

1 Michael Terry
1607 Jason Court
2 Redlands, CA 92374
(909) 283-4673
3 MTerry145@ucla.edu

4 IN PRO PER

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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **FOR THE COUNTY OF SAN BERNARDINO**
9

10 Michael Terry

11 Plaintiff,

12 vs.

13 Twentieth Century Fox Film Corporation

14 &

15 Mr. Matt Nix

16
17 Defendants.

) Case No.: CIVDS1701203
) **NOTICE OF MOTION AND MOTION**
) **FOR SUMMARY ADJUDICATION;**
) **STATEMENT OF UNDISPUTED**
) **MATERIAL FACTS; MEMORANDUM**
) **OF POINTS AND AUTHORITIES;**
) **DECLARATIONS OF WITNESSES.**
) **[CRC 3.1350] [CCP 437 c (t)]**
) Exhibits 1- 5; Lodged items 1-2
) Judge:
) DATE:
) TIME:
) Court:
) Dept.
) Action Filed: January 23, 2017

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24 TO DEFENDANTS TWENTIETH CENTURY FOX FILM CORPORATION AND MR.
25 MATT NIX: NOTICE IS HEREBY GIVEN that on December ____, 2017 at 8:30 am, or as soon
26 thereafter as the matter can be heard in department S24 of the San Bernardino Justice Center,
27 located at 247 W. Third St., San Bernardino, California 92415. Plaintiff Michael Terry will and
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1 hereby does move for an order granting Summary Adjudication in his favor of his common law
2 cause of action only because CCP 437 c (t) allows for it and was made permanent in 2016.

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4 STATEMENT OF FACTS

5 1. The infringed work in question is the first edition of: The Setup: Memoirs of an
6 NSA Black Operation © 2007 (hereafter, “The Setup”). It was completed in the winter of 2007
7 during which copies were mailed to literary agents, self-publishing and marketing firms. During
8 this time, it is believed that defendants obtained a copy of The Setup. In the infringing work
9 (hereafter, “Burn Notice”), the pilot used no less than 7-8 elements of likeness, taken from The
10 Setup were used in the pilot episode. The law generally accepts 3-4 elements of likeness as a
11 misappropriation. This is important because the pilot foreseeably lead to the series that lasted
12 seven years and 111 episodes in the US and 56 foreign markets.

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14 2. Plaintiff sent an e-copy copy his self-publishing firm on June 15, 2007. Defendants
15 aired the first episode (pilot) of Burn Notice on June 28, 2007. To get a break into Hollywood, they
16 had to have more than another story of a private investigator but one with real spy clout.

17 3. An account of a friend who told plaintiff of Burn Notice came when he told me “A
18 television show ripped off your book!” After jotting down the name, plaintiff viewed the Burn
19 Notice first episode, and felt something dear (his memoir) had been stolen. It was very personal
20 and serious. Slack-jawed and a bit shocked, he knew he had to sue.

21
22 4. Plaintiff developed notoriety and a reputation due to the many dangerous and tragic
23 events in his life which made him look like a burned spy. He got setup, fired, blacklisted, offered
24 his job back; believes his employer tried to kill him; was mistaken for a CIA agent; and finally got
25 sent back broke to his hometown in the USA. All of these exact events and many others were
26 misappropriated just 3-5 months after a January 2007-March 2007 distribution of Plaintiff's draft
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1 of his memoir, to various literary agents while in search of a book deal. One firm “WL Literary”
2 received a 1990s version.

3 ARGUMENT

4 **A. LEGAL STANDARD FOR SUMMARY JUDGMENT**

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6 5. Summary Judgment is appropriate where there is no genuine dispute as to any material
7 fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c);
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must demonstrate that
9 there is no dispute as to the material facts of the case. Courts will focus on the facts that might
10 affect the outcome and will disregard all “facts that are irrelevant or unnecessary.” *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12
13 6. Defense Counsel claims its use of Plaintiff’s likeness is protected by the First
14 Amendment. This is a question of law. Defense Counsel also denies misappropriation of Plaintiff’s
15 likeness because Plaintiff does not look like the television character, Michael Westen. Plaintiff
16 shows that as a matter of law, Defendants did misappropriate his likeness.

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18 7. As for evidence, Plaintiff preserved his manuscript of "The Setup" in a 2003 draft that
19 proves that Plaintiff did not write or modify his manuscript after viewing the infringing work, but
20 many years before, so is the original "Michael" identity. It is electronically fixed showing a “Last
21 modified date” in 2003. The 2007 version was sent to the publisher on June 15, 2017 before the
22 airing of the first episode, the pilot of Burn Notice on June 28, 2007. Defense Counsel has
23 admitted it is a “True and correct copy.” [_____] From this book, Plaintiff finds misappropriation
24 of likeness in Burn Notice. Understanding this we must see requires an understanding of what all
25 the law says an actionable likeness is.

26 **B. Plaintiff’s likeness**

1 (1) Burn Notice's main character, Michael Westen's identity is based on the life of Plaintiff
2 that was written about in his 2007 memoir about his overseas adventures from 1991-1995. His
3 activities made him look a spy. It consists of activities which garnered him a reputation in the same
4 manner as the human cannon ball act taped and shown on television without consent in Zacchini v.
5 Scripps-Howard case, a binding U.S. Supreme Court case (Zacchini, 433 U.S. at p. 576). And, in
6 this case, the U.S. Supreme Court ruled saying, "Ohio has recognized what may be the strongest
7 case for a "right of publicity" -- involving, not the appropriation of an entertainer's reputation to
8 enhance the attractiveness of a commercial product, but the appropriation of the very activity by
9 which the entertainer acquired his reputation in the first place." (Ibid). This applies in the matter of
10 the activities in the life of the Plaintiff from 1993-95 as told in the infringed work, "The Setup." So
11 misappropriation of Plaintiff's reputation, notoriety and valuable life activities, are actionable in
12 this lawsuit. The infringing work, the Michael Westen character is derived from Plaintiff's unique
13 and distinctive life activity. Plaintiff was setup, fired, blacklisted; sent back broke to his hometown
14 in the USA and nearly killed, et al, all within the CIA spy context. i.e. "A man known by his
15 reputation."
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17

18 (2) A principle of advertising is that valuable aspects of the product being sold are shown
19 to attract customers. We see this in advertising and pilot episode of Burn Notice. This use of
20 activities in advertising confirms what elements of likeness are valuable (see ex. 2 & 3).
21

22 (3) In the pilot episode, defendants made a direct connection between Burn Notice and my
23 work, The Setup using valuable elements of likeness, as indicated in advertising, to create "a
24 fictionalized expressive work." One just needs to read the book and view the pilot. One could stop
25 at the counter numbers shown in the Evidence Schedule (See Evidence Schedule, ex. 1).
26

27 8. As for interpretation of likeness, Dean Prosser recognized such need for a wider net
28 to catch all methods of invoking someone's identity when he recognized that right of publicity

1 cases involved one of these factual scenarios: name appropriation, and picture or other likeness
2 appropriation. (See Privacy, 48 Cal. L. Rev. at 401-02, nn. 156-57).

3 **C. Why Burn Notice does not deserve First Amendment protection**

4 9. Defense Counsel has claimed a First Amendment right to use Plaintiff’s likeness in
5 the Anti-SLAPP motion and argument for transformative use of it. But fictionalized works based
6 on a real person or events have an additional requirement to gain First Amendment protection.
7 They must make it clear to the viewers that their show is fiction (Findlaw, Right of Publicity, See
8 ex. 4). Usually, this is done by disclaimer. Failure to make this clear and especially purporting or
9 implying that Burn Notice is non-fiction voids any First Amendment protections. Specifically, case
10 law says: “However, if the creative work purports to be factual but is in fact fiction, then the
11 individual’s right of publicity would be infringed.” (Spahn v. Julian Messner, Inc (1967) 21 N.Y.
12 2d 124; Hill, supra 76 Columbia Law Review at pp 1306). These cases seal the doom for
13 Defendants.
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16 10. And in the case of Hicks vs. Casablanca Records, Nos. 77 Civ. 2042, 464 F.Supp
17 426 (1978) the court made law by stating, “It is clear from the review of these two cases...an
18 attempt by a defendant to present the disputed event as true determines...protection of the speech
19 at issue.”

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21 11. Burn Notice purports it is non-fictional with its use of plaintiff’s likeness and spy
22 monologues. i.e. “When a spy gets fired”, “Being a spy is like a trip to the dentist.” Defendants
23 added plaintiff’s likeness to a fictional story of a PI, creating a fictionalized work that has an
24 additional requirement to gain First Amendment protection. The law says that as long as a
25 fictionalized work purports to be non-fictional and doesn’t make it perfectly clear to the audience
26 that it is fiction, then it is not protected by the First Amendment even though it is an expressive
27 work (Findlaw, Right of Publicity; Spahn v. Messner (1967) 21 N.Y 2d 124; Hill, 76 Columbia
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1 Law Review at pp 1306-1307). This opinion is shared in Hicks v. Casablanca Records, Nos 77
2 Civ. 2042, 464 F.Supp 426 (1978) which says, "It is clear from the review of these two cases...an
3 attempt by a defendant to present the disputed events as true determines...protection of the speech
4 at issue."

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6 12. Plaintiff very strongly believes that the Michael Westen character is a
7 misappropriation of his likeness and identity for commercial advantage, making millions, due to
8 the character being very much like the Plaintiff's identity by virtue of reputation, notoriety and
9 activities. We see an example of the use of plaintiff's raw materials in which Plaintiff describes
10 how he was blacklisted overseas. "In a country where reputation is everything, UBS was giving me
11 a bad reference, and were even spreading rumors. This really hit me hard because not only had
12 they violated my civil right[s], but also they had fired me; then to make it worse they were
13 slandering me." This resulted in the "Burn Notice" pilot, the statement, "You're blacklisted!" This
14 is just one of many examples of creative use and misappropriation of Plaintiff's elements of
15 likeness and identity, attempting to exploit a loophole (See The Evidence Schedule, ex. 1). These
16 uses of Plaintiff's likeness were disguised by creative writers who tried to circumvent the law.
17 Nonetheless, Plaintiff's likeness was implied and misappropriated because the law plugs all
18 loopholes in these types of cases (see Prosser, ex. 5).
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20 **D. Reputation Actionable**

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22 13. Reputation that was garnered by life activities that created Plaintiff's reputation is
23 actionable. Citing Matthews vs. Wozencraft, 15 F.3d 432, 437, 439 (5th Cir. 1994), the justice
24 wrote, "Biographical works are not actionable, unless appropriated for the reputation, prestige,
25 social standing or other values of the Plaintiff." We can see this misappropriation of likeness in the
26 form of reputation and values by consulting the Evidence Schedule and matching up text from The
27 Setup with stops at points in the DVD as indicated by the counter number listed in the DVD. So I
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1 stand by my Christian values and reputation. The reason for misappropriation was due to the value
2 of his likeness and identity by virtue of his notoriety and reputation as told in the infringed work,
3 "The Setup."

4 14. In a similar case, it was found, "Years of labor may be required before one's skill,
5 reputation, notoriety or virtues are sufficiently developed to permit an economic return through
6 some medium of commercial promotion. For some, the investment may eventually create
7 considerable commercial value in one's identity." (Lugosi, 25 Cal.3d at pp. 834-835 (dis. opn. of
8 Bird, C. J.). This tells how any person's reputation can be something of commercial value, as told
9 in "The Setup" that was earned by Christian living and an interest in government work while
10 Plaintiff lived overseas. The Evidence Schedule matches up to show how Plaintiff's attributes of
11 identity/likeness were misappropriated to cash in to produce "Burn Notice."
12
13

14 **E. Identity Readily Identifiable When Creatively Misappropriated**

15 15. Remembering the law plugs all of the loopholes in misappropriation cases such as
16 creatively altered misappropriations of likeness, we can understand an appeals court case. The case
17 of *White vs. Samsung*, 971 F. 2d 1395 (9th Cir. 1992), the justice ruled on appeal that: Any
18 method of invoking another's identity without consent is a violation of their right of publicity. This
19 is an example of "other likeness appropriation" mentioned above by Dean Prosser that can be seen
20 as plugging all the loopholes in the law that any infringer or television writer, with some creativity,
21 could otherwise exploit to misappropriate another's identity. A test for this cause of action is
22 whether Plaintiff's identity is infringed by the work in question is whether an individual's identity
23 is implied (readily identifiable) from the context, even when his/her name is not used (L.Rich,
24 2000).
25

26 16. A true story of such occurred when a friend who read Plaintiff's work when it first
27 came out then later viewed an episode of "Burn Notice" exclaimed to Plaintiff, "They ripped off
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1 your book!!!" This is a witness to Plaintiff's likeness and identity being readily identifiable as
2 could be expected with 7-8 copied attributes of likeness and identity in the pilot episode and 20-30
3 in the first season (see Decl., ex. 2). Plaintiff was later shocked and felt the same way after his first
4 viewing of the "Burn Notice" pilot and various episodes. Plaintiff knew he had to sue; it was very
5 personal and serious. Defendants had a duty to pay for the use of Plaintiff's likeness. They should
6 have contacted Plaintiff to secure a release for his likeness.
7

8 **F. Transformative Use Test**

9 17. This test is not relevant because Burn Notice is not protected by the First
10 Amendment like the case of Polydoros v. Twentieth Century Fox stating "Fox had created a
11 fictionalized artistic work." The decision in the Polydoros case was due to the fictional status of
12 the work described as a boy imagining a dog being a bear. Clarification that Burn Notice was a
13 fictionalized work was not done in the pilot episode, nor in the series.
14

15 DAMAGES

16 18. Plaintiff was harmed when paid for use of his likeness. Damages are calculated very
17 conservatively as follows. A likeness is something of value. Celebrities can gain as much as
18 \$400,000 per use. I conservatively estimate that my likeness is worth about \$5,000 to \$10,000 per
19 use. Defendants produced 111 episodes and had distribution of the pilot and series to 56 foreign
20 countries as well as the U.S. for a total of 57 countries, which are separate markets where my
21 likeness was misappropriated. This is explained in the Complaint. Here is the calculation:
22

23 Calculation of General Damages

24	25	26	27	28
Likeness Per Episode	Episodes	Markets	Total Damages	
\$5,000	X 111	X 57	= \$31,635,000	

1 CONCLUSION

2 Burn Notice, being a fictionalized work due to fiction being added to plaintiff's likeness,
3 should have made it clear to viewers that it is fiction. It did not. Instead, defendants purported their
4 fictionalized work to be nonfiction. This is a major "no-no" for fictionalized works. Other defenses
5 do not make this infringement go away. For this reason defendants' legal defense is flawed and
6 cannot be cured. Therefore, their defenses fail and they are liable.

7
8 **THEREFORE**, I respectfully request that the court award to Plaintiff judgment in the
9 principal sum of \$25,000,000 general damages.

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11 *I declare under penalty of perjury under the laws of the State of California that the foregoing is*
12 *true and correct.*

13 Respectfully Submitted,

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15 DATED: October 1, 2017

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17 Michael Terry, Plaintiff in Pro Per

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Memorandum of Points and Authorities

1. Defendants used Plaintiff’s likeness for profit without consent (see ex. 1) in which the Evidence Schedule shows how to match up the uses of activities that identify Plaintiff in The Setup with the Burn Notice.
2. Defendants added fiction to the likeness to create a “fictionalized work.”
3. Fictionalized works must make it clear to viewers that it is fiction, either by disclaimer or a demonstration in the work that it is fiction (Polydoros v. 20th Century Fox Film Corp.)
4. Defendants did not make it clear that it is fiction, creating a liability as a misappropriation of law.
5. Defendant, Mr. Matt Nix was able to foreseeably sign a deal based on the misappropriation in the pilot episode, making him and copyright holder of Burn Notice, 20th Century Fox Film Corporation, liable for the entire 111 episodes produced.
6. Plaintiff sued for misappropriation of likeness.
7. Plaintiff suffered damages of \$25 million to \$30 million in general damages.
8. Plaintiff prays for \$25 million in general damages in the complaint.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

ISSUE 1-THE FIRST CAUSE OF ACTION FOR
COMMON LAW MISAPPROPRIATION OF LIKENESS

- | | |
|---|---|
| 1. The Setup was produced from 1997-2007, before the airing of Burn Notice. | 1. Admits that a 2003 copy of The Setup is a “true and correct copy.” (see _____) |
| 2. The “Michael” character is one of Plaintiff being mistaken for a former CIA agent. | 2. Defense Counsel stated that the Plaintiff a former CIA Officer (see ____). |
| 3. Similarities between The Setup and Burn Notice are numerous. | 3. Obvious to everyone. |

1 **PROOF OF SERVICE**

2
3 **CALIFORNIA SUPERIOR COURT, SAN BERNARDINO COUNTY**

4 At the time of service, I was over 18 years of age and not a party to this action. I am
5 employed at my home which is located at: 1607 Jason Court, Redlands, CA.

6 I served the following: **Motion for Summary Adjudication, Exhibits 1-5; Statement of**
7 **Undisputed Facts; Motion of Points and Authorities and Proof of Service** on the interested
8 party in this action as follows:

9 **Lawrence Hinkle**
10 **Henry Whitehead**
11 **Fox Rothschild**
12 **10250 Constellation Blvd., Suite #900**
13 **Los Angeles, CA 90067**

14 **BY MAIL:** I enclosed the document in a sealed envelope addressed as above and placed it in a
15 U.S. Post Office box for collection in the outgoing bin.

16 I declare under penalty of perjury under the laws of the State of California that the
17 Foregoing is true and correct.

18 Executed on October ____, 2017 in Redlands, California.

19
20 _____
21 Chieko Terry
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