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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANTIDOTE INTERNATIONAL FILMS, INC. a
New York corporation,

Plaintiff;

vs.

Civil Action No. 06 Civ. 6114
(JSR)

BLOOMSBURY PUBLISHING, PLC, a
corporation, UNDERDOGS, INC., a corporation,
LAURA ALBERT, a/k/a J. T. LEROY, an
individual, and JUDI FARKAS, an individual,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANTS LAURA ALBERT AND UNDERDOGS, INC.**

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF FACTS	1
STANDARD FOR SUMMARY JUDGMENT	9
ARGUMENT	10
I. ALBERT AND UNDERDOGS COMMITTED COMMON LAW FRAUD	10
A. Misrepresentations And Omissions	11
B. Knowledge And Intent.....	14
C. Reasonable Reliance	15
D. Damage	17
II. UNDERDOGS HAS BREACHED THE OPTION CONTRACT	18
A. Underdogs has breached Paragraph 9 of the Option Agreement	19
B. Underdogs has breached Paragraph 8 of the Option Agreement.....	20
C. Underdogs has breached Paragraph 11 of the Option Agreement.....	21
D. Underdogs has breached Paragraph 13 of the Option Agreement.....	22
E. Underdogs has breached Paragraph 10 of the Option Agreement.....	22
F. Underdogs Has Breached The Implied Covenant of Good Faith	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S.Ct 2505, 91 L.Ed.2d 202 (1986).....	9
<i>Antidote harm. Goll v. First Tennessee Capital Markets</i> , 05 Civ. 7890 2006 U.S. Dist. LEXIS 52931 (S.D.N.Y. Aug. 1, 2006).....	18, 19, 23
<i>Carofino v. Forester, M.D.</i> , 450 F. Supp. 2d 257 (S.D.N.Y. 2006).....	9, 11
<i>City of New York v. Lead Industries Ass'n</i> , 190 A.D.2d 173 (NY App. 1993)	12
<i>First Investors Corp. v. Liberty Mut. Ins. Co.</i> , 152 F.3d 162 (2d Cir. 1988).....	18
<i>Gallo v. Prudential Residential Services, Ltd. P'ship</i> , 22 F.3d 1219 (2d. Cir. 1994).....	10
<i>Greenberg v. Chrust</i> , 282 F. Supp. 2d 112 (S.D.N.Y. 2003).....	9
<i>Interdigital Comm'ns Corp. v. Nokia Corp.</i> , 407 F. Supp. 2d 522 (S.D.N.Y. 2005).....	23
<i>Kirke La Shelle Co. v. Paul Armstrong Co.</i> , 263 N.Y. 79 (1933)	23
<i>Mead v. Bunn</i> , 32 N.Y. 275 (1865)	16
<i>Newbro v. Freed</i> , 409 F. Supp. 2d 386 (S.D.N.Y. 2006).....	10, 11, 13
<i>Prudential Ins. Co. of Am. v. Premit Group, Inc.</i> , 704 N.Y.S.2d 253 (N. Y. App. 2000)	20
<i>Richardson v. Selsky</i> , 5 F.3d 616 (2d Cir. 1993)	10
<i>Travellers Int'l, A.G. v. Trans World Airlines, Inc.</i> , 41 F.3d 1570 (2d Cir. 1994).....	18, 23

Westchester Teamsters Local 456 v. Fleet Nat'l Bank,
02 Civ. 6664 2006 U.S. Dist. LEXIS 54213 (S.D.N.Y., Aug. 18, 2006)19, 23

STATUTES

Fed. R. Civ. P. 56(c)1, 9, 10

INTRODUCTION

Plaintiff Antidote International Films, Inc. ("Antidote"), brought the instant action to seek, *inter alia*, recompense for harms it has suffered as a direct and proximate result of the fraud perpetrated upon it by defendants Laura Albert ("Albert") and Underdogs, Inc. ("Underdogs"). Albert and Underdogs knowingly and deliberately misrepresented, to the general public and to Antidote directly, that (a) the book *Sarah* was authored by J. T. LeRoy; (b) *Sarah* was based on the author's real-life experiences; and (c) "J. T. LeRoy" was in fact a real person. In reliance on those claims, Antidote was induced to purchase an option to create a film based on *Sarah*, and expended significant resources attempting to develop the project. None of those claims, however, was true. The facts underlying Antidote's fraud and breach of contract claims are undisputed. As the elements of those claims are established beyond dispute, Antidote is entitled to a judgment of liability against Albert and Underdogs on those claims as a matter of law.¹ Antidote therefore hereby respectfully moves this Court for an order granting Antidote partial summary judgment as to liability pursuant to Fed. R. Civ. P. 56(c) on Count III as against defendants Albert and Underdogs and Count V as against defendant Underdogs.

STATEMENT OF FACTS

Plaintiff Antidote is an independent film production company based in New York. SMF 1.² Jeffrey Levy-Hinte ("Levy-Hinte") is the founder and president of Antidote. SMF 2. Defendant Albert is an individual who wrote the novel *Sarah* under the name of "J. T. LeRoy." SMF 3. Defendant Underdogs is a Nevada Corporation illegally doing business in New York,

¹ Antidote is not moving for a determination of the amount of damages at this time.

² "SMF" as used herein refers to Plaintiff's Statement of Material Facts.

which was created as a front to handle "J. T. LeRoy's" business interests and to protect and perpetuate Laura Albert's use of a false identity.³ SMF 4.

In April 2000, Bloomsbury Publishing, Plc ("Bloomsbury") published the novel *Sarah* by "J. T. LeRoy." SMF 5. The copyright is in the name of the purported author, "J. T. LeRoy." No effort has been made to comply with the requirements for registering a copyright using a pseudonym. SMF 5; Ex. J. *Sarah* tells the story of a 12-year-old male prostitute nicknamed Cherry Vanilla who competes with his mother for tricks at truck stops. SMF 6. According to "J. T. LeRoy's" personal history, which became public over a series of reviews and articles and was publicized by Bloomsbury on the cover and in the press, *Sarah* was a semi-autobiographical novel. Ex. G, H, I, J. The "J. T. LeRoy" website claims that his stories are "autobiographical." Ex. S.

After reading the book and learning about "J. T. Leroy" through his biography, the press reports about him depicting him as a real person, his agent Judy Farkas, and the "semi-autobiographical" novel *Sarah*, Levy-Hinte agreed to option *Sarah* and develop the novel into a film. SMF 27. Levy-Hinte believed "J. T. LeRoy" existed. SMF 28. For Antidote, what made *Sarah* interesting and compelling was precisely the knowledge that the novel was an aesthetic response to a horrific, real-life set of experiences. SMF 29, 30. Levy-Hinte believed that "J. T. LeRoy" had managed to use art to understand, interpret and master a personal history of neglect, abuse and violence. SMF 30. The alleged truth behind the novel created greater sympathy for the novel's narrative character, Cherry Vanilla, who was supposedly based on "J. T. LeRoy" himself. SMF 26-27. "J. T. LeRoy's" life story—as created by Albert and Underdogs and

³ Underdogs' primary place of business appears to be Brooklyn, New York. SMF 4. Plaintiff has conducted a reasonable search for, and been unable to find, records of an entity called "Underdogs, Inc." being qualified to do business in the State of New York. Nor has Underdogs produced such documents in this litigation. Curtner Decl., ¶ 24; SMF 84

publicized by Bloomsbury—was thus in large part the catalyst for Antidote agreeing to develop a project based on *Sarah*. SMF 29.

The "biography" that was created for "J. T. LeRoy" was disseminated to the public by a series of magazine and newspaper reviews and articles, planted and arranged by Albert, many of which were interviews with and contained actual quotes from "J. T. LeRoy." Ex. P, R, W. Bloomsbury also publicized the "biography" with press releases about "J. T. LeRoy" and his books. "J. T.'s" touching story was also shared via public readings from his work and "personal" appearances in New York and elsewhere. Ex. G, H, I. It is undisputed that "J. T. Leroy's" "biography," however, is a complete fiction. "J. T. LeRoy" does not exist. SMF 15. ***"J. T. LeRoy" is an imaginary person that exists only in the mind of Laura Albert.*** SMF 16. Unfortunately for Levy-Hinte and Antidote, as well as the public, who read "J. T. LeRoy's" biographies as representing that "J. T. LeRoy" actually existed, Albert and Underdogs did not reveal the fact that "J. T. LeRoy" was a figment of their imagination until 2006. SMF 27-28, 37. Furthermore, Albert and Underdogs tried to hide the truth as long as possible, further evidencing their intent that both the general public and Antidote continue to believe that "J. T. LeRoy" was an actual, living and breathing person. SMF 38-39.

Examples of the "biography" created by Albert and Underdogs to fool the public, including Antidote and Levy-Hinte, include among other items the "J. T. LeRoy" website, the book covers of *Sarah* and other of "LeRoy's" novels, interviews with "LeRoy," and the website and press releases from "J. T. LeRoy's" own publisher, Bloomsbury.

For example, "J. T. LeRoy's" website states:

The extraordinary stories that brought the author a cult following at the age of sixteen. Circulated copies of LeRoy's handwritten notebook pages brought early attention to the then unpublished author. Collected in print for the first time, these loosely connected autobiographical stories describe the harrowing

experiences of a young boy's life on the run. From the heartbreaking "Meteors," where he struggles for the attention of his wandering mother, to the paranoia of "Coal," to living on the streets of San Francisco in "Natoma Street," J. T. LeRoy's voice is as lyrical and nuanced as the readers of his acclaimed debut novel *Sarah* [sic] have come to expect.

Ex. S.

As an additional example, Bloomsbury's website contains a page of "author information" for "J. T. LeRoy" which states:

Born in West Virginia in 1980, J. T. LeRoy embarked upon a roadtrip across America at the age of thirteen with his mother. She abandoned him when they reached San Francisco and J.T. descended into a spiral of drug abuse and prostitution. At fifteen, J.T.'s psychiatrist encouraged him to start writing as a form of therapy.

J. T. LeRoy was first published at the age of sixteen and has written articles for *Spin*, *Nerve*, and *NY Press*. His critically acclaimed first novel *Sarah* was semi-autobiographical and is being made into a film by Gus Van Sant.

Ex. G.⁴

None of the facts contained on "J. T. LeRoy's" website or in Bloomsbury's biography is true. SMF 7-13. "J. T. LeRoy" did not write the novel *Sarah*. It is undisputed that Laura Albert wrote the novel. SMF 53-55. "J. T. LeRoy" was not born in, and never lived in, in West Virginia. SMF 7-8. "J. T. LeRoy" was not born in 1980. SMF 9. "J. T. LeRoy" never took a roadtrip across America at the age of thirteen. SMF 10. "J. T. LeRoy" was not abandoned by his mother in San Francisco. SMF 11. "J. T. LeRoy" did not first publish at the age of sixteen. SMF 12. "J. T. LeRoy" did not descend into a "spiral" of prostitution. SMF 13. *Sarah* is not based on the experiences of "J. T. LeRoy," SMF 14, and is not a "semi-autobiography" because "J. T. LeRoy" does not exist. SMF 15.

⁴ A true and correct copy of this web page is attached as Ex. G. The page can be found at the following address: <http://www.bloomsbury.com/authors/microsite.asp?id=97§ion=1>.

Nor can Albert claim that the author biography reflects her own personal life experiences, or that *Sarah* is a semi-autobiography of Albert's own personal life experiences. SMF 56-66. Albert is not a male. SMF 57. Albert was not born nor did she ever live in West Virginia. SMF 58-59. Rather, Albert was born and raised in Brooklyn, New York. SMF 60. Albert was born in 1965, not 1980. SMF 61-62. Albert never took a roadtrip across America at the age of thirteen. SMF 63. Albert was not abandoned by her mother in San Francisco. SMF 64. Albert did not first publish at the age of sixteen. SMF 65. And, finally, Albert never worked as a truck-stop prostitute. SMF 66.

Additionally, both the *Sarah* book cover and the Bloomsbury website contain a photo allegedly of the author, "J. T. LeRoy." Ex. G. SMF 22, 70. This photo is neither of Albert nor of "J. T. LeRoy." SMF 22. Albert knew this photo was being used as an author photo in connection with the selling of the book *Sarah* and consented to its use. SMF 22.

Despite the fact that "J. T. LeRoy" exists only in Albert's mind, Underdogs and Albert nonetheless knowingly continue to make false statements about "J. T. Leroy" and his writing to this day, and allow Bloomsbury to continue to make similar statements. SMF 17. Bloomsbury issued, and continues to make available, press releases related to both *Sarah*⁵ and *The Heart Is*

⁵ In particular, the *Sarah* press release quotes *Kirkus Reviews* as commenting that "It's disturbing to encounter a 20-year-old who knows this much about life's seamy side, but LeRoy depicts his damaged, deranged characters with considerable tenderness." Ex. G, H. The press release similarly quotes Jerry Stahl as commenting that "*Sarah* is an exhilarating, hysterical and beautifully written disturbing novel. Whatever young LeRoy had to live through to write a book like this, we're lucky he's here." *Id.* The press release makes further reference to the supposed "authenticity" of *Sarah* as a reflection of "Leroy's" own experiences by promising that the reader will be guided through "Leroy's" strange and perverse world by "his" expert hand: "The world of *Sarah* is one which the average person will never experience. Under Leroy's expert hand what initially seems deviant and strange becomes heartbreaking and wonderful as a boy's feelings and struggles with identity become universally recognized." *Id.*

Deceitful Above All Things,⁶ books portrayed as being authored by "J. T. LeRoy." Ex. G, H, I. The repeated suggestions made in the press releases that "J. T. LeRoy's" writing is based in his real-life experiences are not true. SMF 14-15. Neither *Sarah* nor *The Heart is Deceitful* are semi-autobiographical, or based in any part upon "J. T. LeRoy's" personal life, because, again, "J. T. LeRoy" does not exist. SMF 15.

To further substantiate the existence of "J. T. LeRoy," Albert created an actual *persona*. SMF 18, 24. Albert recruited, and sometimes paid, people to pretend to be "J. T. LeRoy" in public. SMF 18-19. Often, Savannah Knoop would pretend to be "J. T. LeRoy" during public appearances, while Albert pretended she was "J. T. LeRoy's" handler, "Speedie."⁷ SMF 20, 21. Albert provided Bloomsbury and magazines with photos of "J. T. LeRoy" which were neither photos of Albert nor photos of "J. T. LeRoy," but, rather, were photos of random people. SMF 18, 22-23. Albert pretended she was "J. T. LeRoy" in various communications via fax, email and telephone, including communications to Jeff Levy-Hinte and Steven Shainberg. SMF 24, 72. Albert conducted and gave interviews acting as "J. T. LeRoy." SMF 24. Albert befriended people as "J. T. LeRoy." SMF 24. Albert maintained and operated "J. T. LeRoy's" online diary and website. SMF 24. The creation of the "J. T. LeRoy" persona led people to believe that "J. T. LeRoy" existed and was a real human being. SMF 28. Albert and Underdogs each intended that both the general public, and Antidote in particular, would believe that "J. T. LeRoy" was a real-life person. SMF 38-39.

⁶ Ex. I. In particular, the press release for *The Heart Is Deceitful Above All Things* claims that "JT LeRoy first burst on the scene with his debut novel *Sarah*, which astonished reading audiences with a literary flair paired with heartbreaking, semi-autobiographical writing." *Id.* The press release also claims that *The Heart Is Deceitful Above All Things* was composed of "journal entries from his past" and that the stories contained therein are "in fact based on LeRoy's life, which was brutal in many ways – filled with homelessness, prostitution, abuse and drugs." *Id.*

⁷ Additionally, Albert falsified travel documents related to these public appearances. SMF 73; Ex. T.

As constructed by Albert and publicized by both Albert and Bloomsbury, "J. T. LeRoy's" life story, his persona and defendants' claim that *Sarah* was semi-autobiographical, lent a substantial and significant aura of authenticity to the story told in *Sarah*. SMF 26-27. The idea that this wild, outlandish story—a glimpse into the seedy, tawdry, frequently garish and often touching world of truck-stop prostitution—was at least in part based on "J. T. LeRoy's" actual experiences deepened the value and meaning of the story to its readers. SMF 26-27. The imprimatur of authenticity lent by "J. T. LeRoy's" drawing on his own personal experiences directly influenced the novel's readers' experience of the story. SMF 26-27; Ex. U.

Albert and Underdogs both intended for Antidote, and subsequently Levy-Hinte as the president of Antidote, to believe that "J. T. LeRoy" was a real-life person. SMF 38-39. In July 2003 Antidote, after negotiations with Judi Farkas, the agent for Underdogs and "J. T. LeRoy," purchased a one-year option on the film rights to *Sarah* for \$15,000. SMF 31-32; Ex. M.⁸ That contract was later extended for two additional year-long option periods, at an additional cost of \$15,000 per year. SMF 33. During the option period, Antidote invested significant time and resources exceeding \$60,000 into developing the project, over and above the \$45,000 spent on the option, including hiring a screenwriter to draft an initial script, attend and participate in development meetings with the screenwriter, Jeffrey Hatcher, and Shainberg. SMF 34-35.

During and after the negotiation of the *Sarah* option contract, Underdogs and Albert, aided by Farkas, all took repeated and deliberate steps to convince plaintiff that "J. T. LeRoy" was a real person and to conceal the fact that *Sarah*, far from being based on "J. T. LeRoy's" real-life experiences, was in fact based entirely on the imaginings of Laura Albert. SMF 37-46, 71-72. At no time before the option was purchased or before the option was extended did Albert,

⁸ Farkas also misrepresented the identity of *Sarah's* author. Ex. X; SMF 83.

Underdogs, or their agent, Judi Farkas, inform Antidote or Levy-Hinte that "J. T. LeRoy" did not exist. SMF 37. Underdogs, through Farkas, provided Antidote with a false IRS Form W-9 purportedly signed by "J. T. LeRoy" as a "United States Person" on August 1, 2003, but actually signed by Carolyn Albert. SMF 40, 42; Ex. L. The effect of providing a false IRS Form W-9 was to further make Levy-Hinte believe that "J. T. LeRoy" was a real person. SMF 44.⁹ Underdogs and Albert contrived for Levy-Hinte to meet "J. T. LeRoy" in person at a party in 2003 at Steven Shainberg's apartment in New York. SMF 45, 46. Albert was present at the meeting between Levy-Hinte and "J. T. LeRoy" in her role as "J. T. LeRoy's" alleged housemate. SMF 45. Underdogs and Albert caused and knowingly allowed Underdogs to execute the Option Agreement between Antidote and Underdogs using the false name "J. T. LeRoy," and further caused and knowingly allowed Underdogs and Judi Farkas to negotiate the Option Agreement under the false pretense that "J. T. LeRoy" was a real person. SMF 38-39.

In mid-to-late Fall, 2005, while Antidote was strategizing with Jeffrey Hatcher and Steven Shainberg on how to rework the first draft of the script for Antidote's *Sarah* film project, journalist Stephen Beachy published a New York Magazine article claiming that "J. T. Leroy" did not exist, and that *Sarah* and Leroy's other works had actually been penned by Albert. Ex. O. Judi Farkas and "J. T. LeRoy" (i.e., Albert) both denied the Beachy article. SMF 85. It was not until The New York Times published an article in January, 2006, that quoted Albert's partner-in-fraud, Geoffrey Knoop, on the hoax, that Farkas quit claiming to Antidote that "J. T. LeRoy" was real. SMF 85.

⁹ The W-9 requires a signature by a "U.S. person" and a person's signature signifies that that person is a "U.S. person." Ex. L. A person is to use Form W-9 "only if you are a U.S. person...to give your correct TIN [taxpayer identification number] to the person requesting it." *Id.*

Antidote found itself with a seemingly worthless film project on its hands, partly developed, and an option that was losing value rapidly. SMF 48. It was no longer possible to make the film Antidote had planned. SMF 49. The book and its author had been thoroughly discredited; the publisher's continuing claims that the novel and other "J. T. Leroy" works were "semi-autobiographical" were patently false. SMF 47. Antidote could not make a movie based only on the novel *Sarah*, without regard to the biographical information of the author. SMF 50. Much of the value Antidote saw in the project was related to the veracity and authenticity provided by the "author's" sordid and troubled past. SMF 29-30. Additionally, director Steven Shainberg has no interest in making a film based on *Sarah* now that "J. T. LeRoy" has been proven to be a hoax. SMF 47, 51. Antidote's involvement was always predicated on Steven Shainberg's involvement, and Antidote has little to no interest in moving forward without Shainberg, or in continuing to develop a film for which it would not be able to obtain financing, distribution or insurance. SMF 52.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue of material fact to be tried and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court determines "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Greenberg v. Chrust*, 282 F. Supp. 2d 112, 116 (S.D.N.Y. 2003). "Only disputes over acts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Carofino v. Forester, M.D.*, 450 F. Supp. 2d 257, 264 (S.D.N.Y. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct 2505, 91 L.Ed.2d 202 (1986)). Ultimately, summary judgment

may be granted to the moving party if, upon reviewing the evidence in light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact. *Richardson v. Selsky*, 5 F.3d 616 (2d Cir. 1993).

The rules for when summary judgment may be used are four-fold. First, the remedy may not be granted unless, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Gallo v. Prudential Residential Services, Ltd. P'ship*, 22 F.3d 1219, 1223 (2d. Cir. 1994) (citing Fed. R. Civ. P. 56(c)). Second, the moving party bears the burden to show that there are no material facts in dispute. Third, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Gallo* at 1223. Finally, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. *Id.* Once the movant has demonstrated that there is no genuine issue as to any material fact, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and cannot rest on "mere allegations or denials" of the facts asserted by the movant. *Newbro v. Freed*, 409 F. Supp. 2d 386, 392 (S.D.N.Y. 2006) (citing Fed. R. Civ. P. 56(e)). As a result, "[w]hen no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo* at 1224. Such is the case here.

ARGUMENT

I. ALBERT AND UNDERDOGS COMMITTED COMMON LAW FRAUD

Under New York law, Antidote can establish its fraud claims against Albert and Underdogs by proving "(1) a material misrepresentation or omission of fact; (2) made by

defendant with knowledge of its falsity; (3) and intent to defraud; (4) reasonable reliance...; and (5) damage." *Carafino v. Forester, M. D.*, 450 F. Supp. 2d 257, 264 (S.D. N.Y. 2006). There is no question that Antidote has sufficient evidence to firmly establish each of these elements *without dispute*,¹⁰ and is therefore entitled to summary judgment on its fraud claims against both Albert and Underdogs.

A. Misrepresentations And Omissions

It simply cannot be disputed that both Albert and Underdogs affirmatively misrepresented and omitted to disclose material facts regarding *Sarah's* authorship. The documentary evidence, admissions, and affidavit and deposition testimony in this litigation establish without question that Albert deliberately misrepresented, to the general public and to Antidote, that "J. T. Leroy" wrote *Sarah*, and that *Sarah* was based on "J. T. Leroy's" real-life experiences. Ex. G-H, R; SMF 18-20, 22-24, 37-39, 40, 45-46, 68, 72. It is similarly undisputed that Underdogs represented that "J. T. Leroy" was both a real person and the person who wrote *Sarah*. SMF 31, 37, 40. Moreover, Underdogs knew that Antidote believed that *Sarah* was, essentially, "J. T. Leroy's" autobiographical memoir, and failed to disclose the truth to Antidote before entering into the option contract. SMF 37, 39.

The undisputed facts establish that Albert deliberately created a false persona, "J. T. Leroy," and set out to convince the public that this persona authored the books she actually wrote. Ex. G-H, R; SMF 18-20, 22-24, 37-39, 40, 45-46, 68, 71-72. Albert has admitted that "J. T. LeRoy" does not exist, and that she took numerous steps to convince the general public that Leroy did exist, had a horrific childhood, was an eccentric, interesting, and slightly debauched celebrity ingenue, and, most importantly, wrote the novel *Sarah* based on his real-life

¹⁰ Under New York law, fraud must be proven by clear and convincing evidence. *Newbro v. Freed*, 409 F. Supp. 2d 386, 400 (S.D.N.Y. 2006).

experiences. SMF 15, 16, 18, 22, 23, 24. She represented herself to be "J. T. Leroy" in phone, e-mail and fax conversations; in her own words, she "communicated with tens of thousands of people as 'J. T. Leroy.'" SMF 24, 72. She represented to the world on her website, in her writing, and through press interviews that J. T. Leroy was a real person and the author of *Sarah*. Ex. G-J, P, R, S, W. She roped Savannah Knoop into portraying Leroy for her, at publicity and social events. SMF 20, 46, 71. Albert cannot deny that she engaged in countless misrepresentations about her writing, "J. T. Leroy's" past experiences and very existence, and the novel *Sarah*. That those representations were aimed primarily at the general public does Ms. Albert no good.¹¹ Antidote, its principal, Jeff Levy-Hinte, and those associated with the *Sarah* film project Antidote undertook to develop were all a part of the broader group at whom Ms. Albert's deceptions were aimed. Ex. G-H, R; SMF 18-20, 22-24, 37-40, 45-46, 68, 71-72. Albert and Underdogs also deceived Levy-Hinte and Shainberg specifically, by e-mail and by arranging for Levy-Hinte to be introduced to "J. T. LeRoy" in person. SMF 45, 46, 72.

It is similarly undisputed that Underdogs, even if it is something more than an alter ego for Albert, was an active participant in Ms. Albert's misrepresentations; the facts establish beyond doubt that Underdogs represented to Antidote that J. T. Leroy existed and was the author of *Sarah*. SMF 18-24, 37, 40, 42, 45, 46, 68, 71, 72. Underdogs falsely executed the option contract for *Sarah* in "J. T. Leroy's" name. Ex. M. Albert and Underdogs provided Antidote with a falsified IRS Form W-9 purportedly "executed" by "J. T. Leroy" as a real "person." SMF 40, 42; Ex. L.

¹¹ See, e.g., *City of New York v. Lead Industries Ass'n*, 190 A.D.2d 173, 177 (NY App. 1993) ("Misrepresentations of safety to the public at large, for the purpose of influencing the marketing of a product known to be defective, gives rise to a separate cause of action for fraud.").

Underdogs knew that Antidote believed that *Sarah* was a semi-autobiographical novel "written" by a semi-famous and precocious young man with a tawdry history. SMF 18-24, 28, 37-40, 44-46, 68, 71, 72. Underdogs knew that Antidote was entering into the option agreement for *Sarah* based on the mistaken belief in the public perception that "J. T. Leroy" wrote the novel, which was deliberately created and fostered by Laura Albert, the novel's true author. SMF 5, 18-24, 26-28, 31, 37-40, 44-46, 68, 71, 72; Ex. L, M. Due to Albert's extensive efforts at deception, SMF 18-24, 37, 40, 45, 46, 68, 71, 72; Ex. L, M, however, the truth about *Sarah's* authorship was unavailable to Antidote, and Underdogs knew it. SMF 18-24, 28, 37-40, 44-46, 68, 71, 72. Underdogs nevertheless deliberately neglected to inform Antidote of the true facts regarding "J. T. Leroy," and instead assisted Albert with the deception, as described above. SMF 37. This failure to disclose on Underdogs' part was as wrongful—and actionable—a misrepresentation as were defendants' affirmative lies about *Sarah's* so-called "author."¹²

It is undisputed that defendants Albert and Underdogs made affirmative misrepresentations about J. T. Leroy and the novel *Sarah*, both to the general public (including Antidote) and to Antidote specifically. SMF 5, 18-24, 37-40, 45-46, 6871-72; Ex. G-M, P, R-T. It is undisputed that the misrepresentations about "J. T. Leroy" were material, as evidenced by the representations Antidote sought in the option contract and its principals' uncontradicted testimony. SMF 26-30, Ex. M. It is also undisputed that, at the time the parties entered into the

¹² Even if Antidote could not prove an affirmative misrepresentation by Underdogs—which is clearly not the case—Antidote can still prove fraud by omission if there was a duty on the part of the defendant to disclose the omitted fact. *Newbro*, 409 F. Supp. 2d at 400. Underdogs was obliged to disclose the "omitted fact"—that "J. T. Leroy" was a hoax—under New York's "special facts doctrine," *id.*, which allows a plaintiff to prove fraud by showing that "(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." *Id.* at 401 (citing *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 155 (2d Cir. 1995)) (stating further that under the special facts doctrine, "[t]he superior knowledge held by one party renders its transaction without disclosure with another party inherently unfair and thus the transaction may constitute fraud").

option contract, Underdogs and Albert had superior knowledge regarding a material fact--that "J. T. Leroy" was not a real person, and that *Sarah* was not his semi-autobiographical novel. SMF 15, 16, 18, 19, 21, 24, 53, 54, 56. Defendants had a duty to disclose the truth about "J. T. Leroy," and they neglected to do so. SMF 37.

B. Knowledge And Intent

Defendants simply cannot argue that they did not have the requisite knowledge and intent to establish the scienter element of Antidote's fraud claims. There can be no disputed issue of material fact on these elements: *Ms. Albert knows who she is*. Laura Albert certainly has known from the beginning of her deception upon the reading public that she is not, in fact, a young male transvestite former homeless prostitute named "J. T. Leroy." SMF 15, 16, 18, 19, 21, 22, 23, 24, 53-68. Laura Albert and Underdogs knew, at the time they were representing otherwise to the world, that "J. T. Leroy" did not, in fact, exist. SMF 15-16, 53-56, 86, 87. Laura Albert and Underdogs have each admitted that *Sarah* is not based on the real-life experiences of a young male transvestite former homeless prostitute named "J. T. Leroy." SMF 8-16, 53-66. Neither Laura Albert nor Underdogs can claim that they did not know that *Sarah* was written by Albert herself. SMF 15, 16, 53-56. And it is very clear from all of the record evidence that each of the defendants' misrepresentations about "J. T. Leroy" was intended to deceive the public, including Antidote, into believing the hype about "Leroy" and *Sarah*.¹³ SMF 18, 19, 22-24, 38-39, 68.

Defendants' complicated efforts at hiding the truth about Albert, "J. T. Leroy," the novel *Sarah*, and "Leroy's" other works are evidence of their intent. As noted in detail above, Albert

¹³ See 60A NY JUR FRAUD AND DECEIT 2d §122 (2006) ("Where representations are made to a class of persons or to the public generally, in order to furnish the basis of liability for fraud, they must have been intended to influence a complaining party as one of the public or as one of the class; in such case, however, an intent to deceive the plaintiff in particular is not necessary, *it being sufficient if there was an intent to defraud any person falling within the category for whom the representations were made.*") (collecting cases).

and Underdogs went to great lengths to establish "J. T. Leroy's" identity, persona, personality, and "existence." They provided photos. Albert impersonated the fictional "LeRoy" by telephone, e-mail, and facsimile. When questions were raised as to "J. T. Leroy's" real identity, Albert hired Savannah Knoop to impersonate "Leroy." SMF 18, 19, 20. Similarly, when Antidote was interested in learning more about "Leroy," defendants arranged for Jeff Levy-Hinte to meet "Leroy" as well. SMF 45, 46. When Beachy's article was published, Albert and Underdogs, again aided by Farkas, denied that "J.T. LeRoy" was hoax in order to continue their fraud. SMF 85. It is undisputed and indisputable that defendants concocted the whole scheme, and planned each misrepresentation and omission, with the intent of deceiving the public (including Antidote), into believing that "LeRoy's" books were a thinly-disguised, authentic memoir of an unbelievable and horrifying past. SMF 24, 38-39.

It is indisputable that both Albert and Underdogs knew that "J. T. Leroy" did not exist. SMF 15, 16. It is indisputable that both Albert and Underdogs knew that *Sarah* was not the semi-autobiographical musings of a former truck-stop prostitute. SMF 7-16. It is indisputable that both Albert and Underdogs knew that *Sarah* was actually entirely fictional, and authored by Albert herself. SMF 14, 53-55. Defendants lied to the public, and to Antidote, about each of those facts repeatedly and deliberately, in order to convince them of "J. T. Leroy's" existence. Both Albert's and Underdogs' scienter is more than sufficiently established by these undisputed facts, and Antidote is entitled to summary judgment in its favor on that issue.

C. Reasonable Reliance

Antidote reasonably relied on Albert and Underdogs' misrepresentations, to both the public and to Antidote itself, as to the identity and biography of *Sarah's* author. Defendants

cannot raise a material issue of disputed fact on this element of fraud, and Antidote is therefore entitled to summary judgment on this issue.

It is undisputed that Antidote relied on defendants' misrepresentations about "J. T. Leroy." Leroy's celebrity and highly-publicized biography were an important part of Antidote's decision to develop *Sarah* into a film. SMF 26-30, 69. Albert and Underdogs had intended that the public believe that *Sarah*, along with Albert's other published writing, was authored by the fictional "J. T. Leroy," and was a true story, and it worked: People believed that "J. T. Leroy" was a real person. SMF 28. Steven Shainberg and Jeff Levy-Hinte were interested in developing a film based on *Sarah* because of their belief that the story would resonate more with audiences because of its semi-autobiographical nature. SMF 26-30. Levy-Hinte believed that the book had been written as an "aesthetic answer" to the (imaginary) trauma suffered by the (imaginary) Leroy during this (imaginary) childhood; that belief was a large part of Antidote's decision to purchase an option to develop the book into a film and to spend significant resources, in time and money, beginning the project. SMF 26-30.

It is also clear that Antidote's reliance was reasonable. It is undisputed that the knowledge that "J. T. LeRoy" was fictional was singularly within the defendants' possession. In order to show that reliance was "reasonable," Antidote need only show that its conduct in relying on defendants' misstatements was not "so utterly unreasonable, in light of the information open to him or her, that the law may properly say that his...loss is his...own responsibility." 60A NY JUR FRAUD AND DECEIT 2d §147 (2006); *see also Mead v. Bunn*, 32 N.Y. 275 (1865) (holding that a contracting party has an absolute right to rely on express statements regarding existing facts when the truth is known to the opposite party and unknown to it).

Antidote had no reason to believe that "J. T. Leroy" did not exist, or that *Sarah* and his other works were not his attempt to purge his childhood demons, or based on real-life experiences. Albert defrauded the entire public about her identity as the true author of *Sarah* and "J. T. Leroy's" other books. Bloomsbury, "LeRoy's" publisher, disseminated biographical information about "LeRoy" on the internet and in its publicity for the books with Albert and Underdogs' knowledge and consent. SMF 5, 6, 14-16, 18-24, 68; Ex. G-K, P, R, S. Albert went to a great deal of effort to convince everyone that "J. T. LeRoy" was a real person, with real issues, based on a real traumatic and difficult past. SMF 5, 6, 14-16, 18-24, 68. Falsified *official* documents were provided, SMF 40, 73; Ex. L, M, T, V and Levy-Hinte was introduced to the "LeRoy" imposter. SMF 45.

D. Damage

Finally, it is clear that Antidote has been damaged. The money it was induced to spend to purchase the option, in addition to the time, money, and other resources spent to begin developing the project—time and resources that could have been spent developing other film projects—are undisputed. SMF 32-35. Antidote was falsely induced to purchase something that was not, in fact, what it was led to believe. SMF 27-30; 74-76. Antidote was forced to abandon its *Sarah* project when the defendants' fraud was revealed. SMF 47-52. Neither Antidote nor the attached director, Steven Shainberg, have an interest in making a movie based on a *Sarah* novel that is wholly fictional, or one associated with Albert and her elaborate, fraudulent and damaging hoax. SMF 47-52.

The facts establishing each of the elements of fraud against defendants Underdogs and Albert are undisputed. Underdogs and Albert knowingly and deliberately made countless material misrepresentations about the nature of the novel *Sarah*, Albert's identity, Savannah

Knoop's identity, and the existence and history of "J. T. LeRoy." Neither Underdogs nor Albert informed Antidote about the truth regarding "J. T. LeRoy," despite their knowledge that Antidote was relying on their public and direct misrepresentations. SMF 37-39. Not only did both Underdogs and Albert know Antidote would have no access to the truth, they each deliberately hid it. SMF 6, 18-24, 37-39, 68; 85. Based on this knowing and deliberate fraud, Antidote was induced to purchase an option it otherwise would not have, and was induced to waste resources and incur opportunity costs on a film it otherwise would not have wanted to make. Those resources, now that the project is worthless, are wasted. None of these facts can be disputed by either Underdogs or Albert, and Antidote is entitled to summary judgment as to liability in its favor on its fraud claims.

II. UNDERDOGS HAS BREACHED THE OPTION CONTRACT

Antidote is also entitled to a judgment of liability as a matter of law on its breach of contract claim against defendant Underdogs. In order to prevail on its breach of contract claim, Antidote must show (a) the existence of a contract, (b) that Antidote performed, (c) that Underdogs breached the contract, and (d) that the breach caused Antidote harm. *Goll v. First Tennessee Capital Markets*, 05 Civ. 7890 (HB), 2006 U.S. Dist. LEXIS 52931, *4 (S.D.N.Y. Aug. 1, 2006) (citing *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1988)). Additionally, New York law implies a covenant of good faith and fair dealing into every contract. *See Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994); *Westchester Teamsters Local 456 v. Fleet Nat'l Bank*, 02 Civ. 6664 (AK), 2006 U.S. Dist. LEXIS 54213 (S.D.N.Y., Aug. 18, 2006).

The undisputed facts demonstrate that Antidote has established each element of liability on its breach of contract claim. The existence of the contract is unquestionable. Ex. M; SMF

31-35. It is similarly undisputed that *Antidote* performed its obligations under the contract: it paid for the option and the extensions, and began to develop a film. SMF 32-33.

The undisputed facts also demonstrate that the option contract was breached. As shown above, it is undisputed that (1) J. T. LeRoy did not exist; (2) J. T. LeRoy was not the author of *Sarah*; and (3) J. T. LeRoy, as an imaginary person, did not have an "approved likeness" or "approved biography" that Underdogs could properly authorize Antidote to use in connection with marketing a film based on *Sarah*. See pp. 10-17, above. These undisputed facts establish that Underdogs has breached Paragraphs 8, 9, 10, 11 and 13 of the Option Agreement, and that those breaches caused Antidote harm.

A. Underdogs has breached Paragraph 9 of the Option Agreement

First, the undisputed facts establish that Underdogs has breached the representations and warranties set forth in Paragraph 9 of the Option Agreement. In particular, Underdogs has breached Paragraph 9(a) of the Option Agreement, in which Underdogs specifically represented that:

JT LeRoy is the sole author of the Work and Owner is the sole and exclusive owner and proprietor throughout the universe of the Work and any and all Granted Rights granted to Producer herein

Ex. M (emphasis added). "The Work" referred to in the above paragraph is the novel *Sarah*. See *Id.* at p. 1.

It is undisputed that Underdogs has breached its representation and warranty that "J. T. LeRoy is the sole author of" *Sarah*. As shown above, it is undisputed that J. T. LeRoy does not

exist and never did, and that Laura Albert was, in fact the "sole author" of *Sarah*. Underdogs' breach of the "sole author" clause of paragraph 9(a) is clear and indisputable.¹⁴

It is also undisputed that Underdogs' breach caused Antidote to suffer harm. As shown above, it is beyond dispute that Antidote would not have entered into the Option Agreement with Underdogs if Underdogs had told the truth about the fact that J. T. LeRoy was not, in fact, the "sole author" of *Sarah*. SMF 74-76. Moreover, it is undisputed that the revelation of the fact that "J. T. LeRoy" does not exist and was not the author of *Sarah* has had a materially adverse effect on the value of the option agreement for Antidote and has deprived Antidote of the benefit of its bargain. SMF 47-52. That is an *incurable* material breach. *See, e.g., Prudential Ins. Co. of Am. v. Premit Group, Inc.*, 704 N.Y.S.2d 253 (N. Y. App. 2000) (finding false warranty of sole ownership of patent constitutes an incurable material breach of license agreement). The only issue that remains to be tried is the amount of damages that Antidote has suffered. Antidote is entitled to judgment as a matter of law on Underdogs's liability for its breach of Paragraph 9.

B. Underdogs has breached Paragraph 8 of the Option Agreement

The undisputed facts also establish that Underdogs has breached Paragraph 8 of the Option Agreement, in which Underdogs promised Antidote that Antidote would have "the unlimited and perpetual right" to utilize J. T. LeRoy's "name, approved likeness and approved biography" in connection with *Sarah* and any film based on *Sarah*. Ex. M. Again, it is

¹⁴ Underdogs has previously argued that Paragraph 9(a) is simply a warranty that no third-party claims would be asserted regarding the authorship of *Sarah*. That argument does not hold water. First, it is contrary to the plain language of the contract, which specifically warrants that J. T. LeRoy is the sole author of *Sarah* and specifically distinguishes between LeRoy and Underdogs for the purpose of doing so. If Underdogs wanted to limit its warranty to the fact that Underdogs was the sole owner of the rights to *Sarah*, it should have insisted that the "sole author" clause of Paragraph 9(a) be excluded. It cannot demand that the Court simply ignore that clause now. Second, the inclusion of Paragraph 8 in the contract—in which Underdogs promised that Antidote would have the use of J. T. LeRoy's biography and likeness when marketing the *Sarah* film—is further evidence that Antidote bargained for, and received, specific assurances that it was J. T. LeRoy—not Laura Albert, James Frey, or anyone else—who had written *Sarah*.

undisputed that there was no J. T. LeRoy whose "name, approved likeness and approved biography" *could* be used in connection with *Sarah*. SMF 15-16, 18, 24, 53-56. As a result, it was literally impossible for Underdogs to ever honor its obligation to provide Underdogs with the promised "approved likeness and approved biography." Underdogs was in breach of Paragraph 8 from the moment it signed the Option Agreement, and it remains in breach today. Moreover, the breach caused Antidote to suffer harm. It is undisputed that Antidote was induced to enter into the Option Agreement by J. T. LeRoy's notoriety and the positive consequences that notoriety promised for the *Sarah* film project. SMF 27-30. It is equally undisputed that Antidote would not have entered into the Option Agreement if it had not been able to secure the rights to use J. T. LeRoy's likeness and biography to help promote the *Sarah* film. Antidote is entitled to a judgment of liability as a matter of law on Underdogs' breach of Paragraph 8 of the Option Agreement.

C. Underdogs has breached Paragraph 11 of the Option Agreement

The undisputed facts also establish that Underdogs has breached Paragraph 11 of the Option Agreement, in which Underdogs promised to "exercise best efforts to maintain in force, for the full term legally allowed, copyright protection throughout the world." Ex. M. It is undisputed that Underdogs has breached this promise. Underdogs authorized filing for the U.S. Copyright in *Sarah* by using a Short Form TX. Ex. V; SMF 82. The Short Form may not be used for anonymous or pseudonymous works. Ex. BB. The proper, long form requires pseudonymous works to be identified as such either by (1) leaving the "author" line blank; (2) identifying the author's name as a pseudonym or (3) identifying both the author's true name and the pseudonym. Ex. CC.¹⁵ It is undisputed that Underdogs did none of those things when it

¹⁵ This Court may take judicial notice of the requirements of U.S. copyright law.

authorized the registration of the copyright in *Sarah*; instead, the Short Form TX listed the "author" as J. T. LeRoy without identifying that name as a pseudonym or identifying Laura Albert as the author's real name. Underdogs' improper, deceptive and legally insufficient copyright registration of *Sarah* through its authorized agent was, as a matter of law, a breach of its promise that it would use "best efforts" to maintain in full force U.S. copyright protection over *Sarah*. Moreover, for the reasons already discussed above, Antidote was harmed by Underdogs' breach. Antidote is entitled to a judgment of liability as a matter of law on Underdogs' breach of Paragraph 11 of the Option Agreement.

D. Underdogs has breached Paragraph 13 of the Option Agreement

The undisputed facts also establish that Underdogs has breached Paragraph 13 of the Option Agreement, in which Underdogs promised that it would "execute and deliver such further documents and perform such further acts consistent herewith as may be or become reasonably necessary or desirable to effectuate the purposes of this Agreement." Ex. M. It is undisputed that when the "J. T. LeRoy" hoax was uncovered in late 2005 and early 2006, Antidote requested through its counsel that Underdogs provide Antidote with clear chain of title to *Sarah*. SMF. 88. It is undisputed that Judi Farkas, Underdogs' agent, agreed that Antidote's request was reasonable and that Underdogs was required to provide the chain of title documents to Antidote. SMF 88; Ex. Z. And it is undisputed that Underdogs never did so. Antidote is entitled to a judgment of liability as a matter of law on Underdogs' breach of Paragraph 13 of the Option Agreement.

E. Underdogs has breached Paragraph 10 of the Option Agreement

The undisputed facts further establish that Underdogs has breached Paragraph 10 of the Option Agreement, in which Underdogs promised to indemnify Antidote against "any and all bona fide claims, demands, damages, liability, losses, judgments, costs and expenses (including

reasonable outside attorney's fees) sustained or incurred by [Antidote] . . . arising out of any breach of any warranty, undertaking or representation or agreement" made by Underdogs in the Option Agreement. As demonstrated above, the undisputed facts establish Underdogs' breach of the undertakings, warranties and representations contained in Paragraphs 8, 9, 11 and 13 of the Option Agreement. Moreover, it is undisputed that Underdogs has refused to provide Antidote with the relief against Underdogs' breaches to which Antidote is entitled, despite Antidote's repeated requests for the same. Ex. DD; SMF 89. Underdogs' wrongful refusal to compensate Antidote for the harm it has suffered due to Underdogs' breaches of the Option Agreement is, itself, a material breach of the Agreement, and it is one on which Antidote is entitled to judgment as a matter of law.

F. Underdogs Has Breached The Implied Covenant of Good Faith

Finally, the undisputed facts demonstrate that Underdogs breached the implied covenant of good faith and fair dealing. *See Travellers Int'l*, 41 F.3d at 1575. "[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Westchester Teamsters*, 2006 U.S. Dist. LEXIS 54213 at *25-26 (citing *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87 (1933); *Interdigital Comm'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 536 (S.D.N.Y. 2005)). The undisputed facts establish that Underdogs was not acting in good faith with Antidote from the very beginning of the contract negotiations and contractual relationship. As demonstrated above, Underdogs participation in the elaborate fraud regarding "J. T. LeRoy's" identity and history made it impossible for Antidote to receive the "fruits of the contract." Because of Underdogs' bad faith, Antidote purchased an option on a story that, essentially, does not exist—the story of the real-life experiences of "J. T. LeRoy's"

childhood. SMF 14-16, 55. Underdogs' bad faith is unquestionable; its participation in the scheme undisputed. See pp. 10-17, above. Its deliberate machinations in order to sell Antidote something that *did not exist* clearly violated the implied covenant and constitutes a breach, therefore, of the option contract.

Underdogs' breach of the option contract is undisputed. The only matter to be resolved at trial is the extent of damages – including reasonable attorney's fees – that Antidote has suffered as a result of Underdogs' breach.

CONCLUSION

For all of the foregoing reasons, Antidote respectfully requests this Court to grant the instant motion for summary judgment on the fraud and unjust enrichment claims against Defendants Albert and Underdogs, and enter judgment as a matter of law in Antidote's favor against .

Respectfully submitted,

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January 10, 2007

CERTIFICATE OF SERVICE

I hereby certify that on **January 10, 2007**, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following:
Toby Butterfield, David Galalis, Edward Rosenthal, and Mason Weisz.

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