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CHANNEL FOUR TELEVISION CORPORATION

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

JANE DOE

*Plaintiff,*

v.

HOME BOX OFFICE, Inc., a Corporation;  
SACHA BARON COHEN, an individual;  
THE DA ALI G SHOW, a business entity, form  
unknown; and DOES 2 through 50,

*Defendants,*  
and

CHANNEL FOUR TELEVISION CORPORATION,

*Defendant Substituted as  
Doe Defendant 1.*

) Case No. SC092739  
)  
) Assigned for all purposes to  
) *Honorable Terry B. Friedman*  
)  
) **DEFENDANT CHANNEL FOUR**  
) **TELEVISION CORPORATION'S**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **MOTION FOR SUMMARY**  
) **JUDGMENT, OR IN THE**  
) **ALTERNATIVE, SUMMARY**  
) **ADJUDICATION OF ISSUES**  
) [Filed Concurrently with Defendant's  
) Separate Statement of Undisputed  
) Material Facts and Evidence.]  
) Date: April 21, 2009  
) Time: 8:45 a.m.  
) Dept.: J  
)  
) Trial Date: May 26, 2009  
)  
) Discovery Cut-Off: April 27, 2009

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. SUMMARY OF ARGUMENTS**

4 The Plaintiff bases this lawsuit on a joking reference to her name by “Ali G,” who she  
5 admits is a “fictional character,” in the comedy television program known as *Da Ali G Show* (the  
6 “Program”). The Plaintiff alleges (a) that former defendant HBO distributed the offending episode  
7 (the “Episode”) of the Program at least 21 times across the United States in August of 2004, (b) that  
8 in December of 2004, Defendant Channel Four Television Corporation (“Channel 4”) distributed  
9 the Episode to Finland, (c) that HBO distributed the Episode in the U.S. again in 2005, (d) that in  
10 December, 2006, a viewer of the Finnish broadcast posted the offending segment of the Episode on  
11 YouTube, and (e) that in 2007, after the Plaintiff’s litigation support service failed to file her  
12 complaint under seal as her counsel instructed, the Plaintiff’s public lawsuit, which included her  
13 name in the original complaint, gave rise to a barrage of worldwide, negative publicity concerning  
14 the Plaintiff and her claims.

15 The court should grant summary judgment in favor of Channel 4 for the simple reason that  
16 the Plaintiff has been unable to articulate, or even allege, any damages proximately caused by  
17 anything Channel 4 has done or failed to do.

18 Channel 4 was not involved in HBO’s broadcast of the Plaintiff’s name on more than “21  
19 separate occasions” across the United States in 2004 – a mass distribution that the Plaintiff says  
20 caused “extreme damage” to her reputation – damage she says can never be repaired. This alone is  
21 enough to warrant dismissal of her defamation and negligence claims, as a matter of constitutional  
22 law. As discussed below, the courts have held that First Amendment principles do not allow such a  
23 plaintiff, who claims his or her reputation on a specific subject already has been tarnished, to  
24 recover for an alleged subsequent defamation on the same subject by a second publisher.

25 Even if Channel 4 could have damaged the Plaintiff’s allegedly already ruined reputation, by  
26 means of Channel 4’s later inadvertent release of the Episode in Finland, the Finland distribution  
27 caused no such damage. The Plaintiff admittedly knows no one in Finland.

28 The Plaintiff alleges instead that her Channel 4-related damages flowed from the illegal  
posting of a segment of the Finnish broadcast on YouTube. She admits, however, that Channel 4  
was not involved in this third-party act of copyright infringement.

1 But the Plaintiff claims that Channel 4 should have foreseen the posting on YouTube when  
2 Channel 4 distributed the Program to Finland in 2004. She is mistaken. YouTube simply did not  
3 exist at that time, nor did any other internet provider of its kind. As stated on YouTube's web site,  
4 and as confirmed by Channel 4's witness on the subject, YouTube was not available to the public  
5 until a year later. The Plaintiff has no evidence to counter the testimony of Channel 4 and its  
6 witnesses that Channel 4 did not foresee, and could not possibly have foreseen, an unauthorized  
7 internet posting of the allegedly offending segment on YouTube or anywhere else.

8 Because there is no evidence that Channel 4 proximately caused any of the Plaintiff's  
9 alleged damages, and because proximate cause is essential to any claim of defamation or  
10 negligence, those causes of action should be dismissed.

11 Furthermore, those claims indisputably are precluded by the fact that all of the alleged  
12 conduct of Channel 4, including the distribution of the Program in Finland, occurred nearly two  
13 years prior to her second settlement agreement with HBO, dated November 22, 2006, in which the  
14 Plaintiff released Channel 4 from all claims, known or unknown, arising from conduct in relation to  
15 the Program. The Plaintiff has admitted that the settlement agreements are binding.

16 In her remaining alleged causes of action for fraud and negligent misrepresentation, the  
17 Plaintiff further claims that Channel 4 tricked her into signing the settlement agreements with HBO,  
18 by falsely promising not to broadcast her name in the future. However, the Plaintiff admitted at her  
19 deposition that notwithstanding Channel 4's alleged breach of promise, she "absolutely" was better  
20 off by entering into the settlements. Indeed, the settlement agreements provided her with \$90,000,  
21 and they allowed her to sue again if anyone distributed the Program with her name in it in the  
22 future. She now admits that she does not regret signing them. Because the settlements are the only  
23 alleged consequence of Channel 4's alleged fraud and misrepresentation, the Plaintiff effectively  
24 admits that she suffered no damage in relation to those causes of action.

25 Even if the Plaintiff were to try to recant her admissions, and say instead that the settlements  
26 were harmful to her because she gave up a valuable right to sue HBO in relation to its broadcast of  
27 the Program, this would be unavailing. As discussed below, damages in fraud and  
28 misrepresentation claims cannot be founded on speculation. There could be no claim more  
speculative than an assertion that had a lawsuit been pursued, it would have resulted in both victory  
and a recovery of a particular amount of damages.

1           The Plaintiff’s attempt to recover damages caused by her own decision to litigate also  
2 should be dismissed. As discussed below, it is axiomatic under California law that a plaintiff  
3 cannot use the consequences of his/her/its own litigation as a basis for otherwise non-existent  
4 damages. Accordingly, the Plaintiff cannot use her alleged stress, medical and acupuncture bills,  
5 filing fees, missed work, and other alleged costs of her decision to sue Channel 4, as a basis for a  
6 damage claim. The same is especially true in relation to the widespread, derogatory, media  
7 publicity about her that she admits was the result of the failure of her counsel’s litigation support  
8 service to file her original complaint under seal.

9           Lastly, the dissemination of the allegedly libelous statements could not have caused damage  
10 in any event. This is because no reasonable person could have believed the statements, given that  
11 they were made by what the Plaintiff now admits is a “fictional character,” in the context of a series  
12 of absurd and unbelievable jokes, in what she admits is a “comedy,” where the actor never steps out  
13 of his fictional role. This is confirmed by the fact that the Plaintiff has no evidence that anyone  
14 believed any of the statements, much less the statement at the core of this lawsuit, namely, that the  
15 Plaintiff had sex with a fictional character. As a matter of California and U.S. constitutional law,  
16 such statements are not actionable, as discussed below.

## 16       **II.       INDISPUTABLE BACKGROUND FACTS**

17           The Plaintiff publicly filed this action on February 9, 2007 against HBO, comedian Sacha  
18 Baron Cohen, the Program at issue, and 50 unnamed “Doe” defendants. [Smith Decl. at ¶2]. On or  
19 about October 23, 2007, the Plaintiff voluntarily dismissed the entire complaint (the “Complaint”),  
20 with prejudice, as to all of the above-named defendants, in exchange for the substitution of Channel  
21 4 as Doe Defendant Number 1. [*Id.* at ¶ 2]. This was so-ordered by the Court on October 24, 2007.  
22 [*Id.* at ¶ 2]. More than 60 days have elapsed since Channel 4 has entered its appearance in this case.  
23 [*Id.* at ¶ 2]. This motion has been served on all parties in this case at least 75 days before the  
24 scheduled date of the hearing, April 21, 2009. [*Id.* at ¶ 2]. The hearing date is at least 30 days  
25 before the scheduled trial date, May 26, 2009. [*Id.* at ¶ 2]. Channel 4 has responded to all of the  
26 Plaintiff’s discovery requests, none of which remain pending. [Smith Decl. at ¶ 21].

27           The Plaintiff alleges that she “noticed [Cohen's] rise on television as a comedian as much as  
28 an average member of the general public.” [*Id.* at ¶ 8]. Cohen appears on the comedy Program “in

1 the persona of Ali G., a would be gangsta rapper....” [Compl. at ¶ 3, annexed to Smith Decl. as Exh.  
2 1]. Ali G is a “fictional character” who “pretends to be a black man.” [Channel 4’s Request for  
3 Admissions Set One No. 1, Request No. 1, and Plaintiff’s Response to Same, annexed as Exhs. 13  
4 and 14 to Smith Decl.] [Compl. at ¶ 4].

5 During an episode of the Program, the admittedly “fictional” Ali G “character,” in a spoof  
6 interview with noted historian and author Gore Vidal, while purportedly discussing amendments to  
7 the U.S. Constitution, remarked as follows:

8 Ain't it better sometimes, to get rid of the whole thing rather than amend it cos  
9 like me used to go out with this bitch called [Jane Doe] and she used to always  
10 be trying to amend herself. Y'know, get her hair done in highlights, get like  
11 tattoo done on her batty crease, y'know have the whole thing shaved – very  
12 nice but it didn't make any more difference. She was still a minger and so,  
13 y'know me had enough and once me got her pregnant me said alright, later,  
14 that is it. Ain't it the same with the Constitution?

15 [Am. Compl. ¶ 11; Exh. 2 to Naik Decl.]. Mr. Vidal laughed, and then responded as follows:

16 “Well, the Constitution has not yet become pregnant.” [Exh. 2 to Naik Decl.].

17 After HBO broadcast the Program “on at least 21 separate occasions” across the United  
18 States in 2004, the Plaintiff brought a claim against HBO. [Am. Compl. at ¶12 annexed as Exhibit 2  
19 to Smith Decl.]. This resulted in a settlement agreement between the Plaintiff and HBO, dated  
20 November 23, 2004. [Exh. 1 to Compl., annexed as Exh. 1 to Smith Decl.]. As a mere licensee for  
21 distribution outside the U.S., Channel 4 was not involved in HBO’s U.S. distribution of the  
22 Program. [Naik Decl. at ¶¶ 4, 6, 9].

23 In paragraphs 3 and 4 of the settlement agreement, the Plaintiff expressly released HBO and  
24 all of HBO's “licensees” (which included Channel 4, as the Plaintiff admits in paragraph 22 of her  
25 original Complaint [Exh. 1 to Smith Decl.]) from “any and all claims... whether known or  
26 unknown... arising out of or related to the Program...” [Exh. 1 to Compl., annexed as Exh. 1 to  
27 Smith Decl.].

28 The Plaintiff alleges that Channel 4 “directly stated in a letter dated October 12, 2004 that  
Channel 4 had removed the offending audible reference which identified the Plaintiff from the  
program in question, and that Channel 4 [would] not broadcast, license, assign, or otherwise  
distribute any version of [the allegedly offending] episode of the show in which the [Plaintiff’s]  
name [] is audible.” [Am. Compl. at ¶¶ 13-14]. The Plaintiff alleges that the “promise and

1 representations made by Channel 4 in the [ ] letter were instrumental in persuading Plaintiff to  
2 settle [with HBO].” [Id.]

3 The Plaintiff admits, however, that notwithstanding Channel 4’s alleged later breach of that  
4 promise, she “absolutely” was better off by entering into this settlement with HBO, as well as the  
5 second subsequent settlement with HBO discussed below. [Doe Dep. Tr<sup>1</sup> p. 82:17-20, annexed to  
6 Smith Decl. as Exh. 7]. The settlement agreements collectively provided the Plaintiff with  
7 \$90,000, and they both allowed her to sue again if anyone distributed the Program with her name in  
8 it in the future. [Exhs. 1 and 2 to Compl., annexed as Exh. 1 to Smith Decl.]. The Plaintiff admits  
9 that she does not regret signing them. [Doe Dep. Tr. at p. 88:15-17, annexed to Smith Decl. as Exh.  
10 7]. In fact, she never sued for fraudulent inducement and/or rescission of either of the settlement  
11 agreements. [Smith Decl. at ¶ 13]. To the contrary, in her original complaint, she annexed the  
12 settlement agreements and sued to enforce them. [Exh. 1 to Smith Decl.]

13 The Plaintiff further alleges that “on or about December 31, 2004,” following the first  
14 settlement agreement, Channel 4 sent “the full and unedited version to YLE Finnish television” and  
15 that “the unedited segment of this particular interview was broadcast in its entirety on YLE Finnish  
16 Television.” [Am. Compl. at ¶ 15]. The plaintiff admits that she knows no one in Finland.  
17 [Channel 4’s Special Interrogatories Set One No. 15 and Plaintiff’s response to the same]. She  
18 claims no direct damages from the Finnish broadcast. [Smith Decl. at ¶ 18].

19 The Plaintiff alleges that in December, 2005, HBO distributed the Program with the  
20 Plaintiff’s name in it again, through HBO’s “on demand” service via Comcast. [Compl. at ¶17].  
21 This led to a second settlement agreement between HBO and the Plaintiff, containing the same  
22 terms as the first settlement, except that instead of paying the Plaintiff \$40,000, this time HBO paid  
23 the Plaintiff \$50,000. [Exh. 2 to Complaint, annexed as Exhibit 1 to Smith Decl.]. Channel 4 had  
24 no involvement in the 2005 broadcast by HBO, although Channel 4 once again was released by the  
25 Plaintiff in the second settlement agreement from “any and all claims... whether known or  
26 unknown,... arising out of or related to the Program...” [Id. at ¶¶ 3 and 4]. Again, the Plaintiff  
27 released all of HBO’s “licensees,” which included Channel 4, as she admits in Paragraph 22 of her  
28 Complaint, annexed to the Smith Declaration as Exhibit 1. All of the alleged conduct of Channel 4,

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1 Citations to Jane Doe's deposition transcript are to the unsigned transcript provided to counsel by the court reporter on January 28, 2009. The parties have agreed that the Plaintiff may revise, if required, and return her signed deposition within fifteen days of her receipt of her copy. However, because the motion for summary judgment is due now, and a signed transcript has not yet been provided, Channel 4 is entitled to rely upon the unsigned transcript. *See Nizuk v. Gorges*, (1960) 180 Cal. App.2d 699 (motion for summary judgment based in part upon two unsigned depositions was upheld).

1 including not only the alleged 2004 false promise to refrain from further publication of the  
2 Plaintiff's name, but also the 2004 distribution of the Program in Finland, occurred prior to this  
3 2006 agreement, which released Channel 4 from all claims. The Court declined to rule in Channel  
4 4's favor on this point at the demurrer stage, noting that "[s]ince the settlement agreement is neither  
5 attached to the FAC nor are its terms pled, the Court cannot determine whether it bars this action."  
6 [*Doe v. Channel Four*, Case No. SC092739, Ruling dated May 22, 2008]. In this summary  
7 judgment motion, however, attached to the Smith Declaration as Exhibit 1 is the Plaintiff's original  
8 complaint, including both settlement agreements annexed by the Plaintiff.

9 The Plaintiff further alleges that in December of 2006, a viewer of the Episode on Finnish  
10 television posted the offending spoof interview on YouTube. [Channel 4's Special Interrogatories  
11 Set Two No. 14 and Plaintiff's Response to the same, annexed as Exhs. 3 and 4 to Smith Decl.].  
12 The Plaintiff admits that Channel 4 was not involved in the YouTube posting. [*Id.*]. However, she  
13 maintains that Channel 4 should have foreseen the posting on YouTube when Channel 4 distributed  
14 the Program to Finland in December of 2004. [See Plaintiff's Response to Form Interrogatories Set  
15 Two p.15:14, qualifying Plaintiff's Response to Request for Admissions Set One No. 31, annexed as  
16 Exhs. 8 and 14 to Smith Decl.]. Contrary to the Plaintiff's position, however, as confirmed by both  
17 YouTube itself and Channel 4's witness on the subject, Gary Shoefield, YouTube did not exist at  
18 that time, and it was not available to the public until a year later. [Shoefield Decl. p.2 at ¶¶ 6-7].  
19 Also, YouTube was the first internet portal of its kind. [*Id.*].

20 The Plaintiff has no evidence to counter the testimony of Channel 4 and its witness that  
21 Channel 4 could not possibly have foreseen an unauthorized internet posting of the Episode to  
22 YouTube or anywhere else. [Smith Decl. at ¶ 19].

23 The Plaintiff further alleges that in 2007, after the litigation support service employed by her  
24 counsel failed to file her complaint under seal as instructed, the Plaintiff's public lawsuit gave rise  
25 to a barrage of worldwide, negative publicity concerning her and her complaint. [Channel 4's  
26 Special Interrogatories Set One p.7 No. 19 and Plaintiff's Response to Same annexed as Exhs. 5 and 6 to  
27 Smith Decl.]; [Channel 4's Request for Admissions Set One p.5 No.21 and Plaintiff's Response to  
28 Same annexed as Exhs. 13 and 14 to Smith Decl.]; [Doe Dep. Tr. p. 50:24-p. 51:2 & p. 52:17-p.  
53:7 annexed as Exh. 7 to Smith Decl.]; [See Daniel's Letter to Filing Service annexed as Exh. 10 to  
Smith Decl.].

1 The Plaintiff admits that all of the allegedly damaging media articles about her were written  
2 in connection with her public lawsuit. [Channel 4's Special Interrogs. Set One p.7 No. 19 and  
3 Plaintiff's Response to Same annexed as Exhs. 5 and 6 to Smith Decl.]. At the hearing on May 22,  
4 2008, the Court granted a demurrer against the Plaintiff's false light claim, with leave to amend (the  
5 Plaintiff did not do so), and the Court dismissed the claim of negligent infliction of emotional  
6 distress, without leave to amend. [*Id.* at ¶ 2]; [*Doe v. Channel Four*, Case No. SC092739, Ruling  
dated May 22, 2008].

7 With regard to Channel 4's argument that no reasonable person could have believed the  
8 allegedly damaging statements in the Episode, the Court declined at the demurrer stage to take  
9 judicial notice of the DVD that provided the context for the statements. However, this context is  
10 now available to the Court at the summary judgment stage. A copy of the Episode at issue is  
11 annexed to the declaration of Channel 4 in-house counsel Prash Naik in DVD format as Exhibit 2.  
12 The segment at issue, namely, Ali G's allegedly reference to the Plaintiff in the spoof interview  
13 with Gore Vidal, can be found 2 minutes and 32 seconds from the beginning of the Exhibit.

14 In the spoof interview about which the Plaintiff complains, the admittedly "fictional  
15 character" Ali G states that the U.S. Constitution was written on two stone tablets, that Moses was  
16 involved in its writing, and that author Gore Vidal is a world-famous hair stylist (apparently  
17 mistaking Mr. Vidal for Vidal Sassoon). [Exh. 2 to Naik Decl.]. Elsewhere in the same Episode, the  
18 character states that actor Denzel Washington lives in George Washington's former home at Mount  
19 Vernon, that John Paul Jones had no arms or legs, that the world is running out of gravity, that  
20 gravity was discovered by "Sir Isaac Newton-John" after shooting an apple from William Tell's  
21 head, that euthanasia refers to the killing of elderly people by youth in Asia, and that the character's  
face now has been included on Mount Rushmore. [*Id.*].

22 With regard to the statements allegedly concerning the Plaintiff, she is unable to produce  
23 any evidence that anyone believed any of them, much less the statement at the core of her lawsuit,  
24 namely, that the fictional character, Ali G (and supposedly by implication, the comedian playing  
this character), had sex with the Plaintiff. [Smith Decl. at ¶ 19].

25 In the Program and the Episode, the well-known comedic actor Sacha Baron Cohen plays  
26 the Ali G character as a white man who is a "wannabe" black gangster-rapper, posing a steady  
27 stream of ridiculous questions and obviously false comments to the guests on the show. [Exh. 2 to  
28

1 Naik Decl.; Naik Decl. at ¶ 4]. The character has attained a huge following around the world for his  
2 incredulous and idiotic interview style and his misguided statements that he is black. [*Id.*].  
3 Throughout the Program and the Episode, Mr. Cohen never steps out of character, and never  
4 appears as himself. [*Id.*]. When this point was raised by Channel 4’s counsel at the oral argument of  
5 the demurrer motion, the Court responded as follows: “That sounds like a very convincing argument  
6 to be made at a fact-based motion or trial.” [Transcript of Demurrer Hearing dated May 22, 2008  
7 p.5:15, annexed as Exh. 12 to Smith Decl.].

### 8 **III. LEGAL STANDARD**

9 A summary judgment motion or summary adjudication of issues must be granted “if all the  
10 papers submitted show that there is no triable issue as to any material fact and the moving party is  
11 entitled to a judgment as a matter of law.” C.C.P. § 437c(c). A “defendant... has met its ‘burden of  
12 showing that a cause of action has no merit if’ it ‘has shown that one or more elements of the cause  
13 of action ... cannot be established.’” *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849;  
14 *County of Los Angeles v. Security Ins. Co. of Hartford* (1975) 52 Cal App.3d. 816. Even if the  
15 Court deems that some triable issues of fact exist, the Court has the power to summarily adjudicate  
16 where one or more causes of action have no merit, or where one or more claims for damages have  
17 no merit. C.C.P. § 437c(f)(1).

### 18 **IV. ARGUMENT**

#### 19 **A. THE PLAINTIFF'S DEFAMATION AND NEGLIGENCE CLAIMS SHOULD 20 BE DISMISSED FOR LACK OF PROXIMATE CAUSE**

21 Proximate cause is required for any defamation or negligence claim. *See e.g. Curley v. Vick*  
22 (1963) 211 Cal.App.2d 670, 673 (lack of proximate cause negates foreseeability and destroys the  
23 basis upon which the owner may be held liable for republication of a libelous statement); *Lopez v.*  
24 *Kline*, 124 N.M. 539, 953 P.2d 304 (N.M.App.,1997) (“Proximate cause is an element of  
25 defamation.”); *Brewer v. Teano* (1995) 40 Cal. App.4th 1024, 1030, 47 Cal. Rptr.2d 348; *Frantz v.*  
26 *San Luis Medical Clinic* (1978) 81 Cal.App.3d 34, 39, 146 Cal.Rptr. 146, 150 (under California  
27 law, “proximate cause is a prerequisite for recovery of damages for negligence”). According to the  
28 Plaintiff's own admissions, there are only three events that caused her alleged damages: a) HBO's  
repeated nationwide broadcasts of the Episode in 2004 and 2005, b) the third-party posting of the  
Episode on YouTube, and c) the derogatory media articles, court costs, and other consequences of

1 the Plaintiff's public pursuit of this lawsuit. [Smith Decl. p.3 at ¶6]. As discussed below, none of  
2 these events were caused by, or attributable to, Channel 4.

3 **1) Channel 4 Did Not Cause HBO's Broadcasts of the Episode, and in**  
4 **Addition, the Broadcasts Rendered the Plaintiff Damage-Proof**

5 The Plaintiff claims that she was physically, emotionally, and economically damaged by  
6 HBO's nationwide broadcasts of the Episode, which the Plaintiff alleges "was aired in full on at  
7 least twenty one (21) separate occasions" in the Summer of 2004. [Am. Compl. at ¶12]. She alleges  
8 she was further damaged by HBO in 2005, when HBO distributed the Episode with the Plaintiff's  
9 name in it again, through HBO's "on demand" service via Comcast. [Compl. at ¶17]. The Plaintiff  
10 stated at her deposition that she suffered severe physical and emotional injuries as a result of HBO's  
11 broadcasts. [Doe Dep. p.10: 22-p.11:24; annexed to Smith Decl. as Exh. 7]. She further stated that  
12 HBO's nationwide distribution of the Episode caused "extreme" damage to her personal and  
13 professional reputation, and that her reputation was not restored prior to the later posting of the  
14 Episode on YouTube. [Doe Dep. p.18:1-p.21:2].

14 The Plaintiff's admission that her reputation already was "extremely" and irreparably  
15 damaged prior to the YouTube posting, by itself is enough to require a dismissal of her defamation  
16 and negligence claims as a matter of constitutional law. *See, e.g. Guccione v. Hustler Magazine,*  
17 *Inc.*, 800 F.2d 298 (2nd Cir.1986) (Jon O. Newman, Circuit Judge), where the U.S. Court of  
18 Appeals for the Second Circuit held as follows:

18 [A] plaintiff's reputation with respect to a specific subject may be so badly tarnished  
19 that he cannot be further injured by allegedly false statements on that subject.... [I]n  
20 those instances where an allegedly libelous statement cannot realistically cause  
21 impairment of reputation because the person's reputation is already so low..., even  
22 nominal damages are not to be awarded. Instead, the claim should be dismissed so  
23 that the costs of defending against the claim of libel, which can themselves impair  
24 vigorous freedom of expression, will be avoided.

23 800 F.2d at 303-304 (internal citations omitted); *see also Wynberg v. National Enquirer, Inc.*, 564  
24 F. Supp. 924, 928-29 (C.D.Cal.1982).

25 In *Guccione*, a plaintiff sued a pornographic magazine, *Hustler*, alleging that an offensive  
26 cartoon falsely suggested he had committed adultery. 800 F.2d at 303-304. The Second Circuit  
27 court dismissed the plaintiff's case, noting that he admitted that before the alleged libel, he already  
28 had a reputation for adultery, among his friends, relatives, and business associates. *Id.* Similarly, in

1 the case here, the Plaintiff herself alleges that the previous nationwide broadcasts by HBO caused  
2 “extreme” and irreparable damage to her personal and professional reputation among the people  
3 who know her, on the very same subject of the alleged defamation by Channel 4. [Am. Compl. pp.  
4 7-8, ¶¶ 22-23, annexed as Exh. 2 to Smith Decl.] [Doe Dep. pp.18:24-19:4, pp.20:24-21:2, annexed  
5 to Smith Decl. as Exh. 7].

6 Accordingly, just as the Second Circuit dismissed Guccione’s case under the First  
7 Amendment libel-proof doctrine, the current case also should be dismissed. Although the Plaintiff  
8 might argue that there should be no similar First Amendment protection for the allegedly offensive  
9 statements in the Ali G Episode, it should be noted that the *Guccione* decision applied to a cartoon  
10 in a pornographic magazine. In that regard, Judge Newman stated as follows: “We must be careful  
11 in cases such as this not to accord... the pornographer defendant less protection than would be  
12 accorded libel litigants who publish more traditional works of literature or journalism.” *Id.* at 299.  
13 In any event, the television comedy at issue here, far from being pornographic, is highly acclaimed  
14 and has won many prestigious awards for its satiric portrayal of the buffoonish “wannabe rapper,”  
15 Ali G. [Naik Decl. at ¶ 5].

16 In the Los Angeles case of *Wynberg v. National Enquirer*, where a Plaintiff sued under  
17 California law, claiming that he had been defamed in a tabloid article suggesting he used his  
18 relationship with actress Elizabeth Taylor to take financial advantage of her, the court cited  
19 *Guccione* in granting summary judgment for the defendant. 564 F. Supp. at 928-29 (C.D.Cal.1982).  
20 The court noted, among other things, that because of numerous prior articles in other publications  
21 on the same subject, the plaintiff had “established a specific reputation for taking financial  
22 advantage of Elizabeth Taylor,” rendering him damage-proof on that issue. *Id.*

23 For the reasons cited above, the repeated HBO broadcasts make it impossible for the  
24 Plaintiff to obtain defamation or negligence damages on the grounds of any subsequent publication  
25 by Channel 4 on the same subject. However, even if the Court were not persuaded on that point, at  
26 least one thing is beyond dispute: Channel 4 did not cause the HBO broadcasts or any resulting  
27 damage.

28 **2) Channel 4 Did Not Cause, and Could Not  
Have Foreseen, the Posting on YouTube**

The Plaintiff claims no direct damages from Channel 4’s December 2004 distribution of the  
Episode in Finland. Indeed, she admits she knows no one in Finland and cannot identify anyone she

1 knows who saw the broadcast there. [Channel 4's Special Interrogatories Set One p.6 No. 15 and  
2 Plaintiff's Response to same, annexed to Smith Decl. as Exhs. 5 and 6]; [Doe Dep. p. 137:6- p.  
3 138:17 annexed to Smith Decl. as Exh. 7]. Instead, she focuses her claims against Channel 4 on the  
4 December 2006 posting of a portion of the Finland broadcast on YouTube. [Channel 4's Special  
5 Interrogatories Set Two p.7 No.21 and p.12 No. 43 and Plaintiff's Responses to same, annexed to  
6 Smith Decl. as Exhs. 3 and 4]. For example, the Plaintiff repeatedly states that "since learning of  
7 the unedited version of the program appearing on YouTube ... [she] has periodically experienced  
8 physical pain.... Also, humiliation, shame and mortification." [*Id.*].

9 However, it is beyond dispute that Channel 4 neither posted the allegedly offending segment  
10 on YouTube, nor authorized anyone to do so. [Naik Decl. at ¶ 10]. The Plaintiff admits that the  
11 illegal upload was made by an individual allegedly located in Estonia. [Channel 4's Special  
12 Interrogatories Set Two p.5 No.14 and Plaintiff's response to the same, annexed to Smith Decl. at  
13 Exhs. 3 and 4]. Accordingly, the alleged damages, if there were any, were caused by that  
14 individual, and not by Channel 4.

15 Moreover, it is beyond genuine dispute that Channel 4 did not, and could not foresee that its  
16 distribution of the Episode in Finland would result in a posting on YouTube or anywhere else. [Naik  
17 Decl. at ¶ 11]. This is because when Channel 4 licensed and sent the Episode to Finland in  
18 December of 2004, YouTube did not exist, nor did any other site of its kind. [Shoefield Decl. at ¶¶ 6  
19 and 7]. As reflected on its own web site, YouTube, the first internet portal of its kind, was not  
20 launched until a year later. [*Id.*].

21 The Plaintiff has no evidence of foreseeability, and without it, her claims must be dismissed  
22 as a matter of law, because “[f]orseeability is a principal element of proximate cause....” *See e.g.*  
23 *Curley v. Vick* (1963), 211 Cal. App. 2d 670, 673 (without some element of proximate cause, and  
24 thereby reasonable foreseeability, the original publisher could not be held liable for any subsequent  
25 republication).

26 Even if YouTube had existed in 2004, Channel 4 could not have foreseen that a viewer of  
27 the Finland broadcast would break the law by uploading Channel 4’s copyrighted material to an  
28 online video-sharing website. [Naik Decl. at ¶ 11-12]. The illegal posting on YouTube was an  
intervening act that relieves Channel 4 of liability for defamation and negligence. “Criminal  
conduct which causes injury will ordinarily be deemed *the* proximate cause of injury, superseding  
any prior negligence which might otherwise be deemed a contributing cause.” *Koepke v. Loo*,

1 (1993) 18 Cal. App. 4th 1444, 1449, 23 Cal.Rptr.2d 34, *citing* 6 Witkin, Summary of Cal. Law (9th  
2 ed. 1988) Torts, § 992, pp. 382, 383 (emphasis in original); *see* 17 U.S.C. § 506(a)(1)(B). It is well-  
3 settled that an intervening act is not foreseeable and thus is a superseding cause of injury “if the  
4 independent intervening act is highly unusual or extraordinary, not reasonably likely to happen....”  
5 *Scrimsher v. Bryson* (1976) 58 Cal App. 3d 660, 664. For the reasons discussed in the Naik and  
6 Shoefield declarations, this is exactly the situation here.

7 **3) Channel 4 Did Not Cause, and Could Not Have**  
8 **Foreseen, the Plaintiff’s Public Filing of this Lawsuit**

9 In another effort to articulate damages attributable to Channel 4, the Plaintiff points to a  
10 barrage of media articles about her lawsuit. [Channel 4's Special Interrogatories Set One p.7 No.19  
11 and Plaintiff's response to the same; Channel 4's Special Interrogatories Set One p.7 No.20 and  
12 Plaintiff's response to the same; Channel 4's Special Interrogatories Set One p.7 No.21 and  
13 Plaintiff's response to the same, annexed to Smith Decl as Exhs. 5 and 6].

14 Yet, while at the same time blaming Channel 4 for this, the Plaintiff admits that the negative  
15 publicity was the result of the failure of her counsel’s litigation support service to file her original  
16 complaint under seal. [Doe Dep. pp.49:5-53:7, annexed to Smith Decl. as Exh. 7]; [Daniels Letter to  
17 Filing Service, annexed to Smith Decl. as Exh. 10]. The Plaintiff further admits that none of the  
18 unflattering media articles she lists as evidence of her suffering were published before the lawsuit  
19 was filed publicly, and all of them are about her lawsuit. [Channel 4's Request for Admissions Set  
20 One p.5 No.21 and Plaintiff's response to the same, annexed to Smith Decl. as Exhs. 13 and 14]. In  
21 her original complaint that the Plaintiff inadvertently made available to the media, she included  
22 several references to her real name, and even her social security number. [Compl. at ¶¶ 13, 29, 41  
23 and 54, annexed to Smith Decl. as Exh. 1; Exhs. 1 and 2 to Compl.]. Her public filing of the  
24 complaint resulted in worldwide repetition of the allegedly defamatory remarks in dozens of  
25 publications. [Channel 4's Special Interrogatories Set One p.7 No.19 and Plaintiff's Response to  
26 same; Channel 4's Special Interrogatories Set One p.7 No.20 and Plaintiff's Response to same;  
27 Channel 4's Special Interrogatories Set One p.7 No.21 and Plaintiff's Response to same annexed to  
28 Smith Decl as Exhs. 5 and 6]; [Channel 4's Request for Admissions Set One No. 21 and Plaintiff's  
Response to same, annexed to Smith Decl. as Exhs. 13 and 14]; [Doe Dep. pp.49:5-53:7, annexed to  
Smith Decl. as Exh. 7]; [Daniels Letter to Filing Service, annexed to Smith Decl. as Exh. 10].

1 If this caused damages to the Plaintiff, once again, Channel 4 was not the cause. Moreover,  
2 Channel 4 did not and could not foresee that this lawsuit would be filed at all, much less in public  
3 for all the world to see. [Naik Decl. at ¶ 11-12]. Accordingly, the Plaintiff has no evidence that  
4 Channel 4 proximately caused the negative publicity about the Plaintiff and her lawsuit. For the  
5 reasons cited above, without proximate cause, the Plaintiff's claims for damages regarding the  
6 media coverage must fail.

7 The same holds true for all of the other damages she alleges were caused by her own  
8 litigation, such as alleged stress, medical and acupuncture bills, court filing fees, attorneys' fees,  
9 missed work, and other alleged costs of her decision to sue Channel 4. [Channel 4's Form  
10 Interrogatories Set One Nos. 6.3, 8.0 and 9.1 and Plaintiff's Response to same, annexed as Exhs. 15  
11 and 16 to Smith Decl.] [Doe Dep. pp.63:22-64:22, annexed to Smith Decl. as Exh. 7].

12 In any event, litigation costs cannot be claimed as damages. *MacCharles v. Bilson*, (1986)  
13 186 Cal.App.3d 954, 958, 231 Cal.Rptr. 155, 157 (“It has always been understood in our system  
14 that attorney's fees and the mental stress of litigation are burdens which the parties must ordinarily  
15 bear themselves”); *Marron v. Superior Court* (2003), 108 Cal.App.4th 1049, 1065 (“Recovery of  
16 litigation costs, including statutory attorney fees, is *not* considered part of an award of damages”);  
17 *Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, 1308 (“When  
18 authorized by statute, awards of attorney's fees are expressly defined as costs, not damages”).

19 We respectfully submit that the Plaintiff should not be allowed to use the consequences of  
20 her own lawsuit to invent a case for damages. For the reasons discussed in the points above, there  
21 were no recoverable damages against Channel 4 when the Plaintiff filed her complaint. To allow  
22 her to salvage an unsustainable lawsuit, by allegedly causing damages by filing it, would be both  
23 absurd and contrary to California law.

24 **B. THE PLAINTIFF RELEASED CHANNEL 4 FROM HER DEFAMATION AND  
25 NEGLIGENCE CLAIMS IN HER 2006 SETTLEMENT, WHICH SHE SIGNED  
26 AFTER ALL OF THE CONDUCT SHE ALLEGES ON THE PART OF CHANNEL  
27 4, AND WHICH INCLUDED A RELEASE OF ALL CLAIMS “KNOWN AND  
28 UNKNOWN”**

29 On November 22, 2006, nearly two years after Channel 4 made the alleged false promise to  
30 delete the Plaintiff's name from all further distributions of the Episode, and nearly two years after  
31 Channel 4 licensed and shipped the Episode to Finland, the Plaintiff entered into the second of her

1 two settlement agreements in this matter. In paragraphs 3 and 4 of the second agreement, the  
2 Plaintiff expressly released all of HBO’s “licensees” (which include Channel 4, as the Plaintiff  
3 admits in Paragraph 22 of her original Complaint – *see* Exh. 2 to Smith Decl.) from “any and all  
4 claims... whether known or unknown... related to the Program....” [Exh. 2 to Original Complaint,  
5 annexed to Smith Decl. as Exh. 1]. Although her settlement allowed her to bring an action “against  
6 any person or entity who unlawfully broadcasts or otherwise disseminates any sound recording of  
7 [the Plaintiff’s] name in the future,” Channel 4’s only distribution of the Episode occurred prior to  
8 the settlement, and not “in the future.” [Naik Decl. at ¶7 and Shipping Invoice annexed to Naik  
9 Decl. as Exh. 1].

10 In short, all of the conduct and omissions of Channel 4 alleged by the Plaintiff in this action  
11 occurred prior to her releasing Channel 4 of all claims, “known or unknown,” in relation to the  
12 Program. The Court declined to consider this release at the demurrer stage, because the release was  
13 not included in the motion itself, but rather was cited as part of the record of the case, since the  
14 Plaintiff attached it to her original Complaint. [*Doe v. Channel Four*, Case No. SC092739, Ruling  
15 dated May 22, 2008 (“Since the settlement agreement is neither attached to the FAC nor are its  
16 terms pled, the Court cannot determine whether it bars this action”)]. The release is included in this  
17 summary judgment motion, however, and it bars at least the Plaintiff’s causes of action for  
18 defamation and negligence. [Exh. 2 to Complaint, annexed to Smith Decl. at Exh. 1].

19 In that connection, it is noteworthy that the Plaintiff does not dispute the binding nature of  
20 her settlement agreement containing the release. Her lawsuit originally included a claim for breach  
21 of the settlement agreements, and the Plaintiff never has sued for fraudulent inducement or  
22 rescission of either of them. To the contrary, she admitted at her deposition that notwithstanding  
23 Channel 4’s alleged breach of promise, she “absolutely” was better off by entering into the  
24 settlements. [Doe Dep. Tr. p.72:17-20, annexed to Smith Decl. as Exh. 7]. Indeed, the settlement  
25 agreements provided her with \$90,000, and they allowed her to sue again if anyone distributed the  
26 Program with her name in it in the future. [*Id.* at pp. 83:25-84:8]. She admits that she does not  
27 regret signing them. [*Id.* at p. 88:15-17].

28 Presumably that is why she chose not to sue for fraudulent inducement or rescission, which  
would have involved a challenge to the validity of the agreements. *See* Civ. Code, § 1691; *Star  
Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal. App.3d 447, 457 (“in order to  
obtain rescission of an agreement, including rescission on the basis of inducement into the

1 agreement by the defendant's fraudulent misrepresentation, a plaintiff must generally restore to the  
2 defendant everything of value which the plaintiff has received from defendant under the  
3 agreement”). Instead, she sued for simple fraud and negligent misrepresentation – claims that do  
4 not involve rescission. *Id.* at 461 (an aggrieved party “may elect either the contract remedy,  
5 consisting of restitution based on rescission or the tort remedy, by affirming the contract and  
6 seeking damages”).

7 Accordingly, the Plaintiff’s release of Channel 4 is binding and indisputably requires  
8 dismissal of at least her defamation and negligence claims.

9 **C. THE PLAINTIFF'S DEFAMATION AND NEGLIGENCE CLAIMS SHOULD BE**  
10 **DISMISSED ALSO BECAUSE NO REASONABLE PERSON COULD HAVE**  
11 **UNDERSTOOD THE ALLEGEDLY DEFAMATORY STATEMENTS TO BE**  
12 **STATEMENTS OF FACT**

13 California courts repeatedly have held that an obvious joke, told during an obvious comedy  
14 performance, which no sensible person could take seriously, cannot be defamatory. *See e.g.*  
15 *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal. App. 3d 543, 551-554. The Court in the  
16 present case already has accepted this reasoning in its demurrer decision, holding, however, that a  
17 review of the alleged defamatory statements and their context “is more appropriate at trial or in a  
18 motion for summary judgment.” *Doe v. Channel Four*, Case No. SC092739.

19 The *Polygram* holding, cited by this Court in its demurrer decision, has been summarized as  
20 follows:

21 The court in *Polygram Records*, relying on both the California and federal  
22 Constitutions, held that a comedian's statements that a wine, with the same name  
23 as plaintiff's product, was a black wine, a ‘motherfucker,’ tasted like urine and  
24 went with ‘any damn thing it wants to,’ were not defamatory as a matter of law  
25 where the content and context made it obvious that no sensible person could take  
26 them seriously. The court noted that ‘to hold otherwise would run afoul of the  
27 First Amendment and chill the free speech rights of all comedy performers and  
28 humorists, to the genuine detriment of our society.’  
*Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1413 (C. D. Cal. 1987), *quoting Polygram*  
*Records*, 170 Cal. App. 3d at 556-557 (internal citation omitted).

The “content and context” considered by the Court in *Polygram* included the fact that the  
statements “were made in jest... [and] represented a very small part of a rather long comedy  
performance,” that the defendant was “performing in a nightclub before an audience that knew him

1 as a comedian,” and the statements were “obvious figments of a comic imagination impossible for  
2 any sensible person to take seriously.” *Polygram*, 170 Cal. App. 3d at 557.

3 The statements at issue in this lawsuit were made by Ali G, who the Plaintiff admits  
4 is “fictional character.” [Channel 4's Request for Admissions p.2 No.1 and Plaintiff's  
5 response to the same, annexed to Smith Decl. as Exhs. 13 and 14]. The Plaintiff further  
6 admits that Sacha Baron Cohen does this portrayal in his professional capacity as a  
7 “comedian.” [Am. Compl. at ¶8]. The statements were made during a spoof “interview” that  
8 was part of a longer comedy television program. [Naik Decl. at ¶¶ 4, 9 and Exh. 2 to Naik  
9 Decl.]. In the same “interview” about which the Plaintiff complains, the Ali G character lets  
10 loose a parade of absurd and obviously untrue statements already referenced above, in the  
11 Summary of Indisputable Facts. [Exh. 2 to Naik Decl.]. As did the Plaintiff in her original  
12 Complaint [Compl. at ¶ 3], we place the word, “interview,” in quotation marks, because it is  
13 readily apparent to all viewers that no serious interview is taking place, and that no serious  
14 questions or statements are being made by the comedic, fictional Ali G character.

14 Further, it is for the court to determine whether a statement constitutes a statement of  
15 fact. *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal. 3D 254, 260, cert. Denied. 479,  
16 U.S. 1032 (1987); see also *Couch v. San Juan Unified Sch. Dist.*, (1995) 33 Cal. App. 4th  
17 1491, 1500 (“Whether published material is reasonably susceptible for an interpretation  
18 which implies a provably false assertion of fact -- the dispositive question in a defamation  
19 action -- is a question of law for the court”), citing *Morningstar, Inc. v Superior Court*,  
(1994) 23 Cal. App.4th 676, 686-687.

20 In another case, *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal. App. 4th  
21 318, 326-27, which involved a defamation claim based on “exaggerations bandied by... fictional  
22 movie characters,” the court disregarded the fact that the plaintiff had the same (although  
23 differently spelled) name as the target of the allegedly defamatory statements. The court noted,  
24 among other things, that the work “is manifestly not about [the plaintiff, but rather] is about a  
25 fictional character who finds himself in various humorous or absurd situations.”

26 Just as in the situations discussed by the California courts in *Polygram* and *Polydoros*, it is  
27 apparent here that the allegedly defamatory statements in this case “were made in jest,” were “a  
28 very small part of a rather long comedy performance,” were made “before an audience that knew  
[the speaker] as a comedian,” were “obvious figments of a comic imagination impossible for any

1 sensible person to take seriously,” and were “manifestly not about [the plaintiff, but rather] about a  
2 fictional character... in various humorous or absurd situations.”

3 Indeed, the Plaintiff has no evidence that anyone who watched the Episode believed any of  
4 the alleged damaging statements. [Smith Decl. at ¶ 19]. But even if the Plaintiff could find  
5 someone who actually believed that a “fictional character” by the name of Ali G had sexual  
6 relations with the Plaintiff, or even that Cohen himself did so (although Cohen never once steps out  
7 of character at any point in the Program [Naik Decl. at ¶ 4 and Exh. 2 to Naik Decl.]), this does not  
8 create a triable issue of fact, where the average member of the audience, as determined by the  
9 Court, could not have reached that conclusion. *San Francisco Bay Guardian v. Superior Court*,  
10 (1993) 17 Cal. App. 4th 655, 658-59 [21 Cal. Rptr. 2d 464] (the fact that the plaintiff furnished  
11 declarations of a few people who stated that they did not recognize an April Fool’s Day parody as a  
joke does not raise a question of fact as to the view of the average reader).

12 In this case, we respectfully submit that any fair consideration of *Da Ali G Show* must lead  
13 to the conclusion that nothing said by what both sides agree is a “fictional” character in this  
14 “comedy” situation could be reasonably understood by the audience as a true statement of fact about  
15 the Plaintiff or anyone else. The court quickly can ascertain this by viewing the Episode itself,  
16 which is attached to the accompanying Naik Declaration as Exhibit 2.

17 Accordingly, the Plaintiff could not have been damaged, and her defamation and negligence  
18 claims should be dismissed as a matter of law.

19 **D. THE PLAINTIFF'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS**  
20 **SHOULD BE DISMISSED BECAUSE (1) SHE ADMITS SHE WAS NOT**  
21 **DAMAGED BY SIGNING THE SETTLEMENT AGREEMENTS; (2) SUCH**  
22 **CLAIMS CANNOT BE BASED ON SPECULATIVE DAMAGES; AND (3) SHE**  
23 **CANNOT ESTABLISH THE REQUISITE “CAUSE AND EFFECT”**  
**RELATIONSHIP BETWEEN THE ALLEGED MISREPRESENTATION AND HER**  
**ALLEGED DAMAGES**

24 **1) The Plaintiff Admits She Was Not Damaged**  
25 **by Signing the Settlement Agreements**

26 The gravamen of the Plaintiff’s claims of fraud and negligent misrepresentation are that  
27 Channel 4 tricked her into signing settlement agreements with HBO, by falsely promising not to  
28 broadcast her name in the future. [Am. Compl. at ¶¶ 49-51]. However, she admitted at her  
deposition that notwithstanding Channel 4’s alleged breach of promise, she “absolutely” was better

1 off by entering into the settlements. [Doe Dep. at p.82:17-20, annexed to Smith Decl. as Exh. 7].  
2 She admits, as she must, that the settlement agreements provided her with \$90,000, and they  
3 allowed her to sue again if anyone distributed the Program with her name in it in the future. She  
4 also admits that she does not regret signing them. [*Id.* at p. 88:15-17]. Because the settlements are  
5 the only alleged consequence of Channel 4’s alleged fraud and misrepresentation, the Plaintiff  
6 effectively admits that she suffered no damage in relation to those causes of action.

7 But without damages, the Plaintiff has no claims. “Fraudulent representations which work  
8 no damage cannot give rise to an action at law.” *Nagy v. Nagy* (1989) 210 Cal. App. 3d 1262,  
9 1268-69 (“An allegation of a definite amount of damage is essential to stating a cause of action”),  
10 citing *Abbot v. Stevens* (1955) 133 Cal.App.2d 242, 247; see also *Gold v. Los Angeles Democratic*  
11 *League* (1975) 49 Cal. App. 3d 365, 374 (“To state a cause of action at law based upon fraud... the  
12 plaintiff must allege not only reliance but that, by reason of the fraud, he has suffered pecuniary  
13 damage in some amount”); *Croeni v. Goldstein* (1994) 21 Cal. App.4th 754, 758, 26 Cal. Rptr. 2d  
14 412 (listing damages as one of the elements of a fraud claim); and *Gagne v. Bertran* (1954), 43  
15 Cal.2d 481, 487-88, 275 P.2d 15 (listing damages as one of the elements of a negligent  
16 misrepresentation claim).

## 16 2) Fraud and Negligent Misrepresentation Claims 17 Cannot Be Based on Speculative Damages

18 Even if the Plaintiff were to try to recant her admissions, and say instead that the settlements  
19 were harmful to her because she gave up a valuable right to sue HBO in relation to its broadcast of  
20 the Program, this would be unavailing. Damages in fraud and misrepresentation claims cannot be  
21 founded on speculation, and there could be no claim more speculative than an assertion that had a  
22 lawsuit been pursued, it would have resulted in both victory and a recovery of a particular amount  
23 of damages. *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768, 343 P.2d 118 (where plaintiff sought  
24 fraud damages based on speculation as to the outcome of a hypothetical litigation, court held that  
25 “[d]amage to be subject to a proper award must be such as follows the act complained of as a legal  
26 certainty and we conclude that the difficulty in ascertaining damages herein is insurmountable”); *B.*  
27 *Braun Medical, Inc. v. Rogers*, 163 Fed.Appx. 500, 508, (9th Cir. 2006) (“Under California law,  
28 speculative fraud damages are not actionable”); see also *Leegin Creative Leather Products, Inc. v.*  
*Diaz* (2005) 131 Cal. App.4th 1517, 1526 (fraud claim rejected where damages “simply too  
speculative”).

1 So, even if the Plaintiff wanted to change positions and claim that the settlement agreements  
2 caused her harm, this new position would hinge entirely on speculation and therefore could not save  
3 her fraud and misrepresentation claims.

4 Similarly, these claims also should be dismissed for lack of specificity. Like any other  
5 element of fraud or negligent misrepresentation, damage causation “must be pled specifically;  
6 general and conclusory allegations do not suffice.” *Lazar v. Superior Court* (1996) 12 Cal.4th 631,  
7 645 [49 Cal.Rptr.2d 377]; *Stansfield v. Starkey* (1990) 220 Cal. App. 3d 59, 74; *Nagy*, 210 Cal.  
8 App. 3d at 1268; 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 662, pp. 111-112.

9 This Court, while ruling on the Channel 4 demurrer, stated that, “[t]hough Plaintiff did not  
10 specify her damages but merely categorized them, Defendant did not argue lack of specificity in this  
11 regard.” [*Doe v. Channel Four*, Case No. SC092739, Ruling dated May 22, 2008]. If Channel 4  
12 did not make clear its argument regarding the Plaintiff’s lack of specificity before, Channel 4 is  
13 doing so now. In her fraud and misrepresentation claims, the Plaintiff has failed to make any  
14 specific allegations whatsoever as to how she was damaged. Accordingly, both claims should be  
15 dismissed. *Small v. Fritz Co., Inc.* (2003)132 Cal. Rptr. 2d 490, 494 (negligent misrepresentation  
16 must be pleaded with the same specificity as fraud).

17 **3) The Plaintiff Cannot Establish the Requisite “Cause and Effect”  
18 Between the Alleged Misrepresentation and Her Alleged Damages**

19 To succeed in a fraud claim under California law, a plaintiff needs to show “a cause and  
20 effect relationship between the fraud and damages sought...” *Commonwealth Mortgage Assurance  
21 Co. v. Superior Court* (1989) 211 Cal. App. 3d 508, 518 [259 Cal. Rptr. 425, 430], citing *Zumbrun  
22 v. University of Southern California* (1972) 25 Cal.App.3d 1, 12 [101 Cal.Rptr. 499].

23 The Plaintiff here not only has failed to allege any “cause and effect relationship between  
24 the fraud and the damages sought,” but she also has failed to adequately allege any fraud damages  
25 in the first place. The Plaintiff alleges that Channel 4 used a false promise to persuade her to sign  
26 the settlement agreements [Am. Compl. at ¶¶ 49-51, annexed to Smith Decl. as Exh. 2], but as  
27 discussed above, she has failed to allege any damage caused to her by signing those agreements.  
28 She has alleged injury to her caused by the posting of the allegedly offending segment on YouTube  
[Channel 4’s Special Interrogatories Set Two No. 21 and No. 43 and Plaintiff’s Response to same  
annexed to Smith Decl. as Exh. 3 and 4], but she has failed to allege that such damage was caused

1 by signing the settlement agreements, or by the alleged false representation by Channel 4. [Smith  
2 Decl. at ¶ 20].

3 Accordingly, the Plaintiff's fraud and misrepresentation claims should be dismissed for that  
4 reason alone.

5 **VI. CONCLUSION**

6 For all of the above reasons, Channel 4 respectfully requests that the Court grant its motion  
7 for summary judgment, or in the alternative, summary adjudication of issues as noted.

8  
9 Dated: February 5, 2009



10  
11 By: \_\_\_\_\_

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