Slade R. Metcalf (SM 8360)
Jason P. Conti (JC 0581)
Rachel F. Strom (RS 9666)
Hogan & Hartson LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Facsimile: (212) 918-3100

Attorneys for Defendants Twentieth Century Fox Film Corporation, One America Productions, Inc., Todd Schulman, and Sacha Baron Cohen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL PSENICSKA,	:	
	:	
Plaintiff,	:	Case No.: 07 CIV 10972 (LAP)
	:	
-against-	:	
	:	
TWENTIETH CENTURY FOX FILM CORPORATION, ONE AMERICA PRODUCTIONS, INC., TODD LEWIS, and SACHA BARON COHEN,	:	
	:	
Defendants.	:	
	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases:

State Cases:

Federal Statutes/Rules

State Statutes

Defendants Twentieth Century Fox Film Corporation ("Fox"), One America Productions, Inc. ("One America"), Todd Schulman ("Schulman") (incorrectly sued herein as "Todd Lewis"), and Sacha Baron Cohen ("Cohen") (collectively, "Defendants") by their undersigned attorneys, respectfully submit this memorandum of law in support of their motion to dismiss the complaint of plaintiff Michael Psenicska ("Plaintiff") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").[1]

Preliminary Statement

Plaintiff is an educated and accomplished man. For 29 years, he has taught high school mathematics in Baltimore, Maryland. Apparently as a side business, he has owned and operated the Perry Hall Driving School in Perry Hall, Maryland for the past 32 years. In that capacity, he has taken on the serious task of training "hundreds of students" (both foreign and domestic) to become safe and careful drivers. (Complaint ¶ 12.) In June 2005, he voluntarily agreed to be filmed for a film that eventually was exhibited under the title *Borat – Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan* (the "Film"). He was paid $500 by the production company for his appearance and signed a release entitled "Standard Consent Agreement". He alleges that he gave Borat (the protagonist in the Film) a driving lesson, and while in the car, Borat engaged in obnoxious, rude, and offensive conduct while he was purportedly learning to drive. Plaintiff also alleges (which is borne out in the Film itself) that he repeatedly objected to Borat's sexist and homophobic statements. Indeed, unlike some other people in the Film, Plaintiff comes across as a sincere, tolerant man who voices his objection to

[1] The facts necessary for the determination of this motion are set forth in the accompanying declarations of Joan Hansen ("Hansen Decl."), sworn to on the 14th day of February, 2008, and of Slade R. Metcalf, ("Metcalf Decl."), sworn to on the 15th day of February, 2008, and the exhibits annexed thereto. The facts set forth in these declarations will not transform this Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. (*See* footnotes 3-4, *infra*.)

socially offensive statements.

Despite his favorable treatment in the Film and the undisputed fact that he signed the Standard Consent Agreement giving up all his rights to sue here, he apparently wants to be paid more than the $500 he received for his appearance in the Film. He now claims that the Agreement is unenforceable because he was duped into signing it. He claims that he didn't have time to read the Agreement before signing it and that he didn't bring his reading glasses to the driving session, allegations that we must, for the purposes of this motion, accept as true. He also claims that the Agreement was illegible, but this claim is belied by the clarity of the copy of the actual Agreement, which is annexed to the Hansen Decl. as Exhibit A. In point of fact, he signed an agreement releasing any and all claims he might have had against Defendants and agreed not to sue. It is clear the Agreement should be enforced and this complaint dismissed.

Factual Background

A. The Parties

Plaintiff Michael Psenicska is, according to his complaint (the "Complaint"), a resident of the State of Maryland. Metcalf Decl., Ex. A, Complaint ¶ 2.

Defendant Fox is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in California. Hansen Decl. ¶ 5. Defendant One America is a California corporation, with its principal place of business in California. *Id*. ¶ 7. Defendant Cohen is a citizen of the United Kingdom and a resident of the State of California. *Id*. ¶ 8. Defendant Schulman is a citizen of the State of California. *Id*. ¶ 9.

B. The Complaint

On December 3, 2007, Plaintiff filed a Summons and the Complaint in this Court. Metcalf Decl.¶ 2. (A true and correct copy of the Complaint is annexed as Exhibit A to the

Metcalf Decl.) The Complaint stems from Plaintiff's alleged inducement to appear in the Film and his subsequent appearance in the Film. *See generally* Complaint. Plaintiff, a high school math teacher and owner of a driving school, notes in the Complaint that he was asked to appear in a "documentary" regarding "'the integration of foreign people into the American way of life.'" *Id.* ¶¶ 12-13. After meeting with individuals affiliated with the Film, and agreeing to be filmed teaching a foreign national how to drive, Plaintiff then went to the agreed-upon location in Columbia, Maryland on Monday, June 13, 2005.[2] *See id.* ¶¶ 13-16.

Plaintiff asserts that on that date, he was paid $500 in cash and asked to sign a standard release. *Id.* ¶ 17. Alleging that he was rushed and did not have his reading glasses, Plaintiff acknowledges that he signed the release "without reading or even more than looking where to sign and put his information." *Id.* After receiving his payment and signing the release, Plaintiff then met the star of the Film—Borat Sagdiyev ("Borat"), played by Cohen. *See* Complaint ¶ 21. After engaging in certain antics, Borat proceeded to take the wheel of a specially-equipped driver-education car with Plaintiff serving as the driving instructor. *Id.* ¶¶ 20, 22. During the filming, Plaintiff alleges that Borat made certain offensive remarks and drove in a dangerous and erratic fashion. *See id.* Plaintiff also claims that he informed Borat he must drive in the safest possible manner, and repeatedly "admonished" Borat for his offensive remarks. *See id.*

As a result of Plaintiff's involvement in the Film and advertising and promotion for the Film, Plaintiff asserts five claims in his Complaint: "fraudulent inducement – compensatory and punitive damages;" "fraudulent inducement – Rescission of the Release;" a violation of "New York Civil Rights Law;" quantum meruit; and prima facie tort. *See generally id.*

[2] Plaintiff alternately states in the Complaint that the date was June 12, 2005 and June 13, 2005. Complaint ¶¶ 15-16. However, Plaintiff is clear that it was a Monday. *See id.* As such, it is clear that the correct date is Monday, June 13, 2005.

C. The Release

On June 13, 2005, Plaintiff and One America entered into a six-paragraph release (the "Release"), whereby, in exchange for five hundred dollars ($500), Plaintiff agreed to appear in the Film. (A true and correct copy of the Release and its cover page is annexed as Exhibit A to the Hansen Decl.)[3] In the Release, Plaintiff acknowledged that "in entering into [the Release, Plaintiff] is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." Release ¶ 5. Further, Plaintiff agreed:

> [N]ot to bring any time in the future, any claims against [One America], or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the [Plaintiff's] name or likeness of image, ... (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light (such as any allegedly false or misleading portrayal of [Plaintiff], ... (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, ... (m) prima facie tort (such as alleged intentional harm to [Plaintiff], (n) fraud (such as any alleged deception or surprise about the Film or this consent

[3] The inclusion of the Release does not convert this motion to dismiss to one for summary judgment because Plaintiff has relied on the terms and effect of the Release in drafting the Complaint and, therefore the Release is integral to the Complaint. *See* Complaint ¶¶ 17-18 (Schulman "gave plaintiff ... a few pieces of paper and a pen. Lewis [sic] said that the papers were standard and needed by the producers for the documentary.... One document given to plaintiff by Lewis [sic] was entitled 'Standard Consent Agreement'...."); *see also Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) (internal quotations omitted) (on a motion to dismiss, a court "is not limited solely to the allegations in the complaint.... Where a plaintiff has relied on the terms and effect of a document in drafting the complaint and that document is thus integral to the complaint, [a court] may consider its contents even it if is not formally incorporated by reference"); *Arnold v. ABC, Inc.*, No. 06 Civ. 1747(GBD), 2007 WL 210330, at *1, n.2 (S.D.N.Y. Jan. 29, 2007) (noting that "The court may, however, consider a document [in conjunction with a motion to dismiss] if the plaintiff 'relies heavily upon its terms and effect,' rendering 'the document 'integral' to the complaint'" and reviewing advertisement and website materials submitted by the defendant, which plaintiff relied on in drafting the complaint) (*citing Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)); *2 Broadway L.L.C. v. Credit Suisse First Boston Mortgage Capital, LLC*, No. 00 Civ. 5773 (GEL), 2001 WL 410074, at *5 (S.D.N.Y. Apr. 23, 2001) (considering releases that were not attached to the complaint on a motion to dismiss because "the Complaint explicitly references them.").

agreement) ...

Id. ¶ 4. In addition, the Release states that Plaintiff "agrees to allow the Producer, and any of its assignees or licensees, to use the [Plaintiff's] contribution, photograph, film footage, and biographical material in connection not only with the Film, but also in any advertising, marketing or publicity for the Film…." *Id.* ¶ 2. After signing the Release, Plaintiff participated in the filming of his appearance for the Film. *See* Complaint ¶¶ 19-20.

D. The Film

The Film, which was distributed by Fox and produced by One America, was first released in theaters in the United States on or about November 3, 2006, and was released on DVD in the United States on March 6, 2007. Hansen Decl. ¶¶ 6-7. (A true and correct copy of the Film on DVD is annexed as Exhibit B to the Hansen Decl.)[4] The documentary-style Film tells the story of Borat, a fictional Kazakh TV personality dispatched to the United States by the Kazakhstan Ministry of Information to report on the American people. Comedian and actor Cohen created and plays Borat. *Id.*, Ex. B

In the Film, Borat travels across America with his friend and producer, Azamat Bagatov. *Id*. During this transcontinental journey, Borat encounters a homophobic rodeo owner, kindly Jewish inn keepers, drunken fraternity boys and various other individuals. *Id.* Cohen employs antics ranging from fish-out-of-water buffoonery, to eccentric and prejudicial commentary, to evoke reactions from the Americans Borat encounters. *See id.* In keeping with this theme, Plaintiff – a driving instructor – is depicted in one scene attempting to teach Borat how to drive, while Borat antagonizes the other drivers and flouts the rules of the road. *See* Hansen Decl., Ex. B (at approximately 19 minutes and 30 seconds, and 77 minutes and 15 seconds into the Film).

[4] Like the Release, the submission of the Film on DVD does not convert this motion to dismiss to one for summary judgment because the Film is integral to Plaintiff's claims. *See* footnote 3.

ARGUMENT

I.
MOTION TO DISMISS STANDARD

When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, a court "must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 350, 357 (S.D.N.Y. 1998) (dismissing Section 51 claim on motion to dismiss). To survive a motion to dismiss, "the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Yurman Design Inc. v. Chaindom Enters., Inc.*, No. 99 Civ. 9307 (JFK), 2000 WL 897141, at *4 (S.D.N.Y. July 5, 2000).

II.
PLAINTIFF'S CLAIMS FOR FRAUDULENT INDUCEMENT MUST FAIL BECAUSE PLAINTIFF CANNOT DEMONSTRATE REASONABLE RELIANCE ON DEFENDANTS' ALLEGED MISREPRESENTATIONS

Plaintiff's claim for fraudulent inducement must fail because Plaintiff signed the Release without any valid excuse for his alleged failure to read it – and therefore cannot demonstrate a reasonable reliance on any alleged misrepresentations. Further, the Release clearly states that Plaintiff was not relying on any representations regarding the nature of the Film.[5] Accordingly, Plaintiff's fraudulent inducement claim must fail.

[5] Plaintiff asserts two claims for fraudulent inducement: one for damages (claim one) and one for rescission (claim two). These claims, however, are not different causes of action; they simply seek different remedies for the same cause of action. *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 123 (2d Cir. 1984) (stating that fraud "serves as a basis for an action for money damages or for rescission of a release") (internal quotations and citations omitted). Indeed, in support of his "claim" for rescission, Plaintiff merely alleges that "All prior averments are repeated" and that "By virtue of defendants' fraudulent conduct, plaintiff is entitled to rescission...." Complaint ¶¶ 39, 40. Accordingly, Defendants address Plaintiff's two fraudulent inducement "claims" as one cause of action.

A. Plaintiff Must Satisfy An Exacting Burden To Void A Release Due To Fraudulent Inducement

Under New York law, which governs the Release (Release ¶ 6), releases are considered to be contracts, and therefore are interpreted according to principles of contract law. *Shklovskiy v. Khan*, 273 A.D.2d 371, 372, 709 N.Y.S.2d 208, 209 (2d Dep't 2000). New York courts consider releases to be a serious and necessary part of our judicial system: "A release may not be treated lightly. It is a jural act of high significance without which the settlement of disputes would be rendered all but impossible." *Touloumis v. Chalem*, 156 A.D.2d 230, 231, 548 N.Y.S.2d 493, 494 (1st Dep't 1989) (internal quotation omitted). Indeed, "It is well established in New York that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties. Thus, a release will be binding on the parties absent a showing of fraud, duress, undue influence, or some other valid legal defense. Moreover, in the absence of a fiduciary relationship, a party seeking to avoid an otherwise valid release has the burden of proving vitiating circumstances." *Skylon Corp. v. Guilford Mills, Inc.*, 864 F. Supp. 353, 358 (S.D.N.Y. 1994) (Preska, J.) (internal quotations and citations omitted).

In order to avoid the conclusive effect of a release due to allegations of fraudulent inducement, a party must prove: "(1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity (8) to his injury." *Hoffenberg v. Hoffman & Pollok*, 248 F. Supp. 2d 303, 310 (S.D.N.Y. 2003). Fraud must be proved by clear and convincing evidence. *Computerized Radiological Servs. v. Syntex Corp.*, 786 F.2d 72, 76 (2d Cir. 1986). Further, under Fed. R. Civ. P. 9(b), a party pleading fraud must allege "the

circumstances constituting fraud or mistake ... with particularity." Fed. R. Civ. P. 9(b). As such, to meet this standard, a plaintiff must "adequately specify the statements he claims were false or misleading, give particulars as to the respect in which he contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Scala v. Sequor Group, Inc.*, No. 94 Civ. 0449 (LAP), 1995 WL 225625, at *3 (S.D.N.Y. Apr. 14, 1995) (Preska, J.).

B. Plaintiff's Fraudulent Inducement Claim Must Fail Because Plaintiff Signed The Release Without Any Valid Reason For His Alleged Failure To Read Its Contents

This Court should dismiss Plaintiff's fraudulent inducement claim because Plaintiff cannot establish reasonable reliance on any alleged misrepresentations. Under New York law, "Reasonable reliance is an essential element of a claim of fraud." *Jackson v. Broadcast Music, Inc.*, No. 04 Civ. 5948 (TPG), 2006 WL 250524, at *9 (S.D.N.Y. Feb. 1, 2006), *aff'd*, No. 06 Civ. 2283, 2007 WL 2914516 (2d Cir. Oct. 5, 2007). And, "[a] plaintiff's ability to establish reasonable reliance is irreparably impaired when [he] simply fails to read a binding document prior to executing the document." *Washington Capital Ventures, LLC v. Dynamicsoft, Inc.*, 373 F. Supp. 2d 360, 365 (S.D.N.Y. 2005) (even assuming the defendants made fraudulent misrepresentations, dismissing fraud claim because plaintiffs failed to read the contract at issue); *see also Jackson*, 2006 WL 250524, at *9 (dismissing fraudulent inducement claim because the one-page agreement at issue was clear that Plaintiff was releasing his rights to his music, so "Plaintiff could not reasonably have relied on any alleged misrepresentation to the contrary."). New York courts reason that, because a party must be actively engaged in contracting and cannot merely blindly rely on another's representations, "[a] party is under an obligation to read a document before he or she signs it, and one cannot generally avoid the effect of a release upon the ground that he or she did not read it or know its contents." *Touloumis*, 156 A.D.2d at 232,

548 N.Y.S.2d at 495.

Indeed, New York courts hold that even "[p]ersons who are blind or illiterate are not automatically excused from complying with the terms of the contracts which they sign simply because their disability might have prevented them from reading the contracts. The cases consistently hold that a person with such a disability must make a reasonable effort to have the document read to him." *Sofio v. Hughes,* 162 A.D.2d 518, 520, 556 N.Y.S.2d 717, 719 (2d Dep't), *appeal denied,* 76 N.Y.2d 712, 563 N.Y.S.2d 768 (1990). *See also Shklovskiy*, 273 A.D.2d at 372, 709 N.Y.S.2d at 209 (rejecting plaintiff's argument that release was obtained by fraud because defendant purportedly told him the release was a receipt, noting "a party will not be excused from his failure to read and understand the contents of a release" even if that person does not speak English).

For example, in *Morby v. Di Siena Assocs. LPA*, 291 A.D.2d 604, 737 N.Y.S.2d 678 (3d Dep't 2002), the plaintiff sought damages stemming from an injury he sustained while doing work for the defendants. The plaintiff, however, had signed a personal injury release – without reading it – because allegedly the defendants fraudulently claimed the release was merely a "labor and materials release." *Id.* 291 A.D.2d at 604-605, 737 N.Y.S.2d at 679-680. The court held that the plaintiff's complaint must be dismissed because:

> [E]ven accepting as true plaintiff's allegations concerning the misrepresentations ... a reading of the simple, straightforward document would have readily advised him that he was indeed discharging all claims against defendants for 'personal injury' ... Having failed to read the release before signing it, plaintiff simply cannot establish the essential element of justifiable reliance.... Plaintiff cannot now avoid his obligations under a release he did not read merely by asserting that he 'thought' it was something else.

Id. 291 A.D.2d at 605, 737 N.Y.S.2d at 680.

Similarly, here, Plaintiff *admits* that he signed the Release without even attempting to

read its contents, noting in the Complaint that he did nothing more than "look[] where to sign." Complaint ¶¶ 17, 18, 20. Plaintiff alleges that he did not read the Release because he "did not have his reading glasses with him," it was "virtually illegible,"[6] and he did not have sufficient time to read it. Complaint ¶¶ 17-18.[7] The law is clear, however, that, even accepting these allegations as true, Plaintiff still had a duty to make reasonable efforts to read the Release or have it read to him *before* signing. *See Weil v. Johnson*, No. 119431/02, 2002 WL 31972157, at *2 (Sup. Ct. N.Y. Co. Sept. 27, 2002) (even if a release was "sheepishly, surreptitiously and in the vein of irrelevancy flashed" to the plaintiff, he was still bound by the release because he signed it). Significantly, Plaintiff has not (and, indeed, cannot) allege that he asked *anyone* to read the Release to him or to give him time to get his reading glasses so he could read it himself. Plaintiff cannot now avoid the consequences of the unambiguous six-paragraph, *one-page* Release due to his own failure to make reasonable efforts to read its contents.

Further, had Plaintiff taken the few minutes needed to read the six-paragraph Release, he would have certainly understood that by signing the Release he was agreeing to waive his right to bring all of the claims he has now asserted against Defendants. One case is particularly

---

[6] Contrary to Plaintiff's allegations, the Release is clearly legible. *See* Hansen Decl., Ex. A. And, as the Second Circuit noted in *Broder*, even on a motion to dismiss, this Court does not have to accept the Complaint's description of the Release. *Broder*, 418 F.3d at 196 (reviewing a document that was "integral to the complaint," rather than "accept[ing the complaint's] description of it").

[7] In a recent case involving a participant in the Film who was also seeking to avoid the consequences of a release due to allegations of fraud, the United States District Court for the Northern District of Alabama held that plaintiff's allegations that "they did not thoroughly read the Standard Consent Agreement because the defendants did not allow them enough time..." did not render the release "unenforceable." *See Streit v. Twentieth Century Fox Film Corp.*, CV 07-J-1918-S, at pp. 3-4 (N.D. Ala. Jan. 30, 2008) (A true and correct copy of the decision is annexed hereto as Exhibit A). The court noted that "a party is responsible for reading a contract before signing it, regardless of whether the party felt 'hurried.'" *Id.* at p. 4 (citing *Ex parte Perry*, 744 So. 2d 859, 863 (Ala. 1999)) ("if the plaintiff felt hurried 'she could have slowed the process down or could have refused to sign the contract.'").

instructive under the circumstances present here. *Weil v. Johnson* involved a film entitled "Born Rich," a documentary about the lives of children who grew up very wealthy. The plaintiff, Luke Weil—heir to the Autotote gaming empire—was one of the eleven individuals profiled in the documentary, which was made by Jamie Johnson, an heir to the Johnson & Johnson fortune. 2002 WL 31972157, at *1. Before participating in the interview for the film, Weil signed three separate release forms. The releases, which appeared under the letterhead of "Black River Films, Inc." along with a Beverly Hills address, contained a general release for the filmmakers to use any footage of the interview in any manner they wished in connection with the film. The release also stated, "I am granting these rights in exchange for good and valuable consideration, receipt of which is hereby acknowledged. I hereby waive any right to injunctive or other equitable relief in connection with the development production, distribution or other exploitation of the Picture." *Id.* at *1-2.

After Johnson completed the documentary, and it was set to be released, Weil sued seeking a declaration that the releases were nullities because they were fraudulently obtained and for an injunction preventing the release of the film. Weil alleged that when Johnson solicited his participation, Johnson "assured Weil that 'the singular purpose and expected utilization of the interview was solely for non-commercial purposes and merely in furtherance of a *school project*.'" *Id.* at *2 (emphasis added). The complaint also claimed that Johnson "sheepishly, surreptitiously and in the vein of irrelevancy flashed a document in front of the plaintiff" noting that the release was necessary before filming, and indicated that "said executed document was an irrelevant formality that needed to be disposed of." *Id.* Despite Weil's arguments, the court rejected his claim of fraud noting, "Weil's allegations are contradicted by the very face of the Release, *which clearly alerted him to the fact that the enterprise was not a 'student project,'* but

rather was a commercial production being undertaken by a professional studio based in Beverly Hills, California." *Id.* (emphasis added). Furthermore, the court noted that it is well settled that "a plaintiff may not avoid his obligations under a clearly worded release on the ground that the defendant falsely misrepresented the true significance of the document to him in order to secure his signature." *Weil*, 2002 WL 31972157, at *2. As such, the court concluded that the releases "signed by plaintiff appear valid and binding on their face." *Id.* at *3.

Similarly, here, Plaintiff alleges that, by signing the Release, he was relying on Schulman's representations that the papers "were standard and needed by the producers for the documentary" and that "the true nature" of the Film "was never disclosed to plaintiff. [Schulman] deliberately deceived plaintiff about the purpose of the purported documentary and plaintiff's appearance in it." Complaint ¶¶ 13, 17, 29. But, these claims are contradicted by the clear terms of the Release itself. The first paragraph states that the document is an agreement for the participant to be paid money in exchange for the "opportunity for the Participant to appear in a *motion picture*...." Release at p. 2 (emphasis added). Further, the Release also fleshes out the nature of the project by stating, "The Participant agrees to be filmed and audiotaped by the Producer for a *documentary-style film*." *Id.* ¶ 1 (emphasis added). That paragraph specifically states that "It is understood that the *Producer hopes to reach a young adult audience by using entertaining content and formats.*" *Id.* (emphasis added). Further, the Release clearly states that Plaintiff will not bring any claims based on any "offensive behavior or questioning." *Id.* ¶ 4(d). As a result, like in *Weil*, the Release here clearly indicated the Film was not merely a documentary on America, but rather an entertaining documentary-*style* film aimed at young adults that may involve "offensive behavior." As a result, it is immaterial that Plaintiff did not have his glasses or was allegedly told that the Film was a documentary on America – he cannot

now disregard the clear provisions in the Release that he admits he signed. Therefore his fraudulent inducement claim must fail.

C. Plaintiff's Fraudulent Inducement Claim Also Must Fail Because The Release States That Plaintiff Was Not Relying On Any Statements About The Nature Of The Film

This Court also should dismiss Plaintiff's fraudulent inducement claim because the Release clearly states that Plaintiff was not relying on any representations about the nature of the Film. Under New York law, when a release "expressly states that the releasor disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations." *Fonseca v. Columbia Gas Sys., Inc.*, 37 F. Supp. 2d 214, 229 (W.D.N.Y. 1998). *See also Scala*, 1995 WL 225625, at *6 (holding that plaintiff "is barred from pursuing his claim that he was defrauded into signing his contracts ... [because plaintiff] disclaimed reliance upon any representations"); *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 95, 495 N.Y.S.2d 309, 312 (1985) ("the substance of [the parties'] guarantee [that it was absolute and unconditional] forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks' oral promise of an additional line of credit.").

Here, the Release Plaintiff admittedly signed clearly states that Plaintiff "acknowledges that in entering into [the Release, Plaintiff], is not relying upon any promises or statements made by anyone about the *nature of the Film* or the identity of any other Participants or persons involved in the Film." Release ¶ 5 (emphasis added). Indeed, Plaintiff waived his right to bring a fraud claim against the Defendants based on "any alleged deception or surprise about the Film or this consent agreement." *Id.* ¶ 4. The law is clear that having disclaimed his reliance on *any* representations about the nature of the Film, Plaintiff is estopped from claiming that he relied on

the alleged misrepresentations when signing the Release. As such, Plaintiff's fraudulent inducement claim should be dismissed.

III.
PLAINTIFF'S CLAIM FOR COMMERCIAL MISAPPROPRIATION MUST BE DISMISSED BECAUSE PLAINTIFF SIGNED THE RELEASE

Plaintiff's third cause of action for commercial misappropriation pursuant to New York Civil Rights Law ("CRL") § 51 ("Section 51") must fail, because the Release completely bars this claim.[8]

New York Civil Rights Law Section 51 provides that "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade" *without the written consent of the plaintiff* can bring an action to enjoin such use and obtain civil damages. N.Y. CRL § 51 (emphasis added). In order to state a claim under Section 51, a plaintiff must establish three elements: (1) defendants used his name, portrait, picture or voice within the state of New York; (2) for purposes of trade or advertising; (3) *without his written consent*. *Finger v. Omni Publ'ns Int'l*, 77 N.Y.2d 138, 141, 564 N.Y.S.2d 1014, 1016 (1990); *Nussenzweig v. DiCorcia*, 11 Misc. 3d 1051(A), 814 N.Y.S.2d 891, 2006 WL 304832, at *5 (Sup. Ct. N.Y. Co. Feb. 8, 2006), *aff'd*, 38 A.D.3d 339, 832 N.Y.S.2d 510 (1st Dep't 2007). Section 51 is to be "narrowly construed" and "strictly limited to *nonconsensual* commercial appropriations of the name, portrait or picture of a living person." *Messenger v. Gruner + Jahr Printing and Publ'g*, 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52, 55 (2000) (citations omitted)

[8] While Plaintiff does not allege what section of the CRL he alleges Defendants violated, Plaintiff's allegation that "Defendants used plaintiff's likeness in the Borat film without his consent for the purposes of trade ..." is likely an attempt to allege a Section 51 claim. Complaint ¶ 42. Indeed, Section 51 is the *only* claim for misappropriation of likeness available under New York law. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 354 (1993) ("in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy.") Accordingly, for the purposes of this motion, Defendants assume Plaintiff intended to allege a Section 51 claim.

(emphasis added). Accordingly, it is axiomatic that a valid release bars a Section 51 claim. *Myskina v. Conde Nast Publ'ns, Inc.*, 386 F. Supp. 2d 409, 414-15 (S.D.N.Y. 2005) (dismissing Section 51 claim, although Plaintiff alleged that her release "was not knowingly or intelligently signed" due to a "language barrier" and her failure to "read its contents," because, the court held, her "claimed misunderstanding of the Release's terms does not excuse her from being bound on the contract"); *Ruffino v. Neiman*, 17 A.D.3d 998, 1000, 794 N.Y.S.2d 228, 229 (4th Dep't 2005) (plaintiff's Section 51 claim must fail due to his written consent).

For example, in *Ruffino v. Neiman*, the plaintiff asserted a Section 51 claim based on his allegations that the defendant, a dermatologist, "improperly published a newspaper advertisement containing photographs taken of plaintiff before and after hair transplant surgery ...." 17 A.D.3d at 999, 794 N.Y.S.2d at 228. The plaintiff had signed a general release for his photographs, but claimed that he was assured by the defendants that "the photographs would not be published or used 'outside of the office.'" *Id.* 17 A.D.3d at 999, 794 N.Y.S.2d at 229. The Court dismissed the Section 51 claim because "the alleged misrepresentations ... directly conflict with the terms of the written consent and thus plaintiff cannot be said to have justifiable relied on the alleged misrepresentations," and, therefore, the release completely barred his Section 51 claim. *Id.* 17 A.D.3d at 1000, 794 N.Y.S.2d at 229.

Similarly here, Plaintiff cannot escape the consequences of the Release, in which he consented to appear in the Film and where he clearly released his right to bring any claim based on "any allegedly improper or unauthorized use of [Plaintiff's] name or likeness or image" in the Film. Release ¶ 4(a).[9] Thus, his consent to appear in the Film completely bars his Section 51

[9] Because it is clear that the Release is valid and therefore completely bars Plaintiff's Section 51 claim, Defendants do not discuss the other defense to Plaintiff's claim: the fact that the Film is newsworthy, and Plaintiff's image bears a real relationship to the theme of the Film. *See*

claim.

IV.
PLAINTIFF'S CLAIM FOR QUANTUM MERUIT IS SUBSUMED BY HIS MISAPPROPRIATION CLAIM, AND THEREFORE SHOULD BE DISMISSED

In his fourth cause of action, Plaintiff has brought a claim for quantum meruit stemming from the alleged misappropriation of Plaintiff's image. Complaint ¶ 47. However, it is well settled that this claim is duplicative of Plaintiff's Section 51 claim, and therefore cannot stand.

One court explained the duplicative nature of a Section 51 claim and a quantum meruit/unjust enrichment claim by noting:

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

Zoll v. Ruder Finn, Inc., No. 02 Civ. 3652 (CSH), 01 Civ. 1339 (CSH), 2004 WL 42260 , at *4 (S.D.N.Y. Jan. 7, 2004) (emphasis in original) (dismissing unjust enrichment claim based on the alleged unauthorized use of plaintiff's image in two videotapes). *See also Myskina*, 386 F. Supp. 2d at 420 ("Under New York law, common law unjust enrichment claims for unauthorized use of an image or likeness are subsumed by Sections 50 and 51."); *Hampton v. Guare*, 195 A.D.2d 366, 366-67, 600 N.Y.S.2d 57, 58-59 (1st Dep't 1993) (common law claims barred because "plaintiff has no property interest in his image, portrait or personality outside the protections granted by the Civil Rights Law").

Here, Plaintiff's Section 51 claim and his quantum meruit claim stem from the exact same set of facts regarding Plaintiff's appearance in the Film. *See* Complaint ¶¶ 47-48 ("By

---

Messenger, 94 N.Y.2d at 441-43, 706 N.Y.S.2d at 55-57 (Section 51 "do[es] not apply to reports of newsworthy events or matters of public interest [and] 'newsworthiness' is to be broadly construed...."). However, for this motion, this Court need only focus on the valid Release that completely bars Plaintiff's claim.

misappropriating Plaintiff's likeness without his consent ... Defendants have been unjustly enriched") (emphasis added). The law is absolutely clear that the *only* claim based on the unauthorized use a plaintiff's likeness or image is under Section 51. As such, Plaintiff's quantum meruit claim is duplicative of his Section 51 claim and should be dismissed.

Further, Plaintiff specifically released his right to bring any claim that is based on "any allegedly improper or unauthorized use of [Plaintiff's] name or likeness or image" in the Film. Release ¶ 4(a). Plaintiff is also precluded from bringing a claim for "breach of any alleged contract (whether the alleged contract is verbal or in writing)." *Id.* ¶ 4(h). As such, there is no question that Plaintiff's quantum meruit claim is subsumed by this Section 51 claim and barred by the Release. Therefore, Plaintiff's quantum meruit claim must be dismissed.

V.
PLAINTIFF'S CLAIM FOR PRIMA FACIE TORT MUST FAIL BECAUSE HE CANNOT ESTABLISH THE NECESSARY ELEMENTS TO MAINTAIN SUCH A CLAIM

This Court should dismiss Plaintiff's fifth and final cause of action for prima facie tort because Plaintiff specifically released his right to bring such a claim. (Release ¶ 4(m)). Moreover, because Defendants' alleged conduct was not the product of disinterested malevolence, and Plaintiff cannot establish special damages, that claim also fails on the merits.

Under New York law, "Prima facie tort affords a remedy for 'the intentional infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful.'" *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142, 490 N.Y.S.2d 735, 740 (1985) (citations omitted). Accordingly, to establish a claim for prima facie tort, a plaintiff must prove "(1) the intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act that would otherwise be lawful." *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990). Courts have stated that, "The

touchstone [of the tort] is 'disinterested malevolence', meaning that the plaintiff cannot recover unless the defendant's conduct was not only harmful, but done with the *sole intent to harm*.... motives other than disinterested malevolence, such as profit, self-interest, or business advantage will defeat a prima facie tort claim." *Id.* (emphasis added) (holding that defendants were not liable for prima facie tort for their refusal to publish competitors' advertisements because refusal was motivated by self-interest). Indeed, when "an act is a product of mixed motives, some of which are perfectly legitimate then recovery in prima facie tort is impossible." *Fabry v. Meridian Vat Reclaim, Inc.*, Nos. 99 Civ. 5149 (NRB), 99 Civ. 5150 (NRB), 2000 WL 1515182, at *2-3 (S.D.N.Y. Oct. 11, 2000) (internal citations and quotations omitted) (dismissing prima facie tort claim based on libelous material because, even assuming "one of [defendant's] motives here was to" injure the plaintiff, defendants were also motivated by business advantage).

Moreover, this Court has repeatedly stated that "prima facie tort is not a 'catch all' alternative for every cause of action that cannot stand on its own legs. A party will not be able to take a defective claim for … any ... intentional tort and simply recast it as one for prima facie tort." *Church of Scientology of California v. Siegelman*, 94 F.R.D. 735, 738 (S.D.N.Y. 1982) (internal citations and quotations omitted). *See also Colina v. One East River Place Realty Co., LLC*, No. 99 Civ. 5173 (DC), 2000 WL 1171126, at *6 (S.D.N.Y. Aug. 17, 2000) (dismissing a prima facie tort claim because plaintiff "merely repeats all the facts set forth in support of her [other] claims...."); *Eavzan v. Polo Ralph Lauren Corp.*, 40 F. Supp. 2d 147, 152 (S.D.N.Y. 1998) (dismissing a prima facie tort claim because plaintiff was trying to assert a "catch-all" claim by merely "reformulat[ing] ... the same facts into a separate cause of action); *Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741 ("prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs.").

Here, Plaintiff is simply asserting a prima facie tort claim as a "catch-all" alternative for his first four defective claims. Indeed, in supporting his prima facie tort claim, Plaintiff merely alleges that "All prior averments are repeated" and "Defendants' conduct constitutes prima facie tort." Complaint ¶¶ 51, 52. These are exactly the type of "catch-all" allegations that courts routinely find insufficient to support a prima facie tort claim.

Additionally, Plaintiff's prima facie tort claim also fails as a matter of law because it is clear that Defendants were not solely motivated by an intent to harm Plaintiff. Indeed, Plaintiff does not allege in the Complaint that the Defendants were motivated by "disinterested malevolence" or that they intended to harm Plaintiff at all. Further, Plaintiff cannot make such an allegation, because it is clear that in using Plaintiff's likeness in the Film, Defendants were motivated, in whole or in part, to create an entertaining and profitable film. As such, Plaintiff cannot show that Defendants included Plaintiff in the Film with the "sole intent to harm," as required for his prima facie tort claim.[10] *See Twin Labs., Inc.*, 900 F.2d at 571.

Finally, this Court should also dismiss Plaintiff's prima facie tort claim because Plaintiff has not, and indeed cannot, allege that he has suffered any special damages. Under New York law, "a critical element of the cause of action [for prima facie tort] is that the plaintiff suffered specific and measurable loss, which requires an allegation of special damages." *Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741. It is insufficient to allege damages in a general fashion, such as "'in the amount of not less than one hundred thousand dollars.'" *Wehringer v. Helmsley-*

[10] Additionally, in *Freihofer*, the New York Court of Appeals held that a prima facie tort claim fails as a matter of law if it is based on the publication of newsworthy content, which is "sufficient justification for its publication." 65 N.Y.2d at 143, 490 N.Y.S.2d at 741. Significantly, one court has already found the Film newsworthy because it addresses the general topics of racism, sexism, homophobia, anti-Semitism, and ethnocentrism. *See Doe v. One America Prods., Inc.*, SC091723 (Sup. Ct. Los Angeles Co. Feb 15, 2007) (A true and correct copy of the decision is annexed hereto as Exhibit B).

Spear, Inc., 91 A.D.2d 585, 586, 457 N.Y.S.2d 78, 80 (1st Dep't 1982) (dismissing a prima facie tort claims for failure to allege special damages).

Here, Plaintiff has utterly failed to allege special damages. *See* Complaint p. 11, ¶ E. The law is absolutely clear that the type of general allegation of damages contained in the Complaint is insufficient to allege special damages. *Id.*; *Wehringer*, 91 A.D.2d at 586, 457 N.Y.S.2d at 80. Accordingly, this Court should dismiss Plaintiff's prima facie tort claim.

CONCLUSION

For all of the foregoing reasons, defendants Twentieth Century Fox Film Corporation, One America Productions, Inc., Todd Schulman and Sacha Baron Cohen respectfully request that this Court dismiss the Complaint in its entirety, with prejudice, and grant such other and further relief, together with costs, as this Court deems appropriate.

Dated: February 15, 2008

Respectfully submitted,

HOGAN & HARTSON LLP

By: s/ Slade R. Metcalf

Slade R. Metcalf (SM 8360)
Jason P. Conti (JC 0581)
Rachel F. Strom (RS 9666)
HOGAN & HARTSON LLP
875 Third Avenue
New York, New York 10022
Tel. (212) 918-3000
Fac. (212) 918-3100

Attorneys for Defendants Twentieth Century Fox Film Corporation, One America Productions, Inc., Todd Schulman, and Sacha Baron Cohen