No. 14-3876

IN THE

United States Court of Appeals for the Eighth Circuit

JESSE VENTURA, a/k/a JAMES G. JANOS,

Plaintiff-Appellee,

– v. –

TAYA KYLE, as Executor of the Estate of CHRIS KYLE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF 33 MEDIA COMPANIES AND ORGANIZATIONS IN SUPPORT OF APPELLANT URGING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29(b), A&E Television Networks, LLC, Advance Publications, Inc., American Society of News Editors, Association of Alternative Newsmedia, Association of American Publishers, Inc., Authors Guild, Inc., Buzzfeed, Inc., Center for Investigative Reporting, Inc., Cox Media Group, E.W. Scripps Company, First Amendment Coalition, Forbes Media LLC, Gannett Co., Inc., Gawker Media LLC, Hachette Book Group, Inc., Hearst Corporation, Landmark Media Enterprises, LLC, Media Law Resource Center, Minnesota Newspaper Association, Motion Picture Association of America, Inc., MPA – The Association of Magazine Media, National Association of Broadcasters, National Press Photographers Association, National Public Radio, Inc., New York Media LLC, New York Times Company, Newspaper Association of America, North Jersey Media Group Inc., Penguin Random House LLC, Reporters Committee for Freedom of the Press, Time Inc., Tribune Publishing Company, LLC , and WP Company LLC (d/b/a The Washington Post) (collectively, "*Amici*"), respectfully move this Court for leave to file the accompanying *amici curiae* brief in the above-captioned matter. In support of this motion, the proposed *Amici* state as follows:

1. The proposed *Amici* are among the nation's leading book, magazine, and newspaper publishers, broadcasters, motion picture companies, media entities and organizations of journalists, writers and others dedicated to the protection of

First Amendment rights. *Amici* have a strong interest in this case because they are concerned about what they view as the unjustified and potentially crippling awards in this case and, in particular, the unprecedented award based not alone on supposed damages sustained by former Governor Ventura but profits purportedly received by the Kyle estate.

2. Defamation cases in America have never resulted in monetary awards based upon profits received by libel defendants. As shown in the accompanying brief, the law of libel is based on the notion that a prevailing plaintiff may recover damages for injuries said to have been sustained, not the amounts claimed to have been received by defendants. But here, in what *Amici* believe is the first time in American history, the ruling below sustained a judgment awarding a libel plaintiff over $1.3 million in profits received from the sale of a book.

3. *Amici* sought consent from the parties for the filing of their brief pursuant to Fed. R. App. P. 29(a). Counsel for Defendant-Appellant Taya Kyle consented to the filing of this brief. On February 23, 2015, counsel for *Amici* contacted counsel for former Governor Ventura to file this brief. Consent was denied. Accordingly, this motion is necessary.

For the reasons above, and for the reasons set forth in the attached *amici* brief, *Amici* respectfully ask this Court to grant their motion to file the

accompanying *amici* brief in the above-captioned matter.

Dated: March 10, 2015

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ Floyd Abrams
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on March 10, 2015, I electronically filed the foregoing documents described as the Motion for Leave To File Brief *Amici Curiae* of 33 Media Companies and Organizations in Support of Appellant Urging Reversal, and [Proposed] Brief *Amici Curiae* of 33 Media Companies and Organizations in Support of Appellant Urging Reversal with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 10, 2015

/s/ Floyd Abrams

No. 14-3876

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JESSE VENTURA, a/k/a JAMES G. JANOS,

Plaintiff-Appellee,

—v.—

TAYA KYLE, as Executor of the Estate of CHRIS KYLE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF *AMICI CURIAE* OF 33 MEDIA COMPANIES AND ORGANIZATIONS IN SUPPORT OF APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, undersigned counsel for *amici curiae* provide the following disclosures of corporate identity:

A&E Television Networks, LLC is a joint venture of Disney-ABC Television Group and Hearst Corporation. No publicly held corporation owns an interest of 10% or more in A&E Television Networks, LLC with the exception of The Walt Disney Company, which indirectly holds an interest of 10% or more.

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

Association of Alternative Newsmedia is a private, non-stock corporation that has no parent.

The **Association of American Publishers, Inc.** is a nonprofit organization that has no parent and issues no stock.

The **Authors Guild, Inc.** is a nonprofit organization that has no parent and issues no stock.

Buzzfeed, Inc. is a privately held company. No publicly held company owns 10% or more of its stock.

The **Center for Investigative Reporting, Inc.** is a nonprofit public benefit corporation that does not have a parent corporation; no public or private corporation holds any interest in the Center for Investigative Reporting.

Cox Media Group, Inc. is owned by Cox Enterprises, Inc., a leading communications, media and automotive services company.

The **E.W. Scripps Company** is a publicly traded corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

The **First Amendment Coalition** is a nonprofit organization that has no parent and issues no stock.

Forbes Media LLC is owned by Forbes Media Holdings LLC. No publicly held company holds an interest of 10% or more in Forbes Media LLC.

Gannett Co., Inc. has no parent corporation and no publicly held company owns 10% or more of Gannett stock.

Gawker Media LLC is privately held and wholly owned by privately held Gawker Media Group, Inc. No publicly held corporation holds an interest of 10% or more in Gawker Media LLC.

Hachette Book Group, Inc. is a wholly owned subsidiary of Hachette Livre USA, Inc. Hachette Livre USA, Inc. is a wholly owned subsidiary of Lagardere North America Inc. Lagardere North America Inc. is a wholly owned subsidiary of

Lagardere Media (formerly Hachette SAS). Lagardere Media is a wholly owned subsidiary of Lagardere SCA, which is traded on the Paris stock exchange.

Hearst Corporation is a diversified, privately held company. No publicly held company owns 10% or more of its stock.

Landmark Media Enterprises, LLC is a privately held media company. No publicly held corporation holds an interest in Landmark Media Enterprises, LLC.

The **Media Law Resource Center** is a nonprofit organization that has no parent company and issues no stock.

The **Minnesota Newspaper Association** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Motion Picture Association of America, Inc. is a nonprofit corporation that has no parent company and issues no stock.

MPA – The Association of Magazine Media has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The **National Association of Broadcasters** has no parent corporation and no publicly held company owns 10% or more of its stock.

The **National Press Photographers Association** is a nonprofit organization that has no parent company and issues no stock.

National Public Radio, Inc. is a privately supported, not-for-profit membership organization that has no parent company and issues no stock.

New York Media LLC is a wholly owned subsidiary of New York Media Holdings LLC. There are no publicly owned entities that have any ownership interest in either company.

The **New York Times Company**, a publicly held corporation, has no parent company, and no publicly held corporation owns 10% or more of its stock.

Newspaper Association of America is a nonprofit organization with no parent corporation or stockholders.

North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

Penguin Random House LLC is a limited liability company in which membership interests are owned in part by Bertelsmann SE & Co. KGaA and in part by Pearson plc. Pearson plc is a publicly traded company.

The **Reporters Committee for Freedom of the Press** is an unincorporated association of reporters and editors that has no parent corporation and issues no stock.

Time Inc. is a publicly traded corporation. No publicly held corporation owns 10% or more of its stock.

Tribune Publishing Company, LLC is publicly held. Oaktree Tribune, L.P. owns 10% or more of its stock.

WP Company LLC (d/b/a The Washington Post) is a wholly owned subsidiary of its parent corporation, Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are media companies and organizations of journalists, writers and others dedicated to the protection of First Amendment rights. All are concerned about what they view as the unjustified and potentially crippling awards in this case and, in particular, the unprecedented award to former Governor Ventura based upon profits purportedly received by the defendant in the case.

The *amici* joining in this brief are as follows:

A&E Television Networks, LLC (AETN) is an award-winning, global media content company organized under the laws of the State of Delaware with its principal place of business in New York. AETN offers consumers a diverse communications environment ranging from television networks to websites, consumer products and educational software. AETN channels and branded programming reach more than 330 million households in over 160 countries.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving more than 2.3 million subscribers.

American Society of News Editors (ASNE) is an organization of over 500 members that includes directing editors of daily newspapers throughout the Americas. Since April 2009, its membership has included editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia (AAN) is a not-for-profit trade association for 130 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The **Association of American Publishers, Inc. (**AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, including educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software, and electronic products and services. The

Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The **Authors Guild, Inc.** (the "Guild"), founded in 1912, is a national nonprofit association of more than 8,500 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

BuzzFeed, Inc. is a leading social news and entertainment media company. It creates news, original reporting, and entertainment content through its website buzzfeed.com.

The Center for Investigative Reporting, Inc. (CIR) is a 501(c)(3) California nonprofit public benefit corporation. Founded in 1977, CIR is nationally respected for setting the highest journalistic standards, and for its signature approach to investigative reporting and collaboration. To reach a broad and diverse audience worldwide, CIR publishes stories online, as well as via print, television, radio/audio, and video.

Cox Media Group, Inc. (CMG) is an integrated broadcasting, publishing, direct marketing and digital media company. The company's operations currently include 14 broadcast television stations and one local cable channel, 59 radio stations, seven daily newspapers and more than a dozen non-daily publications, and more than 100 digital services. CMG currently operates in more than 20 media markets and reaches approximately 52 million Americans weekly, including more than 31 million TV viewers, more than 3.5 million print and online newspaper readers, and more than 14 million radio listeners.

The E.W. Scripps Company has interests in newspaper publishing, online publishing, local broadcast television stations, and licensing and syndication. The company's portfolio of locally focused media properties includes: daily and community newspapers in 14 markets; 21 broadcast TV stations; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

The **First Amendment Coalition** (FAC) is a section 501(c)(3) nonprofit organization dedicated to First Amendment freedoms—primarily freedom of speech and the press—and government transparency. Founded in 1988, FAC works to enhance and protect these rights through a free legal consultation service, educational and information services, public advocacy of various kinds, and

litigation, including the initiation of litigation in its own name and the filing of briefs *amicus curiae*.

Forbes Media LLC is a global media, branding and technology company, with a focus on news and information about business, investing, technology, entrepreneurship, leadership and affluent lifestyles. The company publishes *Forbes*, *Forbes Asia*, *Forbes Europe* and *ForbesLife* magazines, as well as Forbes.com and ForbesLife.com. The Forbes brand today reaches more than 75 million people worldwide with its business message each month through its magazines and 36 licensed local editions around the globe, Forbes.com, TV, conferences, research, social and mobile platforms.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States—including *USA TODAY*—which reach more than 10 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching 30% of all television households in America. Each of Gannett's daily newspapers and TV stations provides digital and mobile products that feature news and advertising customized for the market served and, along with Gannett's other digital products, reach 29% of the U.S. Internet audience.

Gawker Media LLC is the publisher of some of the web's best-loved brands and communities, including the eponymous Gawker, the gadget sensation

Gizmodo, and the popular sports site Deadspin. Gawker supports the interaction of uncompromisingly authentic editorial voices, exceptionally opinionated audiences, and bespoke brand advertising programs. Founded in 2002, Gawker's sites reach over 100 million readers around the world each month.

Hachette Book Group, Inc. is a leading trade publisher based in New York and a division of Hachette Livre, the third largest trade and educational book publisher in the world. Hachette Book Group publishes about 1,000 books per year.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany* (N.Y.) *Times Union*; nearly 300 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18 percent of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a joint venture interest in Fitch Ratings; and internet businesses, television production, newspaper features distribution and real estate.

Landmark Media Enterprises, LLC (formerly Landmark Communications) is a privately held media company headquartered in Norfolk,

Virginia with interests in print and internet publishing, internet marketing/web services, and data centers.

The **Media Law Resource Center** (MLRC) is a nonprofit membership association for content providers in all media, providing a wide range of resources on media law and policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. Today MLRC is supported by over 115 members, including leading publishers, broadcasters, and cable programmers, internet operators, media and professional trade associations, and media insurance professionals in America and around the world.

The **Minnesota Newspaper Association** (MNA) is a voluntary trade association of all of the general-interest newspapers and most of the special-interest newspapers in the state of Minnesota. It is the principal representative of the organized press in Minnesota, with nearly 400 newspaper members. Collectively, MNA represents a large percentage of all of the recognized news organizations and professional journalists in Minnesota.

Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. Its members and their affiliates are the leading producers and distributors of audiovisual entertainment in the theatrical, television and

DVD/home video markets. Throughout its history, MPAA has consistently fought for the First Amendment rights of its members, including by filing amicus briefs urging courts to properly interpret the law of defamation in light of free speech concerns.

MPA – The Association of Magazine Media is a national trade association including in its present membership more than 175 domestic magazine publishers that publish over 900 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The **National Association of Broadcasters** (NAB) is a nonprofit incorporated trade association that serves and represents radio and television stations and broadcast networks. Its members broadcast news, public affairs, entertainment and other programming to listeners and viewers across the nation, and NAB seeks to preserve and promote its members' ability to create and disseminate freely programming and information of all types.

The **National Press Photographers Association** (NPPA) is a 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

New York Media LLC owns the ground-breaking magazine *New York*, which publishes news, investigative, feature and opinion articles on politics, culture, business, education, society, film, literature, entertainment and a wide range of subjects of public interest. It also owns and publishes the up-to-the-

minute news website nymag.com; the Grub Street food site; the entertainment and culture news site Vulture; the fashion and lifestyle site The Cut; Science of Us, a window into the latest science on human behavior; and *New York Weddings* and *New York Design Hunting* magazines.

The **New York Times Company** is the publisher of *The New York Times* and the *International New York Times* and operates various online publications associated with the two papers.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. is an independent, family-owned printing and publishing company. Its flagship publication is *The Record*, which serves Bergen, Passaic and Morris counties. North Jersey Media Group Inc. also publishes more than 40 community newspapers and NorthJersey.com, an online news portal for breaking news, features, columns, and local information pertaining

to North Jersey. The company also publishes several magazines and other websites.

Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form and employs more than 10,000 people globally across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include works by more than 70 Nobel Prize laureates and hundreds of the world's most widely read authors, including the 2014 Pulitzer Prize-winner for general non-fiction, *Toms River: A Story of Science and Salvation* by Dan Fagin.

The **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, receive close to two billion page views each month.

Tribune Publishing Company, LLC is one of the country's leading publishing companies. Tribune's leading daily newspapers include the *Chicago Tribune*, the *Los Angeles Times*, *The Baltimore Sun*, the *Sun-Sentinel* (South Florida), the *Orlando Sentinel*, the *Hartford Courant*, *The Morning Call*, and the *Daily Press*.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's leading daily print newspapers, as well as a website, www.washingtonpost.com, that reaches an audience of more than 20 million unique visitors per month.

Appellant Kyle has consented to the filing of this brief; appellee Ventura has declined his consent. *Amici* have therefore moved the Court for leave to file this brief *amici curiae*.[1]

SUMMARY OF THE ARGUMENT

Defamation law has changed greatly in the past half-century as cases commencing with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) have taken great care to assure that authors, publishers and speakers would receive a high level of constitutional protection for their speech. Well before the Supreme

[1] No party's counsel authored this brief in whole or part. No party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amici curiae*, their members or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Court first addressed such issues, however, the law of libel had been clear that while damages could be awarded to victims of libel, the awards would be limited to the recovery of money for the injuries said to have been sustained by plaintiffs and not for amounts claimed to have been received by defendants.

That proposition has rarely been questioned until this case. Indeed, we know of only one case, decided more than 65 years ago, that is directly on point: *Hart* v. *E.P. Dutton & Co*., 93 N.Y.S.2d 871 (Sup. Ct. 1949), *aff'd*, 98 N.Y.S.2d 773 (App. Div. 1950), *appeal denied*, 99 N.Y.S.2d 1014 (App. Div. 1950). Rooted in constitutional concerns and the common law relating to libel, the *Hart* decision holds that a claim for profits may not be asserted in the defamation context. We are aware of no case before or after *Hart* to the contrary. The ruling below that sustained a judgment awarding a libel plaintiff over $1.3 million in profits received from the sale of a book appears to have been the first in American history ever to have done so.

Libel texts that have examined alternative forms of relief for libel plaintiffs have not even alluded to the possibility of recovering a defendant's profits. Neither have legal commentators and scholars. Nor does either the *Restatement of Torts* or the *Restatement of Restitution and Unjust Enrichment*. The $1.3 million award of profits entered here finds no foundation in the common law.

It also cannot be reconciled with the First Amendment. As the Supreme Court has often cautioned, a state's interest in providing a remedy for defamation coexists uncomfortably with the First Amendment's goal of the assuring the widest possible dissemination of speech on matters of public concern. In striking the balance between those interests the Court has made clear that the harm suffered by the plaintiff must be the focus of the inquiry. An award of profits has nothing to do with the harm suffered by the plaintiff; it is punishment, plain and simple. And given the lack of proportion between the offending passage and the book as a whole, in this case it is clear that it includes punishment of wholly protected speech.

Minnesota also views an award of profits as punitive in nature. By statute Minnesota permits the trier of fact to consider a defendant's profits in the punitive damage context. But no punitive damage claim was submitted to the jury in this case and none could have been because punitive damages are not permitted against an estate. Yet under the guise of an unjust enrichment claim, they were effectively and improperly awarded here.

For the reasons summarized above and addressed below, this Court should vacate the award of profits.

STATEMENT OF THE CASE

In his Complaint in this action, former Governor Ventura advanced three claims. The first sought damages for defamation, a topic to which he devoted the bulk of his Complaint. *See* APP-3/ECF-1, Ex. 1, at ¶¶ 17-44. The jury found for Ventura on this claim and awarded damages in the amount of $500,000. *See* Aug. 7, 2014 Order at 5, ADD-5. In his second claim Ventura sought to recover for commercial misappropriation of his "name and likeness." *See* APP-3/ECF-1, Ex. 1, at ¶¶ 45-48. The jury found that Ventura had not proven that claim. *See* Aug. 7, 2014 Order at 5, ADD-5. The third claim, styled as one for unjust enrichment, sought recovery of profits allegedly received by the defendant as a result of the alleged defamation. As phrased in the Complaint, "[e]quity requires that Kyle make restitution to Governor Ventura for all property and benefits unjustly received, including but not limited to income from the sale of *American Sniper* books and/or any subsidiary or ancillary rights sales." APP-3/ECF-1, Ex. 1, at ¶ 51. The jury recommended an award of $1,345,477.25 on that claim and the district court adopted the jury's recommendation as its own. *See* Aug. 7, 2014 Order at 1, ADD-1. Ventura's request for punitive damages was denied on the ground that such damages are not recoverable against an estate. *See* Feb. 28, 2013 Order at 8, APP-84.

This brief addresses the unjust enrichment claim and the award of more than $1.3 million in alleged profits to Ventura.[2]

ARGUMENT

I. THE COMMON LAW DOES NOT RECOGNIZE AND THE CONSTITUTION DOES NOT PERMIT AN AWARD OF A BOOK'S PROFITS AS A REMEDY FOR DEFAMATION

The notion that a court may award profits as damages for allegedly defamatory conduct is all but unknown in American jurisprudence. The only authority directly on point is the *Hart* case, which unconditionally rejected such an effort based on First Amendment concerns. In *Hart*, plaintiff claimed that he and others had been falsely accused of being traitors during World War II. Damages sought were limited to profits allegedly made by the defendant arising from the sale of the offending book. In the course of dismissing the complaint on statute of limitation grounds, the court concluded that the claim was at its core nothing but one for libel, a claim that by its nature did not permit a recovery of profits but one that was focused on compensating plaintiff for the harm plaintiff suffered. The court put it this way:

> Libel has been [a] field of much litigation both in England and this country and during the course of the years many judicial decisions have been handed down in libel actions. It is significant that in none of these cases has an action such as is brought by the plaintiff in this

[2] While the *amici* find a number of aspects of the trial court judgment below deeply troubling, in this brief we focus solely on the unjust enrichment claim.

> case been instituted. The plaintiff recognizes this fact and states: "We are undertaking to prove additional facts never before pleaded in a libel suit, namely, that the defendant had and received money by virtue of his libellous publication." The absence of attempts to bring an action similar to the instant one is evidence of the recognition by the legal profession and the courts that such an action would not lie under the common law.

Hart, 93 N.Y.S.2d at 879.

The court then cited and relied upon *Near* v. *Minnesota*, 283 U.S. 697 (1931) for the proposition that "[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence [of prior restraints on the press] is significant of the deep-seated conviction that such restraints would violate constitutional right[s]" and thereupon concluded that the historic absence in libel law of the recovery of profits by a libel plaintiff must similarly be precluded. *Id.* As phrased by the court:

> The State which guarantees the freedom [of speech] punishes its abuse, and accords to the individual whose reputation has been attacked, remedies for the injuries sustained. *The remedies thus given at common law, regulated in certain respects by statute, are called actions of libel and slander, whose object is the recovery of money for the injury.* Seelman in Law of Libel and Slander, page 1. It is evident that the right to recover based upon libel has been limited to the recovery of damages under the common law and statutes applicable thereto. It would seem, therefore, that the law is so well established that an innovation such as the plaintiff seeks in this action would impose new and unnecessary hazards upon publishers and would be contrary to the policy of our law.

Id. at 880 (emphasis in original). In the 65 years since the ruling in *Hart*, we are not aware of a single defamation case until this one that has sustained such a

recovery.[3] As was the case in *Near*, such a history may only be read to reflect a consensus that such "new and unnecessary hazards upon publishers" may not be constitutionally countenanced since the prospect of adverse defamation rulings leading to massive awards in unpredictable but potentially staggering amounts can only lead publishers, movie-makers and the like to avoid the release of works about important but controversial subjects, especially those involving public figures or entities known to be litigious.

In his 1993 treatise, *Law of Remedies: Damages – Equity – Restitution* (2d ed.), Professor Dan Dobbs addressed the issue of whether profits from a defamatory work could be awarded as a remedy for defamation. Citing *Hart*, he observed that "[t]he very limited authority on point has denied [such a] restitutionary claim altogether." *Id*. § 7.2(13). He concluded that there were two reasons for rejecting such a remedy, both grounded in the First Amendment:

> One reason to deny the restitution claim is the threat it presents to free speech. Another is the difficulty of apportioning the publisher's profit between his own effort and investment and the defamatory material. The difficulty of making an apportionment is itself an added threat to free speech rights, because an unapportioned recovery of profits from

[3] Five years before the decision in *Hart*, the Supreme Court of Florida, sitting en banc, had similarly affirmed the sustaining of a demurrer to a privacy claim that had sought profits from an offending book. *Cason* v. *Baskin*, 155 Fla. 198 (1944). Both cases—*Hart* and *Cason*—are cited with approval and relied upon in the *Restatement (Third) of Restitution and Unjust Enrichment* § 44 cmt. d, illus. 14 & reporter's note d (2011).

> a libel would very likely capture profits from socially desirable speech as well.

Id. The same is true in this case.

A review of the leading treatises and law review articles on libel remedies reveals an identical consensus on the proposition that, as an older libel text put it, "[t]he remedies . . . given at common law . . . are called actions of libel and slander, whose object is the recovery of money for the injury." Ernst P. Seelman, *The Law of Libel and Slander in the State of New York*, at 1 (rev. ed. 1964). More recent scholars have considered alternatives and additions to money damages, but none appear even to have raised the possibility of awarding defendant's profits as one of them. *See* Robert D. Sack, *Sack on Defamation* § 10, "Damages and Other Remedies" (4th ed.) (discussing injunctions, compulsory retraction, and declaratory judgment as other approaches to defamation remedies, but making no mention of the availability of profits or unjust enrichment); Bruce W. Sanford, *Libel and Privacy* § 9, "The Damage Assessment" (2d ed.) (making no mention of the availability of profits or unjust enrichment); Rodney A. Smolla, *Law of Defamation* § 9, "Damages and Other Remedies" (2d ed. 2014) (discussing equitable remedies available for defamation—injunctions, right of reply, compulsory retraction, and declaratory judgments—but making no mention of the availability of profits or unjust enrichment); *see also* Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. Rev. 640

(1916) (discussing the legal remedies available for defamation without mention of the availability of profits or unjust enrichment); James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 Am. U. L. Rev. 375 (1981) (assessing nondamage remedies available for defamation without mention of the availability of profits or unjust enrichment); *Restatement (Second) of Torts* § 623, "Special Note on Remedies for Defamation Other Than Damages" (1977) (concluding that damages, as the traditional remedy for libel and slander, has inadequacies and recommending consideration of four alternatives—declaratory relief, retraction, injunctive relief, and self-help—but making no suggestion of the availability of profits or unjust enrichment).

The paucity of authorities even considering an award of profits in the defamation context is undoubtedly informed by serious constitutional concerns, as was the court's opinion in *Hart* itself. And for good reason. The Supreme Court has made clear time and again that the touchstone for balancing the tension between protecting robust expression on matters of public concern and providing remedies for those who may be defamed is the requirement that libel plaintiffs be compensated for the harm that they personally suffered. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). This is even more important where the plaintiff is as public a figure as former Governor Ventura admittedly is. Unlike private plaintiffs as to whom the Court has shown particular solicitude, *id.* at 343-45,

public officials and public figures have far greater means of communicating their points of view to the public.

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy.

Id. at 344. And unlike private plaintiffs, "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." *Id*. at 345.

As Professor Dobbs noted in discussing the *Hart* case (*see supra*), an award of profits in the defamation context also offends the First Amendment because of the real likelihood, dramatically illustrated by this case, that the task of apportioning profits allegedly attributable to the defamation will permit juries "to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *See Gertz*, 418 U.S. at 349 (discussing the dangers inherent in an award of presumed damages). More dangerous still is the likelihood that juries will punish speech that is wholly protected by the First Amendment and entitled to its most vigorous protection. The passage at issue in *American Sniper* ran no more than a page and a half in a 379-page autobiography. *See* APP-55-57. Yet the jury recommended an award of more than $1.3 million in supposed profits, a figure the district judge estimated to be 25% of what was received by the estate. *See* Aug. 7, 2014 Order at 4, ADD-4. Such an arbitrary

award may not be sustained under the Constitution just as it cannot be countenanced under the common law.[4]

The district judge dismissed the estate's argument that a book's profits were not recoverable in this case with little analysis, citing *Gertz*.[5] Its rationale appears to have been that because *Gertz* permitted an award of punitive damages in defamation suits brought by private figure plaintiffs when actual malice is proven, an award of profits here is no more threatening under the First Amendment. *See* Nov. 26, 2014 Order at 14, ADD-21. This reasoning ignores that Ventura is by his own admission a very public figure. The issue of whether public figures can obtain

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[4] In *Ruzicka* v. *Conde Nast Publications, Inc*., 733 F. Supp. 1289 (D. Minn. 1990), plaintiff asserted a claim for unjust enrichment seeking profits from the publication of a news article that she claimed had invaded her privacy. The district court dismissed the claim, holding that "[i]n cases involving allegations of wrongful publication, a publisher is not held to have received a benefit merely because it referred to plaintiff in a magazine that was published for profit. In such cases, unjust enrichment requires proof of a deliberate association with the defendant's products in an advertising or promotional scheme." *Id*. at 1301. This Court affirmed, saying: "We agree with the district court that [Plaintiff] has not established the elements of unjust enrichment under Minnesota law." *Ruzicka*, 939 F.2d 578, 583 n.8 (8th Cir. 1991). There is no constitutional barrier to an award of profits in commercial misappropriation cases because such speech receives significantly less protection under the First Amendment. *See Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Of course in this case the jury specifically rejected the commercial misappropriation claim. *See* Aug. 7, 2014 Order at 5, ADD-5.

[5] The court also cited to *United States* v. *Alvarez*, __ U.S. __, 132 S. Ct. 2537 (2012) for the unexceptionable proposition that the government may prohibit fraudulent speech without running afoul of the First Amendment. Nov. 26, 2014 Memorandum Opinion and Order at 13-14, ADD-20-21.

punitive damages in defamation cases on a showing of actual malice alone without violating the First Amendment is an open one that has yet to be addressed by the Supreme Court or this Circuit. Many legal scholars have opined that punitive damages may never be recoverable by a public figure consistent with the First Amendment. As a leading text on constitutional law observes,

> The Court has not explicitly ruled that a public official or public figure cannot collect punitive damages, but a contrary conclusion is troubling. The Court has condemned the inhibiting effect of damage awards in excess of any actual injury, so one should expect it to hold that any punitive damage awards for libels against public officials or public persons interfere with the "breathing space" required in the exercise of robust First Amendment debate.

Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 20.33(e)(i), "Punitive Damages" (5th ed. 2013); *see also* Charles Rothfeld, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 Yale L. & Pol'y Rev. 165 (2000). Other commentators have posited that public figures must prove a heightened standard of intent at the very least, such as common law malice, ill will or willful intent to injure, before an award of punitive damages can survive constitutional scrutiny. *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985); Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382 (1977). Some states preclude an award of punitive damages to public figures on the ground that punitive damage awards would violate the free speech provisions of their own

constitutions. *See, e.g.*, *Wheeler* v. *Green*, 286 Or. 99, 593 P.2d 777 (1979) (punitive damages in defamation actions barred under the Oregon constitution). Other states have precluded or severely limited them by statute. *See, e.g.*, Mass. Ann. Laws c. 231, § 93 (precluding the allowance of punitive damages in libel actions). And still others, including Minnesota (*see* Pt. II, *infra*), have simply adopted standards more stringent than the actual malice standard for determining whether punitive damages may be entertained. *See* Sack, *supra*, § 10.3.5. It is therefore hardly enough to say, as the district court did, that because private figure plaintiffs can recover punitive damages on a showing of actual malice that public figure plaintiffs may be awarded a portion of a book's profits without running afoul of the First Amendment.

Whether viewed through the prism of the common law or analyzed on constitutional grounds, the $1.3 million award of profits cannot be sustained.

II. THE AWARD OF PROFITS FROM *AMERICAN SNIPER* IS TANTAMOUNT TO AN AWARD OF PUNITIVE DAMAGES, DAMAGES THAT ARE NOT PERMITTED AGAINST THE ESTATE

Consistent with its sister courts across the country, no Minnesota court of which we are aware had ever permitted an award of profits in a defamation case, under the guise of an unjust enrichment claim or otherwise, before the trial court did here. Even assuming, arguendo, that such relief could ever be awarded in a

defamation case, it is tantamount to an award of punitive damages under Minnesota law, damages that are not permitted against an estate.

Minn. Stat. § 549.20 sets forth the standards applicable to an award of punitive damages in Minnesota. Punitive damages may be awarded in a civil case "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others," a standard even more stringent than the actual malice standard. *See* Minn. Stat. § 549.20; *Minnesota Jury Instructions Guides – Civil* § 50.65, "Punitive Damages—Defamation" (6th ed.). The factors to be considered in making such an award are specifically delineated in Section 549.20:

> **Factors**. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, *the profitability of the misconduct to the defendant,* the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. § 549.20(3) (emphasis added).

By permitting juries to evaluate "the profitability of the misconduct to the defendant" in assessing whether punitive damages should be awarded in a

particular case, the Minnesota legislature has made a considered judgment that only in the most egregious cases, with a concomitantly higher burden of proof, should profits from alleged misconduct be assessed as a means of punishing the defendant, even in cases where sensitive issues of free expression are absent. In this case, of course, Ventura's motion to amend his complaint to assert a claim for punitive damages was denied by the district court on the ground that punitive damages are not available in an action against an estate because they serve no deterrent or punitive purpose. *See* Feb. 28, 2013 Order at 8, APP-84 (citing *Thompson* v. *Petroff's Estate*, 319 N.W.2d 400, 408 (Minn. 1982)). Where, as here, there was no showing of evil intent sufficient to satisfy Section 549.20, where, as here, an award of profits can serve no deterrent or punitive purpose, and where, as here, the First Amendment's abhorrence of exorbitant damage awards untethered to a plaintiff's true injury is clearly in play, this Court should not be the first to sanction an unprecedented award of a book's profits.

CONCLUSION

For the reasons set forth above, this Court should vacate the District Court's judgment awarding Ventura $1,345,477.25 in profits from the sale of *American Sniper*.

Dated: March 10, 2015

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on March 10, 2015, I electronically filed the foregoing documents described as the Motion for Leave To File Brief *Amici Curiae* of 33 Media Companies and Organizations in Support of Appellant Urging Reversal, and [Proposed] Brief *Amici Curiae* of 33 Media Companies and Organizations in Support of Appellant Urging Reversal with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 10, 2015

/s/ Floyd Abrams

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,779 words, exclusive of the matters exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional spaced typeface using MS Word 2010 in 14 point Times New Roman font.

/s/ Floyd Abrams