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United States District Court,  
C.D. California.

Jeffrey S. SARVER, Plaintiff,  
v.

The HURT LOCKER LLC, et al, Defendants.

No. 2:10-cv-09034-JHN-JCx. | Oct. 13, 2011.

#### Attorneys and Law Firms

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#### ORDER GRANTING DEFENDANTS' MOTIONS TO STRIKE

JACQUELINE H. NGUYEN, District Judge.

\*1 The matter is before the Court on Defendants' Motions to Strike pursuant to Cal.Code Civ. Proc. § 425.16. (Docket no. 78, 98.) On August 8, 2011, the Court heard oral argument on the Motions and took the matter under submission. (Docket no. 125.) For the foregoing reasons, the Court GRANTS Defendants' Motions and strikes Plaintiff's Complaint in its entirety.

#### I.

#### FACTUAL BACKGROUND

Plaintiff Jeffrey Sarver ("Plaintiff") filed this lawsuit alleging that Defendants based the movie *The Hurt Locker* on Plaintiff's personal experiences while serving in the military, without his consent. (Compl.¶ 23.) Plaintiff has been a member of the United States Army since 1991. (*Id.* ¶ 26.) From July 2004 through January 1005, he served in Iraq as an Explosive Ordinance Disposal ("EOD") technician with the 788th Ordinance Company. (*Id.* ¶¶ 33–50.) Plaintiff was one of approximately 150 EOD technicians in Iraq. (*Id.* ¶ 36.)

While Plaintiff was in Iraq, the Department of Defense permitted media representatives to live, work and travel with military units. (*Id.* ¶ 29.) Defendant Mark Boal ("Boal") was embedded with Plaintiff's unit in December 2004 as a reporter for *Playboy Magazine*.<sup>1</sup> (Sarver Decl. ¶¶ 11, 14.) Boal took photographs and videos of Plaintiff and his unit, following them while they were on and off duty. (*Id.* ¶ 16.)

After Plaintiff returned to the United States in 2005, Boal visited him in Wisconsin and conducted additional interviews. (Boal Decl. ¶ 4.) Boal emailed a copy of his article to Plaintiff and members of his unit in August 2005. (*Id.*, Ex. B.) Boal's article, published in the August/September 2005 issue of *Playboy Magazine*, focused entirely on Plaintiff's life and experience in Iraq. (Compl., Ex. A.) An amended version of the article was later published in Reader's Digest in 2006. (Sarver Decl. ¶ 32.)

Boal contends that he interviewed Plaintiff for the express purpose of the article. (Boal Decl. ¶ 4.) Plaintiff, on the other hand, alleges that he never consented to the use of his name or likeness. (Sarver Decl. ¶¶ 19, 27.) Plaintiff claims that he objected to the *Playboy* article prior to its publication, but was told it had already been distributed. (Sarver Decl. ¶ 30.)

Boal subsequently wrote the screenplay for the motion picture *The Hurt Locker*. The movie was released on June 26, 2009, at which time Plaintiff was stationed in New Jersey. (*Id.* ¶¶ 33–34, 40.) Plaintiff alleges that Will James, the main character in the movie, is based on his life and experiences, without his consent to the use of his story. Plaintiff points to characteristics of Will James and events in the movie mirroring his personal story. (Sarver Decl. ¶ 41.) Although Defendants argue the character was adapted from Boal's experience with EOD technicians and other interviews, the actor who played Will James

stated in an interview, “Where they showed me, definitely a guy, there was one guy they knew was like James, this character I played.” (Sarver Decl., Ex. C.) When the movie premiered, Plaintiff claims he attended on his own initiative. (*Id.* ¶¶ 35–36). Boal contends that he maintained contact with Plaintiff through this period and invited him to the premiere. (Boal Decl. ¶ 12.)

\*2 Plaintiff’s lawsuit alleges that he has been harmed, and that the public disclosure of his identity places him at greater risk during military operations. (*Id.* ¶ 46.) He also claims that he has been denied employment within the Joint Special Operations Command after being labeled a counter-intelligence risk for “selling” his movie rights. (*Id.* ¶ 46c.)

## II.

### PROCEDURAL HISTORY

On March 2, 2010, Plaintiff filed a complaint in the United States District Court, District of New Jersey against Defendants alleging the following violations: Right of Publicity/Misappropriation of Name and Likeness; False Light Invasion of Privacy; Defamation; Breach of Contract; Intentional Infliction of Emotional Distress; Actual/Intentional Fraud; and Constructive Fraud/Negligent Misrepresentation. (Docket no. 1.) The case was transferred to this Court under 28 U.S.C. § 1404(a) on November 18, 2010. (Docket no. 54.)

On February 1, 2011, Defendants Nicolas Chartier, Grosvenor Park Media, L.P., Kingsgate Films, Inc., Greg Shapiro, The Hurt Locker, LLC, and Voltage Pictures, LLC, filed a motion to strike Plaintiff’s complaint under Cal.Code Civ. Proc. § 425.16 (“anti-SLAPP”). (“Hurt Locker Motion”; docket no. 78). The Motion was joined by Defendants Mark Boal and Kathryn Bigelow (docket no. 83), and Summit Entertainment, LLC (docket no. 82). On March 2, 2011, Boal and Bigelow filed a separate Motion to Strike. (“Boal Motion”; docket no. 98.) On March 14, 2011, Plaintiff opposed both the Hurt Locker Motion and the Boal Motion in a single opposition, which was filed in two parts. (Docket nos. 103, 104.) Defendants Boal and Bigelow filed a Reply on March 21, 2011. (Docket no. 116.) The Hurt Locker Defendants joined in the Reply. (Docket no. 117.) On August 8, 2011, the Court heard oral argument and took the matter under submission.<sup>2</sup>

## III.

### CHOICE OF LAW

The Court applies the choice of law rules of New Jersey, since this case was transferred from the District Court of New Jersey under 28 U.S.C. § 1404(a). *See Van Dusen v. Barrack*, 376 U.S. 612, 642, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). New Jersey’s choice of laws follows the Restatement Second, Conflict of Laws. *P.V. v. Camp Jaycee*, 197 N.J. 132, 139–42, 962 A.2d 453 (2008). “The Second Restatement provides judges with a starting point ... It is then up to the judge to make it all work.” *P.V.*, 197 N.J. at 140, 962 A.2d 453.

“The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.” **RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1)** (1971). Factors that are weighed include: “(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.” *Id.* § 145(2). A tort occurs wherever libelous material is spread, and an injured party can bring suit in “any forum with which the defendant has minimal contacts.” *See Keaton v. Hustler*, 465 U.S. 770, 780–81, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

\*3 Here, a New Jersey court would have applied California law because it has the greatest relationship with the occurrence and parties. To begin, factor (a)—the place where the injury occurred, and factor (b)—the place where the conduct causing the injury occurred, both favor California law, as the movie was produced in California. Factor (c)—the domicile, residence, nationality, place of incorporation and place of business of the parties—also militates in favor of California law. The majority of defendants reside or are incorporated in California,<sup>3</sup> and even though Plaintiff was stationed in New Jersey, he was there subject to orders and was not domiciled there.<sup>4</sup> Finally, factor (d)—the place where the relationship, if any, between the parties is centered—is neutral. The relationship between the parties was either non-existent or occurred in Iraq or Wisconsin. Accordingly, the occurrence and parties have stronger ties to California than New Jersey, and a New Jersey court would have

applied California law.

#### IV.

### LEGAL STANDARD

California's "anti-SLAPP" statute "was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." *Metabolife Int'l v. Wornick*, 264 F.3d 832, 839 (9th Cir.2001). The statute should "be construed broadly." Cal.Code Civ. Proc. § 425.16(a).

"California courts evaluate a defendant's anti-SLAPP motion in two steps." *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir.2010). First, the defendant must make a threshold showing that the act or acts of which the plaintiff complains were in furtherance of the right of petition or free speech, and in connection with a public issue. *Id.* Second, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " *Navellier v. Sletten*, 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002) (quoting *Wilson v. Parker, Covert, & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002)); *New. Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1098 (2004). "This burden is 'much like that used in determining a motion for nonsuit or directed verdict,' which mandates dismissal when 'no reasonable jury' could find for the plaintiff." *Metabolife*, 264 F.3d at 840 (quoting *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 824, 33 Cal.Rptr.2d 446 (1994)).

#### V.

### EVIDENTIARY OBJECTIONS

Defendants object to portions of the Declaration of Sergeant Jeffrey S. Sarver ("Sarver Decl."). (Evidentiary Objections to Sarver Decl.; docket no. 112.) The Court sustains the hearsay objection to Sarver's statement that Sergeant Major James Clifford "advised" him and others in his unit that they were to accommodate Boal and that Boal was only reporting on EOD operations "in general".

(Sarver Decl. ¶ 12.) The Court also sustains Defendants' objection to Exhibit A, the embedded media "Ground Rules," as lacking in foundation. The Court need not rule on Defendants' remaining objections because the Court does not rely on those portions of the Sarver Declaration.

\*4 The Court also need not address Defendants' objections to the Declaration of Sergeant Paul Wilcock, and to Exhibit A attached to the Declaration of Todd J. Weglarz, because the Court's ruling does not rely on these documents.

The Court addresses Plaintiff's evidentiary objections to the Declaration of Mark Boal as needed in the Order.

#### VI.

### DISCUSSION

Defendants argue that all of Plaintiff's claims must be stricken because Defendants were engaged in protected speech, and Plaintiff cannot establish a probability of success on his claims. Plaintiff counters that even if Defendants were engaged in protected speech, he has made a prima facie showing of a probability of prevailing on his claims.<sup>5</sup>

#### A. Defendants Were Engaged in the Exercise of Free Speech in Connection to a Public Issue

In order to bring an anti-SLAPP motion, Defendants must show that the challenged activity is both in furtherance of free speech and in connection to a public issue. Cal.Code Civ. Proc. § 425.16(b)(1); *Hilton*, 599 F.3d at 902; Cal.Code Civ. Proc. § 425.16(e)(4); see also *Navellier*, 39 Cal.4th at 94, 45 Cal.Rptr.3d 394, 137 P.3d 218.

"The California Supreme Court has not drawn the outer limits of activity that furthers the exercise of free speech rights." *Hilton*, 599 F.3d at 903. "The courts of California have interpreted this piece of the defendant's showing rather loosely." *Id.* at 904. "Motion pictures are a significant medium for the communication of ideas." *Burstyn v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). Thus, "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Id.* at 502.

Here, Defendants have easily met the first prong of showing that they were engaged in protected speech, since *The Hurt Locker* was a commercial film. Indeed, Plaintiff does not attempt to argue otherwise.

Next, Defendants must show that the challenged activity was connected to a matter of public interest.

California courts have held that “ ‘an issue of public interest’ ... is any issue in which the public is interested. In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.” *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal.App.4th 133, 144, 122 Cal.Rptr.3d 264 (2011) (citation omitted.) So long as the conduct at issue is connected to the public interest in some way, anti-SLAPP protection applies. See *Tamkin*, 193 Cal.App.4th at 144, 122 Cal.Rptr.3d 264 (“We believe the statutory language compels us to focus on the conduct of the defendants and to inquire whether that conduct furthered such defendants’ exercise of their free speech rights concerning a matter of public interest. We find no requirement that the plaintiff’s persona be a matter of public interest.”)

Here, the alleged portrayal of Plaintiff in the movie is connected to an issue of public interest, given Plaintiff’s service in the Iraq war, the importance of EOD technicians in the war effort, the high-level danger of Plaintiff’s duties, and Plaintiff’s claims that he disarmed more IEDs than any single team since operations began in Iraq.

\*5 Furthermore, Defendants’ conduct, when viewed in a broader context—the investigative journalism that contributed to the writing of the *Playboy* article as well as the *The Hurt Locker* screenplay—is unquestionably connected to the public interest. The heart of Plaintiff’s Complaint centers on the allegation that while Boal was embedded as a journalist in Plaintiff’s unit, he learned information from Plaintiff that he later used without Plaintiff’s permission. Moreover, both the article and the movie directly address the problem of improvised explosive devices and the men who defused them—an issue of paramount importance in the Iraq war. Therefore, the Court finds that Defendants have also met their burden of demonstrating the second prong that their conduct is connected to a public issue.

#### **B. Plaintiff Has Not Shown a Probability of Prevailing on His Claims**

“To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally

sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff’s favor. The plaintiff’s showing of facts must consist of evidence that would be admissible at trial. The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff’s favor as a matter of law, as on a motion for summary judgment.” *Stewart v. Rolling Stone LLC*, 181 Cal.App.4th 664, 679, 105 Cal.Rptr.3d 98 (2010) (citing *Hall v. Time Warner, Inc.*, 153 Cal.App.4th 1337, 1346, 63 Cal.Rptr.3d 798 (2007) (citations omitted).)

For the reasons stated below, the Court finds that Plaintiff has failed to establish a prima facie showing of facts that, if accepted by the trier of fact, would support judgment in his favor as a matter of law.

#### **1. The Right of Publicity / Misappropriation Claim**

Plaintiff alleges that the writing, filming, production and distribution of *The Hurt Locker* “amounted to an appropriation of plaintiff’s name and/or likeness for the Defendants’ own use and benefit.” (Compl.¶ 71.)

To state a common law right of publicity/misappropriation of name or likeness claim, a plaintiff must allege: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342 (1983). The Ninth Circuit has expanded the common law right of publicity to include protecting celebrities’ interest in their identity as well as name and likeness.<sup>6</sup> *White v. Samsung Electronics America, Inc.*, 1992 U.S.App. LEXIS 19253 (9th Cir.1992).

“The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. ‘Often considerable money, time and energy are needed to develop one’s prominence in a particular field. Years of labor may be required before one’s skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one’s identity.’ “ *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (“*Comedy III*”), 25 Cal.4th 387, 399, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001) (citing *Lugosi v. Universal Pictures*, 25 Cal.3d 813,834–835 (1979) (dis. opn. of Bird, C. J.)) (internal citations omitted in original). The rationale for protecting the right of publicity is to



prevent unjust enrichment by the theft of good will. “No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). “What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity.” *Comedy III*, 25 Cal.4th at 403, 106 Cal.Rptr.2d 126, 21 P.3d 797. Although the theory behind the right would seem to exclude those who can not claim celebrity status, California courts have analyzed misappropriation claims brought by individuals who do not claim celebrity status. *See, e.g., Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.App.4th 318, 322, 79 Cal.Rptr.2d 207 (1997).

#### a. The First Amendment Transformative Use Defense

\*6 Defendants argue that even if Plaintiff can show a probability of prevailing on the elements of a misappropriation claim, the First Amendment bars Plaintiff’s claim. (Boal Motion at 10; Hurt Locker Motion at 13–14.)

The California Supreme Court has adopted the “transformative use” defense to right of publicity claims. *Comedy III*, 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001). In *Comedy III*, after discussing the challenges of devising a test “that will unerringly distinguish between forms of artistic expression protected by the First Amendment and those that must give way to the right of publicity,” the Court borrowed from the first fair use factor—the purpose and character of the use—in the fair use defense employed in copyright law. *Id.* at 404, 106 Cal.Rptr.2d 126, 21 P.3d 797. “This inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.” *Id.* The Court explained that “both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.” *Id.* at 404–05, 106 Cal.Rptr.2d 126, 21 P.3d 797.

The transformative use test strikes a balance between the individual’s right of publicity and the First Amendment right to free expression. “In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as [an] affirmative defense that the work is protected by the First Amendment inasmuch as it

contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.” *Id.* at 407, 106 Cal.Rptr.2d 126, 21 P.3d 797. “The test simply requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant’s work contributes significantly distinctive and expressive content; i.e., is ‘transformative.’ If distinctions exist, the First Amendment bars claims based on appropriation of the plaintiff’s identity or likeness; if not, the claims are not barred.” *Kirby*, 144 Cal.App.4th at 61, 50 Cal.Rptr.3d 607 (citing *Winter v. DC Comics*, 30 Cal.4th 881, 889–891, 134 Cal.Rptr.2d 634, 69 P.3d 473 (2003)).

Further, the Court in *Comedy III* suggested broad application of the transformative use test: “the transformative elements or creative contributions that require First Amendment protection ... can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism.” *Comedy III*, 25 Cal.4th at 406, 106 Cal.Rptr.2d 126, 21 P.3d 797 (citations omitted)

The Court recognizes that “the application of the defense [is] a question of fact.” *Hilton*, 599 F.3d at 909. Therefore, Defendants can prevail on their motions to strike only if the Court finds that they are entitled to the defense as a matter of law—that is, no reasonable trier of fact could conclude that *The Hurt Locker* was not a transformative work. *Hilton*, 599 F.3d at 910; *see also Polydoros*, 67 Cal.App.4th at 323–23, 79 Cal.Rptr.2d 207 (Even if the plaintiff could show that his likeness was appropriated for the main character in the motion picture, *The Sandlot*, the film is constitutionally protected.); *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 865, 160 Cal.Rptr. 352, 603 P.2d 454 (1979) (Bird, J. concurring).

\*7 Here, the Court concludes that, even if the Will James character was based on Plaintiff, no reasonable trier of fact could conclude that the work was not transformative. Defendants unquestionably contributed significant distinctive and expressive content to the character of Will James.<sup>7</sup> Even assuming that Plaintiff and Will James share similar physical characteristics and idiosyncracies, a significant amount of original expressive content was inserted in the work through the writing of the screenplay, and the production and direction of the movie.

To illustrate the expressive content contributed, Defendants cite 29 differences between Plaintiff’s real life experience and the portrayal of Will James. (*See* Declaration of Mark Boal ¶ 8.)<sup>8</sup> For example, Defendants argue that, unlike Plaintiff, the character of Will James

served in Afghanistan prior to serving in Iraq, had an African-American teammate on his EOD team, accidentally shot an American soldier while attempting to rescue him, and was redeployed to Iraq after returning home (whereas Plaintiff went to work for the Army at a facility in New Jersey). (*Id.*) Finally, Plaintiff cannot—and he does not—dispute that the dialogue between characters, the other fictional characters with whom Will James interacted, and the direction of the actor all added significant and distinctive expressive content. Thus, the character of Will James, even if modeled after Plaintiff, “is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.” *Comedy III*, 25 Cal.4th at 406, 106 Cal.Rptr.2d 126, 21 P.3d 797.<sup>9</sup>

Further, the Court also employs a secondary inquiry suggested by the California Supreme Court in *Comedy III* that focuses on whether the value of the work is mainly derived from the fame of the plaintiff. The Court explained:

Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.

*Comedy III*, 25 Cal.4th at 407, 106 Cal.Rptr.2d 126, 21 P.3d 797.

Here, the value of *The Hurt Locker* unquestionably derived from the creativity and skill of the writers, directors, and producers who conceived, wrote, directed, edited, and produced it. Whatever recognition or fame Plaintiff may have achieved, it had little to do with the success of the movie. Thus, Plaintiff’s claim is barred by the First Amendment as a matter of law.<sup>10</sup> Accordingly,

the misappropriation claim is stricken.

## 2. The Defamation Claim

\*8 Plaintiff alleges that *The Hurt Locker* “contained several false and defamatory statements concerning the Plaintiff.” (Compl.¶ 79.) Specifically, Plaintiff alleges that he was falsely portrayed as a bad father, a man who had no respect or compassion for human life and who was fascinated with the thrill of war and death, and a soldier who violated military rules and regulations. (*Id.*) Plaintiff does not allege defamation claims based on the *Playboy* article.

“Defamation is effected by either of the following: (a) Libel. (b) Slander.” Cal Civ.Code § 44. “Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” Cal Civ.Code § 45.

As an initial matter, Defendants contend that Plaintiff’s defamation claim should be stricken because no reasonable person would believe that the film was about Plaintiff. (Hurt Locker Motion at 15.) “The test is whether a reasonable person, viewing the motion picture, would understand the character ... was, in actual fact, [the plaintiff] conducting herself as described.” *Aguilar v. Universal City Studios, Inc.*, 174 Cal.App.3d 384, 387, 219 Cal.Rptr. 891 (1985) (citing *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 78, 155 Cal.Rptr. 29 (1979)). Fictional works have no obligation to the truth. *See, e.g., Guglielmi*, 25 Cal.3d at 871, 160 Cal.Rptr. 352, 603 P.2d 454 (Bird, J. concurring) (“[I]n defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to ‘the facts.’ There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth.”)

The Court agrees with Defendants that the movie is sufficiently transformative such that Plaintiff’s defamation claim is barred. Further, Will James is not Plaintiff’s name, and the beginning of the film contains a specific disclaimer that the film is a work of fiction. (Hurt Locker Motion at 15.) However, even assuming, *arguendo*, that a reasonable viewer would believe the movie is about Plaintiff, he has nevertheless failed to present sufficient evidence to establish a prima facie case that the depictions of him are false.

To state a defamation claim that survives a First

Amendment challenge, ... a plaintiff must present evidence of a statement of fact that is “provably false.”<sup>11</sup> *Nygaard, Inc. v. Uusi-Kertula*, 159 Cal.App.4th 1027, 1048–1049, 72 Cal.Rptr.3d 210 (2008) (citing *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 809, 119 Cal.Rptr.2d 108 (2002)). “To ascertain whether the statements in question are provably false factual assertions, courts consider the ‘totality of the circumstances.’ ” *Id.* (citing *Seelig*, 97 Cal.App.4th at 809, 119 Cal.Rptr.2d 108). “Whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court.” *Id.*

\*9 Plaintiff has not established a prima facie case that the alleged depictions of him are provably false. For example, Plaintiff alleges that he is defamed because Will James is portrayed as a bad father who does not love his son. However, the Court does not agree with Plaintiff’s characterization of Will James as a man who does not love his son. In *The Hurt Locker*, Will James keeps photos of his son with him in Iraq and is shown visiting his wife and child while on leave from duty.

The Court also finds no support in the movie for Plaintiff’s allegation that he is portrayed as a man who had no respect or compassion for human life. To the contrary, *The Hurt Locker* depicts Will James as having compassion for the Iraqi citizens whose lives are affected by the war. For example, in one scene, he befriends a young Iraqi boy with whom he plays soccer. Later in the film, he attempts to save a man who has been locked inside a suicide bomb vest. Thus, the Court finds Plaintiff’s defamation claim to be unsupported.

Plaintiff also alleges he was defamed because he was portrayed as a man who is fascinated with war and death. First, the Court finds no basis for the claim that Will James is fascinated with death. However, even if the character exhibits a fascination with his job and the war, given Plaintiff’s statements printed in the *Playboy* article, the Court does not find that this depiction is provably false. For example, Plaintiff is quoted in the *Playboy* article, describing his fascination with his job:

Where else can I spend the morning taking apart an IED and in the afternoon drive down the road with 200 pounds of explosives in my truck, blowing up car bombs and trucks? I love all that stuff. Anything that goes boom. It’s addictive. The thump, the boom—I love it. It’s like the moth to the bright white light for me.

(Compl., Ex. A.) Because Plaintiff has stated that he is fascinated with his job—disarming bombs in various wars—Plaintiff does not show how this alleged defamatory portrayal is provably false.

Finally, Defendant argues that he is portrayed as a soldier who violated military rules and regulations. However, in illustration of this assertion, Plaintiff points to the fictional scene where Will James responds to a burning car bomb with a fire extinguisher. (Sarver Decl. ¶ 45(a).) The Court does not find this depiction to be a factual assertion that could result in contempt or ridicule or which causes Plaintiff to be shunned or avoided. Nor does the Court find that this scene would tend to injure Plaintiff in his occupation. Although Plaintiff declares that this depiction “causes leadership and junior soldiers to doubt his judgment,” Plaintiff presents no evidence to show that this portrayal has the tendency to injure him in his occupation. Moreover, the fact that Plaintiff admits other soldiers ask him if this event really happened is evidence that the fictional presumption of the film undercuts Plaintiff’s claims of defamation.

\*10 Because Plaintiff does not present evidence to support his claims of defamation, this claim is stricken.

### 3. The False Light/ Invasion of Privacy Claim

Plaintiff alleges that *The Hurt Locker* portrayed him in a false light because the Will James character is “a major misrepresentation of his character” and “highly offensive to a reasonable person.” (Compl.¶ 76.)

To succeed on a false light claim, the portrayal must be both false and highly offensive to a reasonable person. *Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 238, 228 Cal.Rptr. 215, 721 P.2d 97 (1986); see also *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 636, 107 Cal.Rptr.2d 504 (2001) (stating “a ‘false light’ claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such.”). Fair but unflattering depictions are not actionable. See *Aisenson v. Am. Broad. Co.*, 220 Cal.App.3d 146, 161, 269 Cal.Rptr. 379 (1990).

“[N]o person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance.” *Id.* at 630, 269 Cal.Rptr. 379 (quoting Cal. Civ.Code § 3425.3); *Selleck v. Globe Int’l*, 166 Cal.App.3d 1123, 1135, 212 Cal.Rptr. 838 (1988). “Courts have interpreted the single-publication rule to mean that a plaintiff may have only one cause of action for one publication.” *M.G.*, 89 Cal.App.4th at 630, 107

[Cal.Rptr.2d 504.](#)

Here, Plaintiff's false light claim and his defamation claims are redundant because they are based on the same publication or utterance. Accordingly, the Court may strike the false light claim on this ground alone. However, even if this claim were considered, the portrayal of Plaintiff was not highly offensive to a reasonable person. If the character of Will James was in fact modeled on Plaintiff, then Plaintiff was portrayed as a war hero, struggling with presumably the same conflicts experienced by many modern military soldiers, deployed in a foreign country. For these reasons, the false light claim fails.

#### 4. The Breach of Contract Claim

Plaintiff alleges that he was a third party beneficiary to a contract between Boal and the United States Department of Defense which restricted Boal's reporting to military operations in general. (Compl.¶ 87.) Boal allegedly breached the contract by reporting about Plaintiff's personal life. (*Id.* ¶¶ 90, 91, 107 [Cal.Rptr.2d 504.](#))

"A third party beneficiary must show the contract was made expressly for his or her benefit." *Sofias v. Bank of America*, 172 Cal.App.3d 583, 587, 218 Cal.Rptr. 388 (1985). The third party must be benefitted in direct and unmistakable language. *Id.*

Here, Plaintiff cannot prove a probability of success on this claim because he provides no evidence of any contract between Boal and the Department of Defense. While Plaintiff has attached a Public Affairs Guidance Cable to which embedded reporters in Iraq were required to adhere (Pl.'s Ex. A ¶ 4), the Court has deemed this evidence inadmissible due to lack of foundation.

\*11 Further, even if this document were considered, Plaintiff's claim still fails. Plaintiff argues that Defendant Boal breached paragraph 4.F.14 which precluded the media from releasing service member's names and home towns without consent. Paragraph 4.A. states "all interviews with service members will be on the record." By his own admission, Plaintiff voluntarily discussed his background and experiences with Boal, thereby implicitly consenting to the publication of that information. Thus, the language in the alleged contract undermines Plaintiff's argument that the contract was breached. Moreover, there is no indication that Plaintiff was a third party beneficiary, assuming that a contract existed between Boal and the Department of Defense. For these reasons, Plaintiff's breach of contract claim is stricken.

#### 5. The Intentional Infliction of Emotional Distress Claim

Plaintiff alleges that Defendants appropriated his likeness without his consent and depicted him in embarrassing and unflattering ways which proximately caused him severe emotional distress. (Compl.¶¶ 93–96.)

To sustain a claim for the intentional infliction of emotional distress, a plaintiff must prove: (1) defendant's conduct was extreme and outrageous; (2) plaintiff suffered severe or extreme emotional distress; and (3) defendant's conduct proximately caused the injury. *Cervantez v. J.C. Penney Co., Inc.*, 24 Cal.3d 579, 593, 156 Cal.Rptr. 198, 595 P.2d 975 (1979). The first prong is evaluated from the standpoint of a reasonable person, excluding those who are overly sensitive or callous. *Miller v. Nat'l Broad. Co.*, 187 Cal.App.3d 1463, 1487, 232 Cal.Rptr. 668 (1986).

In this case, Plaintiff has failed to establish a probability of success on his intentional infliction of emotional distress claim. First, because Plaintiff's claim of misappropriation fails, the claim of intentional infliction of emotional distress based on the misappropriation claim must also necessarily fail. Second, the infliction of emotional distress claim fails because Defendants' behavior was neither extreme nor outrageous. Boal was embedded in Plaintiff's unit to report on the efforts of Plaintiff's bomb disposal unit in the Iraq war. The fact that his report led to a screenplay which became a movie is not outrageous. Rather it is commonplace that movies are based on real events. Further, Plaintiff voluntarily submitted to interviews with Boal both in Iraq as well as after returning home to Wisconsin. (Sarver Decl. ¶¶ 20, 22.) Finally, even if the lead character was based on Plaintiff, Defendants used a fictional name for the character, which falls short of extreme and outrageous conduct. Accordingly, the claim of intentional infliction of emotional distress is stricken.

#### 6. The Fraud and Negligent Misrepresentation Claims

Plaintiff asserts claims of fraud, constructive fraud, and negligent misrepresentation based on the allegations that Boal misrepresented to Plaintiff that he embedded in Plaintiff's military unit to report on military operations in general. Plaintiff alleges that he relied on the misrepresentation to his detriment. (*Id.* ¶¶ 98, 103–107, 232 Cal.Rptr. 668.)

\*12 "To state a cause of action for fraud, a plaintiff must allege: (a) misrepresentation; (b) knowledge of falsity; (c)



intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Neilson v. Union Bank of Cal.*, 290 F.Supp.2d 1101, 1140–41 (C.D.Cal.2003).

The tort of constructive fraud requires a plaintiff allege: (1) a fiduciary or contractual relationship; (2) an act, omission, or concealment involving breach; (3) reliance; (4) damage. *Id.* at 1142.

“The elements of a cause of action for negligent misrepresentation are the same as those of a claim for fraud, with the exception that the defendant need not actually know the representation is false.” *Id.* at 1141.

Here, Plaintiff has not presented facts that, if credited, would establish actual or constructive fraud. First, Plaintiff does not submit any admissible evidence that Boal misrepresented that his only intent was to report on EOD technicians in general. Nor does Plaintiff present any admissible evidence that Boal obfuscated the fact that he was writing a screenplay based on the *Playboy* article. For this same reason, Plaintiff’s negligent misrepresentation claim also fails. Second, Plaintiff has failed to provide any evidence of a fiduciary or contractual relationship between himself and Boal, which is required for a claim of constructive fraud.<sup>12</sup> Accordingly, these claims are stricken.

### C. Defendants are Entitled to Attorney’s Fees

“A prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.”

### Footnotes

- <sup>1</sup> The parties dispute how long Boal was embedded in Plaintiff’s unit. According to Boal, he spent only 14 days with Plaintiff’s unit. (Boal Decl. ¶ 3.) Plaintiff contends, however, that Boal followed his unit exclusively for 30 days. (Sarver Decl. ¶¶ 14–15.)
- <sup>2</sup> Plaintiff subsequently filed a Supplemental Brief in Opposition, and Defendants Boal and Bigelow filed a Reply and Objection to same. (Docket nos. 126, 127.) The Court did not grant leave to file supplemental briefs and, therefore, the briefs are stricken.
- <sup>3</sup> Of the thirteen defendants, only Boal is domiciled outside of California.
- <sup>4</sup> “A person’s domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.” *Banter v. Warner–Lambert Co.*, 265 F.3d 853, 857 (9th Cir.2001); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). “Service personnel are presumed not to acquire a new domicile when they are stationed in a place pursuant to orders; they retain the domicile they had at the time of entry into the services.” 13E *Charles Alan Wright et al., Federal Practice and Procedure* § 3617, 607 (3d ed.2009); see also *Melendez–Garcia v. Sanchez*, 629 F.3d 25, 41 (1st Cir.2010).
- <sup>5</sup> As an initial matter, Plaintiff argues that Defendants’ Motions were not timely filed. (Opp’n at 1.) Anti–SLAPP motions may be filed within 60 days of the commencement of an action. *Cal.Code Civ. Proc.* § 425.16(f). It is within the

*Cal.Code Civ. Proc.* § 425.16(c)(1). “Any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” *Ketchum v. Moses*, 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001); see also *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 1018, 113 Cal.Rptr.2d 625 (2001).

Defendants in this case, as the prevailing party on a special motion to strike, are entitled to attorney’s fees. Accordingly, the Court awards attorney’s fees to Defendants.

## VII.

## CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants’ Motions (docket nos. 78, 98). Plaintiff’s Complaint is stricken in its entirety.

## IT IS SO ORDERED.

## All Citations

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discretion of the Court to accept or deny Anti-SLAPP motions after 60 days provided the purposes of anti-SLAPP are not undermined. See [New.Net, Inc.](#), 356 F.Supp.2d at 1100 (finding the motion could be considered because the case had not proceeded in any material respect); see also [Cal.Code Civ. Proc. § 425.16\(f\)](#); [Kunysz v. Sandler](#), 146 Cal.App.4th 1540, 1543, 53 Cal.Rptr.3d 779 (Ct.App.2007); [Morin v. Rosenthal](#), 122 Cal.App.4th 673, 678–79, 19 Cal.Rptr.3d 149 (Ct.App.2004). Here, the Court exercises its discretion to review the Motions, as the case has not proceeded in any material respect.

6 In his dissenting opinion, however, Chief Judge Kozinski warned that expanding the right of publicity to include appropriation of identity, even in the commercial context, cannot be squared with the First Amendment. [White](#), 989 F.2d at 1521 (dissent) (“In the name of avoiding the “evisceration” of a celebrity’s rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it.... I cannot agree.”)

7 As the court in [Polydoras](#) discussed, characters in fictional works are often based on real people:  
It is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed are fictional, but very often they grow out of real persons the author has met or observed. This is so also with respect to the places which are the setting of the novel. The end result may be so fictional as to seem wholly imaginary, but the acorn of fact is usually the progenitor of the oak, which when fully grown no longer has any resemblance to the acorn. In order to disguise the acorn and to preserve the fiction, the novelist disguises the names of the actual persons who inspired the characters in his book.  
[Polydoras](#), 67 Cal.App.4th at 323, 79 Cal.Rptr.2d 207 (citing [People v. Charles Scribner’s Sons](#), 205 Misc. 818, 130 N.Y.S.2d 514, 517–18 (1954)).

8 Although Plaintiff objects to the entirety of Mark Boal’s Declaration on the basis that the his declaration is based upon materials Plaintiff has requested but not received, the Court overrules this overly broad objection. (Docket no. 121.)

9 Plaintiff relies on a recent Northern District of California case, [Keller v. Electronic Arts, Inc.](#), No. 09–1967, 2010 U.S. Dist. LEXIS 10719 (N.D.Cal. Feb. 8, 2010). In [Keller](#), the court found that the transformative use defense did not provide First Amendment protection when a video game developer used the likeness of a college football quarterback in a football video game. *Id.* at \*16. [Keller](#) is distinguishable because, unlike Defendants here, the defendants in [Keller](#) added little distinctive and expressive content. *Id.* The plaintiff was depicted as the same height and weight, wearing his college football uniform, wearing the jersey number that he wore in college, and playing football. *Id.* Moreover, while the Court finds the [Keller](#) case to be distinguishable, the Court also notes that the case is not controlling here. For these reasons, the Court finds that the transformative use defense bars Plaintiff’s right of publicity claim.

10 During oral argument, Defendants urge the Court to apply a malice standard to Plaintiff’s right of publicity claim. See [Stewart v. Rolling Stone](#), 181 Cal.App.4th 664, 682, 105 Cal.Rptr.3d 98 (2010) (“We conclude defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation, whether the claims are brought under the common law or under [Civil Code section 3344](#).”) The Court need not address this argument because the Court finds that Plaintiff’s claim is barred under the transformative use test.

11 Typically, the plaintiff’s burden of proof on a defamation claim depends on whether they are public figure, or private individual. Public figures must prove actual malice as they can respond through the media and influence public opinion. See [New York Times v. Sullivan](#), 376 U.S. 254, 281, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); [Gertz](#), 418 U.S. at 327–28. Private figures must only show negligence to recover actual damages. [Khawar v. Globe International, Inc.](#), 19 Cal.4th 254, 274, 79 Cal.Rptr.2d 178, 965 P.2d 696 (1998) (citing [Brown v. Kelly Broadcasting Co.](#), 48 Cal.3d 711, 742, 257 Cal.Rptr. 708, 771 P.2d 406 (1989)).

Here, the Court need not determine whether Plaintiff is a public or private figure because even if Plaintiff is a private figure and only has to show negligence, his defamation claim nevertheless fails.

12 Defendants also argue that Plaintiff’s claim of fraud against Boal for the [Playboy](#) article should be stricken as the statute of limitations has passed. There is a three-year statute of limitations for fraud under California law, starting when the fraud is discovered. [Cal.Code Civ. Proc. § 338\(d\)](#). The Court agrees. The [Playboy](#) article was published in August/September 2005 and Plaintiff received a copy in August 2005, but failed to file this action for more than five years. As such, the fraud claim against Defendant Boal for the [Playboy](#) article is also stricken on this basis.

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