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THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC., and
GOLDFLAT PRODUCTIONS, LLC,

Defendant.

NO. 3:10-CV-05293-KLS

DECLARATION OF THOMAS B.
VERTETIS IN SUPPORT OF
PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT

I, Thomas B. Vertetis, declare and state as follows:

1. I am a partner with Pfau Cochran Vertetis Kosnoff PLLC, I am over the age of 18, I am one of the attorneys for the Plaintiffs in this case, I am competent to testify to the facts of this case, and I make the following declaration based upon my own personal knowledge.

2. In the Combined Joint Status Report and Discovery Plan Pursuant to FRCP 26(f), the defendants agreed discovery in this case would include evidence regarding “the license to Defendant to use the underlying copyrighted work at issue in Sicko” and “whether

1 Defendant's use of the underlying copyrighted work was a fair use." The defendants went so
2 far as to argue that this discovery should occur as a "first phase" prior to any discovery
3 regarding Plaintiff's damages. Despite this joint discovery plan, the defendants' initial
4 disclosures did not include any evidence regarding their purported "license" or their "fair use"
5 defense, other than self-serving evidence showing they had acquired a "license" from
6 Turnbow.
7

8 3. Likewise, when the defendants answered Plaintiff's first set of discovery
9 requests in late October, they claimed they "fact checked" the use of materials in *Sicko*, but
10 they provided no discovery about whether they fact checked their use of Plaintiff's materials.
11 They also claimed they were still searching for responsive materials, would provide more
12 discovery regarding these issues after a protective order was entered, and offered to make
13 materials available for inspection.

14 4. Attached as Exhibit 1 is a true and correct copy of a letter from me to Ms.
15 Kvasnosky, dated November 8, 2010.

16 5. Attached as Exhibit 2 is a true and correct copy of a letter from Ms. Kvasnosky
17 to me, dated November 29, 2010.

18 6. Attached as Exhibit 3 is a true and correct copy of a letter from Mr. Amala
19 from our office to Ms. Kvasnosky, dated December 2, 2010.

20 7. Attached as Exhibit 4 is a true and correct copy of a letter from Ms. Kvasnosky
21 to Mr. Amala, dated December 10, 2010.

22 8. Attached as Exhibit 5 is a true and correct copy of Defendant's Initial
23 Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1).
24
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1 9. The deadline for disclosing expert witnesses is nearly four months away, the
2 discovery cut-off date is almost six months away, and the deadline for filing dispositive
3 motions, like the pending one, is almost seven months away. Prior to those deadlines,
4 Plaintiff intends to continue pursuing the following discovery:
5

- 6 (1) Depose Christine Fall, who corresponded with Turnbow about the footage at
7 issue;
- 8 (2) Depose Stephanie Palumbo, who corresponded with Turnbow about the
9 footage at issue;
- 10 (3) Depose Joanne Dorosho, who provided legal advice as to fact-checking in
11 *Sicko*;
- 12 (4) Depose David Schankula, who provided fact-checked certain portions of
13 *Sicko*;
- 14 (5) Pursue discovery regarding other individuals who provided fact-checking
15 regarding the intellectual property at issue, including what efforts the
16 defendants made to verify their license was lawful;
- 17 (6) Pursue discovery regarding the defendants' decision to use Plaintiff's
18 intellectual property, including the value that it provided to *Sicko* and other
19 materials they considered for the same role;
- 20 (7) Pursue discovery regarding the value of the intellectual property at issue,
21 including the value that defendants placed on similar materials that were
22 obtained for *Sicko* and similar documentaries;
- 23 (8) Pursue discovery regarding the purported license between defendants and
24 Turnbow regarding the intellectual property at issue, including whether it was
25 obtained through lawful consideration; and,
- 26 (9) Obtain expert opinions on the damages that Plaintiff has suffered and the
27 effect that *Sicko* has had on the market for Plaintiff's work.

28 As explained more fully in Plaintiff's opposition brief, Plaintiff cannot present the
29 facts essential to justify his opposition regarding the four fair use factors until he is finished
30 conducting the aforementioned discovery. And as reflected in Exhibit 1-5, Plaintiff has

1 diligently pursued discovery, but the defendants have either stalled producing it or have yet to
2 produce it.

3 I declare under penalty of perjury under the laws of the United States of America, 28
4 U.S.C. ¶ 1746, that the foregoing is true and correct.

5 Dated this 14th day of February 2011 in Tacoma, Washington.

6 PFAU COCHRAN VERTETIS KOSNOFF PLLC

7
8 By _____


9 Thomas B. Vertetis, WSBA No. 29805
10 thomas@pcvklaw.com
11 Attorneys for Plaintiff
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EXHIBIT 1



A Professional Limited Liability Company

Columbia Tower
701 Fifth Avenue, Suite 4730
Seattle, WA 98104
(206) 462-4334
(206) 623-3624 Fax

Metzger Building
911 Pacific Avenue, Suite
200
Tacoma, WA 98402
(253) 777-0799
(253) 627-0654 Fax

Thomas Vertetis
Email: tom@pcvklaw.com
Direct No.: Tacoma (253) 777-0799

November 8, 2010

Noelle Kvasnosky
DAVIS WRIGHT TREMAINE, LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101

RE: *Aronson v. Dog Eat Dog – supplemental responses*

Counsel,

I am writing in response to your client's discovery responses dated October 22, 2010.

First, please provide us with a draft protective order, as well as an explanation of the specific documents that your client believes must be produced under a protective order. Enclosed with this letter, please find a letter from Judge Bryan regarding the issue of protective orders in federal court which should provide some guidance as to what the Court may be willing to do in terms of a protective order.

Second, your client responded to our discovery requests by stating that it (1) is still searching for documents, and (2) will eventually make some documents available. Please confirm in writing the specific requests for which your client is still looking for responsive documents. Additionally, please confirm in writing that your client has produced all responsive documents in its possession.

Third, your client objected to a number of our requests as asking for information protected by the attorney-client privilege or work product doctrine. Please confirm that you have produced a complete privilege log regarding any documents that have been withheld or redacted.

November 8, 2010

Page 2

Fourth, your client responded to a large number of our requests by stating that documents would be made available for inspection. Please let us know a time next week that we can review those documents.

Fifth, a number of your responses refer to Christine Fall. Please provide the last known contact information for Ms. Fall.

Sixth, Interrogatory No. 8 asked your client to identify the person or persons who communicated with Eric Turnbow about the materials he provided for consideration in the use of *Sicko*. In response, your client only identified Christine Fall. Please confirm in writing that your client is not aware of anyone else who communicated with Turnbow about the materials he provided for consideration in the use of *Sicko*.

Additionally, please confirm in writing that your client has no additional information to provide regarding the factchecker who was responsible for reviewing the material submitted by Mr. Turnbow. Please note that some of the documents your client produced appear to show footnotes made by a factchecker. If your client maintains that it has no additional information to provide, please provide (1) the last known contact information for all factcheckers that were involved in *Sicko*, and (2) the portions of *Sicko* that each reviewed and/or factchecked.

Seventh, your client responded to Request for Production No. 8 by stating that it "will produce documents in its custody or control that are responsive to this request for production that are not subject to the attorney-client privilege or work product protections." Please confirm in writing that all responsive documents have been produced. Additionally, please confirm that no documents have been withheld on the grounds of attorney-client privilege or work product.

Eighth, Interrogatory No. 9 asked your client to "please identify the person or persons who decided to use the video footage and song lyrics at issue in *Sicko*." Other than a general description, your client did not identify any specific person or persons who decided to use the video footage and song lyrics at issue in *Sicko*. Please ask your client to supplement its response with this information. Likewise, please ask your client to supplement its response to Request for Production No. 8 that your client does not have documents that reflect its decision to use the video footage and song lyrics at issue in *Sicko*.

Ninth, Request for Production No. 12 asked your client to produce all e-mails that it exchanged with Eric Turnbow regarding *Sicko*. Please confirm that all responsive documents have been produced or have been identified on a privilege log.

Tenth, Request for Production No. 14 asked your client to produce all documents it possesses regarding its acquisition of the video footage and lyrics at issue. Please confirm in writing that all responsive documents have been produced or identified on a privilege log.

November 8, 2010

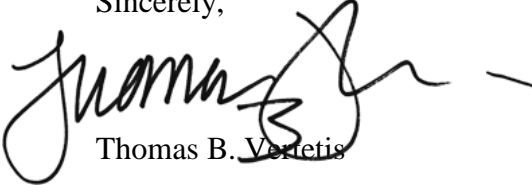
Page 3

Eleventh, Request for Production No. 15 asked your client to produce all documents in its possession regarding its decision to use the video footage and lyrics issue. Please confirm in writing that all responsive documents have been produced or have been identified on a privilege log. Please note that your client objected to this request as asking for information protected by the First Amendment. Your client needs to provide a privilege log regarding any such materials.

Finally, Request for Production No. 19 asked your client to produce all documents related to its solicitation, consideration, and decision to use the video footage regarding Abby Road. Please confirm in writing that all responsive materials have been produced or identified on a privilege log. Please note that your client also objected to this request as asking for information protected by the First Amendment. Your client needs provide a privilege log regarding any such materials that it has withheld because of arguments under the First Amendment.

I would appreciate it if you could get back to me regarding the above topics by this Friday. If your client is not willing to supplement its responses in line with the above requests, please let me know a time that you are available for a meet and confer.

Sincerely,



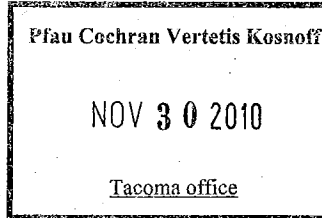
Thomas B. Venetis

TBV/jpa

4851-9918-4904, v. 1

EXHIBIT 2

November 29, 2010



Via Federal Express

Thomas Vertetis
Pfau Cochran Vertetis Kosnoff
911 Pacific Avenue, Suite 200
Tacoma, WA 98402

Re: *Aronson v. Dog Eat Dog - Supplemental Responses*

Dear Mr. Vertetis:

I write in response to your letter dated Nov. 8, 2010 regarding supplementing Defendant Dog Eat Dog Films's responses to plaintiff's discovery requests.

A draft protection order is enclosed for your review. We will produce documents responsive to discovery requests that contain non-public financial information or personal information only upon entry of an appropriate protective order. Once a protective order is in place, let's discuss a mutually agreeable time for you to inspect such confidential documents.

My client has identified additional documents responsive to plaintiff's discovery requests, which are enclosed along with a privilege log explaining the redactions of personal information. To date our client has produced all documents in its possession that it has so far identified as responsive and which are not subject to work-product protection, or attorney-client or other privilege, or whose confidential nature requires a protective order to be in place prior to production.

We provided you with a privilege log contemporaneously with our initial document production, which together with the privilege log enclosed today we believe lists all documents identified to date as responsive to plaintiff's discovery requests, but withheld or redacted on the basis of work-product protection, attorney-client privilege, or confidential personal information. There is one exception—to avoid both the unnecessary waste of our client's funds and needless makework, any documents subject to obvious work-product protection that were created after the case was commenced have been withheld and are not listed on a privilege log.

Christine Fall, a former employee of Goldflat Productions, may be contacted through me.

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Thomas Vertetis
November 29, 2010
Page 2

In further answer to Interrogatory Number 8, my client has learned that Stephanie Palumbo, a former employee of Goldflat who worked on *Sicko* as a researcher, communicated with Mr. Turnbow about the materials Mr. Turnbow submitted to Goldflat Productions. My client is not aware whether a factchecker communicated with Mr. Turnbow about the materials he provided to Goldflat Productions. Beside the supplemental information provided here, and in the enclosed documents, my client has no additional information or documents to provide regarding the specific factchecker who was responsible for reviewing the segment of the film that includes Mr. Turnbow's story.

As stated above, and in our response to plaintiff's discovery requests, to date our client has produced all documents in its possession that it has so far identified as responsive to each discovery request—including Request for Production Numbers 8, 12, 14, 15 and 19—and that are not subject to work-product protection, or attorney-client or other privilege.

To the best of my knowledge, no documents responsive to Request for Production Number 8 have been identified that were redacted or withheld on the basis of attorney-client privilege or work-product protection. Regarding Request for Production Number 12, any documents that are subject to work-product protection that were created after plaintiff filed the complaint that might otherwise be responsive have not been produced, and are not listed on a privilege log.

Regarding Requests for Production 15 and 19, to date my client has not identified any documents responsive to these discovery requests that are protected under the journalistic privilege of the First Amendment; however, we preserve this objection in the event any such responsive document is identified.

To supplement defendant's Answer to Interrogatory Number 9, my client has learned that Stephanie Palumbo, a former Goldflat employee who worked as a researcher for *Sicko*, communicated with Mr. Turnbow early on about the materials he submitted to Goldflat Productions and Ms. Palumbo may have been the individual who initially identified Mr. Turnbow's story as one of interest to include in the film. Additional documents potentially responsive to Request for Production Number 9 that are not subject to work-product protection, or attorney-client or other privilege, are included in the document production accompanying this letter. As stated in defendant's Answer to Interrogatory Number 9, typically a field producer would identify the stories or materials of individuals that fit into the editorial theme of *Sicko*, subject to final directorial review, and my client has no reason to believe that was not the case with the decision to use the video footage and song lyrics at issue in this lawsuit.

In further answer to Interrogatory Number 13, my client has identified that Stephanie Palumbo, a former employee of Goldflat Productions who was a researcher for *Sicko*, may have discoverable

Thomas Vertetis
November 29, 2010
Page 3

information regarding Goldflat Production's receipt of the video footage at issue, and other facts pertinent to this lawsuit. Ms. Palumbo may be contacted through me.

Very truly yours,

Davis Wright Tremaine LLP

Boni Grant for Noelle Kvasnosky
Noelle H. Kvasnosky

Enclosures

cc Bruce Johnson

EXHIBIT 3

**PCV PFAU COCHRAN
VERTETIS KOSNOFF**

A Professional Limited Liability Company

Columbia Tower
701 Fifth Avenue, Suite 4730
Seattle, WA 98104
(206) 462-4334
(206) 623-3624 Fax

Metzger Building
911 Pacific Avenue, Suite 200
Tacoma, WA 98402
(253) 777-0799
(253) 627-0654 Fax

Jason P. Amala
Email: jason@pcvklaw.com
Direct No.: Seattle (206) 462-4339
Tacoma (253) 777-0799

December 2, 2010

Noelle Kvasnosky
DAVIS WRIGHT TREMAINE, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Re: *Aronson v. Dog Eat Dog*

Dear Counsel,

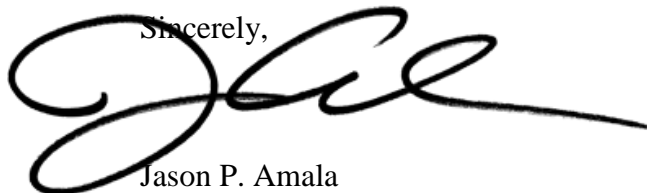
Please let this letter serve as a follow-up to your letter dated November 29, 2010.

Given that your client claims that it cannot determine the name(s) of the individual(s) who performed the fact checking at issue, if any took place, please produce documents that reflect: (1) the names of all individuals who worked on *Sicko* during the time that fact-checking was done, (2) the names of all known fact checkers, (3) the dates that all known fact checkers were employed, and (4) the last known contact information for all such individuals.

As you can imagine, we intend to use the above information to determine who was responsible for the fact-checking at issue, or if any actually took place. If your client would prefer to do this analysis on its own, we would of course be open to the same.

Please provide this information no later than December 10, 2010. If you're not willing to provide this information, please let me know a time on December 10th that you are available for a meet and confer.

Sincerely,

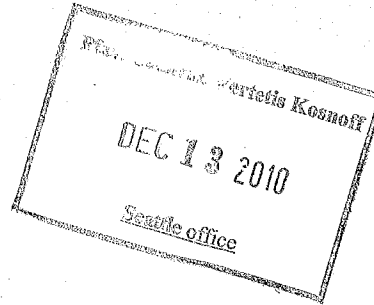
A handwritten signature in black ink, appearing to read 'JPA', with a long horizontal flourish extending to the right.

Jason P. Amala

EXHIBIT 4

December 10, 2010

Jason Amala, Esq.
Pfau Cochran Vertetis Kosnoff
Columbia Tower
701 Fifth Avenue, Suite 4730
Seattle, WA 98104



Re: *Aronson v. Dog Eat Dog*

Dear Mr. Amala:

I write in response to your letter dated December 3, 2010, regarding fact checking for the film *Sicko*.

As we have previously conveyed in answer to Interrogatory Number 8, my client is not aware whether a Goldflat employee communicated with Mr. Turnbow about the materials he provided to Goldflat Productions. Joanne Doroshow, Esq. provided prepublication legal advice concerning *Sicko*, and the facts therein; the confidential legal advice Ms. Doroshow provided to Goldflat is subject to the attorney-client privilege. David Schankula, a former Goldflat employee, performed research into facts in the section of *Sicko* that discusses the U.K. Mr. Schankula's research is included in a document that incorporates his research, which has previously been produced to you as GOLD000112-135. Both Mr. Schankula and Ms. Doroshow may be contacted through me.

My client has identified one additional document that is responsive to plaintiff's discovery requests, GOLD000136-137, which is enclosed along with a privilege log explaining the redactions of personal information.

Very truly yours,

Davis Wright Tremaine LLP



Noelle H. Kvasnosky

Enclosures

cc: Bruce Johnson

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