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6
7 UNITED STATES DISTRICT COURT

8 DISTRICT OF ARIZONA

9 TODD MCFARLANE PRODUCTIONS,
INC.; TMP INTERNATIONAL, INC., a
10 Michigan corporation; TODD MCFARLANE
ENTERTAINMENT, INC., a California
11 corporation; and TODD MCFARLANE,

12 Plaintiffs,

13 vs.

14 AL SIMMONS and MELANIE SIMMONS,
husband and wife,

15 Defendants.
16

No. _____

**VERIFIED COMPLAINT FOR
INJUNCTIVE RELIEF AND
OTHER RELIEF**

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17 Plaintiffs, Todd McFarlane Productions (“TMP”), TMP International, Inc.
18 (“TMPI”), Todd McFarlane Entertainment, Inc. (“TME”), collectively (“the McFarlane
19 Companies”) and Todd McFarlane (“McFarlane”), for their Verified Complaint for
20 Injunctive Relief and Other Relief against Defendants, allege as follows:
21

NATURE OF THE CASE

22 1. This is an action for Lanham Act violations, actual and threatened
23 misappropriation of trade secrets, and other claims. Plaintiffs seek injunctive relief and
24 monetary damages.

25 2. Defendants Al Simmons and Melanie Simmons (collectively, “Defendants”
26 or the “Simmons”) are former TMPI employees who breached fiduciary duties and
27 engaged in unlawful, tortious conduct while they were still employed by TMPI. TMPI
28

1 trusted Defendants and, based upon that trust and Defendants' agreement not to disclose
2 confidential information about the McFarlane Companies, Defendants accessed trade
3 secret and confidential information about the McFarlane Companies while they worked at
4 TMPI. The Defendants' misappropriation of the McFarlane Companies' trade secrets
5 and disclosure of the McFarlane Companies' confidential information have damaged the
6 McFarlane Companies and McFarlane, and threatens to cause other irreparable harm to
7 the McFarlane Companies and McFarlane. Additionally, Defendants have violated
8 Plaintiffs' federally protected and common law intellectual property rights.

9 **THE PARTIES**

10 3. TMP is an Arizona corporation that is authorized to and regularly conducts
11 business in Maricopa County, Arizona.

12 4. TMPI is a Michigan corporation that is authorized to and regularly conducts
13 business in Maricopa County, Arizona.

14 5. TME is a California corporation.

15 6. McFarlane is an Arizona resident.

16 7. Defendants Al Simmons and Melanie Simmons, also known as Melanie
17 Baird-Simmons, are husband and wife and residents of Maricopa County, Arizona. All
18 actions taken by Defendants as alleged herein were taken on behalf of themselves and
19 their marital community.

20 8. Defendants have taken actions and caused events to occur in Maricopa
21 County, Arizona, out of which TMP's claims arise. Venue and jurisdiction are
22 appropriate in this Court pursuant to 28 U.S.C § 1331 and 28 U.S.C. § 1391(b).

23 **BACKGROUND**

24 **TMP's Business**

25 9. TMP is a publishing, entertainment and production company providing
26 products and services. The industry is highly competitive and substantial efforts are
27 required to secure new business, maintain customers, and promote TMP's brands.

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1 10. TMPI, among other functions, designs, manufactures and distributes
2 products.

3 11. TME is an entertainment company, which oversees and produces
4 programming and other content.

5 12. The McFarlane Companies' financial success and viability depends upon
6 maintaining strong relationships with its customers and vendors and also relies on the
7 reputation and property rights of the McFarlane Companies and McFarlane.

8 13. The McFarlane Companies disclose confidential information to their staff
9 including, but not limited to, information regarding customers and prospective customers,
10 history of accounts, product development and promotional efforts, costs, employees,
11 marketing methods and plans, support, processes, proprietary methods, technical
12 specifications, and financial information.

13 14. Plaintiffs' confidential, proprietary, and trade secret information was
14 compiled through and by the use of Plaintiffs' ingenuity, time, marketing, and product
15 development strategies, pricing, labor, significant financial investment, investigation, and
16 long experience, rendering this information a critical asset.

17 15. Plaintiffs take reasonable steps to protect their confidential, proprietary, and
18 trade secret information, its customer base, and its goodwill. The McFarlane Companies
19 require their employees to execute confidentiality and non-disclosure agreements, do not
20 share their trade secret information, and keeps this information secure.

21 **Defendants' Employment with TMPI and Obligations**

22 16. TMPI employed Al Simmons. In his trusted positions for TMPI, Al
23 Simmons was exposed to and accessed a great deal of the McFarlane Companies'
24 confidential information and trade secrets.

25 17. With TMPI's permission, as necessary, Al Simmons worked in the
26 McFarlane Companies' office, warehouse, and out of his home office to conduct the
27 McFarlane Companies' business.

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1 18. TMPI employed Melanie Simmons as its human resources executive. In this
2 trusted position, Melanie Simmons was exposed to and accessed a great deal of the
3 McFarlane Companies' confidential information and trade secrets. Upon information and
4 belief, Melanie Simmons has aided and abetted Al Simmons in the unlawful conduct
5 described in this Complaint.

6 19. As a condition of the Simmons' employment by TMPI, the Simmons were
7 required to and did sign acknowledgements of TMPI's Employment Handbook and
8 policies ("Simmons Agreements"). Further, as an HR manager at TMPI, Melanie
9 Simmons was responsible for having new hires sign the same agreement, which included
10 confidentiality and non-disclosure requirements.

11 20. In the Simmons Agreements, the Simmons agreed, among other things:
12 (1) not to use or disclose the McFarlane Companies' business information, including
13 products, sources, costs of products, or any other information, during their employment
14 and after employment terminates; (2) not to use unpublished or copyrighted materials;
15 and (3) to maintain confidentiality concerning the McFarlane Companies and McFarlane.
16 The Simmons Agreements protect the McFarlane Companies' legitimate interests in their
17 customer base, confidential information, and goodwill.

18 21. TMPI would not have employed Al or Melanie Simmons or provided them
19 with access to its confidential, proprietary, and trade secret information, if they had not
20 agreed to maintain the confidentiality of the McFarlane Companies' information and
21 refrain from using or disclosing the information, on their own behalf or on behalf of any
22 other third party.

23 22. The McFarlane Companies' confidential, proprietary, and trade secret
24 information is not readily accessible to their competitors, and Simmons would not have
25 been exposed to this information if they had not agreed to the restrictive covenants in the
26 Simmons Agreements.

27 23. In early 2011, Al Simmons approached TMPI and McFarlane stating that he
28 desired to write or have co-authored an autobiography about his life (the "Book").

1 24. McFarlane and TMPI questioned that decision, but discussed with Al
2 Simmons that so long as he was accurate with regard to any mentions of the McFarlane
3 Companies and McFarlane, and honored his obligations to them, that Al Simmons was
4 free to pursue the Book on his free time.

5 25. Later in 2011, Al Simmons requested and Todd McFarlane agreed to
6 participate in a background discussion with Al Simmons and a ghostwriter that Al
7 Simmons had hired from Scottsdale Multi-Media, Inc. McFarlane again cautioned Al
8 Simmons to make sure that the Book did not infringe on any of the McFarlane
9 Companies' or McFarlane's rights and that the Book be accurate. McFarlane also
10 communicated again to Al Simmons that he questioned the purpose of the Book and did
11 not endorse it.

12 26. In 2012, Al Simmons published the Book, entitled "The Art of Being
13 Spawn," which is riddled with knowing untruths, inaccuracies, misappropriations of the
14 McFarlane Companies' trade secrets, disclosures of the McFarlane Companies' and
15 McFarlane's confidential information, and infringements on the McFarlane Companies'
16 and McFarlane's intellectual property rights.

17 27. One of the most egregious examples of false and misleading information in
18 the Book is Al Simmons' suggestion in the Book that his life was allegedly the
19 inspiration for or provided any background for the "Spawn" character. Al Simmons, who
20 was flattered and eagerly gave his consent to McFarlane in 1992 for his name to be a part
21 of "Spawn," was not the inspiration for "Spawn's" central character and no one has ever
22 confused that character with Defendant Al Simmons. Curiously, Defendant Al Simmons
23 has, over the years, as "Spawn" enjoyed popularity, remarked on how his association
24 with Plaintiffs has provided him with some name recognition or notoriety, where he had
25 none before "Spawn." Defendant Simmons has, in effect, traded on Plaintiffs' fame,
26 brand and copyright protected creation, and now is deliberately using falsities in the Book
27 to further attempt to improperly capitalize and infringe upon the McFarlane Companies'
28 property interests and McFarlane's name, likeness and identity.

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1 28. TMPI and McFarlane took steps to point out the fundamental problems and
2 wrongful and tortious content in the Book to the Simmons, but Defendants refused to
3 cease publishing the Book and to retract any copies or content that they had sold or
4 distributed.

5 29. Al Simmons also wrongfully and tortiously threatened wider distribution of
6 the Book and further damage to the reputation and goodwill of the McFarlane Companies
7 and McFarlane, unless McFarlane and TMPI paid the Simmons an exorbitant sum of
8 money in exchange for that and other alleged but unfounded claims.

9 30. Simmons is violating his contractual obligations by disclosing and using the
10 confidential and proprietary information of the McFarlane Companies.

11 31. The Simmons have wrongfully used the McFarlane Companies' confidential
12 and trade secret information to promote the Book.

13 32. As a result of Defendants' actions, the McFarlane Companies and McFarlane
14 have been harmed and face continuing harm and irreparable injury by losing customers,
15 goodwill and the value of the McFarlane Companies' proprietary information, which will
16 continue unless Defendants are restrained.

17 33. As a further result of Defendants' actions, Plaintiffs' property rights,
18 reputation and business expectancies have been wrongfully damaged.

19 **COUNT I**

20 **ACTUAL AND THREATENED MISAPPROPRIATION OF**
21 **TRADE SECRETS**
22 **(Arizona Uniform Trade Secrets Act**
Ariz. Rev. Stat. Ann. § 44-401, et seq.)

23 34. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-33.

24 35. The confidential and proprietary information regarding the McFarlane
25 Companies' customers, services, contract terms, development plans, employees,
26 customer preferences, and other business information constitute trade secrets, because the
27 McFarlane Companies derive independent economic value from that information not
28 being generally known to the public and not being readily ascertainable by proper means

1 by other persons who can obtain economic value from its disclosure or use, and because
2 the information was the subject of reasonable efforts by the McFarlane Companies to
3 maintain its secrecy.

4 36. The McFarlane Companies invested substantial time and money in
5 developing and maintaining its confidential and proprietary information. The McFarlane
6 Companies' confidential and proprietary information is not known outside of the
7 McFarlane Companies and could be learned by others, if at all, only by the expenditure of
8 considerable time, effort, and expense.

9 37. Only as a result of their positions with the McFarlane Companies were the
10 Simmons given access to extensive confidential and proprietary information of the type
11 described herein.

12 38. Defendants are obligated by their agreements with TMPI and by applicable
13 law to maintain the secrecy of the McFarlane Companies' confidential information.
14 Nonetheless, Defendants threaten to breach, have breached, and inevitably will breach
15 these duties by utilizing or disclosing the McFarlane Companies' trade secrets and
16 confidential information.

17 39. Defendants will be and have been unjustly enriched by their misappropriation
18 of the McFarlane Companies' trade secrets, and, unless restrained, will continue to use,
19 divulge, threaten to and otherwise misappropriate the McFarlane Companies' trade
20 secrets.

21 40. Defendants' misappropriation of the McFarlane Companies' trade secrets has
22 been willful and malicious.

23 41. The McFarlane Companies and McFarlane have been injured, irreparably and
24 otherwise, and are threatened with additional and ongoing injuries as a result of
25 Defendants' threatened or actual misappropriation of trade secrets, as alleged above.

26 42. The McFarlane Companies will suffer or have suffered damages as a result of
27 Defendants' actions in an amount to be determined at trial, and because its remedy at law
28 is inadequate, seeks injunctive relief to recover and protect its information, its goodwill

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1 and other legitimate business interests. The McFarlane Companies also seek to recover
2 from Defendants any gains, profits and advantages obtained as a result of the wrongful
3 acts alleged herein in an amount to be determined and an award of exemplary damages
4 and attorneys' fees.

5 **COUNT II**

6 **COMMON LAW UNFAIR COMPETITION**

7 43. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-42.

8 44. Plaintiff McFarlane owns an enforceable right to his own name, likeness and
9 identity.

10 45. Plaintiff McFarlane is extremely well known as a creator, artist and innovator
11 in the comic book and entertainment industries.

12 46. Defendants, without permission, used Plaintiff McFarlane's name, likeness,
13 and identity in such a way that Plaintiff McFarlane is identifiable from such use.
14 Defendants misappropriated Plaintiff McFarlane's name, likeness, and identity in
15 association with Defendants' Book by, among other things:

- 16 a. including Plaintiff McFarlane's name in the Book's cover art and on its title
17 page, with the words "with contributions by *Spawn* Creator Todd
18 McFarlane";
- 19 b. utilizing Plaintiff McFarlane's name, likeness, and identity throughout the
20 Book; and
- 21 c. utilizing Plaintiff McFarlane's name, likeness, and identity in promotional
22 material for purposes of advertising or selling, or soliciting purchases of the
23 Book. Several examples of this include stating: "Todd McFarlane named
24 Al . . . as the alter ego of the *Spawn* character," and "Al and Todd have
25 lived nearly parallel lives."

26 47. Defendants' misappropriation was made in an effort to attract a larger
27 audience to the Book. Specifically, Defendants sought to increase sales of the Book by
28 falsely implying in the Book, in promotional materials, and in other communications that:

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- 1 a. Plaintiff McFarlane assisted in the creation of the Book;
- 2 b. Plaintiff McFarlane endorsed the Book;
- 3 c. Plaintiff McFarlane is affiliated with the creation and distribution of the
- 4 Book; and
- 5 d. Defendants contributed to the creation of the *Spawn* comic book, and its
- 6 key characters.

7 48. The aforementioned misappropriation of Plaintiff McFarlane's name,

8 likeness, and identity was done for Defendants' pecuniary gain and profit.

9 49. Plaintiff McFarlane did not consent or otherwise agree to Defendants'

10 appropriation of his name, likeness and identity, and such unauthorized appropriation has

11 resulted in an invasion into Plaintiff McFarlane's right to privacy, and damage to the

12 commercial value of Plaintiff McFarlane's persona.

13 50. Defendants undertook the foregoing acts to gain an unfair competitive

14 advantage over the McFarlane Companies, and Defendants are unfairly competing in the

15 marketplace.

16 51. As a result of Defendants' actions, the McFarlane Companies and McFarlane

17 have been injured and face immediate and irreparable injury. The McFarlane Companies

18 and McFarlane are threatened with irreparable harm through, without limitation, the loss

19 of customers, income and goodwill in amounts that may be impossible to determine

20 unless Defendants are enjoined and restrained by order of this Court.

21 52. As a proximate result of the foregoing, Plaintiff McFarlane also has been

22 injured in an amount not yet fully determined, but believed to be in excess of \$75,000,

23 exclusive of costs and interests.

24 53. In addition to the foregoing, as a result of Defendants' misappropriation,

25 Plaintiff McFarlane has suffered and will continue to suffer irreparable harm through,

26 without limitation, the loss of goodwill, for which he has no adequate remedy at law.

27 Unless Defendants' misappropriation is enjoined by this Court, Plaintiff McFarlane will

28 continue to suffer a risk of irreparable harm.

1 54. Defendants knowingly, intentionally, wantonly and willfully undertook the
2 foregoing acts with knowledge of and disregard for the McFarlane Companies' and
3 McFarlane's rights, and with the intention of causing harm to the McFarlane Companies
4 and McFarlane, and benefiting Defendants, such that Plaintiffs the McFarlane Companies
5 and McFarlane are entitled to all appropriate punitive damages, in addition to a full
6 recovery of their attorneys' fees and costs.

7 **COUNT III**

8 **BREACH OF FIDUCIARY DUTY AND DUTY OF LOYALTY**

9 55. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-54.

10 56. During their employment with TMPI, Al Simmons and Melanie Simmons
11 owed TMPI a fiduciary duty and duty of loyalty to act at all times solely for the benefit of
12 TMPI.

13 57. Upon information and belief, the Simmons breached their fiduciary duties
14 and duties of loyalty while still employed by TMPI by, among other things, not devoting
15 their best efforts to TMPI, preparing to operate a competing business or not informing
16 TMPI of their efforts to interfere with TMPI's customer and business relationships, and
17 misleading TMPI and McFarlane regarding their future plans, all which had an adverse
18 impact on TMPI.

19 58. TMPI has been damaged by the Simmons' willful breaches of their fiduciary
20 duties and duties of loyalty to TMPI.

21 59. As a result of the Simmons' actions, TMPI has been injured and faces
22 irreparable injury. TMPI is threatened with losing employees, customers, income and
23 goodwill in amounts that may be impossible to determine unless the Simmons are
24 enjoined and restrained by order of this Court.

25 **COUNT IV**

26 **FALSE ENDORSEMENT**
27 **(15 U.S.C. § 1125(A))**

28 60. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-59.

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1 61. Defendants have written, and are advertising and distributing the Book in
2 interstate commerce.

3 62. The Book is a “good” within the definition of 15 U.S.C. § 1125(a).

4 63. Defendants’ Book contains cover art and a title page that read, “with
5 contributions by *Spawn* Creator [sic] Todd McFarlane.”

6 64. Likewise, Defendants’ advertising for the Book makes reference to
7 “contributions” thereto by Plaintiff McFarlane, and makes use of Plaintiff McFarlane’s
8 name, likeness and identity, for example by stating: “Todd McFarlane named Al . . . as
9 the alter ego of the *Spawn* character,” “Al and Todd have lived nearly parallel lives.”

10 65. Defendants’ use of Plaintiff McFarlane’s name, likeness and identity in
11 support of their advertising and distribution of the Book is directly related to the goods
12 Defendants are offering to the consuming public.

13 66. Defendants’ use of Plaintiff McFarlane’s name, likeness and identity in
14 connection with their advertising, promotion and distribution of the Book constitutes a
15 false or misleading description of fact or misrepresentation of fact that is likely to cause
16 confusion to consumers, and deceives consumers as to the affiliation, connection and/or
17 association with, and endorsement by Plaintiff McFarlane in violation of Section 43(a) of
18 the Lanham Act.

19 67. Defendants’ use of Plaintiff McFarlane’s name, likeness and identity was
20 made without Plaintiff’s permission, or license.

21 68. Plaintiff McFarlane has been, and is likely to continue to be, harmed by this
22 false or misleading use of his name, likeness and identity. As a proximate result of that
23 unauthorized use, Plaintiff McFarlane has been injured in an amount not yet fully
24 determined, but believed to be in excess of \$75,000, exclusive of costs and interests.

25 69. Moreover, Plaintiff McFarlane has been and will continue to be irreparably
26 injured as a result of Defendants’ conduct, and he has no adequate remedy at law,
27 entitling him to preliminary and permanent injunctive relief pursuant to 15 U.S.C.
28 § 1116.

1 70. Furthermore, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117(a),
2 Plaintiff McFarlane is entitled to monetary damages, corrective advertising costs,
3 Defendants’ profits, costs, and prejudgment interest.

4 71. Plaintiff McFarlane is informed and believes, and thereon alleges, that
5 Defendants’ use of Plaintiff McFarlane’s name, likeness and identity was done
6 knowingly, intentionally, wantonly and willfully, such that this is an exceptional case
7 under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), thereby entitling him to
8 recover his attorneys’ fees and up to three-times his actual damages.

9 **COUNT V**

10 **FALSE ADVERTISING**
11 **(15 U.S.C. § 1125(A))**

12 72. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-71.

13 73. Defendants’ Book is and has been sold in interstate commerce.

14 74. Defendants’ Book contains cover art and a title page which read “with
15 contributions by *Spawn* Creator [sic] Todd McFarlane.” Likewise, Defendants’
16 advertising for the Book makes reference to “contributions” by Plaintiff McFarlane, and
17 makes use of Plaintiffs’ *Spawn* character. Likewise, Defendants’ advertising suggests
18 that: (a) Defendants “begin working closely with” Plaintiff McFarlane, and (b) as a result
19 of this, *Spawn* “expanded into a line of action figures, a successful movie by New Line
20 Cinema and an Emmy and Grammy award-winning HBO animated mini-series.”

21 75. Defendants’ advertising in this manner is false, deceptive, and misleading.
22 Defendants’ false, deceptive, and misleading advertising is likely to deceive consumers
23 and materially influence their purchasing decisions with regard to the Book.

24 76. Defendants’ false, deceptive, and misleading advertising has caused and will
25 continue to cause irreparable harm to Plaintiffs McFarlane and the McFarlane
26 Companies. Unless Defendants are enjoined from continuing the aforementioned
27 unlawful acts, Plaintiffs McFarlane and the McFarlane Companies will suffer irreparable
28

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1 harm for which they have no adequate remedy at law, such that they are entitled to
2 preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116.

3 77. As a direct and proximate result of Defendants’ false, deceptive, and
4 misleading advertising, Plaintiffs McFarlane and the McFarlane Companies have suffered
5 damages in an amount not yet fully determined, but believed to be in excess of \$75,000,
6 exclusive of costs and interests. Furthermore, pursuant to Section 35 of the Lanham Act,
7 15 U.S.C. § 1117(a), Plaintiffs McFarlane and the McFarlane Companies are entitled to
8 monetary damages, corrective advertising costs, Defendants’ profits, costs, and
9 prejudgment interest.

10 78. Plaintiffs McFarlane and the McFarlane Companies are informed and
11 believe, and thereon allege, that Defendants’ false, deceptive, and misleading advertising
12 was done knowingly, intentionally, wantonly and willfully such that this is an exceptional
13 case under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), thereby entitling
14 Plaintiffs to recover their attorneys’ fees and up to three-times their actual damages.

15 79. Pursuant to 15 U.S.C. § 1118, Plaintiffs McFarlane and the McFarlane
16 Companies are also entitled to, and seek, a destruction order requiring all advertisements
17 in Defendants’ possession bearing the false, deceptive, or misleading use of, *inter alia*,
18 Plaintiff McFarlane’s name, likeness and identity, to be delivered up and destroyed.

19 **COUNT VI**

20 **TRADEMARK INFRINGEMENT**
21 **(15 U.S.C. § 1125(A))**

22 80. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-79.

23 81. Plaintiff TMP is the owner of a valid, federally registered trademark,
24 Registration No. 3020406, in the *Spawn* name.

25 82. Plaintiff TMP similarly owns other valid, federally registered and/or common
26 marks in related “Spawn” names, each of which arises out of the *Spawn* comic book
27 franchise (collectively with Registration No. 3020406, the “Marks”).
28

1 83. Plaintiff TMP's extensive use and publicity of the Marks has resulted in their
2 having gained acquired distinctiveness and secondary meaning. Plaintiff TMP is
3 informed and believes, and thereon alleges, that as a result of the foregoing, the Marks
4 are strong and well-known, and thus entitled to a broad scope of protection.

5 84. Notwithstanding the foregoing, Defendants have used the Marks in interstate
6 commerce, without the consent of Plaintiff TMP. Specifically, Defendants have used the
7 Marks in connection with the publication, distribution, promotion and advertising of their
8 Book. Defendants' unauthorized use of the Marks has been done in a manner that is
9 likely to cause confusion among ordinary consumers as to the source, sponsorship,
10 affiliation, or approval of Defendants' Book.

11 85. Plaintiff TMP is informed and believes, and thereon alleges, that Defendants'
12 use of the Marks is intended to falsely indicate an affiliation, connection, association
13 between Defendants and Plaintiffs McFarlane and TMP, and/or sponsorship or approval
14 of the Book by Plaintiff TMP and/or Plaintiff McFarlane.

15 86. Plaintiff TMP is informed and believes, and thereon alleges, that Defendant
16 has used the Marks for his own commercial gain. Specifically, Defendant has used the
17 Marks in an effort to increase sales by attracting fans of *Spawn* and the literary/artistic
18 work of Todd McFarlane, as these individuals are Defendants' desired audience.

19 87. As a result of Defendants' infringing acts, Plaintiff TMP has been injured in
20 an amount not yet fully determined, but believed to be in excess of \$75,000, exclusive of
21 costs and interests.

22 88. In addition to the foregoing, as a result of Defendants' infringing acts,
23 Plaintiff TMP has been and will continue to be irreparably injured as a result of
24 Defendants' conduct, and it has no adequate remedy at law, entitling it to preliminary and
25 permanent injunctive relief pursuant to 15 U.S.C. § 1116.

26 89. Furthermore, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117(a),
27 Plaintiff TMP is entitled to monetary damages, corrective advertising costs, Defendants'
28 profits, costs, and prejudgment interest.

1 90. Plaintiff TMP is informed and believes, and thereon alleges, that Defendants’
2 infringing acts were done knowingly, intentionally, wantonly and willfully such that this
3 is an exceptional case under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), thereby
4 entitling Plaintiff TMP to recover its attorneys’ fees and up to three-times its actual
5 damages.

6 **COUNT VII**

7 **COPYRIGHT INFRINGEMENT**
8 **(17 U.S.C. § 106, et seq.)**

9 91. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-90.

10 92. Plaintiff TMP is the owner of the copyright in the contents of various
11 photographs, artwork, and literary text (the “Work”). Plaintiff TMP holds registered
12 copyrights in and to the Work with the U.S. Copyright Office.

13 93. Defendants have copied portions of the Work, including without limitation,
14 text, artwork and photographic images, and reproduced the same in the Book, and the
15 advertising for the Book.

16 94. As a result of the foregoing, Defendants have infringed upon Plaintiff TMP’s
17 copyrighted Work by reproducing, displaying and using it without Plaintiff TMP’s
18 knowledge or consent.

19 95. Upon information and belief, Defendants’ copying and displaying of Plaintiff
20 TMP’s Work was done knowingly and intentionally, and knowingly done in disregard of
21 Plaintiff TMP’s legal rights.

22 96. Plaintiff TMP has been and will continue to be irreparably injured as a result
23 of Defendants’ conduct, and it has no adequate remedy at law, such that it is entitled to
24 preliminary and permanent injunctive relief preventing Defendants’ further unauthorized
25 distribution, marketing and use of the Work.

26 97. In addition to the foregoing, because Defendants’ infringement of the Work
27 was done after Plaintiff TMP obtained copyright registration in the same, Plaintiff TMP
28

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1 is entitled to statutory damages and attorneys’ fees incurred as a result of Defendants’
2 infringement.

3 98. Plaintiff TMP is informed and believes, and thereon alleges, that it is also
4 entitled to: (i) an impounding and destruction order covering all physical and electronic
5 copies and derivatives that Defendants made or used in violation of Plaintiff TMP’s
6 copyrights; (ii) all appropriate direct and consequential damages including any and all
7 profits Defendant made as a result of the infringing activity; and (iii) an award of all
8 appropriate fees and costs as against Defendant and those persons acting in concert with
9 him as provided in 17 U.S.C. §§ 101 et seq.

10 **COUNT VIII**

11 **COMMON LAW MISAPPROPRIATION**

12 99. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-98.

13 100. Plaintiffs McFarlane and TMP are the owners of the Work, which
14 Defendants physically misappropriated for purposes of reproducing in the Book, and in
15 the advertising for the Book. Defendants continue to exercise dominion and control over
16 the property appropriated.

17 101. As a result of the foregoing, Plaintiffs McFarlane and TMP have been injured
18 in an amount not yet fully determined, but believed to be in excess of \$75,000, exclusive
19 of costs and interests.

20 **COUNT IX**

21 **TRADE LIBEL**

22 102. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-101.

23 103. Through publication of the Book and in promotional materials and elsewhere,
24 Defendant willfully, and without justification or privilege, published to other persons the
25 statement that he was, in whole or in part, responsible for the expansion and success of
26 the *Spawn* franchise.

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1 104. The statement that Defendant was responsible for the expansion or success of
2 the *Spawn* franchise is false and damages the Plaintiffs' reputation as the creator of,
3 among other things, the *Spawn* character and resulting franchise.

4 105. As a result of Defendants' publication of the false statement regarding his
5 involvement with the success of the *Spawn* franchise, Plaintiff McFarlane has suffered
6 injury to his reputation, and Plaintiff TMP has suffered pecuniary loss in an amount to be
7 determined at trial.

8 106. Defendants' publication of the false statement regarding Al Simmons'
9 involvement with the success of the *Spawn* franchise was done with malice and
10 oppression in that Defendants knew their statements were false. Based on this, Plaintiffs
11 are entitled to seek punitive damages in an amount to be determined at trial.

12 **RELIEF REQUESTED**

13 WHEREFORE, Plaintiffs request the following relief against Defendants:

14 A. That upon application, Defendants, along with their respective agents,
15 independent contractors, employers, employees, and those persons in active concert or
16 participation with the Defendants:

17 (i) be enjoined from misappropriating or threatening to misappropriate
18 the McFarlane Companies' trade secrets and confidential information and that defendants
19 be specifically required to return to TMPI all trade secrets and confidential information in
20 their possession, including all copies thereof;

21 (ii) be enjoined from revealing, utilizing, or trading upon the McFarlane
22 Companies' and McFarlane's proprietary rights, proprietary information, trade secrets
23 and confidential information; and

24 (iii) be compelled to account for the whereabouts of the McFarlane
25 Companies' proprietary information and produce for inspection all computers on which
26 the McFarlane Companies' information may have resided;

27 B. Awarding Plaintiffs damages they have suffered, in an amount to be proven
28 at trial, but in excess of \$75,000, excluding interest and costs;

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1 C. Awarding Plaintiffs exemplary damages for willful and malicious
2 misappropriation of trade secrets;

3 D. Awarding Plaintiffs' statutory damages;

4 E. Awarding Plaintiffs compensatory, punitive, and exemplary damages;

5 F. Awarding Plaintiffs actual or reasonable attorneys' fees and the costs of
6 this action, pursuant to the Arizona Uniform Trade Secrets Act, federal law and A.R.S.
7 § 12-341.01;

8 G. Awarding Plaintiffs such further relief as the Court deems just.

9 DATED this 26th day of September, 2012

10 BRYAN CAVE LLP

11
12 By /s/Jay A. Zweig

13 Jay A. Zweig
14 Melissa R. Costello
15 Two North Central Avenue, Suite 2200
16 Phoenix, Arizona 85004-4406
17 Attorneys for Plaintiffs
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VERIFICATION

STATE OF ARIZONA)
County of Maricopa) ss.

Todd McFarlane, being first duly sworn upon his oath, states:

I am the CEO of Plaintiffs Todd McFarlane Productions, Inc., TMP International, Inc., and Todd McFarlane Entertainment, Inc. and am authorized to and make this Verification based upon my own personal knowledge.

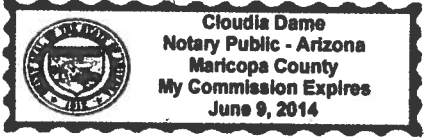
I have read the foregoing Verified Complaint and verify that the statements made therein are true to the best of my knowledge, information and belief and the business records maintained by Todd McFarlane Productions, Inc., TMP International, Inc., and Todd McFarlane Entertainment, Inc.

Todd McFarlane
Todd McFarlane

SUBSCRIBED AND SWORN TO before me this 26 day of September, 2012 by Todd McFarlane.

Cloudia Dame
Notary Public

My Commission Expires:
6/9/14



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