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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SGT. JEFFREY S. SARVER, Plaintiff, v. THE HURT LOCKER, LLC, MARK BOAL, KATHRYN BIGELOW, GREG SHAPIRO, NICOLAS CHARTIER, TONY MARK, DONALL McCUSKER, SUMMIT ENTERTAINMENT, LLC, VOLTAGE PICTURES, LLC, GROSVENOR PARK MEDIA, LP, FIRST LIGHT PRODUCTIONS, INC., KINGSGATE FILMS, INC. and PLAYBOY ENTERPRISES, INC., Jointly and Severally, Defendants.	HON. DENNIS M. CAVANAUGH CIVIL ACTION NO. 2:10-cv-01076 Oral Argument Requested **(Filed Electronically)** **Return Date: July 19, 2010**

DEFENDANTS MARK BOAL'S AND KATHRYN BIGELOW'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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I. FACTUAL BACKGROUND

Plaintiff, Jeffrey Sarver, is a Tennessee resident and a trained bomb disposal technician for the United States Army. *See* Plaintiff's Complaint ("Compl.") ¶¶ 1, 26, 32, 34. In December 2004, Defendant, Mark Boal ("Boal"), a journalist, spent thirty days embedded within Plaintiff's unit in Baghdad, Iraq for the purpose of reporting and writing a magazine article. *Id.* at ¶¶ 39, 41-43. During that time, Plaintiff alleges that Boal became acquainted with the operations of Plaintiff's unit, as well as Plaintiff's personal information and life story. *Id.* at ¶¶ 43-46. Plaintiff claims that after his unit returned home, he met with Boal in Wisconsin to provide information that Boal was seeking to complete his article. *Id.* at ¶¶ 52-53. Plaintiff alleges that Boal then used Plaintiff's personal information to write an article that was published in Playboy Magazine by Defendant, Playboy Enterprises, Inc. ("Playboy"), and that the article later served as a basis for the 2009 motion picture "The Hurt Locker" (the "Film") *Id.* at ¶¶ 52, 63, 93. Plaintiff alleges that prior to Boal's embedment, Defendant Kathryn Bigelow ("Bigelow"), who directed the Film, advised Boal that he could use his embedment to create a screenplay for a commercial movie. *Id.* at ¶¶ 39-40.

Although the Film makes no reference to Plaintiff by name or otherwise, Plaintiff filed this action in the United States District Court for the District of New Jersey against, among other Defendants, Boal and Bigelow, alleging that the Film misappropriates his name and likeness, invades his privacy, and depicts him in a derogatory manner to inflict emotional distress. *See* Compl. ¶¶ 70-81, 92-96. Plaintiff also claims that the Defendants engaged in fraud and breached a contract between Playboy and the United States Government to which he was a third-party beneficiary. *Id.* at ¶¶ 82-91; 97-111.

Boal and Bigelow both reside in California. *See* June 4, 2010 Declaration of Mark Boal ("Boal Dec.") at ¶ 2; June 4, 2010 Declaration of Kathryn Bigelow ("Bigelow Dec.") at ¶ 3. Neither Boal, nor Bigelow has transacted business, participated in meetings, or performed any services in New Jersey. Boal Dec. at ¶¶ 3-4; Bigelow Dec. at ¶¶ 4-5. Neither Boal, nor Bigelow is employed by a company that is incorporated, maintains offices or conducts business in New Jersey. Boal Dec. at ¶ 5; Bigelow Dec. at ¶ 6. Neither Boal, nor Bigelow votes, owns property or pays taxes in New Jersey. Boal Dec. at ¶ 6; Bigelow Dec. at ¶ 7. Neither Boal, nor Bigelow has a telephone listing or bank account in New Jersey. *Id.*

None of the research or writing that Boal performed in connection with his 2005 article or the 2009 Film took place in New Jersey. Boal Dec. at ¶ 8. In addition, all of the decision-making and contracts with which Bigelow was involved in connection with the making of "Hurt Locker" occurred outside New Jersey. Bigelow Dec. at ¶ 8. No part of the Film's production took place in New Jersey. Principal photography was shot internationally in Jordan, and some secondary footage was shot in Canada. Certification of Nicolas Chartier ("Chartier Cert.") ¶ 9; Bigelow Decl. at ¶ 9. The pre-production, domestic production and post-production work was performed in California. Chartier Cert. at ¶ 10. The Film was initially screened at film festivals outside the United States and was later subjected to a limited release throughout the United States, including a few theatres in New Jersey during the time period that Plaintiff alleges to have resided in the State. *Id.* at ¶¶ 10, 13; Certification of William Lewis, ¶¶ 5-8. Neither Bigelow, nor Boal participated in the Film's distribution.

None of the other named Defendants is a New Jersey resident. Compl. at ¶¶ 3-15. All of the individual Defendants reside in California. *Id.*; May 30, 2010 Certification of Mark Boal, at ¶ 2. Moreover, with the exception of Playboy, which is headquartered in Illinois, all of the

named entities are domiciled in California. Compl. ¶¶ 3-15. And Plaintiff alleges that all of the Defendants conduct business in California. *Id.*

II. LEGAL ARGUMENT

A. This Court Should Dismiss Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(2) Because it Cannot Assert Personal Jurisdiction over Boal or Bigelow

When a defendant raises a jurisdictional defense, the plaintiff bears the burden of presenting facts to establish that jurisdiction is proper. *D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 102 (3d Cir. 2009). New Jersey permits long-arm jurisdiction to the extent that it comports with the United States Constitution's Due Process Clause. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998). The exercise of personal jurisdiction does not comport with due process unless the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

There are two types of personal jurisdiction: general jurisdiction and specific jurisdiction. *D'Jamoos*, 566 F.3d at 102. General jurisdiction allows the court to assert jurisdiction over a non-resident defendant for activities performed outside the forum, but does not exist unless the defendant's contacts with the forum are "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Far more than mere minimum contacts with the forum are required to establish general jurisdiction: the contacts must be both "extensive and persuasive." *Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 589 (3d Cir. 1982); *Dollar Sav. Bank v. First Sec. Bank, N.A.*, 746 F.2d 208, 212 (3d Cir. 1984).

This Court cannot assert general jurisdiction over Boal or Bigelow because neither has ***any*** contacts, much less the requisite "continuous and systematic" contacts, with New Jersey. Boal and Bigelow both reside in California. Boal Dec. at ¶ 2; Bigelow Dec. at ¶ 3. Neither Boal, nor Bigelow has transacted business, participated in meetings, or performed any services in New Jersey. Boal Dec. at ¶¶ 3-4; Bigelow Dec. at ¶¶ 4-5. Neither Boal, nor Bigelow is employed by a company that is incorporated, maintains offices or conducts business in New Jersey. Boal Dec. at ¶ 5; Bigelow Dec. at ¶ 6. Neither Boal, nor Bigelow votes, owns property or pays taxes in New Jersey. Boal Dec. at ¶ 6; Bigelow Dec. at ¶ 7. Neither Boal, nor Bigelow has a telephone listing or bank account in New Jersey. *Id.* Thus, the assertion of general jurisdiction over Boal and Bigelow would be manifestly inappropriate. *See, e.g., Close v. New Line Cinema Corp.*, 1994 U.S. Dist. LEXIS 19703, at **4-5, 7 (N.D. Ohio Sept. 12, 1994) (ruling that Ohio court could not establish general jurisdiction over director or producer of motion picture "The Lawnmower Man" because: they did not transact business in Ohio; they did not have mailing addresses, telephone listings, or bank accounts in Ohio; and they did not pay state or local taxes in Ohio).

Plaintiff would fare no better in attempting to establish specific jurisdiction over Boal and Bigelow. Specific jurisdiction allows the court to exercise personal jurisdiction over a non-resident defendant for actions "arising out of" the defendant's contact with the forum. *IMO Indus., Inc.*, 155 F.3d 258-59. To establish specific jurisdiction over a defendant, the plaintiff must first prove that the defendant "purposefully directed [his or her] activities at the forum." *D'Jamoos*, 566 F.3d at 102. Then the plaintiff must establish that the litigation "arise[s] out of or [is] related to" those activities. *Id.* That showing cannot be made here.

Neither Boal, nor Bigelow has "purposefully directed" any activities at New Jersey. Thus, this litigation cannot be said to "arise out of" and is not "related to" Boal's or Bigelow's activities within the forum. Indeed, all of the actions that Boal and Bigelow took with regard to the making of the Film occurred outside New Jersey. Boal never met with Plaintiff in New Jersey; he traveled with Plaintiff's military unit in Iraq and met with him in Wisconsin after his unit returned home. Boal Dec. at ¶ 7. Further, none of the research or writing that Boal performed in connection with his 2005 article or the 2009 Film took place in New Jersey. *Id.* at ¶ 8. Similarly, all of the decision-making and contracts with which Bigelow was involved in connection with the making of the Film occurred outside New Jersey. Bigelow Dec. at ¶ 8. And all of the filming and production of the Film took place outside of New Jersey; it was filmed internationally in Jordan and Canada and was produced in California. *Id.* at ¶ 9.

Plaintiff alleges that this Court may exercise jurisdiction over all the Defendants because they have "written, released, and distributed, the major motion film and DVD, 'The Hurt Locker', to various movie theatres and retail stores located throughout the country, including such movie theatres and retail stores located in the State of New Jersey." Compl. at ¶ 17. This position is unavailing for several reasons. First, neither Boal, nor Bigelow was involved with the release or distribution of the Film or DVD; Boal wrote the screenplay and Bigelow directed the Film. Second, the law is well established that this Court cannot assert personal jurisdiction over Boal or Bigelow by virtue of the fact that the Film played in selected New Jersey theatres. *See, e.g.*, *Close*, 1994 U.S. Dist. LEXIS 19703, at *5-6 (ruling that Ohio court could not establish specific jurisdiction over director or producer of film "The Lawnmower Man" because "[a]ll of the[ir] activities . . . with respect to the motion picture and screenplay took place outside of Ohio"); *Tillman v. New Line Cinema Corp.*, 295 Fed. Appx. 840, 841-42 (7th Cir. 2008) (holding

that, in copyright infringement action, district court properly dismissed screenwriter of major motion picture John Q for lack of personal jurisdiction); *Ferguson v. Nat'l Broadcasting Co., Inc.*, 584 F.2d 111, 112 (5th Cir. 1978) (television program's theme song composer dismissed from copyright infringement action for lack of personal jurisdiction).

This Court cannot assert general or specific jurisdiction over Boal or Bigelow. Thus, Plaintiff's claims against Boal and Bigelow should be dismissed under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

B. This Court Should Dismiss Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(3) Because it was Brought in an Improper Venue

Because Plaintiff alleges that jurisdiction in this case is based on diversity of citizenship, Compl. at ¶¶ 16, 17, his choice of venue must comply with 28 U.S.C. § 1391(a), which provides:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Boal and Bigelow incorporate by reference the arguments presented by Hurt Locker, LLC, Voltage Pictures, LLC, and Nicolas Chartier in section II of their Brief in Support of their Motion to Dismiss or, in the Alternative, to Transfer Venue (hereinafter the "Hurt Locker, LLC Brief") that this Court should dismiss Plaintiff's Complaint because the District of New Jersey is not a proper venue for this action. Indeed, none of the three prongs of § 1391(a) allows Plaintiff to establish venue in this District.

Plaintiff cannot establish venue in this District under subsection (1) because all of the Defendants do not reside in New Jersey. In fact, none of the Defendants resides in New Jersey.

Compl. at ¶¶ 3-15. All of the individual Defendants reside in California. *Id.*; May 30, 2010 Certification of Mark Boal, at ¶ 2. Moreover, with the exception of Playboy, which is headquartered in Illinois, all of the named entities are domiciled in California. Compl. at ¶¶ 3-15. And Plaintiff alleges that all of the Defendants conduct business in California. (*Id.*).

Plaintiff cannot establish venue in this District under subsection (2) because "a substantial part of the events or omissions giving rise to the claim" did not occur in New Jersey. In fact, none of the alleged facts that Plaintiff advances to support his claims occurred in New Jersey:

1. Plaintiff alleges that Boal traveled with his military unit in Iraq, during which time Plaintiff shared many aspects of his personal life with Boal (Compl. at ¶¶ 39, 41-43);
2. Plaintiff alleges that he met with Boal in Wisconsin after his unit returned home from Iraq to allow Boal to complete his magazine article (*Id.* at 52-53); and
3. "The Hurt Locker" was filmed internationally in Jordan and Canada, and it was produced in California (Chartier Cert. ¶¶ 9-10).

Plaintiff cannot establish venue in this District under subsection (3) because the action could have been brought in another judicial district -- the Central District of California. Venue in the Central District of California would have been proper because: (1) all of the Defendants reside in California; and (2) "a substantial part of the events . . . giving rise to the claim" -- including the pre-production, domestic production and post-production of the Film -- occurred in that District.

For these reasons, this Court should dismiss Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(3) because the action was brought in an improper venue.

C. This Court Should Dismiss Plaintiff's Complaint or Transfer this Action under 28 U.S.C. § 1406 Because it was Brought in an Improper Venue

28 U.S.C. § 1406 provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." For the reasons expressed in section (B) above, Plaintiff cannot establish venue in this District. Thus, this Court should dismiss Plaintiff's Complaint under § 1406. In the alternative, if this Court determines that the interest of justice requires, it should transfer this action to the Central District of California under § 1406 because, as discussed in section (B) above, this case could have been brought in that District.

D. In the Alternative, this Court Should Transfer this Action under 28 U.S.C. § 1404(a) to the Central District of California

28 U.S.C. § 1404(a) provides that a district court in which an action is properly venued may transfer the action to a district where the action could have been brought if the convenience of the parties and witnesses and the interest of justice so requires. Section 1404(a) is inapplicable here because this case is not properly venued in this District. Nevertheless, if the Court determines that venue is proper in this District, it should exercise its discretion and transfer this action to the Central District of California, which is a far more convenient forum to litigate this action.[1]

[1] For the reasons discussed in section (B) above, this action could have been originally brought in the Central District of California.

The purpose of § 1404(a) is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotations and citations omitted). In determining whether to transfer an action under § 1404(a), courts consider several private interest and public interest factors. *Jumara v. St. Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995). The private interest factors include: (1) the plaintiff's forum preference; (2) the defendants' forum preference; (3) whether the claim arose in another forum; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses, but only to the extent that witnesses may be unavailable for trial in one of the fora; and (6) the location of books and records, limited to the extent the files could not be produced in another forum. *Id.* at 879. The public interest factors include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) in diversity cases, the familiarity of the trial court with applicable state law. *Id.* at 879-80.

Boal and Bigelow incorporate by reference the arguments presented in section III of the Hurt Locker, LLC Brief and in section III(B) of Playboy Enterprises, Inc.'s Memorandum of Points and Authorities in Support of their Motion to Transfer that the private and public interest factors tip decidedly in favor of transferring this action to the Central District of California. To summarize the analysis of the private interest factors:

1. Plaintiff's Choice of Forum: This factor is entitled to little deference because Plaintiff does not reside in New Jersey, and all of the alleged operative events occurred outside of the State. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *Am. Tel. & Tel. Co. v. MCI Commc'ns Corp.*, 736 F. Supp. 1294, 1306 (D.N.J. 1990).

2. Defendants' Forum Preference: All the Defendants are located in California and would prefer to litigate this action in the Central District of California, which has the greatest connection to the operative facts.

3. Whether Plaintiff's Claims Arose in Another Forum: As discussed in section (B) above, Plaintiff does not allege that any of his claims arose from conduct occurring in New Jersey.

4. Convenience of the Parties: None of the parties is located in New Jersey.

5. Convenience of the Witnesses: All of the Defendants and potential witnesses, including the actor who played the lead role in the Film, Jeremy Renner, are located in California.

6. Access to Documentary Evidence: Because all of the parties and potential witnesses reside in California, it is likely that all documentary evidence is located there.

To summarize the analysis of the public interest factors:

1. Enforceability of Judgment: Given the connection that the Central District of California has with Defendants and the alleged operative facts, Plaintiffs should be able to assert jurisdiction over all Defendants and enforce any judgment in that District.

2. Practical Considerations that would make Trial Easy and Expeditious: This Court would encounter difficulty in compelling the testimony of key non-party witnesses. *See* Fed. R. Civ. P. 45(c)(3)(A)(ii). It would be easier to schedule motions and other court appearances in the Central District of California.

3. Local Interest in Deciding Local Controversies at Home: California has a strong interest in this lawsuit because all Defendants reside and conduct business there. New Jersey has no connection with the parties or the alleged operative facts of this action. Therefore, it has no local interest, and its citizens should not be burdened with jury duty in this action. *Liggett Group Inc. v. R.J. Reynolds Tobacco Co.*, 102 F. Supp. 2d 518 (D.N.J. 2000).

4. Familiarity of Trial Court with Applicable State Law: New Jersey law will not govern this action because the parties and alleged operative facts have no relation to New Jersey. Conversely, California law is likely to govern some or all of the issues.

The private and public interest factors weigh heavily in favor of transferring this action. Therefore, if this Court determines that venue is proper in this District, then it should transfer the action under 28 U.S.C. § 1404 to the Central District of California.

E. Plaintiff's Claims Should be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because they Fail to State a Claim Upon Which Relief can be Granted

A plaintiff cannot survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) unless he or she provides the "grounds of his entitle[ment] to relief," which requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted). In this regard, a plaintiff must advance factual allegations that "raise a right to relief above a speculative level." *Id.* at 555-56. In ruling on a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 n.8 (3d Cir. 1997) (holding that courts deciding motions to dismiss must reject "legal conclusions, unsupported inferences, unwarranted deductions, footless conclusions of law, or sweeping legal conclusions cast in the form of factual allegations").

1. This Court Should Dismiss Plaintiff's Right of Publicity Claim Against Bigelow and Boal Because it is Barred by the First Amendment

Boal and Bigelow incorporate by reference the arguments presented in section (IV)(B) of the Hurt Locker, LLC Brief that Plaintiff's right of publicity claim should be dismissed because it is barred by the First Amendment.

Motion pictures are expressive works protected by the First Amendment. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1989); *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir.

1989) ("Movies, plays, books, and songs are all indisputably works of artistic expression and deserve [First Amendment] protection."). For that reason, the use of an individual's likeness in a motion picture does not infringe on his or her right of publicity. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) ("Under the First Amendment, a cause of action for appropriation of another's name and likeness may not be maintained against expressive works, whether factual or fictional" (internal quotations and citations omitted)); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996) (ruling that plaintiff's right of publicity claim premised on the theory that defendants used his name and likeness in a film and on the cover of home video failed as a matter of law); *Ruffin-Steinback v. DePasse*, 267 F.3d 457 (6th Cir. 2001) (ruling that right of publicity claim failed as a matter of law because use of plaintiffs' fictionalized likenesses in mini-series was protected by First Amendment). Indeed, a plaintiff whose likeness has been used in an expressive work cannot state a right of publicity claim unless he or she can show that the defendant used his or her likeness in a manner wholly unrelated to the content of the Film. *Rogers*, 875 F.2d at 1004-05 (ruling that right of publicity claim failed because defendants' use of plaintiff's name in movie title was "clearly related to the content of the movie"); *Seale*, 949 F. Supp. at 336 ("However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability." (internal quotations and citation omitted)).

Plaintiff's right of publicity claim against Boal and Bigelow fails as a matter of law because it is premised upon the theory that they used his likeness and persona for the content of the Film. *See* Compl. ¶¶ 70-81. Accordingly, Plaintiff's claim is barred by the First Amendment, and Count I of the Complaint should be dismissed.

2. This Court Should Dismiss Plaintiff's Defamation and False Light Claims Against Bigelow and Boal

Plaintiff's defamation and false light claims against Boal and Bigelow fail as a matter of law and should be dismissed. First, to state a defamation or false light claim, the plaintiff must allege facts suggesting that he or she was the subject of the allegedly offending publication or statement. *Romaine v. Kallinger*, 109 N.J. 282, 289, 294 (1988) (affirming dismissal of defamation and false light claims after ruling that plaintiff must be subject of offending publication to maintain defamation or false light action); *Genesis Int'l Holdings v. Northrop Grumman Corp.*, 2009 U.S. Dist. LEXIS 74282, at *7, 10-12 (D.N.J. Aug. 21, 2009) (dismissing defamation claim because allegedly defamatory material was not "of and concerning Plaintiff personally"); *Inman v. Thawley*, 297 Fed Appx. 683, 684 (9th Cir. 2008) (defamation claim failed because statements did not concern plaintiff); *Wright v. Dunn*, 2007 U.S. Dist. LEXIS 20234, at *16 (E.D. Mich. March 22, 2007) ("[I]t is apparent that Plaintiff cannot maintain an action against Defendant . . . for a statement that did not concern him."); Russell G. Donaldson, *False Light Invasion of Privacy – Cognizability and Elements*, 57 A.L.R. 4th 22, at 122 (2010) ("As a matter of common sense, there can be no recovery for a false depiction … if the public cannot be made aware that the plaintiff is … being depicted …. ").

Plaintiff is not identified, by name or otherwise, at any point during the Film. In fact, the Film contains a disclaimer stating that it is a "work of fiction" and "any similarity to or identification with the name, character, or history of any actual persons . . . is entirely coincidental and unintentional." Compl. ¶ 63. Thus, his defamation and false light claims are defective, and this Court should dismiss Counts II and III against Boal and Bigelow.

Second, Plaintiff's defamation claim against Boal and Bigelow fails as a matter of law because he has not alleged that they made a defamatory statement of fact about him. *See, e.g.*, *DeAngelis v. Hill*, 180 N.J. 1, 14 (2004) (ruling that "[s]tatements of opinion, as a matter of constitutional law, enjoy absolute immunity," and dismissing defamation claim). In this regard, Plaintiff contends that the Defendants portrayed him as "a bad father who did not love his son," "messed up," "reckless," "unstable," and generally irresponsible. Compl. ¶ 79. But he fails to allege that Boal or Bigelow uttered a single defamatory statement of fact, capable of objective verification, concerning him. *Id.* ("A factual statement can be proved or disproved objectively while an opinion statement generally cannot."). Thus, his defamation claim should be dismissed.

3. This Court Should Dismiss Plaintiff's Breach of Contract Claim Against Bigelow Because She was Not in Privity to a Contract with Plaintiff

Bigelow incorporates by reference the arguments presented in section (IV)(C) of the Hurt Locker, LLC Brief that Plaintiff's breach of contract claim should be dismissed. Plaintiff fails to allege any facts to support his allegation that Bigelow was "privy" to the alleged contracts between Playboy and the United States Government or between Playboy and Plaintiff. *See* Compl. at ¶ 88. Thus, his breach of contract claim against Bigelow is defective as a matter of law and should be dismissed. *See Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 590 (1985) ("The absence of privity . . . generally constitute[s] [] an insurmountable obstacle to recovery for losses for breach of contract.") (Handler, J., concurring).

4. This Court Should Dismiss Plaintiff's Intentional Infliction of Emotional Distress Claim Against Boal and Bigelow Because Plaintiff Failed to Allege Sufficient Facts to Support his Claim

To state a claim for intentional infliction of emotional distress, a plaintiff must allege specific facts to suggest that the defendant: (1) acted intentionally or recklessly; (2) acted outrageously; and (3) proximately caused Plaintiff to suffer severe distress. *Buckley v. Trenton Sav. Fund Soc.*, 111 N.J. 355, 366 (1988); *G.D. v. Kenny*, 411 N.J. Super. 176, 194 (App. Div. 2009). The plaintiff must allege facts suggesting that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Buckley*, 111 N.J. at 366. It is the role of the Court to "determine[] whether outrageous conduct could possibly be found as a matter of law based on the facts." *G.D.*, 411 N.J. Super. at 194.

Plaintiff's claim for intentional infliction of emotional distress against Boal and Bigelow fails as a matter of law because Plaintiff has not alleged facts to support a finding that Boal or Bigelow engaged in conduct that is so "outrageous . . . and . . . extreme . . . as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Buckley*, 111 N.J. at 366. In support of his claim, Plaintiff asserts that Boal and Bigelow knew that the Film contained scenes that would embarrass him and place him at increased risk of harm during future deployments. Compl. at ¶ 93. But Plaintiff is not identified, by name or otherwise, at any point in the Film. And he concedes that Defendants took measures to protect any member of the United States Army, including Plaintiff, who could be inadvertently linked to the Film's characters, by including a disclaimer stating that: "[T]his is a work of fiction. The characters and incidents portrayed and the names herein are fictitious, and any

similarity to or identification with the name, character, or history of any actual persons living or dead . . . is entirely coincidental and unintentional." Compl. ¶ 63.

Furthermore, Plaintiff has failed to allege facts supporting his conclusory allegation that he suffered "severe emotional distress." Compl. ¶ 95. Plaintiff claims that the emotional distress he has suffered consists of being laughed at by young soldiers and having to wonder whether his peers will continue to respect and protect him. *Id.* at ¶ 69. These allegations cannot support a conclusion that Plaintiff has suffered "severe emotional distress," including physical illness or serious psychological trauma, as a consequence of Boal's or Bigelow's alleged conduct. *See, e.g., Turner v. Wong*, 363 N.J. Super. 186, 200 (App. Div. 2003) (ruling that "[s]evere emotional distress is a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by trained professionals," and that "[m]ere allegations of aggravation [or] embarrassment . . . are insufficient as a matter of law" (internal quotations and citations omitted)).

For these reasons, this Court should dismiss Count V of Plaintiff's Complaint against Boal and Bigelow.

5. This Court Should Dismiss Plaintiff's Fraud Claim Against Bigelow Because Plaintiff has Failed to State a Claim Upon Which Relief Can be Granted

Plaintiff's fraud claim against Bigelow should be dismissed for the reasons expressed in section (E)(1) of the Hurt Locker, LLC Brief. To state a common-law fraud claim under New Jersey law, a plaintiff must allege: (1) a material misrepresentation of fact; (2) knowledge or belief by the defendant of its falsity; (3) intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damage. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005). Under Fed. R. Civ. P. 9(b), a plaintiff is required to "state the

circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which it is charged." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (internal quotations and citation omitted). A plaintiff does not satisfy this standard unless he or she "plead[s] or allege[s] the date, time, and place of the alleged fraud or otherwise inject[s] precision or some measure of substantiation into a fraud allegation." *Id.*

Plaintiff has failed to plead specific facts to support any of the elements of his fraud claim against Bigelow. Instead, Plaintiff merely states that Bigelow received "the information [Boal] gathered about Plaintiff and Plaintiff's experiences," and that during Boal's embedment with Plaintiff's unit, all of the Defendants "were likely already in the process of writing a 'movie' for their own material and commercial gain." Compl. ¶¶ 100-01. That general allegation falls woefully short of satisfying the pleading requirements of Fed. R. Civ. P. 9(b). Therefore, this Court should dismiss Count VI against Bigelow.

6. This Court Should Dismiss Plaintiff's Constructive Fraud/Negligent Misrepresentation Claim Against Boal and Bigelow Because Plaintiff has Failed to State a Claim Upon Which Relief Can be Granted

To state a claim for negligent misrepresentation, a plaintiff must allege facts to support the following elements: (1) the defendant negligently provided false information; (2) the plaintiff was a reasonably foreseeable recipient of that information; (3) the plaintiff justifiably relied on the information; and (4) the false statements proximately caused plaintiff's damages. *Karu v. Feldman*, 119 N.J. 135, 147 (1990). Moreover, "in New Jersey, any tort of negligence requires the plaintiff to prove that the putative tortfeasor breached a duty of care." *South Broward Hosp. Dist. v. Medquist Inc.*, 516 F. Supp. 2d 370, 395 (D.N.J. 2007), *aff'd*, 258 Fed. Appx. 466 (3d Cir. 2007). Consequently, "[i]f there is no duty owed to a plaintiff independent of what the defendant owes plaintiff under a contract, a plaintiff may not maintain a tort claim (as a

necessary element of the tort claim is absent)." *Id.* at 396 (dismissing plaintiff's negligent misrepresentation claim because plaintiffs "failed to plead that [defendant] owed a legally cognizable duty to [p]laintiffs -- outside of [defendant's] contractual duties -- for which [p]laintiff [could] recover in tort").

Plaintiff's negligent misrepresentation claim against Boal and Bigelow fails as a matter of law because Plaintiff has not plead facts suggesting that either individual owed him a duty of care independent of their contractual duties. *See South Broward Hosp. Dist.*, 516 F. Supp. 2d at 395 ("There are three general types of transactions where the duty to disclose arises: (1) where a fiduciary relationship exists between the parties, (2) where the transaction itself calls for perfect good faith and full disclosure, or (3) where one party expressly reposes a trust and confidence in the other." (internal quotations and citations omitted)). Plaintiff advances the naked assertion that "Defendants owed to Plaintiff both a common law duty and a contractual duty by virtue of the express and implied agreements entered into between BOAL/PLAYBOY and the United States, and between BOAL/PLAYBOY and Plaintiff, to carefully and reasonably carry out any publications regarding the Plaintiff." Compl. ¶ 108. But that conclusory allegation is insufficient to survive a motion to dismiss. Thus, this Court should dismiss Count VII of Plaintiff's Complaint against Boal and Bigelow.

III. CONCLUSION

For the reasons set forth above, Defendants, Mark Boal and Kathryn Bigelow, respectfully request that this Court dismiss Plaintiff's Complaint. First, this Court should dismiss Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(2) because it cannot assert personal jurisdiction over Boal or Bigelow. This Court cannot assert general jurisdiction over Boal or Bigelow because neither has any contacts with New Jersey, much less the requisite "continuous and systematic" contacts. This Court cannot assert specific jurisdiction over Boal or Bigelow because neither has "purposefully directed" any activities at New Jersey, and thus this litigation does not "arise out of" their contact with the forum.

Second, this Court should dismiss Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(3) because the District of New Jersey is an improper venue for this action. Indeed, Plaintiff cannot satisfy any of the three prongs of 28 U.S.C. § 1391(a), which sets forth the venue requirements in diversity actions. None of the Defendants resides in New Jersey, Plaintiff does not allege that a "substantial part of the events or omissions giving rise to the claim" occurred in New Jersey, and the action could have been brought in another judicial district -- the Central District of California.

Third, the Court should dismiss Plaintiff's Complaint or transfer the action to the Central District of California under 28 U.S.C. § 1406, which permits a district court in which venue is improper to dismiss the action or, if the interests of justice so require, to transfer to a district in which the action could have been brought.

In the alternative, if this Court determines that venue is proper in this district, it should transfer this action to the Central District of California under 28 U.S.C. § 1404(a). Neither the Plaintiff, nor any of the Defendants, nor any of the potential key witnesses, resides in New

Jersey. Plaintiff does not allege that any of his claims arise out of conduct occurring in New Jersey. And New Jersey law will not govern this dispute. Conversely, all of the Defendants, key non-party witnesses, and potential documentary evidence are located in California. A substantial part of the alleged operative events -- including the Film's production -- occurred in California, and California law is likely to govern the dispute.

In the event this Court declines to dismiss Plaintiff's Complaint for lack of personal jurisdiction or improper venue, or transfer this action to the Central District of California, it should dismiss, in part, Plaintiff's claims against Boal and Bigelow under Fed. R. Civ. P. 12(b)(6) because they fail to state a claim upon which relief can be granted. Plaintiff's right of publicity claim against Boal and Bigelow should be dismissed because it is premised upon the theory that Boal and Bigelow used Plaintiff's likeness for the Film's content, which is an expressive work protected by the First Amendment. Plaintiff's defamation and false light claims should be dismissed against Boal and Bigelow because the allegedly offensive statements constitute non-actionable opinion and did not concern Plaintiff. Plaintiff's breach of contract claim against Bigelow should be dismissed because he has not alleged facts to suggest that she was privy to the alleged contracts to which he was allegedly a third-party beneficiary. Plaintiff's intentional infliction of emotional distress claim against Boal and Bigelow should be dismissed because Plaintiff has failed to allege that they engaged in "outrageous," "extreme," "atrocious," or "utterly intolerable" conduct. Plaintiff's fraud claim against Bigelow should be dismissed because the Complaint does not contain a single fact suggesting that she engaged in fraudulent conduct. Finally, Plaintiff's negligent misrepresentation claim against Boal and Bigelow should be dismissed because Plaintiff has failed to allege facts suggesting that either individual owed him a duty of care independent of their contractual duties.

Dated: June 15, 2010

/s/ Stephen M. Orlofsky

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