

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jesse Ventura,
a/k/a James G. Janos,

Civil No. 12-0472 (RHK/SER)

Plaintiff,

v.

Taya Kyle, Executrix of the
Estate of Chris Kyle,

Defendant.

PLAINTIFF JESSE VENTURA'S TRIAL BRIEF

PRELIMINARY STATEMENT

Plaintiff Jesse Ventura ("Ventura") submits this Trial Brief in accordance with the Court's Order (Doc. No. 267). Following this Preliminary Statement are Ventura's:

1. Statement of the Issues;
2. Summary of the Court's Prior Rulings;
3. Summary of Facts Expected to be Proved at Trial; and
4. Discussion of the Controlling Law.

In brief, Chris Kyle ("Kyle") wrote *American Sniper, the Autobiography of the Most Lethal Sniper in U.S. Military History*. One of the stories in the book is about Ventura. Kyle wrote that Ventura showed up at 2006 wake for a fallen Navy SEAL, and in the presence of servicemen and their families proclaimed that SEALs serving in Iraq

were murdering innocent women and children and “deserved to lose a few.” Kyle also wrote that he confronted Ventura, punched him in the face and knocked him to the ground, and that Ventura was later ridiculed because he showed up the next day at a military graduation ceremony with a black eye. Coincident with the book’s January 2012 release Kyle also went on national radio and television to re-tell the story and, in interviews about it, mocked and made fun of Ventura.

Because the story Kyle wrote and retold is not true, Ventura sued him for defamation, misappropriation of name and likeness, and unjust enrichment. Following Kyle’s untimely death in February 2013 Kyle’s wife, Taya (“Ms. Kyle”), as Executrix of the Estate of Chris Kyle (the “Estate”), was substituted as the defendant.

The evidence at trial will show that Kyle’s story is false, defamatory on its face, and that Kyle published it with actual malice, *i.e.*, that he either knew it was false or acted with reckless disregard for the truth. The evidence will further show that Ventura’s reputation has been virtually destroyed in the SEAL community where he once enjoyed a position of respect and honor, and that Kyle and the Estate have been unjustly enriched because the widespread media attention given to, and the ensuing controversy surrounding the false story made the book a best seller.

STATEMENT OF THE ISSUES

1. Is the story Kyle wrote and retold about Ventura false?
2. Did Kyle publish and retell the story about Ventura with knowledge that it was false or with reckless disregard for the truth?

3. Did Kyle's false and defamatory story damage Ventura's reputation or cause him to suffer humiliation and embarrassment?
4. Did Kyle appropriate Ventura's name and likeness for his own use or benefit without Ventura's consent?
5. Were Chris Kyle and the Estate unjustly enriched?
6. What are Ventura's damages?

SUMMARY OF THE COURT'S PRIOR RULINGS

A. THE DECEMBER 20, 2012, ORDER.

In its December 20, 2012, Order, this Court declined to grant summary judgment in Kyle's favor on Ventura's claims for misappropriation of name and likeness and unjust enrichment. Among other things, the Court explained that:

Kyle argues that he is entitled to summary judgment because his statements about Ventura are protected by the First Amendment. . . . But this argument depends entirely on his own version of the facts and ignores Ventura's. **His statements are *not* protected by the First Amendment if they were knowingly false and defamatory, as Ventura claims.**

Kyle also argues that he is entitled to summary judgment because he did not appropriate Ventura's identity for a commercial purpose. But this argument misses the mark because **Ventura is not required to show a commercial purpose. Under Minnesota law, appropriation "is not limited to commercial appropriation."**

Kyle also argues that the unjust-enrichment claim is an impermissible attempt to circumvent his First Amendment defenses to the defamation claim. . . . But Kyle is mistaken to the extent he argues that the unjust-enrichment claim is merely duplicative of the defamation claim. **Although they may stem from the same underlying facts, recovery under the two claims is distinct—defamation relates to Ventura's damage while unjust enrichment relates to Kyle's benefit.**¹

¹ ECF No. 125 at 5–6, 8 (bold emphasis added).

B. THE MARCH 19, 2014, ORDER.

In its March 3, 2014, Order this Court declined to grant summary judgment in the Estate's favor on Ventura's defamation, misappropriation and unjust enrichment claims because the evidence was sufficient for a jury to conclude that Kyle's story is materially false. In particular, the Court pointed out that:

Defendant asserts Kyle's statements were substantially true and Ventura cannot prove otherwise. . . . Defendant urges the Court to discount the affidavits of Gotchey and the DeWitts, arguing their testimony does not pertain to the night in question. . . . But viewing their affidavits in the context of the record as a whole, it appears more likely that Gotchey and the DeWitts were simply mistaken as to the date. . . . **The Court may reasonably infer from this evidence that Gotchey's and the DeWitts' statements describe the events of October 12th, not October 13th.**

Ventura has also submitted **corroborating photographs of himself at the graduation ceremony the following day in which no injuries are visible, despite Kyle's allegation that he punched Ventura . . . in the face with such force that he knocked him to the ground.** Altogether, Ventura has proffered sufficient evidence upon which a jury could conclude that Kyle's statements were materially false.²

The Court also concluded that the evidence was sufficient for a jury to find that Kyle published his story with actual malice:

Defendant's assertion that actual malice cannot be inferred from a false statement is only true if the statement relates to an ambiguous event. . . . **But Kyle's story does not recount an ambiguous event.** While it is *possible* Kyle could have misinterpreted Ventura's comments to him and innocently published a false account of them, this reasoning does *not* apply to Kyle's account of "punching out" Ventura. **If Ventura proves that statement was false—that is, if a jury does not believe Kyle punched Ventura—it follows that Kyle fabricated it. . . . And if a jury concludes Kyle fabricated part of the story, it could reasonably conclude he fabricated the rest of his story about Ventura.**³

² ECF No. 269 at 8–10 (bold emphasis added).

³ ECF No. 269 at 11–12 (bold emphasis added).

As an alternative to summary judgment the Estate asked the Court to limit Ventura's damages claims for misappropriation and unjust enrichment, arguing that he could not seek to recover any revenues from the film adaptation of the book. The Court rejected that argument, explaining that:

Defendant asserts Ventura should be allowed to recover (if at all) only proceeds from the book American Sniper and not from the film contract. . . . Although Ventura does not provide any specific evidence linking Warner Brothers' interest in a film adaptation to the Ventura story, **the Court does not find his claim for damages too remote.** . . . If the Ventura story garnered publicity and dramatically increased book sales, it does not stretch logic to believe it could have generated Kyle's Warner Brothers contract also.⁴

SUMMARY OF FACTS EXPECTED TO BE PROVED AT TRIAL

A. THE PARTIES.

1. Jesse Ventura.

Jesse Ventura is the former Governor of the State of Minnesota, having served in that capacity from 1999 through 2002; the former Mayor of Brooklyn Park, Minnesota, having served in that capacity from 1990 through 1993; and is also a veteran of the United States Navy, having served his country as a member of the Naval Special Forces Underwater Demolition / SEAL Teams. Through and as a result of his accomplishments in a career that has spanned more than four decades, Ventura has become well known to the public throughout the United States as a professional wrestler, entertainer, actor, speaker, author, and politician. He has created for himself a unique public personality and image, and his professional names, "Jesse Ventura" and "Jesse 'the Body' Ventura,"

⁴ ECF No. 269 at 12 (bold emphasis added).

as well as his image, voice, photograph, likeness, and public persona, have become commercially valuable commodities.

Ventura comes from a military family: his father served in the United States military during World War II and earned six Bronze Battle Stars; his mother served in the United States military during World War II, as a nurse stationed in North Africa; and his brother served in the United States military as a Navy SEAL during the Vietnam war. He is very proud of his, and his family's, military service, and he has nothing but the highest regard for veterans of, and those currently serving in, the United States military.

Ventura's service in the Naval Special Forces Underwater Demolition / SEAL Teams was a defining experience in his life, and he has always believed that those with whom he served, as well as those who preceded and followed him, deserve his and the nation's utmost respect and deepest gratitude.

As a member of the military, Ventura took an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic," and to "bear true faith and allegiance to the same." As Governor of the State of Minnesota, Ventura took an oath "to support the Constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability," and he was the "commander-in-chief of the military and naval forces," vested with the power to "call them out to execute the laws, suppress insurrection and repel invasion." He has always taken his oaths to defend and protect the Constitution of the United States from all enemies very seriously, and he has always considered it a great honor to have had the

privilege of serving his country, first, in the military, and, second, as the Governor of Minnesota.

Over a period of many years, Ventura has maintained close friendships with his former colleagues in the Naval Special Forces Underwater Demolition / SEAL Teams, and he has on several occasions since his own discharge from the military attended and spoken at Navy SEAL graduation and other ceremonies, where he has always been treated with dignity and respect. Although Ventura has exercised his First Amendment right to criticize government policy, and has been publicly opposed to the war in Iraq, he has always supported America's troops, and has never, and would never, wish them any harm.

2. Chris Kyle, Taya Kyle, and the Estate.

Chris Kyle was a Navy SEAL sniper and the author of *American Sniper, the Autobiography of the Most Lethal Sniper in U.S. Military History*. Kyle told his story to co-author Jim DeFelice, who then drafted the manuscript. In the opening pages, Kyle wrote that the "events that happened in this book are true." The book was released nationally, including in Minnesota, on January 3, 2012, by William Morrow, an Imprint of HarperCollins Publishers, and it reached number one on the New York Times' Bestseller list by January 29, 2012. [REDACTED]

[REDACTED].

On February 2, 2013, Chris Kyle was tragically killed by fellow veteran Eddie Ray Routh. Following the death of her husband, Taya Kyle filed a statement confirming that she had accepted an appointment as the Executrix of his estate. On July 18, 2013,

the Court granted Ventura's motion to substitute Taya Kyle, Executrix of the Estate of Chris Kyle, as Defendant.

B. CHRIS KYLE ADMITTEDLY PUBLISHED HIS DEFAMATORY STORY ABOUT VENTURA, REPRESENTING IT TO BE TRUE, AND THEN REPEATED IT ON TELEVISION AND RADIO.

1. Chris Kyle Publishes Defamatory Statements About Ventura in *American Sniper*.

Chris Kyle's book *American Sniper* contains a sub-chapter captioned "*Punching Out Scruff Face*," which appears at pages 310 through 312. In the *Scruff-Face* subchapter, Kyle recounts an alleged 2006 incident that occurred at a public bar and restaurant in Coronado, California, in which Ventura appears at a wake for a fallen SEAL and proceeds to tell all present that he hates America, that SEALs are murdering innocent people, and that SEAL's deserve to die; after which Kyle emerges as the hero when he punches Ventura, knocks him to the ground, and gives him an embarrassing black eye.

The *Punching Out Scruff Face* sub-chapter reads, in its entirety, as follows:

AFTER THE FUNERAL WE WENT TO A LOCAL BAR FOR THE WAKE proper.

As always, there were a bunch of different things going on at our favorite nightspot, including a small party for some older SEAL's and UDT members who were celebrating the anniversary of their graduation. Among them was a celebrity I'll call Scruff Face.

Scruff served in the military; most people seem to believe he was a SEAL. As far as I know, he was in the service during the Vietnam conflict but not actually in the war.

I was sitting there with Ryan and told him that Scruff was holding court with some of his buddies.

"I'd really like to meet him," Ryan said.

“Sure.” I got up and went over to Scruff and introduced myself.

“Mr. Scruff Face, I have a young SEAL over here who’s just come back from Iraq. He’s been injured but he’d really like to meet you.”

Well, Scruff kind of blew us off. Still, Ryan really wanted to meet him, so I brought him over. Scruff acted like he couldn’t be bothered.

All right.

We went back over to our side of the bar and had a few more drinks. In the meantime, Scruff started running his mouth about the war and everything and anything he could connect to it. President Bush was an asshole. We were only over there because Bush wanted to show up his father. We were doing the wrong thing, killing men and women and children and murdering.

And so on. Scruff said he hates America and that’s why he moved to Baja California. 9/11 was a conspiracy.

And on and on some more.

The guys were getting upset. Finally, I went over and tried to get him to cool it.

“We’re all here in mourning,” I told him. “Can you just cool it? Keep it down.”

“You deserve to lose a few,” he told me.

Then he bowed up as if to belt me.

I was uncharacteristically level-headed at that moment.

“Look,” I told him, “why don’t we just step away from each other and go on our way?”

Scruff bowed up again. This time he swung.

Being level-headed and calm can last only so long. I laid him out.

Tables flew. Stuff happened. Scruff Face ended up on the floor.

I left.

Quickly.

I have no way of knowing for sure, but rumor has it he showed up at the BUD/S graduation with a black eye.

The quoted passage from *American Sniper* contains matters of description, facts, and circumstances sufficient for readers to infer that Kyle was referring to Ventura, including: the “*Scruff Face*” reference to his famous facial hair; his status as an “older” “celebrity” former UDT / Seal who served during the Vietnam war; his winter home in Baja California (Mexico); his opposition to the war in Iraq; the 9/11 “conspiracy” about which he has talked and written; and his having been the speaker at BUD/S graduation ceremonies. Kyle has admitted both to providing the content for the *Scruff Face* sub-chapter, and to doing national television and radio interviews about it during which he repeated the story.

2. Chris Kyle Repeats the Defamatory Statements in Radio and Television Appearances.

On January 4, 2012, Kyle appeared on the *Opie & Anthony* radio show:

HOST: There's someone on the line saying that you had—you were in a bar fight with Jesse, Ventura. Is that true?

HOST: What.

CHRIS KYLE: God.

HOST: It's probably—is it?

CHRIS KYLE: Yes.

HOST: Oh, sh___ (expletive deleted).

HOST: Oh, let's get into this.

HOST: Yeah, I would like to.

HOST: Can we talk about it?

HOST: I was going to ask you how you felt about it, actually.

* * *

HOST: What happened in the bar?

HOST: Yeah, what happened? You were in a bar and—

HOST: Oh, Jesus.

CHRIS KYLE: We, ah, we had just come back from our '06 deployment when we lost our guys. We were having a wake for the guy who got the Medal of Honor, Mikey Mansoor. And he happened to be there. He was coming in for a graduating BUDs class that he was going to speak to. And he was upset with the war. He doesn't agree with it, which is fine. I—you don't have to agree with the war. I just get sent there. I don't have to agree with politics. I signed up to serve the country; the country tells me what to do.

HOST: Uh-huh.

CHRIS KYLE: But he was making it known that he did not agree with it. And I approached him and said, "Hey, you know"—

HOST: It's not the place.

CHRIS KYLE: —"I appreciate it, but we are having a wake." It was the SEAL bar there in town. I said, "We're having the wake here. The family is here. I would appreciate it if you'd just kind of keep it down." He told us that we were killing innocent people over there—

HOST: Oh, f___ (expletive deleted).

CHRIS KYLE: —men, women and children. That we were murderers. And, you know, I said, "You know what, we can all have our differences, that's—that's fine; but, please, just don't upset the family."

HOST: Yeah.

CHRIS KYLE: And then he said that, you know, we deserve to lose a few guys.

HOST: Holy sh__ (expletive deleted).

HOST: Jesse said that?

CHRIS KYLE: Yes.

HOST: What the f__ (expletive deleted) is wrong with him.

HOST: So, by the way, all you guys out there that attacked me because I f__ ing (expletive deleted) attacked him, good, I'm glad to hear that. He really is a douche. And what happened when he said that to you?

CHRIS KYLE: I punched him.

HOST: Did you grab his ponytail?

CHRIS KYLE: No, I punched him.

* * *

HOST: Where did you punch him?

HOST: Bravo.

CHRIS KYLE: In the face.

HOST: What happened?

HOST: That's when you take a head shot.

CHRIS KYLE: I mean, Jesse Ventura, he's—

HOST: Big man.

CHRIS KYLE: —he's an older guy, too.

HOST: Yeah, he's an older guy.

CHRIS KYLE: Of course all the guys then started making fun of me. “So what geriatric” (inaudible)—(Laughter.)

HOST: Wait. When you hit him, did he hit you back, or . . .

CHRIS KYLE: No, he—he went down.

* * *

HOST: Did his walker fall with him?

CHRIS KYLE: Yeah, I think he fell out of his wheelchair.

HOST: Wow. Wow. He went down.

HOST: You hit a big dude. He’s a—he’s still Jesse the Body. I mean, he’s an older guy, but he’s still a big strong guy.

HOST: Did he awkwardly get up and have to walk out of the place?

CHRIS KYLE: I don’t know. I took off running, because the cops were already outside. And as soon as I hit him, I knew, SEAL party, SEAL bar, cops were watching, they saw the whole thing happen. So I took off running.

HOST: Oh, yeah. So Jesse Ventura said to a SEAL at a bar where there was a wake for a SEAL: “You deserve to lose a few guys”?

HOST: Yeah.

CHRIS KYLE: Yes, he did.

On January 5, 2012, Kyle appeared on the *O’Reilly Factor* on FOX TV:

MR. O'REILLY: Personal story segment tonight: Chief Chris Kyle, a Navy SEAL, is officially the most lethal sniper in U.S. military history. The Chief has written a brand new book called *American Sniper*, that chronicles his amazing story in Iraq. I spoke with him last night. So, Chief, I read your book. Very entertaining. I recommend it for my audience. I think they'll like it. First of all, you say you knocked Jesse Ventura to the floor with a punch. Now, you don't mention his name, but

everybody knows who that is. Number one, that—that happened? You knocked him out?

MR. KYLE: Well, I knocked him down.

MR. O'REILLY: Knocked him down. Why? Why would you punch Ventura?

MR. KYLE: It was in '06. Was the year we lost our first two SEALS in Iraq. We came home. We lost our last guy just before coming home. We had the wake in a SEAL bar there in Coronado. And he was there. He was there for a speaking engagement at a BUD ceremony, graduating class—

MR. O'REILLY: Because he was a SEAL, right?

MR. KYLE: Yes, sir.

MR. O'REILLY: He was a Navy SEAL. So he was badmouthing the war, right?

MR. KYLE: Badmouthing the war, badmouthing Bush, badmouthing America.

MR. O'REILLY: And you took exception?

MR. KYLE: I did find a problem with it. The family was there. I asked him to please tone it down, that we did not want to upset the family members of Mikey Mansoor.

MR. O'REILLY: Who was killed?

MR. KYLE: Yes, sir. And he earned the Medal of Honor. He jumped on a grenade and saved everybody else around.

MR. O'REILLY: But I want to be clear. Ventura wasn't attacking him at all, verbally bashing him; he was just bashing the whole thing in general?

MR. KYLE: Yes, sir.

MR. O'REILLY: All right.

MR. KYLE: Until he said we deserve to lose a few guys.

MR. O'REILLY: He said we deserve to—we, the United States—

MR. KYLE: No. He said, “You, y’all, deserve to lose a few guys.”

MR. O'REILLY: Navy SEALs.

MR. KYLE: I—I’m assuming. He was saying that to me.

MR. O'REILLY: Was he drunk?

MR. KYLE: No, sir. I never saw him with a drink in hand at all.

MR. O'REILLY: So once he said, “You deserve to lose a few guys,” you popped him?

MR. KYLE: Yes, sir.

MR. O'REILLY: Did he fight back?

MR. KYLE: He went down. The cops were there, I took off running.

MR. O'REILLY: You ran?

MR. KYLE: Yes, sir.

MR. O'REILLY: Did they arrest you?

MR. KYLE: No, sir. I—I have a master chief that always said, “Punch and run.”

On January 10, 2012, Kyle appeared on the *Opie & Anthony* radio show for the second time:

HOST: What exactly happened, Chris? If you could just refresh, because a lot of people might not have heard you on that moment. Just if you could give us a brief—just kind of sum the story up so people know what we're talking about.

MR. KYLE: It was the wake for Mikey Mansoor, and of course all the families were there. He was there. He started getting loud and voicing his

opinion coming out against the war and the troops and everything. So we asked him to keep it down. And he got belligerent about it, and finally said we deserve to lose a few.

* * *

HOST: Now, Chris, is it possible that you and Jesse were arguing or you were debating and he said something to the effect of it's only natural you're going to lose a few? Are you 100 percent sure that he said it and with the intention that you heard it?

MR. KYLE: No. I feel that (inaudible) he said exactly what I thought I heard. Them other guys that were standing right there—

HOST: Oh, they heard it as well?

MR. KYLE: —exact same way.

* * *

HOST: Chris, there's no doubt in your mind you punched Jesse Ventura that day, right?

MR. KYLE: Yes, sir, definitely.

Kyle's interviews on *Opie & Anthony* and the *O'Reilly Factor* have been broadcast and made available on the Internet, including in Minnesota.

C. KYLE'S STORY ABOUT VENTURA IS A FABRICATION.

1. The "Incident" Did Not Happen.

Ventura will testify that Kyle's story about him is false because the incident described by Kyle did not happen—it is a complete fabrication. The evidence presented at trial will show that the following sequence of events took place in October 2006:

- Ventura arrived in San Diego, California on the evening of Thursday, October 12, 2006, and at 7:29 p.m. rented a car at the San Diego airport.
- Ventura and his BUD/S Class 58 classmates were scheduled to attend an “informal gathering” at McP’s Irish Pub on the evening of Thursday, October 12, 2006.
- BUD/S Class 258 was scheduled to graduate the following day, Friday, October 13, 2006, at 3:00 p.m.
- Ventura and several of his BUD/S Class 58 classmates attended the graduation.
- The next day, Saturday, October 14, 2006, they attended a picnic.
- Ventura was scheduled to return his rental car to the San Diego airport on Sunday, October 15, 2006, at 11:00 a.m.

Bill DeWitt, a corporate security director in the private sector who has served as a Navy SEAL, Army Ranger, Green Beret and, for 23 years, as an Army counter-intelligence officer, was with Ventura the entire time he was at McP’s in October 2006, and is certain that the incident Kyle wrote about did not happen. DeWitt will testify that:

(i) there were no hostile words or gestures exchanged by anyone; (ii) Ventura did not say anything to anyone at McP’s to the effect that SEALs are murdering innocent people or SEALs deserve to die or to lose a few; (iii) Ventura would never wish harm on any American serviceman, and would never say that SEALs, in particular, deserved to die; (iv) neither Kyle nor anyone else punched Ventura; (v) there was no altercation or incident; and (vi) Kyle’s story about Ventura is a fabrication. DeWitt’s wife, Charlene, will testify similarly, and add, contrary to Kyle’s claims, that she heard Ventura say, “I don’t think the war is worth one SEAL dying for.”

Robert Leonard, who was also with Ventura at McP's on October 12, 2006, will additionally testify that he never saw Ventura have an argument or altercation with anyone at McP's, nor heard him say anything offensive or upsetting to anyone. And both Leonard and Wayne Robertson will testify that on the days following the McP's gathering, they saw no indication that Ventura had been punched, nor was there any discussion amongst the various McP's attendees that Ventura had caused a scene or had been involved in a fight. They will both further testify that Ventura would never say SEALs deserve to die.

Date-stamped photographs taken by DeWitt and Leonard will demonstrate that Ventura and his friends were at McP's on the evening of October 12, attended the BUD/S graduation on October 13, and attended a picnic on October 14. The photographs show a smiling Ventura at McP's on the evening of Thursday, October 12, 2006, with his arm around SEALs of Kyle's approximate age. Other photographs depict Ventura on Friday, October 13, 2006, at the BUD/S Class 258 Graduation, and at the Saturday, October 14, 2006, BUD/S Class 58 picnic. Although Ventura was taking blood-thinning medication at the time of the alleged incident at McP's, none of the photographs show Ventura with a black eye, a bruised or bloodied lip, or otherwise exhibiting any physical effects of supposedly having been punched directly in the face by a 220-pound trained killer.

2. Kyle's Story is Not Credible.

Over the years, Kyle told multiple versions of the alleged incident involving Ventura. Below are several versions of the fabricated story Kyle has told.

(a) *The Story Kyle Originally Told Co-Author DeFelice in 2011.*

In 2011, *American Sniper* co-author Jim DeFelice recorded an interview with Kyle. Kyle said [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Kyle explained that [REDACTED]

[REDACTED] and that he [REDACTED]

[REDACTED]

[REDACTED] Kyle then told DeFelice that [REDACTED]

[REDACTED].” Kyle told DeFelice that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].”

(b) *The Story Kevin Lacz Told Co-Author DeFelice in 2011.*

Kyle’s SEAL teammate, Kevin Lacz, told DeFelice that [REDACTED]

[REDACTED].” But then Lacz said, “[REDACTED]

[REDACTED]

[REDACTED].”

(c) *The Story Kyle Told in Early Draft Versions of the American Sniper Manuscript.*

In the first draft manuscript, DeFelice added a new detail so that it would not sound like Kyle assaulted Ventura without provocation, saying instead that [REDACTED]

[REDACTED]” Omitted was [REDACTED]
[REDACTED].

In the next iteration, more details were added to make Kyle out to be more of a hero, and to make Ventura look worse. As the story morphed, Kyle this time remained

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”

(d) *The Story Kyle Told After He was Warned of a Libel Lawsuit.*

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]” But even with the redactions there was little mystery as to the subject of the story, as evidenced by an editor’s comment on a subsequent draft which said, “[REDACTED]
[REDACTED]
[REDACTED]”

(e) *The Story Kyle Told in the Published Version of American Sniper.*

Kyle included the published version of *American Sniper* references to Ventura taking a swing at him, tables flying and stuff happening, and to Ventura having a black eye when he showed up to the BUD/S graduation ceremony. Omitted from the published

version were various but not unimportant details from prior drafts, such as Ventura supposedly hitting his head on the sidewalk and not getting up.

(f) *The Story Kyle Told in His Interrogatory Response.*

In his response to Interrogatory No. 8, Kyle changed his story yet again. This time, he did not claim that “Tables flew. Stuff Happened.” Instead, he testified that the incident occurred “[REDACTED]

[REDACTED]” And he specifically said that he “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”

3. *The Estate’s Witnesses Cannot Corroborate Kyle’s Fabricated Story.*

The Estate’s attorneys procured declarations from several of Kyle’s SEAL teammates who were at McP’s on October 12, 2006, along with two SEAL mothers who were also there, and a SEAL instructor who has heard stories about that night. The SEAL teammates are Bob Gassoff, Andrew Paul, Jeremiah Dinnell, Kevin Lacz, John Jones, John Kelly, and Guy Budinscak. The SEAL mothers are Debbie Lee and Debbie Job. The SEAL instructor is Ivan Krusic. All have been deposed and their testimony, individually and collectively, fails to corroborate Kyle’s story and shows it, instead, to be a fabrication.

(a) *Witness Testimony is Compromised by Alcohol.*

Kyle’s friends said in their declarations that a SEAL wake is a somber occasion, and that they are able to remember the events from 2006 because they all tried to stay

sober and under control. But in his book, Kyle prefaced his story about meeting Ventura at a SEAL wake as follows:

SEAL funerals are kind of like Irish wakes, except there's a lot more drinking. Which begs this question, how much beer do you need for a SEAL wake? That is classified information, but rest assured it is more than a metric ass-ton.

Kelly confirmed in his deposition that Kyle's written description "seems accurate."

Lacz testified in his deposition that he "might have been" drunk. But in his original recorded interview, he told DeFelice that [REDACTED] that night, and later confirmed that there was "a copious amount of alcohol there." Jones candidly admits in his deposition that he was "intoxicated that night," and he was "trying to recall something—in an intoxicated mind or frame, so—I hope I'm not messing this up too bad." Kelly said, "[i]f there were no shots at that point, that wouldn't be a frogman wake," and "I can guarantee you somebody was puking that night." Mr. DeWitt and his wife confirm that the younger SEALs at McP's were drinking heavily, including some who decided to climb a concrete structure nearby, and another who was puking in the bathroom.

(b) *The Estate's Witnesses Did Not Hear Ventura Make the Statements Attributed to Him.*

Gassoff did not see or hear Kyle and Ventura speak to each other. In fact, everything Gassoff knows about what was said he heard from someone else.

Paul never heard Ventura say "Navy SEALs deserve to lose a few," "SEALs are killing innocent people," "SEALs are murderers," or that "SEALs are killing women and children." Except for a brief, ten-minute period, Paul did not hear anything Ventura said

the entire evening. Nor could he hear anything Ventura and Kyle said to each other, and he “didn’t see anything that made it appear to [him] that there was any kind of confrontation.”

Lacz did not hear Ventura say the things attributed to him by Kyle. Just the opposite, Lacz testified that Ventura was saying that he disagreed with the manner in which SEAL missions were being conducted jointly with regular forces in Iraq, and the gist of what he was saying is that, if SEALs continue to be put in those situations, it is just a matter of time before they lose some guys. In other words, according to Lacz, Ventura was expressing concern for the safety of the SEALs fighting in Iraq—not wishing death upon them.

Jones did not directly hear Ventura say anything at McP’s, and does not recall any specific remarks anyone else present attributed to Ventura. All Jones recalls is that Ventura reportedly voiced objections to the tactic of SEALs operating during the day time, and in general to U.S. intervention in Iraq. Jones did not hear anyone say that Ventura had called SEALs murderers, just that SEALs should expect to lose some guys if they continued using the types of tactics they were using in Iraq.

Kelly did not hear Ventura make any of the alleged statements either; he only knows what Kyle told him Ventura said. Kelly cannot remember any specifics as to what Ventura said about President Bush, only that Ventura was talking about the U.S. not fighting a military enemy in Iraq, but instead fighting “civilian population type.” Kelly never heard Ventura say SEALs deserve to lose a few. And he cannot remember anything else Ventura said, “[o]ther than that it was all hearsay, guys telling me what

they heard him say . . . so I can't honestly say I heard him say the other things he had, but, I mean—excuse me—I trust my friends.” Kelly does not recall who told him that Ventura had said SEALs deserve to lose a few.

(c) *The Estate's Witnesses Confirm that Kyle Invented His Story During a Night of Drinking at Danny's Bar.*

Kelly explained how Kyle's story started—a bunch of drunk guys sitting in a bar, telling tales that kept getting better as the night wore on. Kelly said he met up with his Teammates at Danny's, a bar down the street from McP's, where Kyle started telling the story that he punched Jesse Ventura. Before Kyle arrived, no one at Danny's was talking about Ventura. But, after Kyle got there:

[E]veryone's stories didn't start coming together until we all, you know, grouped up again, and through the close proximity of everyone at Danny's [a bar], I mean—especially, you know, drinks started flying, everyone is real loud and started telling what they heard and they heard and this heard, and guys started getting all riled up It just had its own life and energy

“And then . . . That's where the stories started, there at Danny's, and from there SEALs like to talk, and pretty soon a lot of people in the SEAL community had heard this story that Chris Kyle had told you at Danny's, is that [] right? . . . Yes.” Kelly also admits that, by the time he left Danny's that night, he had had between 15 and 20 drinks.

Jones told a similar story, testifying that, “when I made it to Danny's . . . that's when I got the whole story.” And he testified that giving specifics about what people were telling him, “would be doing the same thing they're—they're doing, making—making it up.” “So one of the jokes in our community is we're a big sewing circle—all we do is gossip.”

(d) *The Estate's Witnesses Did Not See Kyle Punch Ventura.*

Gassoff did not see who was involved in the alleged “commotion,” tables being knocked over, or Kyle or Ventura leave afterward. Everything Gassoff knows about the supposed altercation he heard from someone else.

Paul said that even though he was only 15 feet away, he did not see Kyle punch Ventura, and did not see him on the ground. In fact, it “was more from the story [Kyle told] the next morning [that Paul could] kind of figure out what happened as it played out,” because no one at McP’s that evening talked about the alleged incident—there was not any “kind of a buzz among the crowd” with “people saying, ‘Wow, did you just see that? Jesse Ventura got hit?’” Paul, in fact, did not even know Kyle had supposedly punched Ventura until the next day when Kyle told him. But, although Paul is an officer and Kyle’s superior, when Kyle told Paul that he had punched Ventura, Paul did not report him to either civilian or military authorities.

Debbie Lee views Kyle and other SEALs as her adopted sons. She was at McP’s on the night in question until about 10:30 p.m. But “other than what Chris Kyle has told [her, she does not] have any other information about what actually happened,” and she cannot identify any other people who have told her what happened.

Before filing a declaration on Kyle’s behalf, Debbie Job called him to discuss if she “was remembering it correctly or not,” and she asked him specific questions to “help [her] remember correctly.” She asked Kyle “if it happened on the front sidewalk, because that is where [she] know[s] that a police car had pulled up,” but Kyle said it was “on the side street” so it “confirmed that [she] did not see it happen.” Nor did she

witness any interactions between Kyle and Ventura, or see any tables or chairs falling or tipping over. She does, however, recall some sort of altercation that occurred down the street from McP's where "some guys were talking to some guy about something he said"—and which did not involve Ventura.

Lacz did not witness Kyle having angry words with or punching Ventura. Nor did he actually see Ventura on the ground, or see anyone around Ventura or anyone help him up—even though Lacz describes Ventura as "one of the top five most well-known SEALs" of all time. And, like the others, Lacz says that, even though Ventura was famous, and was supposedly punched and knocked down at a gathering of SEALs, no one even discussed the alleged incident at the time.

Jones did not see Kyle punch Ventura, or even see them in close proximity to each other. Nor did Jones see Chris Kyle around when the "incident" supposedly happened or actually see Ventura on the ground. Based on what he saw, in fact, Jones had no reason to believe that Ventura did not just trip. There was nothing he witnessed about the scene that led him to believe that there had been a physical altercation.

Kelly did not see Kyle punch Ventura, did not see Ventura fall, and cannot recall ever speaking to anyone who actually saw Kyle punch Ventura, or who saw him on the ground. Although Kelly believes he saw Ventura on the ground, he does not remember if he saw him get up, and does not remember whether he hit his head on the ground or not.

(e) ***The Estate's Witnesses Do Not Know or Remember Which Story to Tell.***

(i) **What Happened?**

Kyle's original story was that Ventura went down from the punch, hit his head on the pavement, and did not get up. But, as discussed above, none of Kyle's witnesses who claim to have been present saw Ventura either hit his head on the pavement or lay on the ground as though he had.

Paul testified that Ventura was yelling and screaming at Kyle "F--- you. I'm gonna f---ing kill you." But Kyle has never mentioned anything about Ventura supposedly yelling obscenities in any of the versions of the story he has told, and although all of Kyle's witnesses claim to have been within a few feet of the alleged incident, and to have earlier heard Ventura engaging in conversation on the patio, not one of them claims to have heard him yell anything.

Paul is also the only one who claims to have seen blood on Ventura's lip. But no other witness claims to have seen any blood on Ventura. Nor has Kyle said in his book or in any of his subsequent interviews about the book that his alleged punch caused Ventura to bleed—only that he thought he had given him a black eye.

Kyle also said the Coronado police were there and watched the whole thing. But there is no police report of an assault on Ventura in October 2006, and no hospital record related to the alleged incident.

(ii) Where Did it Happen?

Gassoff consulted with Kyle to refresh his memory and they agreed where they would say the alleged occurrence took place. Nonetheless, Gassoff still could not say whether the supposed incident occurred inside the walls of the patio or outside in the parking lot.

Paul and Dinnell both place the “incident” inside the walls of the McP’s patio. But Paul said Ventura and Kyle were on the northeast side of the patio when the alleged incident occurred, and Dinnell says that it allegedly happened on the opposite northwest end of the patio. Lacz said that he saw Ventura in proximity to Kyle near the parking lot area just outside of the northeast side of the McP’s patio. But Lacz did not see anything out of the ordinary about their interaction, and the next time he looked he saw Kyle alone and at the other end of the parking lot on the northwest side.

Kelly testified that Ventura was outside the McP’s patio wall on the northwest sidewalk—not inside the patio and not in the parking lot on the northeast side. Jones said he never saw Ventura and Kyle in proximity to one another in the parking lot area, did not see Kyle in the area when the alleged incident occurred, and did not see any confrontation between the two. And Debbie Job recalls seeing a fight out on the sidewalk and down the street from McP’s—but that fight did not involve Ventura. No one recalls any “tables flying” as Kyle wrote in his book.

(iii) Jeremiah Dinnell’s Incredible Testimony

Jeremiah Dinnell is the only one of Kyle’s witnesses who claims to have actually seen Kyle punch Ventura, or who heard him say “SEALs deserve to lose a few.” His memory and credibility, however, are seriously suspect.

Dinnell does not remember how he got to McP’s, who drove, who was with him, or what he was drinking at the bar. Dinnell says that he left McP’s for a period of time before the alleged incident occurred and went to a bar down the street called Danny’s. But he does not remember if he had any drinks there, how long he stayed, or if anyone

was with him when he came back to McP's. Although Dinnell said in his declaration that while at McP's Ventura was telling stories about his wrestling days, Vietnam days, and about being Governor of Minnesota, in his deposition Dinnell said that he did not recall hearing Ventura say anything about those topics.

However, Dinnell did testify that, at the precise second he arrived on the sidewalk outside of McP's patio, he: (i) noticed a group of people, including Kyle and Ventura—inside the patio walls at McP's near the northwest corner; (ii) heard Ventura say “you deserve to lose a few”; and (iii) saw him get punched; but (iv) did not “actually see Ventura hit the ground.” Aside from that one-second snapshot, however, Dinnell remembers virtually nothing else of the entire weekend.

As explained above, Dinnell's testimony does not place him, or the alleged occurrence, anywhere even remotely close to where Kyle claimed that it happened in his original story and Interrogatory response. Dinnell said the incident occurred inside the McP's patio walls—not out in the parking lot as Kyle claimed. Nor does Dinnell remember hearing anything Kyle said, or anything else Ventura may have said, or any conversation between Kyle and Ventura. He cannot recall anything about the crowd at all, including the crowd's reactions or whether tables were knocked over or anything said by anyone, or even where Kyle and Ventura were in relation to the crowd. And he does not remember if he returned to Danny's after he witnessed the incident and stayed until closing time, who he was with when he went back to Danny's, whether he had more drinks, whether anyone discussed the alleged incident that night, or what time he got home. In fact, Dinnell does not even remember if anyone talked about the incident the

next day, or even whether he went to work the next day or if it was a weekend, saying that “it’s all kind of hazy.”

Dinnell’s testimony, and his credibility, can be summed up in two sentences:

Q. So once you saw Chris Kyle strike Governor Ventura, is it your testimony that you really can’t remember anything that happened after that?

A. Yes, sir.

The alcohol-related pictures Dinnell posted on his Facebook account perhaps show why Dinnell’s memory of the events in question is virtually non-existent, save for the few minutes of feigned clarity he perceives to be in his “brother” Kyle’s interests.

(f) *The Estate Files the Declaration of Laura deShazo Well After the Deadline for Discovery.*

The Court’s scheduling orders required fact discovery to be completed by December 1, 2012. On October 28, 2013—10 months after the discovery cutoff—the Estate provided Ventura with the Declaration of Laura deShazo. In her declaration—which is as sparse on details as the previous witness declarations drafted by the Estate’s counsel that have since been discredited at depositions—deShazo claims to have seen some unidentified person punch Ventura.

Although deShazo now says for the first time—seven years after the fact and nearly two years after Kyle’s book came out—that she saw some unidentified person punch Ventura, as with all of the prior, deliberately vague, declarations, she does not provide any other details regarding what supposedly happened, where, or who was involved. Ventura and his witnesses, on the other hand, all say that the alleged incident never happened, and photographs show that Ventura’s face exhibited no evidence of a

blunt force trauma at the time or in the days that followed. Ventura has moved *in limine* to preclude the deShazo sisters from testifying because they were not timely disclosed.

D. KYLE HAS A HISTORY OF TELLING FALSE STORIES THAT MAKE HIM LOOK LIKE A “HERO.”

Not unlike the story Chris Kyle told about Ventura in *American Sniper*, it has been publicly reported that Kyle regularly told similar tall tales that were intended to make him look like a hero. Kyle told one reporter, for example, that during Hurricane Katrina he was sent to New Orleans where, from the top of the Superdome, he and other snipers shot and killed dozens of looters during the riots.

Kyle told another story to, among others, a reporter for the *New Yorker* magazine, in which he claimed that, as he was filling his truck with gas at a rural Texas convenience store, two thieves attempted to rob him at gunpoint. Just as he claims to have calmly taken care of Ventura when he supposedly mouthed off, Kyle’s story is that, as the thieves were standing there with handguns pointed directly at him, he calmly reached into his truck as if to get the keys, pulled a gun from inside the truck, tucked it under his arm, and with his back turned shot and killed the two would-be robbers. According to Kyle, when the police arrived they ran his driver’s license and were directed to call a number that rang at the Department of Defense, who advised the police officers that Chris Kyle was an American hero and America’s deadliest sniper, and instructed them to release Kyle without question.

With striking similarity to the Ventura encounter reported in *American Sniper*, Kyle also told a story about a time when he was at a University of Texas football game in

a suite full of spectators, and saw a former University of Texas football star who had fooled around with his friend's girlfriend. Once again making himself out to be the hero—and just like the Ventura story—Kyle claims that to defend his friend's honor he choked the football star into unconsciousness and, intentionally holding the choke a little longer than necessary, caused the football star to urinate and defecate, all while a suite full of witnesses looked on.

As with Kyle's story about Ventura, however, there is no evidence that any of the other hero stories he regularly told are true: no arrests, no police reports, no coroner reports, no hospital records, no surveillance video, no news reports, nothing.

E. TAYA KYLE CRITICIZES VENTURA IN THE MEDIA.

Perhaps taking a cue from her husband, who had previously mocked Ventura on radio and television programs, or from her counsel who have consistently disparaged Ventura in their court filings, Taya Kyle has taken her case to the media in an attempt to influence public opinion in her favor and against Ventura. Appearing on FOX TV's the *O'Reilly Factor* and Glenn Beck's internet program, for example, Ms. Kyle criticized Ventura for pursuing this suit and said he is trying to take away money she needs to raise her children. She also painted Ventura as selfish and unfeeling toward the families of military veterans.

The following exchange occurred between Ms. Kyle and Glenn Beck:

Glenn Beck:

[S]peaking of, um, great American heroes. Chris Kyle...you raised so much money for his wife and family when he was murdered... [H]is family is being put through hell and before we bring her on I'm going to say

something because I don't want her to have to even react to it. Um, but Jesse Ventura is a dirt bag. And I have met Jesse Ventura, and he is an out-of-his-mind, crazy, bad man –

Seriously bad guy –

Yeah...he is suing Chris' family... I tend to believe uh, Chris because...I know Jesse Ventura, um, but it doesn't matter – he's dead, man, what are you doing? And now he's suing the family...

Because Chris talked about the bar incident where he hit him in the face and knocked him down. . . .

[H]e's a dirt bag...Taya Kyle is on the phone with us now...

Taya, um, uh, feel free to just say no, and everyone will understand. Do you want to comment on the Jesse Ventura thing?

Taya Kyle:

Huh, the only thing that I would like to say – and thank you for allowing me the opportunity to not discuss it – but I was surprised to hear him say that, I think he was trying to say that he was suing an insurance company or that it wasn't personal or it wasn't about money. And I would like to clear up the fact that he is absolutely seeking money from Chris's estate – he always was and he continues to be. The insurance company for Harper Collins William Morrow is helping me pay the legal fees, but if he were to win some sort of award, it comes out of the money that I have to raise my children and to give to other veterans...

Glenn Beck:

We, this audience, you know, in \$20 increments, raised an awful lot of money for your family and we put it in a trust, um, for you...Is that money secure?

Taya Kyle:

Thank you for bringing that up because I have to – first of all, let me answer your question, yes. And secondly, I have to tell you that what you and your viewers and your fans and supporters did for my family changed our lives and it changed it, you know, the day I met with you.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Because the Estate's defense appears to have shifted from the merits to one based on sympathy and prejudice—with Ms. Kyle proclaiming to all who will listen that Ventura is suing a widowed veteran's wife who is just trying to feed and clothe her two children—the facts that will show Ms. Kyle's claims to be untrue are now relevant.

F. VENTURA'S REPUTATION HAS BEEN DAMAGED BY THE DEFAMATORY STORY.

Over the years, Ventura has maintained close friendships with his former BUD/S classmates and has occasionally spoken at SEAL graduation ceremonies, where he has always been treated with respect. While he has criticized government policy and publicly opposed the war in Iraq, he has always supported America's troops and would never wish harm upon them. Ventura is so proud of his UDT / SEAL service that, prior to Kyle's defamatory statement, and post-Iraq war, he had the SEAL Trident tattooed on his body. The Trident is also painted on his motorcycle, and he proudly wore the Trident in his official portrait at the Minnesota State Capitol. By falsely claiming that Ventura said SEALS deserve to die, Kyle intended to inflict a vicious and deliberate assault on his character and reputation, and to turn the SEAL community and Americans against him. And Kyle succeeded.

Kyle conceded that, for a Navy SEAL, the Trident medal is a “symbol of who were are.” In his book, he Kyle talks about the “SEAL mentality and lifestyle and camaraderie.” He also acknowledges that making a “dispute between two of its members public” could “harm the SEAL community.”

Kyle’s SEAL friends admit that the “story of Chris [Kyle] punching Ventura definitely took off within the SEAL community on the West Coast,” that the “fight between Chris [Kyle] and Ventura was well-known all over the West Coast SEAL teams,” “word of Chris [Kyle] punching out Ventura spread pretty quickly,” and that “the story . . . spread throughout . . . the SEAL community pretty fast.”

Before Kyle’s book came out, however, the story that was making the rounds in the SEAL community consisted of only vague references to Ventura being punched; there were “no details of the story. It’s . . . just that Chris knocked down Mr. Ventura.” Jones said that, “I think most of the community even forgot about it until the book came out.” Many different versions of the story have been told over the years, all of them having the general theme that “Jesse got knocked out on the deck of McP’s,” “Jesse got knocked out in front of McP’s,” or “Jesse got knocked out somewhere.” But, when the story had been told prior to Kyle’s book, “it was just somebody knocked him out,” and what Ventura supposedly said to provoke the punch was never part of the story, other than generalities about him “running his mouth.”

After Kyle’s book came out it was different. There are thousands of public comments posted on Internet and news sites that vilify, malign, disparage and, in general,

exhibit disgust, hatred, and contempt for Ventura because of the statement Kyle attributes to him about SEALs being murderers and deserving to die.

The Estate's own witnesses also uniformly agree that attributing to Ventura statements to the effect that he believes SEALs are murderers and SEALs deserve to die lowers his reputation and standing in the SEAL community. Paul testified that "[i]t's absolutely appalling to make those kinds of statements at a wake," and "it would be considered one brother turning against another if a SEAL actually did say that SEALs deserve to die for what they're doing overseas." "A former SEAL or former UDT guy who would say something like that would certainly be shunned by his former brothers . . . that's just bad—bad stuff all around," Dinnell testified.

Lacz said that the only thing more vile than the statements Kyle attributes to Ventura would be if he had said he hates God. Lacz also testified that a former SEAL who said that "SEALS were murderers, they were killing innocent people, and that SEALs deserved to die" would be held in "extremely low" regard. Or, as Kelly phrased it, "there's a deep dislike for the man now . . . Some stuff you just can't unsay"; "To me it's vile because it's close to my heart . . . those comments really affected me"; "He's no longer a SEAL to me . . . he's no longer welcome on the West Coast . . . he's not welcome at any reunion over there." I would not "consider that SEAL to be a member of the brotherhood," said Jones.

Debbie Job, the mother of a fallen SEAL, testified that saying SEALs deserve to lose a few "was a cruel thing to say," the statement "made [her] think less of Mr. Ventura," and that she cannot "think of anything worse to say." Krusic testified that,

“[a]nybody that says that their brothers deserve to die . . . that would sit wrong with anybody that heard it if it was in [the SEAL] community . . . [there is nothing] worse . . . than a SEAL turning on his brothers and telling others that they deserve to die.” And that, “[i]f a former SEAL actually said something . . . to the effect that his brothers deserve to die overseas while serving their country . . . [it] would pretty much destroy his reputation in the SEAL community.”

G. THE ESTATE HAS UNJUSTLY BENEFITED FROM CHRIS KYLE’S DEFAMATORY STATEMENTS ABOUT VENTURA.

Kyle’s book was released on January 3, 2012, and from January 4 through 10, 2012, he went on national television and radio programs to promote it. In those interviews, the primary topic of conversation was Kyle’s alleged altercation with Ventura. The publicity Kyle received from his interviews about the alleged incident with Ventura caused book sales to [REDACTED] and exceed all expectations, with the book’s publisher organizing a marketing campaign around the Ventura story to sell more. By January 22, 2012, *American Sniper* was No. 2 on the New York Times Bestseller list. It went to No. 1 by January 29, 2012.

The book has since been on a number of “best-seller” lists, and as of June 30, 2013, royalties were in excess of \$3 million. In June 2012, Chris Kyle optioned the movie rights to Warner Brothers Entertainment, Inc. Hollywood actor Bradley Cooper is set to produce and star in the movie adaptation.

In short, the evidence is that Kyle’s book was driven to No. 1 on the bestseller lists primarily by the publicity he received, and the controversy he generated, by telling his

false and defamatory story about Ventura. When all of the evidence is in at trial, it is for the jury to look at the revenue derived by Kyle and the Estate, and to determine what amount is necessary to compensate Ventura for the appropriation claim; and it is for the Court to determine the amount unjustly received by the Estate that must be disgorged on the unjust enrichment claim.

CONTROLLING LAW

A. DEFAMATION

1. Common Law Defamation

Common law defamation (libel and slander) requires: (i) a false and defamatory statement about the plaintiff; (ii) nonprivileged communicated to a third party; and (iii) a tendency to harm the plaintiff's reputation and to lower him in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *Stepnes v. Ritschel*, 663 F.3d 952, 963 (8th Cir. 2011); *Cavanaugh v. Burlington N. R.R. Co.*, 941 F.Supp. 872, 879 (D. Minn. 1996).

When a libel is expressed in clear and unambiguous terms, the question whether it is libel *per se* is one of law for the Court. *See Morey v. Barnes*, 2 N.W.2d 829, 831 (Minn. 1942) (“To be libelous per se, words must be of such a nature that the court can say, as a matter of law, that they will tend to disgrace and degrade the party defamed”). Where a publication “clearly defames a person . . . the court should instruct the jury that it is libelous as a matter of law.” *Id.*; *see also Sharpe v. Larson*, 70 N.W. 1, 1 (Minn. 1897) (“If the publication is obviously defamatory, it is the duty of the trial judge, in a civil action, to direct the jury, as a matter of law, that it is libel per se”).

2. The First Amendment's Actual Malice Standard

Defamatory statements about a public figure are not protected by the First Amendment if they are made with “actual malice,” meaning that they are knowingly false or were written with reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331–32 (1974). Because direct evidence of a defendant’s subjective knowledge of falsity is rare, a defamation plaintiff “is entitled to prove actual malice by circumstantial evidence.” *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 1003 (D. Minn. 1998) (citing *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989)).

A defendant cannot “automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.” *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). “Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination Nor will they be likely to prevail when the publisher’s allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” *Id.*

“[I]f the defendant is an eyewitness to an unambiguous event which he or she then misreports, a finding of ‘actual malice’ may arise from testimony of other witnesses establishing that the event did not happen as described.” ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §5.5.2, at 5-83–84 (4th ed. 2010); *see also Prinzing v. Schwab*, No. A05-398, 2006 WL 538926, at *1 (Minn. Ct.

App. Mar. 7, 2006) (“[W]hen a defendant's testimony as to his subjective beliefs simply is not credible, the fact-finder is free to disbelieve the testimony and draw a contrary conclusion.”).

3. Presumed Damages in Actions for Libel

Under the common law, libel is actionable *per se*, meaning that a plaintiff asserting a claim for libel need not produce evidence of actual or special damages. *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984) (“Courts at common law presumed damages from any libel.”). Minnesota courts have at times confused the concepts of libel—in which presumed damages are always available—with slander—in which presumed damages are only available if the defamatory statement fits into one of the slander *per se* categories. The Minnesota Supreme Court, however, has made clear that Minnesota follows the common law approach to libel claims:

[w]ritten publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous although they involve no imputation of crime, and are actionable without any allegation of special damages.

Advanced Training Sys., 352 N.W.2d at 9 (quoting *Byram v. Aikin*, 67 N.W. 807, 808 (Minn. 1896)).

B. MISAPPROPRIATION OF NAME AND LIKENESS

Misappropriation of name and likeness was recognized as part of the appropriation branch of the right of privacy by Minnesota’s Supreme Court more than a decade ago in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998). The elements are: (1)

appropriation; (2) of another's name and likeness; (3) for one's own use or benefit; (4) without consent. *Id.* There is no requirement under Minnesota law that the appropriation be for advertising or other commercial purposes. *Id.*; *see also* Minn. CIV JIG 72.15 ("Invasion of privacy by appropriation occurs when a person appropriates another person's name or likeness for his or her own use or benefit."), and official cmt. ("The Restatement rule, however, is not limited to commercial appropriations. The rule applies whenever the defendant appropriates the plaintiff's name or likeness for his own purposes or benefit, even if not commercial and pecuniary.").

C. UNJUST ENRICHMENT

Unjust enrichment is an equitable doctrine that provides a remedy where another party knowingly received something of value to which he was not entitled, and the circumstances are such that it would be unjust for that person to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). A claim in unjust enrichment lies where the defendant's conduct is morally wrong. *Id.*; *see also*, *ServiceMaster of St. Cloud v. GAB Business Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) ("To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant 'in equity and good conscience' should pay."). While Ventura's defamation claim provides damages to the extent of the harm to Ventura's reputation, damages for an unjust enrichment claim are measured by the extent of the unlawful and unjust benefit received by the Estate. *Zirinsky v. Sheehan*, 413 F.2d 481 (8th Cir. 1969) (recovery for unjust enrichment measured by defendant's gain; not plaintiff's loss).

HENSON & EFRON, P.A.

Dated: April 21, 2014

By s/ David Bradley Olsen

David Bradley Olsen, #197944

Court J. Anderson, #331570

John N. Bisanz, Jr., #0389098

220 South Sixth Street, Suite 1800

Minneapolis, MN 55402-4503

Telephone: (612) 339-2500

dolsen@hensonefron.com

canderson@hensonefron.com

jbisanz@hensonefron.com

Attorneys for Plaintiff Jesse Ventura, a/k/a James
Janos