cattau v. Nat’l Ins. Servs. Of Wis., Inc.*, 2018 WI App 45, ¶ 22, 383 Wis. 2d 600, 918 N.W.2d 127. Whether a duty exists and the scope of any such duty are questions of law. *Id.* The existence of a duty is “an important element that must be established by the plaintiff . . . and is . . . restricted to what is reasonable under the circumstances.” The test of negligence is whether the conduct *foreseeably* creates an *unreasonable* risk of harm to others. *Id.* at ¶ 23. The nature of the duty to refrain from engaging in acts that could unreasonably injure others depends upon the circumstances of a given situation, including the nature of the relationship between the parties. *Id.*

After a diligent search, American Girl has found no authority that supports the existence of the duty that Walkowicz asserts here. This is hardly surprising, as “[g]enerally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons or tangible things.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 92, at 657 (5th ed. 1984); *see also* 4 Fowler V. Harper et al., *The Law of Torts* §§ 25.18A to 25.18D (2d ed. 1986) (discussing the general rule that economic damages alone are not compensable in negligence). Walkowicz has not alleged anything other than economic damages here.

Moreover, Walkowicz has pleaded no facts that show a relationship between the parties, nor any reasonable argument that it was foreseeable that American Girl could harm Walkowicz by creating a doll using its own copyrighted head mold, with a name it has used with various dolls for years, in space-themed dolls and accessories as Mattel has done for decades.

Even if the Court finds that American Girl held this purported duty, public policy would limit the imposition of liability for negligence. Wisconsin courts have precluded liability based upon public policy considerations at the motion to dismiss stage. *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶¶ 19–20, 294 Wis. 2d 397, 412–13, 717 N.W.2d 760, 767–68, citing *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 42, 251 Wis. 2d 171, 641 N.W.2d 158. In circumstances where public policy is applied to dismiss a claim for failure to state a claim, the court assumes the defendant is liable for negligent conduct, but for reasons of public policy, the court prevents the claim from proceeding. *Id.* at ¶ 17 (citing *Cole v. Hubanks*, 2004 WI 74, ¶ 5, 272 Wis. 2d 539, 681 N.W.2d 147.). Whether public policy considerations preclude liability is a question of law. *Butler*, 2006 WI 102, ¶ 17.

Wisconsin recognizes six public policy factors available to bar recovery, any one of which can support a finding of no liability. *Id.* at ¶ 22. The factors are: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; (5) to allow recovery would open the way for fraudulent claims; or (6) to allow recovery would enter a field that has no sensible or just stopping point. *Id.* at ¶ 19.

For example, the Wisconsin Supreme Court affirmed the dismissal of a negligence-based claim when there was another means of recovery. *Kleinke v. Famers Co-op. Supply & Ship.*, 549 N.W.2d 714, 716 (Wis. 1996). In *Kleinke*, the Court reasoned that public policy allowed the dismissal of a negligent infliction of emotional distress claim because the remedy was more appropriately addressed through a conversion claim. *Id.* The Court held that “allowing recovery would place an unreasonable burden on negligent actors in property damage cases,” which it reasoned would increase the possibility of future fraudulent claims, unduly give the plaintiff a windfall, and remove any logical stopping point to a tortfeasor’s liability. *Id.* at 717.

Similarly, in this case, Walkowicz’s “Negligence” claim does nothing more than restate her Right of Privacy claim, albeit in a way that seeks to unfairly supplant the intent requirement, and circumvent the case law discussed above. As Wisconsin’s Right of Privacy statute already gives Walkowicz a means of recovery if she meets the standards set forth by the Legislature and the courts interpreting same, this Negligence claim is redundant, places an unreasonable burden on the alleged tortfeasor, and would remove any logical stopping place to a tortfeasor’s liability. To allow Walkowicz to move forward with this negligence count would disrupt the very purpose

of the well-defined statutory context developed to protect a person's right to publicity and further the imposition of negligent liability would be against public policy. Accordingly, even if this Court newly recognizes a duty as Walkowicz claims here, the Court should dismiss the Negligence claim.

B. Count Four Fails to State a Claim For Negligent Supervision.

Similarly, Walkowicz's claim for Negligent Supervision should also be dismissed because it has not been adequately pled, and cannot be adequately pled based on the facts present. "The tort of negligent supervision places liability upon a master for injuries inflicted on third persons by its servant when the master was guilty of selecting a servant incompetent or otherwise unfit to perform the services for which he was employed." *Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir. 1991). Importantly, liability to an employer "does not result solely because of the relationship of the employer and employee, but instead because of the independent negligence of the employer." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 699 n.21, 563 N.W.2d 434, 445 n.21 (1997). To state a claim upon which relief can be granted, the plaintiff must plead four elements: (1) the employer had a duty of care owed to the plaintiff; (2) the employer breached its duty; (3) a wrongful act or omission of an employee was a cause-in-fact of the plaintiff's injury; and (4) an act or omission of the employer was the cause-in-fact of the wrongful act of the employee. *Wilson v. Northland College*, Case No. 17-cv-337, 2018 WL 341749 (W.D. Wis. Jan. 9, 2018).

Walkowicz has pled no plausible factual basis for any of those four elements, much less all four.

With respect to the first element, the negligent supervision tort creates a duty when it was foreseeable that an act or omission to act may cause harm to someone. *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 260, 580 N.W.2d 233, 238 (1998). The duty is to refrain from

such act or omission. *Id.* For example, Wal-Mart was found to have a duty of care to its customers to adequately and properly train its loss prevention employees because it is foreseeable that if not properly trained, a loss prevention employee could harm someone. *Id.* at 260–61. In contrast, it is “not reasonably foreseeable that permitting employees to have unsupervised access to the internet would probably result in harm to some person or some thing.” *Sigler v. Kobinsky*, 2008 WI App 183, ¶ 11, 314 Wis. 2d 784, 793, 762 N.W.2d 706, 710 (Wis. Ct. App. 2008); *see also Maypark v. Securitas Sec. Serv’s USA, Inc.*, 2009 WI App 145, ¶ 15, 775 N.W. 2d 270, 275, 321 Wis. 2d 479, 488 (Wis. App. 2009) (holding security company not negligent in training and supervision of guard who posted photos of the plaintiffs on adult websites).

As set forth above in the Negligence section, the Amended Complaint does not adequately plead facts to establish American Girl had a duty of care to Walkowicz. This is fatal to the Negligent Supervision claim as well. Moreover, as it relates specifically to this cause of action, the Amended Complaint contains no factual allegations, nor plausible inferences, about an act or omission related to American Girl’s training or supervision. Further, it contains no factual allegation, nor plausible inferences, that the alleged awareness of Walkowicz from a TED talk would foreseeably lead to an alleged harm to Walkowicz. Finally, while some cases have found limited duties owed to a company’s customers, Walkowicz does not purport to be a customer; nor does the Amended Complaint contain any allegations sufficient to support a general duty to the public at large with respect to the naming conventions of dolls.

With respect to the second element, the alleged negligence of the employer must be connected to the act of the employee. *Miller*, 218 Wis. 2d at 262, 580 N.W.2d at 239. As a result, to survive a motion to dismiss, a complaint must address how the employer’s actions in

hiring, training, or supervising its employees would allow a trier of fact to plausibly infer negligence on the employer's part. *Bjerke v. Messerli & Kramer, P.A.*, 16-CV-748, 2017 WL 2869957, at *6 (W.D. Wis. July 5, 2017) (granting motion to dismiss negligent supervision claim for lack of allegations about employer's training or supervision of its employees).

The Amended Complaint contains no allegation addressing what specific act or omission on behalf of American Girl was connected to the alleged act of an employee to cause harm. The Amended Complaint fails to identify any specific type of employee training or supervision that was lacking; nor are any facts plead with respect to any of American Girl's training or hiring procedures.

The Amended Complaint also fails the third element. The third element requires Walkowicz to identify a wrongful act or omission of an employee that caused her injury, which is not possible given that the acts complained of were the company's actions, not the act of a single rogue employee. Developing, manufacturing, and selling a doll, such as the LUCIANA VEGA "Girl of the Year" doll, is plainly not the act of a single employee. Business decisions, such as launching a new product, necessarily involve many employees. In tacit recognition of this, Walkowicz makes nothing more than conclusory allegations with no facts regarding any specific wrongful act or whether one, or many, employees engaged in the amorphous wrongful act.

Finally, the Amended Complaint likewise fails to plead facts that if true establish an act or omission of American Girl that caused the wrongful act of an employee. "The question is not whether the employer's alleged conduct presents a 'bare possibility' of injury caused by one of its employees, but whether it presents a 'foreseeable likelihood of injury needed for find negligence.'" *Bjerke*, 2017 WL 2869957 at *6 (quoting *Kolbe & Kolbe Millwork, Co. v. Mason*

Ins. Agency, Inc., 983 F. Supp. 2d 1035, 1048 (W.D. Wis. 2013)). Given the facts at issue, Walkowicz has not, and cannot, identify an act or omission that makes the alleged harm a foreseeable likelihood. As such, the claim for Negligent Supervision should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court dismiss the Amended Complaint with prejudice.

Respectfully submitted this 8th day of September, 2020.

/s/ Kristin Graham Noel
Kristin Graham Noel
Lori S. Meddings
QUARLES & BRADY LLP
33 East Main Street, Suite 900
Madison, WI 53703
Telephone: (608) 251-5000
Facsimile: (608) 251-9166
kristin.noel@quarles.com
lori.meddings@quarles.com

Johanna M. Wilbert
Katelin V. Drass
QUARLES & BRADY LLP
411 E Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 277-5000
Facsimile: (414) 271-3552
johanna.wilbert@quarles.com
katelin.drass@quarles.com

Mark S. Lee (*pro hac vice*)
Rimon, P.C.
2029 Century Park East, Suite 400N
Los Angeles, CA 90067
Telephone: (310) 361-5776
Facsimile: (213) 375-3811
mark.lee@rimonlaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I caused to be electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kristin Graham Noel
Kristin Graham Noel