

1 LOUIS P. PETRICH (State Bar No. 38161)  
2 DANIEL M. MAYEDA (State Bar No. 108543)  
3 LEOPOLD, PETRICH & SMITH, P.C.  
4 2049 Century Park East, Suite 3110  
5 Los Angeles, California 90067-3274  
6 T: [REDACTED] 3 • Fax: [REDACTED]  
7 Email: [REDACTED]

8 Attorneys for Defendants  
9 TWENTIETH CENTURY FOX FILM CORPORATION,  
10 ONE AMERICA PRODUCTIONS, INC. AND  
11 EVERYMAN PICTURES

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT  
14 WEST LOS ANGELES COURTHOUSE

15 JOHN DOE 1, an individual; JOHN DOES 2, an  
16 individual,

17 Plaintiffs,

18 v.

19 ONE AMERICA PRODUCTIONS, INC., a  
20 California Corporation; EVERYMAN  
21 PICTURES, a California Corporation;  
22 GOLD/MILLER PRODUCTIONS, business  
23 entity and form unknown; TWENTIETH  
24 CENTURY FOX FILM CORPORATION, a  
25 Delaware Corporation; and ROES 1 through 50,  
26 inclusive

27 Defendants.

CASE NO.: SC091723

[Assigned for all purposes to the Honorable  
Joseph S. Biderman]

OPPOSITION BY DEFENDANTS TO  
ORDER TO SHOW CAUSE RE  
PRELIMINARY INJUNCTION

DATE: December 7, 2006  
TIME: 8:30 a.m.  
DEPT: Department C

Complaint Filed: November 9, 2006  
Discovery Cut-Off:  
Motion Cut-Off:  
Trial Date:

[DECLARATIONS OF CHELSEA  
BARNARD, LAURA COOK, JOAN  
HANSEN, LOUIS PETRICH, TODD LEWIS  
SCHULMAN, AND BRUCE SNYDER  
FILED CONCURRENTLY HERewith]

1 **I. INTRODUCTION**

2 Defendants One America Productions, Inc., Everyman Pictures, and Twentieth Century Fox  
3 Film Corporation ("Fox") file this Opposition to plaintiffs' Application for TRO and Preliminary  
4 Injunction ("Plfs' App.).

5 The gist of the only claims for which plaintiffs seek an injunction – alleged violation of the  
6 right of publicity – is without merit. Plaintiffs may claim that they were tricked "into making fools  
7 out of themselves" and becoming "unsuspecting players" in the movie "Borat," Plfs' App. 3/22, 4/5,  
8 but, they never contend, as they cannot, that bigoted and misogynistic statements were put into their  
9 mouths<sup>1</sup>. It is also fatuous to argue as plaintiffs do that they wouldn't have vented their spleens but  
10 for their supposed belief that the movie "would never air in the United States" but only to more than  
11 500,000,000 inhabitants of Europe and Kazakhstan. Petrich Dec., ¶ 10, Ex. 17.

12 This Court should deny the requested Preliminary Injunction for each and all of the following  
13 reasons:

14 1. Plaintiffs seek an impermissible prior restraint in violation of the free speech  
15 provisions of the federal and California Constitutions, especially as they apply to motion pictures  
16 with a social content. Movies are entitled to First Amendment protection "even though they are  
17 designed to entertain, and are produced and exhibited for private profit." Hunt v. National  
18 Broadcasting Co. (9th Cir. 1989) 872 F.2d 289, 294-95 (affirming the District Court's denial of a  
19 preliminary injunction against the broadcast of a television docudrama in part on the ground that  
20 such an injunction would amount to an unconstitutional "prior restraint"), citing Joseph Burstyn,  
21 Inc. v. Wilson (1952) 343 U.S. 495, 501-02, 72 S.Ct. 777, 96 L.Ed. 1098.

22 2. There is no likelihood that plaintiffs will succeed on their misappropriation claims:

23 a. Their depiction in the movie was permitted under the "public affairs"  
24 exemption of California Civil Code §3344(d) and the implicit public affairs exemption and free  
25 speech defense to any common law right of publicity. Dora v. Frontline Video, Inc. (1993) 15  
26 Cal.App.4<sup>th</sup> 536, 541-46. The movie is a satirical work of great public interest that has generated  
27

28 <sup>1</sup> Their papers ignore the misogynistic statements altogether.

1 form as Justin Seay, and is identified in this litigation as Doe 1. David signed a consent form as  
2 David Corcoran; he has not joined in this litigation. The third Participant signed a consent form as  
3 Anthony Allen but no one with that name is a party to this suit.<sup>2</sup>

4 As shown by the declarations of Todd Schulman and Chelsea Barnard, on October 28, 2005.  
5 Todd interviewed a number of members of the Chi Psi fraternity in Columbia, South Carolina, the  
6 home of the University of South Carolina, including the three participants known as Justin, David  
7 and Anthony. In his interviews, Todd told the individuals that Borat was making a documentary-  
8 style motion picture about his travels in the United States and was attempting to film various aspects  
9 of American culture. He said the producers had decided that Borat wanted to hear from members of  
10 a fraternity and determine how they viewed and lived life. Todd told them that they would be  
11 pretending to be taking a recreational vehicle (RV) to Los Angeles and would stop on the highway to  
12 pick up a hitchhiker known as "Borat." Plaintiff Justin Seay, among others, invited Todd to attend a  
13 Halloween party the night before. Todd told the prospective participants in the movie that they  
14 would each be paid \$200 and that their participation would take about one or two hours. Todd also  
15 confirmed by asking them that they were all of the legal age for consuming alcoholic beverages in  
16 South Carolina, all at least 21 years of age. Schulman Decl., ¶ 6.

17 Todd then took them to the local restaurant "The Flying Saucer" located in downtown  
18 Columbia, South Carolina, to wait until the RV used in the film was ready. Soon after they arrived,  
19 and before drinks were served, Todd had them sign the written form consent agreements, including  
20 releases, which are attached to Schulman's declaration. Contrary to plaintiffs' statements, Pliffs.  
21 App. 7/9-12, before any of the participants were allowed to drink alcoholic beverages at the  
22 restaurant, they were "carded," that is, they each confirmed that they were at least 21 years old by  
23 presenting picture identifications that were reviewed by the waitress who served them at the  
24 restaurant. Todd checked for himself the three students' identification and age at the same time. In

25  
26 <sup>2</sup> Christopher Rotunda, identified in this lawsuit as Doe 2, never identified himself by that name to  
27 the motion picture producers. Schulman Decl., ¶ 6. In his declaration, he does not state that he used  
28 a false identification and a false name. However, unless Rotunda is now lying in his declaration and  
was not actually in the Picture, then (by process of elimination), he must be the individual known to  
the production as Anthony Allen. If so, then Rotunda lied about whether he was of legal age to be  
served alcoholic beverages.

1 robust debate: it easily qualifies as a "public affairs" work. Petrich Decl., ¶¶ 3-8, Exs. 2-15. A *Wall*  
2 *Street Journal* article likens "Borat" to Alexis De Tocqueville and his 1831 travels through America  
3 resulting in the famous book "Democracy In America". *Id.* at ¶ 6, Ex. 11.

4 b. The uses of plaintiffs' names and likenesses in the motion picture are also  
5 permitted under the federal and state constitutional free speech provisions which constitute a  
6 complete defense against a claims based on either the California statutory or common law right of  
7 publicity because the uses are "transformed" by the context of the motion picture. Winter v. DC  
8 Comics (2003) 30 Cal. 4<sup>th</sup> 881; Kirby v. Sega of America, Inc. (2006) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2006  
9 WL 2718911; Hoffman v. Capital Cities/ABC, Inc. (9<sup>th</sup> Cir. 2001) 255 F. 3d 1180.

10 c. Plaintiffs consented to the subject uses both by their conduct and by reason of  
11 their signed written releases.

12 (1) Their consent was not vitiated by fraud in the inception;  
13 (2) Their consent was not vitiated by fraud in the inducement;  
14 (3) Their consent was not vitiated by the plaintiffs' alleged diminished  
15 capacity.

16 3. Plaintiffs cannot show any irreparable harm:

17 a. They concede that they expected the release of the motion picture abroad, to  
18 countries with more than a combined population of 500,000,000. Petrich Decl., ¶ 10, Ex. 17.

19 b. Motion picture materials are frequently picked up and shown on the  
20 worldwide web of the Internet on such sites as YouTube. Petrich Decl., ¶ 4, Ex. 2.

21 c. Damages are adequate if plaintiffs are able to prove defendants' liability.

22 4. The relative hardships weigh in favor of the defendants.

23 In addition, any injunction would have to be conditioned on the posting of a very substantial  
24 bond.

## 25 II. FACTS

26 Defendants have lodged a copy of the portion of the movie, Exhibit 4 to Schulman  
27 Declaration, which depicts the participation by three fraternity brothers identified in the film as  
28 "Justin," "David" and "Anthony." The person referred to as Justin in the Picture signed a consent

1 addition, the person known as "Anthony" indicated on his written release form that he was 22 years  
2 old. Schulman Decl., ¶¶ 6-7, Exs. 1-3.

3 Only after they had signed their releases were the three participants allowed to begin to drink  
4 alcoholic beverages at the restaurant. Contrary to the statement in the Plfs' App. at 7/16-19, Todd  
5 did not state that the releases were limited solely to avoid liability that might be incurred while  
6 driving around in a motor home. The consent forms expressly contradict plaintiffs' assertions.  
7 None of the participants stated that they had a problem reading or understanding the release. All of  
8 them represented that they were attending a major university at the time. Schulman Decl., ¶ 6;  
9 Barnard Decl., ¶¶ 4-6.

10 After about an hour or two at the restaurant, the plaintiffs were taken to the motor home or  
11 RV where the filming would take place. The motor home was driven by an associate of the creator  
12 of the Borat character, Sacha Baron Cohen. Todd and the movie's director Larry Charles remained  
13 in the rear of the motor home while the filming took place. The filming was done openly. Two film  
14 crew members carried large cameras on their shoulders and stood at one end of the cabin of the  
15 motor home filming all of the activities. Each of the participants was conspicuously wired for sound  
16 or "miked" so that their words would clearly be recorded. Schulman Decl., ¶ 8.

17 Very early on, the motor home stopped on the side of the road to pick up the "Borat"  
18 character, Mr. Cohen. At no time did Todd Schulman or anyone else associated with the production  
19 of the movie tell the participants that the film would never be shown in the United States or that  
20 neither the University or the Participants would be identified. Instead, whenever asked, the  
21 producers stated that they hoped that the film would be shown internationally, that is, throughout the  
22 world. Indeed, the signed releases authorize use of the Participants' names and likenesses "without  
23 restriction in any media throughout the universe." Additionally, the Participants address each other  
24 by first name, their faces are clearly shown and Anthony prominently wears an official University of  
25 South Carolina cap (with distinctive team name and logo) throughout the film segment. Schulman  
26 Decl., ¶¶ 13-15, Ex. 2, ¶ 2; Ex. 5.

27 When the filming of the segment with the three fraternity students had ended, Todd drove  
28 them back to the fraternity house. Because Todd was particularly surprised by a comment Anthony

1 had made during filming about slavery, he asked "Anthony" whether he really believed the bigoted  
2 statements he had made or was just play-acting. "Anthony" confirmed his belief in those negative  
3 views. All the participants told Schulman how much they enjoyed participating in the event and  
4 thanked him profusely. Schulman Decl., ¶¶ 11-12.

5 The motion picture was originally released in 839 theaters throughout the United States on  
6 November 3, 2006. On November 10, 2006 the number of theaters expanded to 2,566. The theaters  
7 in the United States and Canada have reportedly received about \$ 90.8 million as of November 19,  
8 2006. Assuming an average ticket price of \$6.50 (because the film is "R" rated), almost 14 million  
9 people have paid admissions to see the motion picture in the United States and Canada alone. Bruce  
10 Snyder Decl., ¶ 5. The motion picture was also released abroad in at least 26 countries beginning in  
11 November 2006 and has taken in the tens of millions of dollars overseas. Petrich Decl., ¶ 11 &  
12 Ex. 18. DVD and other home video versions of the Picture are planned to be released in about  
13 March 2007. The level of their success is in turn dependent upon the success of the movie in  
14 theaters. Cook Decl., ¶¶ 6-8.

15 Plaintiffs first complained to defendants about the film by filing this action. Hansen Decl., ¶

16 6.

17 **III. A PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED**

18 Plaintiffs' Application for a Preliminary Injunction does not meet any of the traditional  
19 equitable criteria for granting a preliminary injunction: (1) strong likelihood of success on the  
20 merits; (2) the possibility of irreparable injury to the plaintiff if injunctive is not granted; (3) a  
21 balance of the hardships favoring the plaintiffs; and (4) no injury to the public interest. Cohen v.  
22 Board of Supervisors (1985) 40 Cal.3d 277, 286; Butt v. California (1992) 4 Cal.4th 677, 678, 692;  
23 6 Witkin, Calif. Procedure "Provisional Remedies" §§345-346 (4th ed. 1997).

24 A. **There Is No Likelihood That Plaintiffs Will Succeed On The California**  
25 **Statutory Or Common Law Misappropriation Claims**

26 1. **The Claims Are Barred By Statutory and Free Speech Defenses**

27 In the leading case, Dora v. Frontline Video, Inc. (1993) 15 Cal.App.4th 536, a famous surfer  
28 in the 1950s, Mickey Dora, sued Frontline Video, Inc. because defendant included footage of famous

1 surfers including Dora taken during the 1950s in defendant's video documentary entitled "The  
2 Legends of Malibu." The program chronicled the events and public personalities of Malibu in the  
3 early days of surfing. Included as background to the depiction of the photographs was the audio  
4 portion of an interview of Dora. Dora sued for the unauthorized use of his name, voice and likeness  
5 under California Civil Code §3344 and under California's common law right of publicity.

6 A summary judgment for defendants was affirmed on appeal. In considering the common  
7 law cause of action, the Court of Appeal noted that not every publication of someone's name or  
8 likeness gives rise to an appropriation action. "Publication of matters in the public interest, which  
9 rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily  
10 actionable ... public interest attaches to people who by their accomplishments or mode of living  
11 create a bonafide attention to their activities." 15 Cal.App.4<sup>th</sup> at 542. The Court also noted that  
12 matters in the public interest are not restricted to current events -- that magazines and books, radio  
13 and television may legitimately inform and entertain the public with the reproduction of past events,  
14 travelogues and biographies. Id. at 543. The program before it was "a documentary about a certain  
15 time and place in California history, and, indeed, in American legend. The people who were a part  
16 of that era contributed, willingly or unwillingly, to the development of a lifestyle that has become  
17 world-famous and celebrated in popular culture." The Court held that "the program contains matters  
18 of public interest and that [defendant] was not required to obtain [Dora's] consent to use his name,  
19 likeness and voice in the program." Id. at 544.

20 The statutory right of publicity, California Civil Code §3344 contains an exemption in  
21 subdivision (d) which states:

22 For purposes of this section, a use of a name, voice, signature,  
23 photograph, or likeness in connection with any news, public affairs, or  
24 sports broadcast or account, or any political campaign, shall not  
constitute a use for which consent is required under subdivision (a).  
(Emphasis added).

25 In ruling on the statutory cause of action, the Dora Court concluded that because subdivision  
26 (d) of section 3344 distinguishes between news and public affairs, public affairs are not necessarily  
27 news but were intended to mean "something less important than news." Id. at 545. The Court  
28 determined that "public affairs must be related to real-life occurrences." The Court concluded that

1 "the public is interested in and constitutionally entitled to know about things, people, and events that  
2 affect it. For that reason, we cannot limit the term 'public affairs' to topics that might be covered on  
3 public television or public radio." Id. at 546. It concluded "we find that surfing is of more than  
4 passing interest to some. It has created a life-style that influences speech, behavior, dress, and  
5 entertainment among other things." Ibid. It thus held the use of Dora's name and likeness to be  
6 among the uses exempt from consent in Civil Code §3344(d).

7 In addition to the inherent "public interest" exclusion from the common law tort and the  
8 statutory exemption from section 3344, there is an overriding constitutional defense. In Comedy III  
9 Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal.4<sup>th</sup> 387, the California Supreme Court  
10 concluded that constitutional free speech rights trump the statutory right of publicity when the use of  
11 the celebrity's name and likeness are transformed by the new work. The Comedy III concluded that  
12 lithographs and t-shirts bearing only the likenesses of the Three Stooges were not sufficiently  
13 transformative to receive First Amendment Protection.

14 The Court elaborated that on that defense in Winter v. DC Comics (2003) 30 Cal.4<sup>th</sup> 881  
15 when two well-known musicians sued the publisher of comic books and other defendants alleging  
16 causes of action including appropriation of their names and likenesses under Civil Code §3344. The  
17 California Supreme Court began by noting that:

18 In Comedy III, we considered when constitutional free speech rights  
19 may trump the statutory right of publicity. We formulated "what is  
20 essentially a balancing test between the First Amendment and the right  
21 of publicity based on whether the work in question adds significant  
22 creative elements so as to be transformed into something more than a  
23 mere celebrity likeness or imitation.

22 30 Cal.4<sup>th</sup> at 885. In Winter, applying the same balancing test to comic books containing characters  
23 that evoked the musical brothers Johnny and Edgar Winter, the Court concluded, as a matter of law,  
24 that the subject comic books contained significant and creative elements that transformed them into  
25 something more than mere celebrity likenesses. Accordingly, the comic books were entitled to First  
26 Amendment protection. Ibid. In applying that test in Winter, it pointed out that the comic books  
27 were not just conventional depictions of plaintiffs but contained significant expressive content other  
28 than plaintiffs' mere likenesses. First, the books did not depict plaintiffs' literally. The plaintiffs

1 were distorted for purposes of lampoon, parody or caricature. Plaintiffs were depicted as half-human  
2 and half-wormlike. "In a larger story, which is itself quite expressive, the characters and their  
3 portrayals do not greatly threaten plaintiffs' right of publicity." Ibid. at 890.

4 Moreover, "the comic books 'are no less protected because they provide humorous rather  
5 than serious commentary.' [Citations omitted]." Ibid. The Court also rejected the argument that the  
6 comic books did not qualify as parody. It stated:

7 The distinction between parody and other forms of literary expression  
8 is irrelevant to the Comedy III transformative test. It does not matter  
9 what precise literary category the work falls into. What matters is  
10 whether the work is transformative, not whether it is parody or satire  
11 or caricature or serious social commentary or any other specific form  
12 of expression.

13 Ibid. at 891.

14 Nor was the commercial marketing of the work relevant:

15 The question is whether the work is transformative, not how it is  
16 marketed. If the work is sufficiently transformative to receive legal  
17 protection, "it is of no moment that the advertisements may have  
18 increased the profitability of the [work]." (Citation omitted.)

19 Id. at 891. To the extent that plaintiffs here claim their appearance was distorted, while they might  
20 have other theories of action, their appropriation claim is barred because of the transformative use by  
21 defendants. Alternatively, even if their appearance was not transformed, their appropriation claim  
22 still fails because "if the marketability and economic value of the challenged work do not derive  
23 primarily from the celebrity's fame, 'there would generally be no actionable right of publicity'." Id.  
24 at 889 (quoting Comedy III). Plaintiffs can make no showing that the value of the movie derives  
25 primarily from their fame.

26 The latest decision in California on the transformative defense appears in the recently  
27 published Kirby v. Sega of America, Inc. (2006) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2006 WL 2718911. There,  
28 the lead singer of a musical group known professionally as Lady Miss Kier or "Miss Kier" or "Lady  
Kier" (Kirby) complained that the distributors of a video game had created a character in the video  
game which misappropriated her likeness and identity in violation of Civil Code §3344 and the  
common law right of publicity and committed a violation of the Lanham Act, unfair compelltion,

1 interference with prospective business advantage and unjust enrichment. Although the video game  
2 featured a computer-generated image named "Ulala" who resembled plaintiff sufficiently to create a  
3 triable issue as to the use of plaintiff's likeness and identity, the trial court found that the free speech  
4 considerations in Winter provided a complete defense as a matter of law because there were  
5 sufficient differences to show that defendants had made a transformative work. The Court of Appeal  
6 affirmed. Ibid. at \*5-6.

7 Between the Comedy III and Winter decisions, the Court of Appeals for the Ninth Circuit  
8 had occasion to apply Comedy III's transformative test in Hoffman v. Capital Cities/ABC, Inc. (9<sup>th</sup>  
9 Cir. 2001) 255 F.3d 1180. Dustin Hoffman had won a substantial award in a bench trial asserting  
10 violation of his right of publicity under the federal Lanham Act as well as the California common  
11 law and statutory rights of publicity. Los Angeles Magazine had altered a famous still photo from  
12 the movie "Tootsie" showing him in character wearing a red long-sleeved sequined evening dress  
13 and high heels - to create a new photo using Hoffman's head and substituting a male model in the  
14 same pose, wearing a more current gown. The Court of Appeals reversed, holding as to the publicity  
15 claims that the uses were "transformative" because the elimination of Hoffman's body, and  
16 substitution of a new body and clothing constituted "significant transformative elements." Id., at  
17 1184 n.2. quoting Comedy III.

## 18 2. The Claims Are Barred By The Plaintiffs' Consent

19 Consent to the use of a person's name or likeness is a complete defense to a claim for an  
20 unauthorized appropriation of a name or likeness for commercial purpose. California Civil Code  
21 §3344(a) (liability arises only if such use is "without such person's prior consent")<sup>3</sup> and 3515 ("He  
22 who consents to an act is not injured by it"); Montana v. San Jose Mercury News (1995) 34  
23 Cal.App.4<sup>th</sup> 790, 793 (lack of consent is plaintiff's burden to meet for common law  
24 misappropriation).

25 Here, the three participants in the movie -- Justin Seay (Doc 1), Anthony Allen and David  
26

27 <sup>3</sup> California Civil Code §3344 does not require the consent to be in writing. Consent may be oral  
28 and it may be implied by conduct, as by the Participants willingness to be photographed and  
identified in a movie. Newton v. Thomason (9<sup>th</sup> Cir. 1994) 22 F.3d 1455, 1461 (applying California  
law of misappropriation).

1 Corcoran (not a plaintiff in this case) -- signed identical standard consent agreements, all dated  
2 October 28, 2005, in which they agreed that Springland Films (the producer) had the right to film  
3 and audiotape them for a "documentary-style film (the "Film") ... that the Producer hopes to reach a  
4 young adult audience by using entertaining content and formats." Paragraph 2 authorizes the  
5 producer to assign or license to others the right to use the Film and any recorded material that  
6 includes the participant.<sup>4</sup> Paragraph 3 states that the participant understands that the producer and its  
7 assigns or licensees are relying on the consent in spending time, money and effort on the Film and  
8 the participant's participation in it and thus that the consent will be irrevocable. Paragraph 4 recites,  
9 among other things, that each participant is waiving and agreeing not to bring any claim against the  
10 producer or its assigns or licensees any claim for "rights of publicity or misappropriation (such as  
11 any allegedly improper or unauthorized use of the Participant's name or likeness or image)."  
12 Paragraph 5 is an integration clause precluding reliance on representations or promises outside the  
13 agreement. No plaintiff claims that the consent form is ambiguous or would not be sufficient to  
14 cover the claims brought here, absent the alleged fraud.

15 By contract, a person may expressly waive "the right to sue for harm caused in the future by  
16 the wrongful behavior of a potential defendant, eliminating a remedy for wrongdoing." Coates v.  
17 Newhall Land & Farming, Inc. (1987) 191 Cal.App.3d 1, 7. Because the plaintiffs have expressly  
18 waived the right to sue for misappropriation of their names and likenesses, they cannot show any  
19 likelihood of prevailing on that claim.

20 **IV. PLAINTIFFS HAVE NOT SHOWN THE CONSENTS TO BE RESCINDED, VOID**  
21 **OR VOIDABLE**

22 Plaintiffs unsuccessfully attempt to avoid the consequences of the written releases they  
23 signed by arguing the releases: (1) are void due to "fraud in the inception"; (2) are voidable due to  
24 "fraud in the inducement"; and (3) are invalid due to "diminished capacity." Pifs' App. at 11-15.

25 **A. There Was No Fraud in the Inception.**

26 Fraud in the "inception" or "execution" of a contract arises where "the promisor is deceived  
27

28 <sup>4</sup> Springland Films has assigned or licensed all rights to defendants. Hansen Decl., ¶¶ 3-5.

1 as to the nature of his act and actually does not know what he is signing, or does not intend to enter  
2 into a contract at all, mutual assent is lacking, and [the contract] is void." Rosenthal v. Great  
3 Western Financial Securities Corp. (1996) 14 Cal.4th 394, 415 (emphasis in original), quoting  
4 Ford v. Shearson Lehman American Express, Inc. (1988) 180 Cal.App.3d 1011, 1025.<sup>5</sup>

5 Here, plaintiffs admit they knew they were signing releases and willingly did so. Plaintiffs  
6 only contend they thought "the releases were merely for liability issues that could arise out of the  
7 trip in the recreational vehicle." Plfs' App. at 12. Besides the fact that the booker who procured  
8 their signatures denies making any such statement, Schulman Decl. ¶ 16, the assertion is so patently  
9 contrary to the form's express and detailed waivers as to be unbelievable.

10 To meet their burden of proof, plaintiffs must show that their reliance on the booker's alleged  
11 statements was "objectively reasonable." Rosenthal, 14 Cal.4th at 423. They cannot meet this  
12 burden by ignoring or contradicting statements in the agreement -- because even a brief scan of the  
13 document clearly reveals that it releases far more than RV-related accidents. See id. at 424-26  
14 (plaintiff's failure to read contract, relying solely on defendant's representations as to its contents,  
15 was objectively unreasonable, negating a claim of fraud in the inception).

16 One party's misrepresentations as to the nature or character of the  
17 writing do not negate the other party's apparent manifestation of  
18 assent, if the second party had "reasonable opportunity to know of the  
19 character or essential terms of the proposed contract." (Rest. 2d  
20 Contracts, § 163, 443.) If a party, with such reasonable opportunity,  
21 fails to learn the nature of the document he or she signs, such  
22 "negligence" precludes a finding that the contract is void for fraud in  
23 the execution. (C.I.T. Corporation v. Panac, 25 Cal.2d 547, 549  
24 (1944).)

25 Id. at 423.

#### 26 B. There Was No Fraud in the Inducement

27 To rescind the releases based on fraud in the inducement, the plaintiffs have the burden of  
28 proving material misrepresentation, knowledge of falsity, the intent to defraud, justifiable reliance by  
the plaintiffs and resulting damage. Lazar v. Superior Court (1996) 12 Cal.4th 631, 638. Here, the

<sup>5</sup> Examples of a contract that is void due to fraud in the inception or in the execution are where the plaintiff, under the control, influence and direction of his psychotherapist, signed numerous documents but did not know that some of the documents were contracts (Ford, supra) or where the plaintiff could not read English and signed a release relying upon the representation of his agent who was also acting on behalf of the adverse party. Meyer v. Haas (1899) 126 Cal. 560.

1 misrepresentations plaintiffs allege are not based on facts, Schulman Decl. ¶¶ 5-17, Barnard Decl.  
2 ¶ 5, and in any event are not material. Plaintiffs' affiliation with their fraternity or with their school  
3 has no bearing on the plaintiffs' appearance in the Picture. The alleged statement that the Picture  
4 would not be shown in the United States is contrary to the wording of the consent forms (rights  
5 extend to "any media throughout the universe") and to what was told to them by the bookers.  
6 Schulman Decl. ¶ 15, Barnard Decl. ¶ 5.

7 Plaintiffs' alleged reliance on the bookers' supposed representations would not have been  
8 justified. Specifically, the alleged misrepresentation that the consent forms were intended only to  
9 release liability that might be incurred by plaintiffs' ride in the RV is denied by the bookers and  
10 flatly contrary to the express wording of the consent forms each of the plaintiffs signed. As such,  
11 plaintiffs' reliance would have been "irrational," rather than justified. See Van Meter v. Bent  
12 Construction Co. (1956) 46 Cal.2d 588, 595 (no fraud claim where "plaintiff's conduct, in light of  
13 his intelligence and information, is preposterous or irrational"); Cortez v. Weymouth (1965) 235  
14 Cal.App.2d 140, 152 (no fraud claim where plaintiff "put faith in representations which are  
15 preposterous, or which are shown by facts within his observation to be so patently and obviously  
16 false that he must have closed his eyes to avoid discovery of the truth").<sup>6</sup>

17 Moreover, plaintiffs' alleged injuries, for humiliation, mental anguish, emotional and  
18 physical distress, loss of reputation, goodwill and standing in the community, is not the type of  
19 economic injury<sup>7</sup> that arises out of the right of publicity tort which is the only claim for which  
20 injunctive relief is even an arguable remedy. An award of damages, not injunctive relief, is the only  
21 remedy for an invasion of the right of privacy. See Organization For A Better Austin v. Keefe  
22 (1971) 402 U.S. 415, 419-20, 91 S. Ct. 1575, 29 L.Ed. 2d 1 ("invasion of privacy ... is not sufficient  
23

24 <sup>6</sup> Moreover, the fact that plaintiffs might have been mistaken as to the contents or effect of the  
25 release does not permit them to escape the actual terms of the contract they signed. Where a plaintiff  
26 "signed the release on the mere unspoken belief that the release did not encompass [certain] claims,  
27 despite express language in the release to the contrary, he may not now rely on his unspoken  
intention not to waive these claims in order to escape the effect of the release." Skrbina v. Fleming  
Companies (1996) 45 Cal.App.4th 1353, 1367.

28 <sup>7</sup> "[T]he right of publicity is essentially an economic right." Winter, 30 Cal. 4<sup>th</sup> at 889.

1 to support an injunction." ); Matter of Providence Journal Co. (1<sup>st</sup> Cir. 1986) 820 F. 2d 1342, 1350  
2 ("That publication would prove embarrassing or infringe [plaintiff's] privacy rights is, however, an  
3 insufficient basis for issuing a prior restraint.").

4 Because plaintiffs cannot meet their burden of proving the elements of fraud in the  
5 inducement, the releases must be deemed valid and plaintiffs cannot show a likelihood of prevailing  
6 on their claims.

7 C. There is No "Diminished Capacity" Defense to a Validly Executed Release.

8 Plaintiffs correctly note that a person who is so drunk as to be "unable to consent to the terms  
9 of a contract" lacks the mental capacity to enter into a valid contract. Pifs App. at 14, citing  
10 Guidici v. Guidici (1953) 2 Cal.2d 497, 502. However, Guidici held that to avoid a contract, the  
11 plaintiff must be so "completely intoxicated" that "he did not know what he was doing." Id. at 501  
12 (the Guidici plaintiff had been drinking for two straight weeks at the time he signed various  
13 documents and was so intoxicated during this period that he could not recall that he had signed a  
14 deed or gotten married).

15 The bookers who procured plaintiffs' signatures on the releases assert that the plaintiffs  
16 signed the forms prior to being given access to any alcoholic beverages. Schulman Decl. ¶ 6.  
17 Bernard Decl. ¶¶ 6-7. In addition, the face of the releases themselves -- on which the plaintiffs were  
18 required to print their name, address and social security number in addition to signing -- negates any  
19 suggestion that the plaintiffs were so "completely intoxicated" that they did not understand that they  
20 were signing releases. In any event, the use of alcoholic beverages does not completely incapacitate  
21 a person from making legally binding decisions. For example, in California, one stopped for  
22 suspected driving under the influence of alcohol must immediately make a decision whether or not  
23 to consent to giving a breathalyzer test or a blood test, and for failing to do so, loses the privilege of  
24 a driver's license in California for at least one year. Vehicle Code § 13353. Civil law similarly  
25 provides that the mere fact that one has been drinking does not preclude that individual's ability to  
26 be bound to a written contract such as a release. Pickett v. Sutter (1855) 5 Cal. 412 (the influence of  
27 liquor alone cannot avoid a contract). Importantly, the fact that a person's judgment might be  
28 impaired due to alcohol or mental illness will not make the contract voidable if he was able to

1 understand the general nature of the contract he was entering into. Thus, in Smailey v. Baker (1968)  
2 262 Cal.App.2d 824, 832, the court rejected the plaintiff's claim to rescission despite evidence of his  
3 psychosis at the time he signed the contract where he understood what he was doing, even though his  
4 judgment was impaired due to his then-present manic-depression.

5 In the instant case, even assuming that plaintiffs had consumed some alcoholic beverages  
6 prior to signing the releases, their contention is that they would not have signed the releases if  
7 alcohol had not impaired their judgment, not that they did not realize they were signing release  
8 forms.

9 **V. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION**  
10 **IS DENIED; THE RELATIVE HARM TIPS IN FAVOR OF DEFENDANTS**

11 The fact that the plaintiffs are concerned that they will be shunned or avoided or subject to  
12 criticism for the truthful portrayal of their statements amounting to racial bias or misogynistic views  
13 is no basis for presuming that they are likely to suffer irreparable harm. Because of the widespread  
14 dissemination of the film so far, their concerns about the effects of future dissemination are moot.  
15 The movie has already been seen by tens of millions of people in the United States and elsewhere,  
16 and the movie, including the Frat Boy segment, has been a widespread topic of discussion and  
17 debate on the Internet, and on broadcast and print media. No small part of the attention can be  
18 directly attributed to the filing of this lawsuit. Petrich Decl., ¶¶ 3-8, 10, 11, Exs. 2-15, 17, 18;  
19 Snyder Decl., ¶ 5; Cook Decl., ¶¶ 6-8.

20 Secondly, even assuming they expected the movie to be shown only to a population of  
21 500,000,000 living in Europe and Kazakhstan, because of the Internet and such internationally  
22 accessible websites as YouTube, it was reasonably foreseeable that a film shown only in Europe  
23 would be seen or discussed in the United States. Petrich Decl., ¶¶ 4, 10, Exs. 2, 17.

24 Finally, the hurt feelings and loss of reputation to which plaintiffs refer are more  
25 appropriately remedied by an award of damages. They have an adequate legal remedy.

26 If providing alcoholic beverages to John Doe 2 was mistaken and also illegal, it was so under  
27 South Carolina law, not the California Business and Professions Code. For the purposes of this civil  
28 action, however, defendant Doe 2 should be estopped by his misrepresentations about his age from

1 asserting this element of his claim. Cal. Evidence Code § 623.

2 Either Christopher lied to the bookers and is therefore guilty of unclean hands, or he is lying  
3 to the Court and had nothing to do with the Film. Either way, any injunctive relief is inappropriate  
4 as to that individual. See Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4<sup>th</sup> 436, 446.

5 VI. ANY INJUNCTION MUST BE CONDITIONED UPON THE POSTING OF AN  
6 ADEQUATE BOND

7 Section 529 of the Code of Civil Procedure requires an undertaking or cash deposit in lieu  
8 thereof if a preliminary injunction is granted. The bond requirement is mandatory. Abba Rubber  
9 Co. v. Seacquist (1991) 235 Cal. App. 3d 1, 10 (\$1,000 bond inadequate where possible lost profits of  
10 \$315,000). The bond must be sufficient to cover any damages to defendant if it is finally determined  
11 the injunction was improvidently granted. Top Cat Productions, Inc. v. Michael's Los Feliz (2002)  
12 102 Cal. App. 4<sup>th</sup> 478. In this case, an injunction would likely lead to the loss of another \$65 million  
13 in box office receipt and at least \$30 million to defendants. Snyder Decl., ¶ 6. Proceeds from future  
14 sales of the yet to be released home video versions of the Picture will likely exceed \$ 20 million.  
15 Cook Decl., ¶ 9.

16 VII. CONCLUSION

17 For all the foregoing reasons, defendants respectfully submit that the plaintiffs' Application  
18 for Preliminary Injunction should be denied.

19  
20 DATED: November 9, 2006

LEOPOLD, PETRICH & SMITH  
A Professional Corporation

21  
22  
23 By: 

LOUIS P. PETRICH  
DANIEL M. MAYEDA  
Attorneys for Defendant  
TWENTIETH CENTURY FOX FILM  
CORPORATION