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The Honorable Karen Strombom

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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|------------------------------|---|------------------------|
| KEN ARONSON, |) | |
| |) | |
| Plaintiff, |) | No. 3:10-CV-05293-KLS |
| |) | |
| v. |) | ANSWER AND AFFIRMATIVE |
| |) | AND OTHER DEFENSES TO |
| DOG EAT DOG FILMS, INC., and |) | AMENDED COMPLAINT |
| GOLDFLAT PRODUCTIONS, LLC., |) | |
| |) | |
| Defendants. |) | |

Defendants Dog Eat Dog Films, Inc. (“Dog Eat Dog”)* and Goldflat Productions, LLC answer Plaintiff Ken Aronson’s Amended Complaint as follows:

I. ANSWER

1.1 In answer to Paragraph 1.1, Defendant lacks sufficient information to form a belief as to the truth of the allegations in the first, second and third sentences of Paragraph 1.1 and therefore denies them. Defendant denies the remaining allegations generally, and specifically denies that Defendant committed any act of copyright infringement.

* Dog Eat Dog, a loan-out company owned by Michael Moore and his wife Kathleen Glynn, is incorrectly designated as a defendant in this case. The company that produced *Sicko* is Goldflat Productions, LLC. (hereinafter “Defendant”).

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II. THE PARTIES

2.1 In answer to Paragraph 2.1, Defendant lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 2.1 and therefore denies them.

2.2 In answer to Paragraph 2.2, Defendant admits that Dog Eat Dog Films, Inc.'s ("Dog Eat Dog") principal place of business is in New York, New York. Defendant denies Dog Eat Dog is in the business of producing, advertising, marketing and distributing documentary films by Michael Moore. Paragraph 2.2 states legal conclusions to which no response is required. Insofar as the allegations in Paragraph 2.2 require a response, Defendant denies them.

2.3 In answer to Paragraph 2.3, Defendant admits its principle place of business is in New York, New York. Defendant also admits it produces documentary films by Michael Moore. Paragraph 2.3 states legal conclusions to which no response is required. Insofar as the allegations in Paragraph 2.3 require a response, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies them.

III. JURISDICTION AND VENUE

3.1 In answer to Paragraph 3.1, Paragraph 3.1 states legal conclusions to which no response is required. Insofar as the allegations in Paragraph 3.1 require a response, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies them.

3.2 In answer to Paragraph 3.2, Defendant admits that venue is proper.

IV. FACTS

4.1 In answer to Paragraph 4.1, Defendant lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 4.1 and therefore denies them.

1 4.2 In answer to Paragraph 4.2, Defendant admits that a CD entitled “I’m Alive” is
2 copyrighted under the name of Eric Turnbow. A copy of Mr. Turnbow’s copyright
3 registration to “I’m Alive” as available from the website of the Library of Congress is
4 attached as Exhibit A to Defendant’s Answer and Affirmative and Other Defenses.

5 Defendant lacks sufficient information to form a belief as to the truth of the remaining
6 allegations in Paragraph 4.2 and therefore denies them.

7 4.3 In answer to Paragraph 4.3, Defendant lacks sufficient information to form a belief
8 as to the truth of the allegations in Paragraph 4.3 and therefore denies them.

9 4.4 In answer to Paragraph 4.4, Defendant admits that Mr. Turnbow possessed a VHS
10 copy of their video footage. A copy of Mr. Turnbow’s three VHS cassette tapes, as
11 provided by his attorney in *Aronson v. Turnbow*, Thurston County Superior Court Cause
12 No. 08-2-02542-7, and transferred to DVD, is attached as Exhibit B to Defendant’s
13 Answer and Affirmative and Other Defenses. Defendant lacks sufficient information to
14 form a belief as to the truth of the remaining allegations in Paragraph 4.4 and therefore
15 denies them.

16 4.5 In answer to Paragraph 4.5, Defendant lacks sufficient information to form a belief
17 as to the truth of the allegations in Paragraph 4.5 and therefore denies them.

18 4.6 In answer to Paragraph 4.6, Defendant admits that Michael Moore sought
19 information about health care stories that could be included in the documentary film, *Sicko*,
20 and that an email request for such information was sent to an electronic listserv in 2006.
21 Defendant lacks sufficient information to form a belief as to the truth of the remainder of
22 the allegations in Paragraph 4.6 and therefore denies them.

1 4.7 In answer to Paragraph 4.7, Defendant admits that Mr. Turnbow submitted
2 materials to Defendant and that Mr. Turnbow signed a release and license expressly
3 permitting their use by Defendant. The signed release and license are attached as Exhibit
4 C to Defendant's Answer and Affirmative and Other Defenses. Defendant lacks sufficient
5 information to form a belief as to the truth of the remainder of the allegations in Paragraph
6 4.7 and therefore denies them.

7 4.8 In answer to Paragraph 4.8, Defendant admits that no agent of Michael Moore
8 contacted Plaintiff. Defendant lacks sufficient information to form a belief as to the truth
9 of the remaining allegations in Paragraph 4.8 and therefore denies them.

10 4.9 In answer to Paragraph 4.9, Defendant admits that *Sicko* was nominated for an
11 Academy Award in the "Best Documentary" category. A copy of *Sicko* is attached as
12 Exhibit D to Defendant's Answer and Affirmative and Other Defenses. Defendant lacks
13 sufficient information to form a belief as to the truth of the remaining allegations in
14 Paragraph 4.9 and therefore denies them.

15 V. CAUSES OF ACTION

16 5.1 In answer to Paragraph 5.1, Paragraph 5.1 states a legal conclusion to which no
17 response is required. Insofar as the allegations in Paragraph 5.1 require a response,
18 Defendant lacks sufficient information to form a belief as to the truth of the allegations and
19 therefore denies them.

20 5.2 In answer to Paragraph 5.2, Paragraph 5.2 states a legal conclusion to which no
21 response is required. Insofar as the allegations in Paragraph 5.2 require a response,
22 Defendant denies them.

1 5.3 In answer to Paragraph 5.3, Paragraph 5.3 states a legal conclusion to which no
2 response is required. Insofar as the allegations in Paragraph 5.3 require a response,
3 Defendant denies them.

4 5.4 In answer to Paragraph 5.4, Paragraph 5.4 states a legal conclusion to which no
5 response is required. Insofar as the allegations in Paragraph 5.4 require a response,
6 Defendant lacks sufficient information to form a belief as to the truth of the allegations and
7 therefore denies them.

8 5.5 In answer to Paragraph 5.5, Paragraph 5.5 states a legal conclusion to which no
9 response is required. Insofar as the allegations in Paragraph 5.5 require a response,
10 Defendant denies them.

11 5.6 Paragraph 5.6 states a legal conclusion to which no response is required. Insofar as
12 the allegations in Paragraph 5.6 require a response, Defendant denies them.

13 5.7 In answer to Paragraph 5.7, Paragraph 5.7 states a legal conclusion to which no
14 response is required. Insofar as the allegations in Paragraph 5.7 require a response,
15 Defendant denies them.

16 5.8 In answer to Paragraph 5.8, this Court has already dismissed with prejudice, under
17 its Order of August 31, 2010, Plaintiff's claim of invasion of privacy. Insofar as the
18 allegations in Paragraph 5.8 require a response, Defendant denies them.

19 5.9 In answer to Paragraph 5.9, this Court has already dismissed with prejudice, under
20 its Order of August 31, 2010, Plaintiff's claim of invasion of privacy. Insofar as the
21 allegations in Paragraph 5.9 require a response, Defendant lacks sufficient information to
22 form a belief as to the truth of the allegations and therefore denies them.

1 5.10 In answer to Paragraph 5.10, this Court has already dismissed with prejudice, under
2 its Order of August 31, 2010, Plaintiff's claim of invasion of privacy. Insofar as the
3 allegations in Paragraph 5.10 require a response, Defendant denies them.

4 5.11 In answer to Paragraph 5.11, this Court has already dismissed with prejudice, under
5 its Order of August 31, 2010, Plaintiff's claim of misappropriation of likeness. Insofar as
6 the allegations in Paragraph 5.11 require a response, Defendant denies them.

7 5.12 In answer to Paragraph 5.12, this Court has already dismissed with prejudice, under
8 its Order of August 31, 2010, Plaintiff's claim of misappropriation of likeness. Insofar as
9 the allegations in Paragraph 5.12 require a response, Defendant denies them.

10 Defendant denies any factual allegations contained in any paragraph of
11 the Complaint except as expressly admitted above. Defendant further denies that Plaintiff
12 is entitled to any of the relief requested in the Prayer for Relief on pages 6-7 of
13 the Complaint or to any other relief.

14 **VI. AFFIRMATIVE AND OTHER DEFENSES**

15 6.1 **Failure to State a Claim.** The Complaint fails to state a claim against Defendant
16 upon which relief can be granted.

17 6.2 **License.** Defendant's use of the material to which Plaintiff allegedly owns the
18 copyright was non-infringing as it occurred under license from a co-owner of the
19 underlying work, Mr. Turnbow.

20 6.3 **First Amendment.** The Complaint, and each cause of action therein, is barred by
21 the First Amendment to the United States Constitution.

1 6.4 **Fair Use.** Defendant's use of material to which Plaintiff allegedly owns the
2 copyright was a nonactionable use protected by the fair use doctrine, codified at 17 U.S.C.
3 § 107.

4 6.5 **Preemption.** Plaintiff's state law claims for misappropriation of likeness and
5 invasion of privacy, which have been dismissed with prejudice under the Court's Order of
6 August 31, 2010, are preempted by 17 U.S.C. § 301.

7 6.6 **Failure to Comply with Prerequisites to Maintain a Copyright Infringement**
8 **Claim.** Plaintiff failed to register or preregister the work at issue before instituting an
9 action for infringement, as 17 U.S.C. § 411 requires.

10 6.7 **Failure to Comply with Prerequisites for Statutory Damages and Attorneys'**
11 **Fees.** Plaintiff's claim for statutory damages and/or attorneys' fees is barred by his failure
12 to comply with 17 U.S.C. §§ 411 and/or 412.

13 6.8 **No Damages.** Plaintiff did not incur any damage or loss as a result of any act or
14 conduct by Defendant.

15 6.9 **Speculative Damages.** Plaintiff's damages, if any, are vague, uncertain,
16 imaginary, and speculative.

17 6.10 **Anti-SLAPP.** Plaintiff's state law claims are governed by the Washington Act
18 Limiting Strategic Lawsuits Against Public Participation ("Anti-SLAPP Act"), as
19 recognized by this Court's order of August 31, 2010. The Anti-SLAPP ACT requires the
20 prompt dismissal of Plaintiff's state law claims, with reimbursement of Defendant's
21 reasonable attorneys' fees and costs, possible additional sanctions, and a statutory award of
22 \$10,000, as this Court ordered on August 31, 2010.

1 6.11 **Statute of Limitations.** Plaintiff's state law claims, which were dismissed with
2 prejudice by this Court's Order of August 31, 2010, are barred by their statutes of
3 limitations.

4 6.12 **Laches and/or Estoppel.** Plaintiff's state law claims, which were dismissed with
5 prejudice by this Court's Order of August 31, 2010, are barred, in whole or in part, by the
6 doctrines of laches and/or estoppel.

7
8 **VII. PRAYER FOR RELIEF**

9 WHEREFORE, Defendant prays for relief as follows:

10 7.1 That Plaintiff take nothing by reason of the Complaint in this matter, that judgment
11 be rendered in favor of defendants, and that the Complaint be dismissed, with prejudice;

12 7.2 That each defendant be awarded its costs of suit incurred in defense of this matter,
13 including reasonable attorneys' fees and costs recoverable pursuant to 17 U.S.C. § 505 or
14 any other statute, rule, or other authority;

15 7.3 That, per this Court's order of August 31, 2010, Defendant be awarded its
16 reasonable attorneys' fees, costs, additional sanctions, and a statutory award of \$10,000, in
17 accordance with the Anti-SLAPP Act; and

18 7.4 For such other relief as this Court deems just and proper.
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1 DATED this 16th day of November, 2010.

2
3 DAVIS WRIGHT TREMAINE LLP
4 *Attorneys for Defendants Dog Eat Dog Films,*
5 *Inc. and Goldflat Productions, LLC*

6 By /s/ Noelle H. Kvasnosky

7 Bruce E. H. Johnson, WSBA # 7667

8 Noelle Kvasnosky, WSBA # 40023

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 16th day of November, 2010, I caused to be filed
3 electronically the above and foregoing document with the court, using the CM/ECF
4 system, which will send email notification of such filing to the below addressees.

5 **Attorneys for Plaintiff:**

6 Thomas Brian Vertetis _____ U.S. Mail
Pfau Cochran Vertetis Kosnoff PLLC _____ Hand Delivery
7 911 Pacific Avenue _____ Overnight Mail
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9 Philip Talmadge _____ U.S. Mail
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 X CM/ECF Notification via email
12 service to: phil@tal-fitzlaw.com

13 Declared under penalty of perjury dated at Seattle, Washington this 16th day of
14 November, 2010.

15 _____
16 /s/ Noelle H. Kvasnosky
Noelle H. Kvasnosky