

1 trend seldom extends to works with extensive graphic material, nor to placement of an
2 entire graphics-heavy work online eight months before publication. It certainly does not
3 extend to placing apparently uncorrected proofs online, particularly of a purportedly
4 accurate historical account.

5 5. Other statements connected with the 2006 Comic-Con, a comics and
6 graphic novel convention in San Diego held annually in late July or early August, indicate
7 that defendants chose this unusual course of action in an effort to obtain prepublication
8 publicity for their idiosyncratic, revisionist “history” of comics and graphic novels in the
9 United States. These efforts specifically included attempts to use Mr. Ellison’s name and
10 reputation for their own commercial purposes without any prior license, approval,
11 permission, or indeed notice. It would be highly unusual for a commercially published
12 book to have page proofs available six months before publication, and three months before
13 a major scheduled tie-in event like Comic-Con.

14 6. In light of my prior dealings with defendants and the scurrilous nature of the
15 statements in the online publication, I sent a letter dated 25 [sic] July 2006 to defendants.
16 A true and correct copy of that letter is attached to this Declaration as Exhibit A. My
17 records indicate receipt via facsimile at approximately 3:15pm Pacific Daylight Time on 24
18 July 2006. I specifically did not characterize the letter as a settlement document, or as
19 otherwise not subject to disclosure under Fed. R. Evid. 408 or any cognate provision of
20 California or Washington law.

21 7. On 27 July 2006, I received a telephone call from Kenneth Norwick,
22 identifying himself as defendants’ counsel. I had had previous dealings with Norwick in the
23 course of representing other authors in unrelated matters. The conversation lasted
24 approximately fifteen minutes. Norwick stated that:

25 (a) Mr. Ellison is a public figure for all purposes, and therefore has no
26 right or ability to control or object to defendants’ statements about him.

27 (b) The statements on pages 118 and 119 of the online publication are
28 based on “the best of [Groth’s] recollection” of a twenty-year-old case, and that Groth’s

1 responsibility to investigate or otherwise confirm factual statements required him to do no
2 more than rely upon his memory of legal technicalities — even though Groth is not a
3 lawyer. Norwick specified the “motion” slightly more specifically, claiming that it had
4 something to do with Mr. Ellison “agreeing” to pay Fleisher’s attorney’s fees if Mr. Ellison
5 was “brought back into the suit.” I requested that Norwick, in the interest of keeping the
6 dispute from escalating, provide further details and documentation consistent with his
7 statements and with the statements in the publication. However, Norwick explicitly refused
8 to provide any documentation of those statements, claiming that it is “[Ellison’s] burden to
9 prove falsity.”

10 (c) Norwick threatened that if Mr. Ellison attempted to take any further
11 action regarding the statements in the publication, whether by lawsuit or otherwise, that he
12 (Norwick) would “cause plenty of damage to Mr. Ellison’s First Amendment reputation,”
13 especially if Mr. Ellison attempted to “get a prepublication injunction against a book.”
14 When I pointed out that the work had already been published by placing it online, Norwick
15 abruptly refused to discuss that aspect of the matter further and changed the subject.

16 (d) On behalf of defendants, Norwick rejected all demands in my letter of
17 24 July, which he specifically stated he had reviewed. However, without any prompting
18 (and inconsistent with his protestations of accurate recall and his objections to
19 “prepublication injunction against [the] book”), Norwick offered to insert a disclaimer on
20 page 118 to the effect that “[Ellison disputes the accuracy of these statements]”. Norwick
21 reiterated his refusal to provide any further documentation or other support for the
22 accuracy of the statements in question.

23 8. Although Norwick maintained a minimally civil tone during the telephone
24 conversation, he persisted in aggressively asserting positions without consideration of
25 factual and legal foundations. When challenged or questioned, whether on legal doctrine
26 related to defamation and commercial misuse of Mr. Ellison’s identity and rights, or on the
27 underlying facts, Norwick consistently failed to respond and changed the subject.

28 9. Even after receipt of the letter in Exhibit A, defendants persisted in publishing

1 several further pages online each business day. At no time prior to the filing of the
2 complaint in this matter did defendants materially alter either the posted pages or their
3 contextual statements consistent with Norwick's unsolicited attempt to mitigate any
4 damages to Mr. Ellison as described in paragraph 7(d) of this Declaration.

5 I declare under penalty of perjury under the laws of the State of California and under
6 the United States of America that the foregoing is true and correct to the best of my
7 knowledge. Executed this 11th day of December 2006 at Urbana, Illinois.

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10 Charles E. Petit, Declarant

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