

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAHMEL BINION,

Plaintiff,

v

SHAQUILLE O'NEAL, ALFONSO CLARK
"TREY" BURKE, III and JUAQUIN MALPHURS
a/k/a WAKA FLOCKA FLAME,

Defendants.

Case No: 14-cv-13454
Hon. Avern Cohn
Mag. Judge David R. Grand

MCCC No: 14-2983-NO
Hon. John C. Foster

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**DEFENDANT ALFONSO CLARK "TREY" BURKE, III'S
STATEMENT OF FACTS FOR MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6) AND/OR FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56**

Pursuant to Judge Cohn's Practice Guidelines, Defendant Alfonso Clark "Trey" Burke, III ("Burke") submits the following Statement of Undisputed Material Facts in Support of his Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and/or for Summary Judgment Pursuant to Fed. R. Civ. P. 56.

1. Plaintiff Jahmel Binion's ("Binion") Complaint alleges that Defendant Shaquille O'Neal "mocked and ridiculed" Plaintiff by publishing a picture on Instagram and Twitter and that Defendants Burke and Malphurs republished the photograph posted by O'Neal and published their own photographs "mocking and ridiculing" Plaintiff. Plaintiff's Complaint contains counts for invasion of privacy, intentional infliction of emotional distress, defamation and general negligence. (Docket Entry 1, Complaint).

2. Binion is an individual who resides in Macomb County, Michigan. (Docket Entry 1, Removal Petition, ¶ 3).

3. Burke is a professional basketball player for the Utah Jazz who resides in Salt Lake City, Utah. (Docket Entry 1, Removal Petition, ¶ 4).

4. Defendant Shaquille O'Neal ("O'Neal") is an individual that resides in Florida and Massachusetts. (Docket Entry 1, Removal Petition, ¶ 5).

5. Defendant Juaquin Malphurs a/k/a Waka Flocka Flame ("Malphurs"), is an individual that resides in Georgia. (Docket Entry 1, Removal Petition, ¶ 6).

6. Upon information and belief, Binion has yet to effectuate service on O'Neal or Malphurs.

7. Venue is proper in this district and division under 28 U.S.C. § 1441(a) because this district and division embrace the place where the removed action has been pending. (Docket Entry 1, Removal Petition, ¶ 10).

8. The Lawsuit was properly removed to this Court by Burke pursuant to the provisions of 28 U.S.C. § 1441(b) and the procedures set forth in 28 U.S.C. § 1446. (Docket Entry 1, Removal Petition, ¶ 11).

9. Burke had a typical locker-room relationship with close friend and teammate, Ian Clark ("Clark"). (Ex. A¹, Affidavit of Trey Burke, ¶ 2.)

10. Burke and Clark often razzed each other and occasionally that razzing found its way to social media. (Ex. A, Affidavit of Trey Burke, ¶ 3.)

11. In April 2014, Burke reposted a picture that he found on Malphurs' Instagram account. (Ex. A, Affidavit of Trey Burke, ¶ 4.)

12. Malphurs has over 900,000 followers on Instagram. (Ex. A, Affidavit of Trey Burke, ¶ 5.)

¹ All Exhibits referenced herein are attached as Exhibits to the Brief in Support of Burke's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and/or for Summary Judgment Pursuant to Fed. R. Civ. P. 56.

13. Burke has never met O'Neal or Malphurs and never saw the photograph allegedly posted by O'Neal until it received widespread media publicity. (Ex. A, Affidavit of Trey Burke, ¶ 10.)

14. The only photograph (relevant to this case) that ever appeared on Burke's Instagram account is the photograph of Binion that Burke discovered on Malphurs' Instagram account. This was the same photograph that appeared (and continues to appear) on multiple Instagram accounts set up by Binion. (Ex. A, Affidavit of Trey Burke, ¶ 11.)

15. Every Instagram user is advised that "[a]ll photos are public by default which means they are visible to anyone using Instagram or on the instagram.com website." (Ex. F, <http://instagram.com/about/faq/#>.)

16. Instagram affords users the option to "make [their] account private" such that "only people who follow [the user] on Instagram will be able to see [their] photos." (Ex. F.)

17. An Instagram user who makes his or her account private has the option of accepting or rejecting requests by other Instagram users to follow that user on Instagram. If the Instagram user fails to make his/her account private, "anyone can subscribe to follow [their] photos." (Ex. F.)

18. Instagram's terms and conditions implore Instagram users not to "post private or confidential information" and that "any Content will be non-confidential and non-proprietary." (Ex. G, <http://instagram.com/about/legal/terms/#>.)

19. Instagram's Privacy Policy is clear that: "By using our Service you understand and agree that we are providing a platform for you to post content, including photos, comments and other materials ("**User Content**"), to the Service and to share User Content publicly. This means that **other Users may search for, see, use, or share any of your User Content that you make publicly available** through the Service ..." (Ex. H, <http://instagram.com/about/legal/privacy/#> (emphasis added).)

20. The Privacy Policy further states: "Any information or content that you voluntarily disclose for posting to the Service, such as User Content, becomes available to the public, as controlled by any applicable privacy settings that you set. To change your privacy settings on the Service, please change your profile setting. **Once you have shared User Content or made it public, that User Content may be re-shared by others.**" (Ex. H.)

21. Burke re-posted the photograph of Binion on his own Instagram account with the caption "Hacked by @IanClark". (Ex. A, Affidavit of Trey Burke, ¶ 7.)

22. Burke believed that the picture had been photoshopped and had no idea that the picture was of a real person. (Ex. A, Affidavit of Trey Burke, ¶ 6.)

23. Burke did not know that the photograph depicted Binion or that Binion suffered from a medical condition that affected his appearance. (Ex. A, Affidavit of Trey Burke, ¶ 8.)

24. Burke did not learn of Binion's medical condition until the story began receiving media attention. (Ex. A, Affidavit of Trey Burke, ¶ 8.)

25. Burke never directed any negative comments at Binion and never made a single comment about the photograph itself, Binion or his medical condition. (Ex. A, Affidavit of Trey Burke, ¶ 12.)

26. Shortly after Burke discovered that the picture was real and that the person depicted in the photograph suffered from a rare medical condition that caused certain physical abnormalities, Burke removed the picture from his Instagram account and sought out and contacted Binion to apologize for his offensive conduct. (Ex. A, Affidavit of Trey Burke, ¶¶ 13-14.)

27. Burke offered to host Binion at a Detroit Pistons/Utah Jazz game during the upcoming season. (Ex. A, Affidavit of Trey Burke, ¶ 15.)

28. Binion graciously accepted Burke's apology which he characterized as extremely sincere in an interview with Fox 2 reporter, Randy Wimbley. (Ex. A, Affidavit of Trey Burke, ¶ 16.)

29. Binion also indicated that he intended to take Burke up on his offer. (Ex. A, Affidavit of Trey Burke, ¶ 16.)

30. Binion started a Facebook Group called "Hug Don't Judge" which currently has 22,489 Members. (Ex. I, <https://www.facebook.com/#!/groups/234486460081570/>.)

31. The same photograph that remained on Burke's Instagram account for a short period of time has remained posted on Binion's Instagram accounts since January 2014. (Ex. C, <http://instagram.com/jahmelbinion#>; Ex. D, <http://instagram.com/jstardboii23#>.)

Respectfully submitted,

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Dated: September 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2014, I caused the Statement of Facts for Motion to Dismiss and/or for Summary Judgment to be electronically filed with the Clerk of the Court using the ECF system, which sent notification of such filing upon all ECF Participants.

Respectfully submitted,

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**DEFENDANT TREY BURKE'S MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6) AND/OR FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56**

Pursuant to Fed. R. Civ. P. 12(b)(6), and for the reasons stated in the accompanying Brief in Support, Defendant Alfonso Clark "Trey" Burke, III ("Burke") requests that this Court dismiss Plaintiff Jahmel Binion's Complaint in its entirety.

In the alternative, Burke asks that the Court grant his motion for summary judgment and dismiss Binion's claims with prejudice pursuant to Fed. R. Civ. P. 56.

Burke's counsel conferred with Binion's counsel on September 11, 2014 and explained the nature of the instant motion and its legal basis and requested but did not obtain concurrence in the relief sought.

Respectfully submitted,

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**BRIEF IN SUPPORT OF DEFENDANT TREY BURKE'S
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR
FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56**

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STATEMENT OF ISSUES PRESENTED

1. Can Plaintiff prove the elements necessary to establish a claim for invasion of privacy by intrusion?

Burke says: No

Binion says: Yes

2. Can Plaintiff prove the elements necessary to establish a claim for invasion of privacy by appropriation?

Burke says: No

Binion says: Yes

3. Can Plaintiff prove the elements necessary to establish a claim for invasion of privacy by publicity?

Burke says: No

Binion says: Yes

4. Can Plaintiff prove the elements necessary to establish a claim for invasion of privacy by false light?

Burke says: No

Binion says: Yes

5. Can Plaintiff prove the elements necessary to establish a claim for intentional infliction of emotional distress?

Burke says: No

Binion says: Yes

6. Can Plaintiff prove the elements necessary to establish a claim for defamation?

Burke says: No

Binion says: Yes

7. Can Plaintiff prove the elements necessary to establish a claim for general negligence?

Burke says: No

Binion says: Yes

I. INTRODUCTION AND FACTUAL BACKGROUND

In an attempt to extort three affluent Defendants, Plaintiff Jannel Binion (“Binion”) has turned an unfortunate error in judgment, which was immediately rectified, into a frivolous lawsuit. Millions of people use social media because it is a powerful tool with many professional and personal advantages. However, social media users run the risk inherent in a medium where people lack control over what others say about them in a public forum. Every single day, millions of posts and photographs appear on social media that have the effect (whether intended or unintended) of hurting someone’s feelings. While the widespread distribution of social media can certainly make an insulting comment or unflattering photograph more hurtful, it does not make defamatory a statement that would otherwise not be defamatory and does not make conduct unlawful that would otherwise be lawful.

In this case, Defendant Alfonso Clark “Trey” Burke, III (“Burke”), a 21 year old professional basketball player for the NBA’s Utah Jazz, had a typical locker-room relationship with close friend and teammate, Ian Clark (“Clark”). [Ex. A, Affidavit of Trey Burke, ¶ 2.] Burke and Clark often razzed each other and occasionally that razzing found its way to social media. [Ex. A, ¶ 3.] In April 2014, Burke reposted a picture that he found on co-Defendant and professional rapper Juquin Malphurs a/k/a Waka Flocka Flame’s (“Malphurs”) Instagram account. [Ex. A, ¶ 4.] Burke believed that the picture had been photoshopped and

had no idea that the picture was of a real person. [Ex. A, ¶ 6.] Burke re-posted it on his own Instagram account with the caption “Hacked by @IanClark”. [Ex. A, ¶ 7.] Burke had no idea that the photograph depicted Plaintiff Jahmel Binion (“Binion”) or that Mr. Binion suffered from a medical condition that affected his appearance. [Ex. A, ¶ 8.] Burke never directed any negative comments at Binion and, in fact, never made a single comment about the photograph itself, Binion or his medical condition. [Ex. A, ¶ 12.]

Burke soon found out the hard way, as many young people do, that innocent teasing can be hurtful to others – even a person who was not the target of the teasing in the first place. As soon as Burke discovered that the picture was real and that the person depicted in the photograph suffered from a rare medical condition that caused certain physical abnormalities, Burke was ashamed and remorseful. [Ex. A, ¶ 13.] Burke removed the picture from his Instagram account and sought out and contacted Binion to apologize for his offensive conduct. [Ex. A, ¶ 14.] Burke offered to host Binion at a Detroit Pistons/Utah Jazz game during the upcoming season. [Ex. A, ¶ 15.] Binion graciously accepted Burke’s apology which he characterized as extremely sincere in an interview with Fox 2 reporter, Randy Wimbley. [Ex. A, ¶ 16; Ex. B, <http://www.myfoxdetroit.com/story/25387647/shaq-apologizes-for-mocking-disabled-mich-man-on-social-media>.] Binion intended to take Burke up on his offer. [Ex. A, ¶ 16; Ex. B.]

Burke learned a difficult lesson as a result of the incident. He was widely criticized for his actions in the press despite the fact that the photograph remained on Burke's Instagram account for only one day. Burke was sincere in his apology to Binion and has done everything in his power to learn and grow from the incident. [Ex. A, ¶ 17.] Burke was blindsided by the instant lawsuit which, in an attempt to garner the most publicity possible, was served on Burke while he was running a youth basketball camp in Ann Arbor, Michigan. [Ex. A, ¶ 18.]

Binion's Complaint seeks monetary damages against Burke and co-Defendants Shaquille O'Neal and Malphurs¹ and contains four counts: Invasion of Privacy, Intentional Infliction of Emotional Distress, Defamation and General Negligence. Even assuming the truth of Binion's allegations, they are insufficient to establish the necessary elements on any of the four counts. Consequently, Burke requests that this Court dismiss Binion's Complaint in its entirety.

II. LEGAL ANALYSIS

A. Legal Standard

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a plaintiff's complaint. *See e.g. Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) ("The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law,

¹ Burke has never met O'Neal or Malphurs and never saw the photograph allegedly posted by O'Neal until it received widespread media publicity. [Ex. A, ¶ 10.]

the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.”); *Benschoter v. Hardy*, 202 F.R.D. 216, 219 (E.D. Mich. 2001). The Court accepts the well-pleaded allegations as true, and reviews the complaint to determine whether the plaintiff has alleged facts sufficient “to raise a right to relief above the speculative level.” *CBC Companies, Inc. v. Equifax, Inc.*, 561 F.3d 569, 571 (6th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Likewise, a pleading that offers labels and conclusions or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of entitlement to relief.” *Twombly*, 550 U.S. at 557. Pursuant to the standards set forth by the United States Supreme Court, Binion’s Complaint fails to state a claim upon which relief can be granted and should be dismissed in its entirety.

In the alternative, Burke moves for summary judgment pursuant to Fed. R. Civ. P. 56(b), which provides that “[a] party against whom a claim, counterclaim, or cross-claim is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in that party’s favor as to all or any part

thereof.” Fed. R. Civ. P. 56(b).² Summary judgment is proper where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Binion’s Complaint fails to establish what was actually posted on Burke’s Instagram account. Binion falsely alleges in paragraph 11 of his Complaint that “Defendant Trey Burke republished O’Neal’s photograph and published his own photograph mocking and ridiculing the plaintiff.” Not surprisingly, Binion failed to attach the actual photograph that Burke posted to Instagram. Burke categorically denies republishing Defendant O’Neal’s photograph and, in fact, never saw that photograph until after it was publicized in the media. [Ex. A, ¶ 10.] Even if Burke had re-posted O’Neal’s photograph (which he did not), Binion would be unable to establish a legally cognizable claim against Burke. Therefore, this Court should dismiss Binion’s Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6). However, if the Court believes that there is a legally relevant

² Burke has reviewed the Court’s Practice Guidelines and understands that the Court prefers that summary judgment motions be filed at the close of discovery. Burke views this motion primarily as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). However, there were certain glaring factual inaccuracies in Plaintiff’s Complaint and Burke believes that it is important for the Court to understand what actually happened in this case. Consequently, Burke files this motion as a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, a Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56.

distinction between republishing O'Neal's photograph and republishing Binion's photograph (which is what Burke actually did), Burke requests that this Court grant summary judgment in favor of Burke pursuant to Fed. R. Civ. P. 56.

B. Binion Cannot Establish a Claim for Invasion of Privacy.

Count I of Binion's Complaint contains a hodgepodge of allegations that fail to establish any potential claim for invasion of privacy. Invasion of privacy torts are grouped into four categories: intrusion, appropriation, publication and false light. *Beaumont v. Brown*, 401 Mich. 80, 95-98; 257 N.W.2d 522 (1977), *overruled on other grounds*, *Bradley v. Saranac Community Schools Bd. of Educ.*, 455 Mich. 285; 565 N.W.2d 650 (1997). Binion's Complaint references all four of these "buzzwords", but fails to adequately plead the elements necessary to establish any one of them. As explained in detail below, Binion's Complaint provides "a formulaic recitation of the elements of a cause of action" – precisely what *Twombly* warns against.

1. Intrusion

"There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man." *Doe v. Mills*, 212 Mich. App. 73, 88; 536

N.W.2d 824 (1995). An action becomes a tortious intrusion when it is unreasonable and highly offensive upon the seclusion of another. *Prosser and Keeton on the Law of Torts* §117, at 854 (5th ed. 1984). Such a claim “focuses on the manner in which information is obtained, not its publication; it is considered analogous to a trespass.” *Mills*, 212 Mich. App. at 88 (citing *Tobin v. Civil Service Comm.*, 416 Mich. 661, 672; 331 N.W.2d 184 (1982)).

In *Mills*, protesters picketed in front of an abortion clinic holding signs displaying the names of women who were entering the clinic to have abortions. The court held that “intrusion does not exist where ‘the only aspect of the contemplated disclosure offensive to the plaintiffs is the fact of disclosure, not the method by which it was obtained.’” *Id.* at 89 (internal citation omitted).

For the reasons set forth below, Binion has failed to adequately allege any of the elements necessary to establish an intrusion claim.

a. Existence of a secret and private subject matter.

Binion claims that he “has a privacy interest in his appearance and medical condition.” [Complaint, ¶ 14.] The only information that Burke obtained regarding Binion’s appearance is the photograph of Binion. Burke came across the photograph on Malphur’s Instagram account and reposted it on his own Instagram account. Malphurs has over 900,000 followers on Instagram. [Ex. A, ¶ 5.] As such, the photograph had already been publicly disseminated by the time Burke

discovered it. Moreover, the photograph was initially posted on two different Instagram accounts opened by Binion and remains on both of those Instagram accounts to this day. [Ex. C, <http://instagram.com/jahmelbinion#>; Ex. D, <http://instagram.com/jstardboii23#>.] In other words, Binion did nothing to keep his appearance private. The photograph itself cannot be construed to be a “secret and private subject matter.”

Burke was not even aware of Binion’s medical condition when he posted the photograph. [Ex. A, ¶ 8.] In fact, he did not even know that the photograph depicted a real person. [Ex. A, ¶ 6.] Burke did not learn of Binion’s medical condition until the story began receiving media attention. [Ex. A, ¶ 9.] Consequently, even if Binion’s medical condition could be construed as “secret and private subject matter,” Burke did not obtain the information through improper methods. In any event, Binion has done nothing to keep his medical condition private. Rather, he has publicized it by accepting multiple television interviews in which he provided details about the condition. [Ex. B; Ex. E, <http://www.myfoxdetroit.com/story/25345293/mich-mans-selfie-mocked-by-celebrities-on-social-media>.]

b. A right possessed by the plaintiff to keep the subject matter private

Binion lost any rights he might otherwise have had to keep his appearance private by posting the disputed photograph of himself on Instagram. Every

Instagram user is advised that “[a]ll photos are public by default which means they are visible to anyone using Instagram or on the instagram.com website.” [Ex. F, <http://instagram.com/about/faq/#>.] Instagram affords users the option to “make [their] account private” such that “only people who follow [the user] on Instagram will be able to see [their] photos.” [Ex. F.] An Instagram user who makes his or her account private has the option of accepting or rejecting requests by other Instagram users to follow that user on Instagram. If the Instagram user fails to make his/her account private, “anyone can subscribe to follow [their] photos.” [Ex. F.] Instagram’s terms and conditions implore Instagram users not to “post private or confidential information” and that “any Content will be non-confidential and non-proprietary.” [Ex. G, <http://instagram.com/about/legal/terms/#>.]

Instagram’s Privacy Policy is clear that:

By using our Service you understand and agree that we are providing a platform for you to post content, including photos, comments and other materials (“User Content”), to the Service and to share User Content publicly. This means that **other Users may search for, see, use, or share any of your User Content that you make publicly available** through the Service ...

[Ex. H, <http://instagram.com/about/legal/privacy/#> (emphasis added).] The

Privacy Policy further states:

Any information or content that you voluntarily disclose for posting to the Service, such as User Content, becomes available to the public, as controlled by any applicable privacy settings that you set. To change your privacy settings on the Service, please change your profile

setting. **Once you have shared User Content or made it public, that User Content may be re-shared by others. [Ex. H.]**

Burke found the photograph on Malphurs' Instagram account. [Ex. A, ¶ 4.]

There is no doubt that the photograph was public by the time Burke stumbled across it. In reality, the photograph became public as soon as Binion posted it on his own Instagram accounts without invoking the available privacy settings. The photograph remains publicly available on Binion's Instagram pages to this day, long after the photograph was removed by both Burke and Malphurs.

As far as Binion's medical condition goes, Burke had no idea that the photograph depicted a real person or that the person in the photograph was suffering from a medical condition. [Ex. A, ¶¶ 6, 8.] Nor does Binion's Complaint allege otherwise. Thus, Burke did nothing to publicize Binion's medical condition. However, anyone familiar with the effects of ectodermal dysplasia, the medical condition from which Binion suffers, could have concluded from the photograph that Binion was suffering from the condition. Thus, by posting the photograph on his Instagram accounts, Binion was publicizing his own medical condition and forfeited the right to keep the information private.

c. The obtaining of information about that subject matter through some method objectionable to a reasonable man.

The only "information" that Burke obtained about the subject matter was the photograph of Binion, which he obtained from the Instagram account of Malphurs.

The photograph was also posted by Binion on his own Instagram accounts, which were accessible to any of the more than 150 million Instagram users.

Typically, courts find intrusion where the information was obtained by a method that would be objectionable to a reasonable man. For example, courts have found the installation of two way mirrors to enable one person to observe another getting undressed as an intrusion. *Harkey v. Abate*, 131 Mich. App. 177; 346 N.W.2d 74 (1983). Similarly, commentators have concluded that peering into windows and making unwanted phone calls constitute tortious intrusions. *Bradshaw v. Michigan Nat'l Bank*, 39 Mich. App. 354, 356; 197 N.W.2d 531 (1972).

No reasonable man, particularly in the age of social media, would find it objectionable to repost a photograph that someone else had already posted publicly.

In order to establish an intrusion claim, Binion is required to establish all three elements set forth above. Even if all of the allegations in Binion's Complaint were true (which they are not), he cannot prove a single required element.

2. Appropriation

Invasion of privacy through appropriation occurs when a person uses another's name or likeness without permission, to their own pecuniary benefit. *Restatement (Second) of Torts*, §652C. Although Binion erroneously alleges that

“Defendants’ publication of photos mocking the plaintiff constituted appropriation, for the defendants’ advantage, of the plaintiff’s name or likeness,” there is no allegation that Burke posted the photograph of Binion for his pecuniary advantage or that Burke profited from posting Binion’s photograph . [Complaint, ¶ 18.] Burke removed the photograph upon learning that it depicted a real person and that Binion suffered from a rare medical condition. [Ex. A, ¶¶ 13-14.]

Additionally, it does not make sense that one could be found liable for appropriation based on information that is already public knowledge or something that the general public can easily obtain. As explained in detail above, Burke discovered the photograph on the Instagram account of Malphurs, a public figure with over 900,000 followers. The photograph had already been widely disseminated by the time Burke discovered it. Further, pursuant to Instagram’s Privacy Policy, which Binion agreed to when he signed up for an Instagram account, the photograph was publicly available and accessible as soon as Binion posted it on his own Instagram accounts. [Ex. H.]

For the aforementioned reasons, Binion cannot prove the elements required to establish an appropriation claim.

3. Publicity

Invasion of privacy by publicity involves the public disclosure of embarrassing private facts. See *Beaumont*, *supra*, 401 Mich. at 95-96. Binion

speciously alleges that “Defendants’ publication of photos mocking the plaintiff constituted a public disclosure of embarrassing private facts about the plaintiff.” [Complaint, ¶ 16.] Pursuant to *Twombly*, “a formulaic recitation of the elements of a cause of action” is insufficient to survive a motion to dismiss on the pleadings.

“Embarrassing private facts” consist of information that concerns the plaintiff’s private life. *Mills*, 212 Mich. App. at 82. “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.” *Beaumont*, 401 Mich. at 105. “This form of invasion of privacy requires that the disclosed information be highly offensive to a reasonable person and of no legitimate concern to the public.” *Sargent v. Barbara Ann Karmanos Cancer Institute*, 2003 WL 21359350 (E.D. Mich., Feb 7, 2003) (quoting *Fry v. Ionia Sentinel-Standard*, 101 Mich. App. 725; 300 N.W.2d 687, 689 (1981)).

Binion’s Complaint fails to make clear what “embarrassing private facts” were publicly disclosed by Burke. The only “fact” that was publicized was the photograph of Binion, which had already been widely disseminated on Malphur’s Instagram account and became publicly available to more than 150 million Instagram users as soon as Binion posted it on his own Instagram accounts.

If Binion’s claim is that he did not want people to know that he suffers from ectodermal dysplasia, Burke cannot be held liable. Burke did not create any

publicity regarding Binion's medical condition because Burke was not even aware that Binion suffered from the condition (nor does Binion claim otherwise). Burke could not have publicized the information, nor is there any allegation that he did.

If Binion's claim is that he did not want the photograph to be publicly displayed, he would not have posted the photograph to his Instagram accounts, where any of the more than 150 million Instagram users could find it and any one of them would have the ability and the express consent of Binion to share the photograph on their own Instagram account. The same photograph that remained on Burke's Instagram account for a very short time has remained posted on Binion's Instagram accounts since January 2014. Thus, Binion is the only person who has intentionally publicized and continues to publicize the allegedly "embarrassing private facts about the plaintiff."

For the aforementioned reasons, Binion cannot prove the elements necessary to establish a claim for invasion of privacy by publicity.

4. False Light

False light actions arise when a publication to a broad array of people has occurred and the facts in that publication are false and cause damage to the plaintiff. The gravamen of this tort is that a defendant's publication "attribut[ed] to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v. The Detroit News*, 200 Mich. App. 622,

632; 504 N.W.2d 715 (1993). The two necessary elements to make out a false light claim are (1) publicity and (2) placement of the plaintiff in a false light in the public eye. *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 591, 349 N.W.2d 529 (1984). The light in which the plaintiff is placed must be “highly offensive to a reasonable person.” *Early Detection Ctr, P.C. v. New York Life Ins Co.*, 157 Mich. App. 618, 630; 403 N.W.2d 830 (1986). Moreover, the defendant “must have had knowledge of or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” *Id.*

In *Rhoads v. Baker College et al*, 2008 WL 4648972 (Mich. App. 2008), the plaintiff brought a claim for false light invasion of privacy based in part on the individual defendant allegedly passing out a leaflet to her neighbors with plaintiff’s picture and identifying information that warned them to watch out for him. The court dismissed the claim, rejecting the plaintiff’s argument that the posting of his picture “implicitly attributed to [him] characteristics and conduct that were false and placed [plaintiff] in a false position.” *Id.* at * 6. The court emphasized that the photograph evinced the plaintiff’s true likeness. Thus, “[e]ven if plaintiff could establish that the posting was broadcast to a large number of people, the posting did not constitute ‘information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.’” *Id.* (internal citation omitted).

Binion erroneously claims that “the publication of photos mocking the plaintiff constituted publicity which placed the plaintiff in a false light in the public eye.” [Complaint, ¶ 17.] Binion’s Complaint fails to explain how reposting a photograph that Binion voluntarily displayed on his own Instagram accounts placed Binion in a false light. Burke did nothing to alter the photograph and Burke did not make a single statement regarding the photograph, Binion or his medical condition. As in *Rhoads*, the photograph represented a true likeness of Binion.

Binion cannot prove the elements necessary to establish a false light claim.

C. Binion Cannot Establish a Claim for Intentional Infliction of Emotional Distress.

The elements necessary to make out a prima facie case of intentional infliction of emotional distress include “(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress.” *Atkinson v. Farley*, 171 Mich. App. 784, 788; 431 N.W.2d 95 (1988). Conduct is not considered “extreme and outrageous” if it is merely insulting. Rather, the defendant’s conduct must be outrageous in character beyond all possible bounds of decency or must be extreme to the point of being atrocious and utterly intolerable based on community standards. *Grochowalski v. DAIIIE*, 171 Mich. App. 771; 430 N.W.2d 822 (1988). A defendant is not liable for “mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.” *Mills, supra*, 212 Mich. App. at 91.

Michigan courts routinely dismiss intentional infliction of emotional distress claims for failure to demonstrate the requisite extreme and outrageous conduct. See e.g. *Meek v. Michigan Bell Tel. Co.*, 193 Mich. App. 340, 346-47; 483 N.W.2d 407 (1991) (court granted motion for summary disposition, dismissing intentional infliction of emotional distress claim premised on repeated harassing and derogatory comments about plaintiff's gender and religion by her supervisor and coworker); *Warren v. June's Mobile Home Village & Sales, Inc.*, 66 Mich. App. 386; 239 N.W.2d 380 (1976).

Burke's conduct in sharing a photograph that was already posted on the Instagram account of Malphurs can hardly be characterized as extreme and outrageous. Burke did not make any comment directly related to the photograph, Binion or his medical condition. Even if one could infer that Burke was indirectly mocking Binion's appearance by posting the photograph, the case law is clear that mere insults are insufficient to establish intentional infliction of emotional distress. See e.g. *Webster v. United Auto Workers, Local 51*, 394 F.3d 436, 443 (6th Cir. 2005) ("Webster was subject only to the kinds of insults and indignities that Michigan courts have determined are not properly the bases for a claim of intentional infliction of emotional distress."); *Parker v. Fed. Exp. Corp.*, 2010 WL 3803459 (E.D. Mich. Sept. 23, 2010) ("racial insults ... have been found insufficiently extreme or outrageous to support an intentional infliction of

emotional distress claim”); *Grochowalski v. Detroit Auto. Inter-Ins. Exch.*, 171 Mich. App. 771, 776; 430 N.W.2d 822, 824 (1988) (“The rough edges of our society still need a good deal of filing down and, in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind. ... The law will not intervene in every case where a plaintiff’s feelings are hurt.”)

Moreover, although Binion makes the bald assertion that he has suffered severe emotional distress, there is absolutely no evidence to support the claim. The same photograph that was posted on Burke’s Instagram account for a short time has remained on Binion’s Instagram accounts since January 2014. The media crucified all three Defendants for their apparent insensitivity (despite the fact that Burke had no idea that the picture was real or that the person depicted suffered from a medical condition). The incident resulted in a groundswell of positive attention and support for Binion. Binion started a Facebook Group called “Hug Don’t Judge” which currently has 22,489 Members. [Ex. I, [https://www.facebook.com/#!/groups/234486460081570/.](https://www.facebook.com/#!/groups/234486460081570/)]

Moreover, when Burke called Binion to apologize and offer to provide him tickets to an upcoming Pistons/Jazz game, Binion told Fox 2 reporter Randy Wimbley that Burke’s apology was sincere and that he intended to take him up on

his offer. Apparently the “severe emotional distress” came later when Binion’s head became filled with dollar signs.

Binion cannot prove the elements necessary to establish a claim for intentional infliction of emotional distress.

D. Binion Cannot Establish a Claim for Defamation.

The four essential elements of an action for defamation are (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Rouch v. Enquirer & News*, 440 Mich. 238, 251; 487 N.W.2d 205 (1992). “A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual’s reputation in the community or deters others from associating or dealing with the individual.” *Kefgen v. Davidson*, 241 Mich. App. 611, 617; 617 N.W.2d 351 (2000).

Moreover, for a statement to be defamatory, it must be reasonably interpreted as stating actual facts about the plaintiff, as opposed to being mere opinion. *Ireland v. Edwards*, 230 Mich. App. 607, 617; 584 N.W.2d 632 (1998). Even when defamation allegedly takes place “by implication,” a plaintiff bears the

burden of specifically pleading those precise statements that form the basis of the complaint. *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 197 Mich. App. 48, 52; 495 N.W.2d 392 (1992). If a defendant can demonstrate that the statements about the plaintiff are true, those statements cannot be defamatory. *Porter v City of Royal Oak*, 214 Mich. App. 478, 485-86; 542 N.W.2d 905 (1995).

Binion's Complaint does not attribute a single statement to Burke. In fact, Burke did not make a single comment about the photograph, Binion or his medical condition. Burke did nothing more than post a true and accurate photograph of Binion – the same photograph that Binion voluntarily made public by posting on his own Instagram accounts without invoking any of the available privacy settings.

Binion contends that “[t]he defendants’ communications were false because the plaintiff’s medical condition is not an appropriate reason for mockery, ridicule and shame.” [Complaint, ¶ 29.] Binion’s allegation makes no sense. First, Burke was unaware of Binion’s medical condition and never made any mention of it. Moreover, even assuming arguendo that Burke had mocked Binion’s medical condition, he would not have defamed Binion unless he made a false statement about Binion’s medical condition – which he clearly did not.

Binion erroneously claims that the “defendants’ communications clearly implied that the plaintiff was an appropriate object of mockery, ridicule and shame” and that “[t]he defendants’ communications had the effect of lowering the

plaintiff's reputation in the eyes of those who respected the views and opinions of the defendants." [Complaint, ¶¶ 27-28.] It would be a sad commentary on our society if a photograph depicting Binion's physical abnormalities caused by a rare medical condition would lower Binion's reputation. In reality, as explained in section II.C above, it has had the opposite effect.

Even assuming arguendo that Burke was suggesting that Binion's appearance was worthy of ridicule, that would not be sufficient to make out a defamation claim. Courts from around the country have held that insults and other derogatory comments are insufficient to establish a defamation claim. *See e.g. Weiner v. Doubleday & Co., Inc.*, 142 A.D.2d 100, 104-5; 535 N.Y.S.2d 597 (1988) ("Although we disapprove Mrs. Berenice Bradshaw's derogatory reference to plaintiff as a 'big, fat, ugly Jew', we find that it is a mere epithet, and, in this State there can be no action for libel based upon opinion, expressed in the form of epithets."); *Grillo v. John Alden Life Ins. Co. et al*, 939 F. Supp. 685, 688 (D. Minn. 1996) (court dismissed plaintiff's defamation claim because defendant's epithets directed at plaintiff, including that he was "short and stupid" and a "dago guinea ... are matters not susceptible of empirical determination ... [and] are not capable of being proven true or false."); *Travers v. Shane*, 4 Mass. L. Rptr. 141 (1995) (court dismissed plaintiff's defamation claim premised on defendant's statement that the plaintiff was "nothing but a fat, fucking, disgusting bitch"

because “[t]he cause of action for defamation, be it libel or slander, provides no redress for epithets, rhetorical hyperbole, or pure statements of opinion”).

Finally, even if Binion could establish that his reputation was damaged by Burke posting the photograph on Instagram, under Michigan’s defamation statute, MCL 600.2911, Binion would only be entitled to recover economic damages. Specifically, MCL 600.2911(7) provides that “[a]n action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.”

In *Glazer v. Lamkin*, 201 Mich. App. 432, 436-37; 506 N.W.2d 570 (1993), the court held that private plaintiffs are limited to economic damages where the publication of the defamatory falsehood is negligent. Given that Binion has not alleged that Burke published the photograph with any actual malice³ and, in fact, alleges negligence in count IV of his Complaint, Binion cannot possibly be entitled to anything other than economic damages. However, Binion has failed to allege that he suffered any economic damages in his Complaint.⁴

³ Burke had never met Binion and did not even know that the photograph was real when he posted it on Instagram. Clearly, Burke was not acting with any malice toward Binion by posting the photograph.

⁴ Binion is precluded from pursuing exemplary or punitive damages under MCL 600.2911(2)(b) since the photograph was removed from Burke’s Instagram

Binion cannot prove the elements necessary to establish a defamation claim.

E. Binion Cannot Establish a Claim for General Negligence.

“To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v. Consumers Power Co.*, 463 Mich. 1, 6; 615 N.W.2d 17, 20 (2000). A negligence action may only be maintained if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Maiden v. Rozwood*, 461 Mich. 109, 130; 597 N.W.2d 817 (1999). This analysis requires a determination whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of the other. *Id.* One of the factors that courts consider in determining whether the defendant owes a duty to the plaintiff is the existence of a relationship between the parties. *Buczowski v. McKay*, 441 Mich. 96, 100; 490 N.W.2d 330 (1992).

Binion makes no attempt to explain what duty Burke could have possibly owed him. Rather, Binion simply contends that “[t]he defendants mocked and

account before it was even necessary for Binion to request a retraction. The Michigan Supreme Court has ruled that this statutory provision only permits exemplary and punitive damage recovery if common law malice amplified the injury to the plaintiff’s feelings. *See e.g. Peisner v. Detroit Free Press*, 421 Mich. 125, 136; 364 N.W.2d 600 (1984) (exemplary and punitive damages may not be awarded absent finding that defendant acted with common law malice, i.e., ill will or bad faith, in publishing libel).

ridiculed the plaintiff, a person completely unknown to themselves, in public forums where their activity would be widely disseminated” and that “[s]uch conduct violates the general duty to conform to the legal standard of reasonable conduct in the light of the apparent risk.” [Complaint, ¶¶ 32, 34.] Burke had never met Binion before and did not even know that the photograph depicted a real person. Burke’s relationship with Binion was precisely the same as the relationship between Binion and any of the more than 150 million users of Instagram. Like every one of those users, Binion had the option to make his Instagram accounts private. If he had exercised that option, he would have been able to control who could view the photographs that he posted.

Instead, Binion chose to keep his accounts public. As a result, every Instagram user was able to view his photographs. In addition, Binion explicitly authorized Burke and any of the more than 150 million Instagram users to share the content that he posted. Specifically, Binion acknowledged that “other Users may search for, see, use, or share any of your User Content that you make publicly available through the Service ...” [Ex. H.] The Privacy Policy further states that “[o]nce you have shared User Content or made it public, that User Content may be re-shared by others.” [Ex. H.]

In addition, every Instagram user was authorized to post comments about Binion’s photographs and, unfortunately, many of them did just that. The same

photograph that Burke posted and removed within one day remains on Binion's Instagram accounts and contains numerous comments mocking, insulting and/or ridiculing Binion. Burke, on the other hand, did not make a single comment directly about the photograph, Binion or his medical condition. Yet, not surprisingly, the only individuals who offended Binion sufficiently to be named in a lawsuit were the three most affluent individuals.

Burke did not owe any duty to Binion to keep his photographs private. Nor did he have any duty to prevent others from commenting on Binion's photographs, whether those comments were positive or negative. Without a duty, there cannot be a breach. Binion cannot prove the elements necessary to establish a general negligence claim.

III. CONCLUSION

For the aforementioned reasons, Burke respectfully requests that this Court dismiss Binion's Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, that the Court grant summary judgment in favor of Burke, pursuant to Fed. R. Civ. P. 56.

Respectfully submitted,

JAFFE, RAITT, HEUER, & WEISS, P.C.

By: /s/ Kevin B. Hirsch

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Dated: September 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2014, I caused the Motion to Dismiss and/or for Summary Judgment to be electronically filed with the Clerk of the Court using the ECF system, which sent notification of such filing upon all ECF Participants.

Respectfully submitted,

JAFFE, RAITT, HEUER, & WEISS, P.C.

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**INDEX OF EXHIBITS TO
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

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EXHIBIT A

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UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAHMEL BINION,

Plaintiff,

Case No:
Hon.

v

MCCC No: 14-2983-NO
Hon. John C. Foster

SHAQUILLE O'NEAL, ALFONSO CLARK
"TREY" BURKE, III and JUAQUIN MALPHURS
a/k/a WAKA FLOCKA FLAME,

Defendants.

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AFFIDAVIT OF ALFONSO CLARK "TREY" BURKE, III

STATE OF MICHIGAN)
) SS:
COUNTY OF OAKLAND)

I, Alfonso Clark "Trey" Burke, III, being first duly sworn, and having personal knowledge of the matters set forth herein, would be competent to testify to the following if called as a witness:

1. I am 21 years old and am currently an NBA player for the Utah Jazz. From 2011 to 2013, I was a student-athlete at the University of Michigan.

2. I have a typical locker-room relationship with my close friend and teammate, Ian Clark ("Clark").

3. Clark and I often razz each other and occasionally do so through social media.

4. In April 2014, I reposted a picture that I found on co-Defendant and professional rapper Juaquin Malphurs a/k/a Waka Flocka Flame's ("Malphurs") Instagram account.

5. Malphurs is a public figure who has over 900,000 followers on Instagram.

6. I believed that the picture had been photoshopped and had no idea that the picture was of a real person.

7. I re-posted the picture on my own Instagram account with the caption "Hacked by @IanClark".

8. I had no idea that the photograph depicted Plaintiff Jahmel Binion ("Binion") or that Mr. Binion suffered from a medical condition that affected his appearance.

9. I did not learn of Binion's medical condition until the story began receiving media attention.

10. I have never met Defendant Shaquille O'Neal or Malphurs and I never saw the photograph allegedly posted by O'Neal until it received widespread media publicity. I never reposted any photograph from O'Neal's Instagram account.

11. The only photograph that ever appeared on my Instagram account related to this litigation is the photograph of Binion that I discovered on Malphurs' Instagram account. This was the same photograph that appeared (and continues to appear) on multiple Instagram accounts setup by Binion.

12. I never directed any negative comments at Binion nor did I ever make a single comment about the photograph itself, Binion or his medical condition.

13. As soon as I discovered that the picture was real and that the person depicted in the photograph suffered from a rare medical condition that caused certain physical abnormalities, I was ashamed and remorseful.

14. I removed the picture from my Instagram account and sought out and contacted Binion to apologize for my offensive conduct.

15. I offered to host Binion at a Detroit Pistons/Utah Jazz game during the upcoming season.

16. Binion graciously accepted my apology and indicated that he intended to take me up on the offer to attend the game.

17. I was sincere in my apology to Binion and have done everything in my power to learn and grow from the incident.

18. I was blindsided by the instant lawsuit which was served on me while I was running a youth basketball camp in Ann Arbor, Michigan.

Alfonso Clark "Trey" Burke

DONIELLE DEBORAH FALL
Notary Public, State of Michigan
County of Oakland
My Commission Expires 02-04-2016
Acting in the County of _____

Subscribed and sworn before me
this ____ day of September 2014

Notary Public

_____, County, _____

My Commission Expires: _____

Acting in the County of _____

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EXHIBIT B

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Shaq, others apo man with genetic disorder

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By myFOXDetroit.com Staff - email

SOUTHFIELD, Mich. (WJBK) -- Shaquille O'Neal has apologized for mooking a Madison Heights, Mich. man with a rare genetic disorder on social media.

O'Neal tweeted Tuesday, "Made a new friend today when I called and apologized to Jahmel Binion. Great Dude."

Several celebrities, including O'Neal, were heavily criticized on social media for teasing Binion, who has ectodermal dysplasia, a condition characterized by a reduced ability to sweat, missing teeth and abnormal hair growth.

Binion told FOX 2's Randy Wimbley he's been teased his whole life, but never thought he'd be bullied after posting a selfie on Instagram. He says people began recognizing him after O'Neal posted a side-by-side comparison of himself making a contorted face and Binion's selfie and the caption: "Smile today."

Binion says O'Neal told him on the phone he didn't realize the photo was of a real person, and thought it was photoshopped. The photo on O'Neal's Instagram has since been taken down.

Former University of Michigan athlete Trey Burke and Atlanta rapper Waka Flocka Flame also joined in on the teasing, but also apologized Tuesday.

"I wanna apologize to Jahmel Binion for being a *ss and making a mockery of him," Flame tweeted.

As for Burke, officials with the Utah Jazz say he also called Binion to apologize and invited him to the Palace of Auburn Hills next season when the Jazz play the Pistons.

In an email sent to FOX 2, Burke's mother also offered an apology from the Burke family, saying they are very sorry Jahmel "had to endure this embarrassment" and that Trey is "very remorseful." The Utah Jazz confirmed the email was sent from her.

Since then, Binion has launched his own anti-bullying campaign called Hugs Don't Judge. In less than a week, the group has more than 10,000 members on Facebook from around the world.

Now, Binion says he's thinking about speaking in classrooms and hopes O'Neal, Flame and Burke will take part in raising awareness about ectodermal dysplasia.

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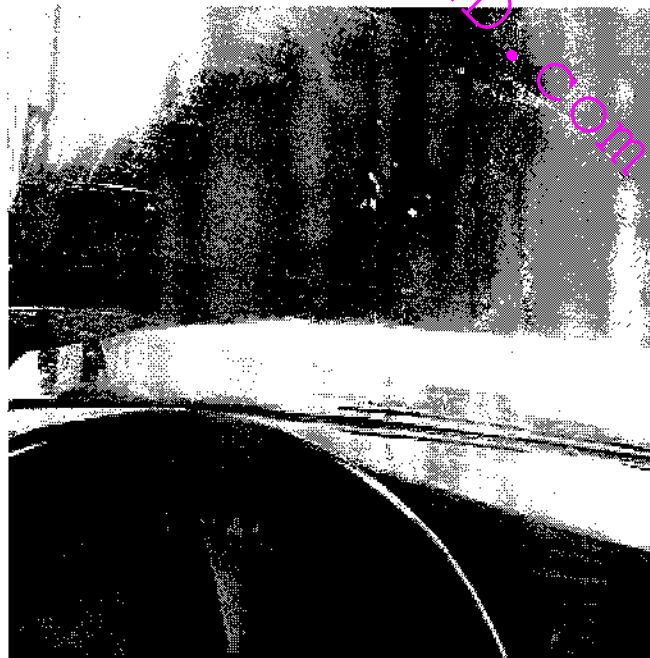
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Mich. man's selfie mocked by celebrities on social media

Posted: Apr 25, 2014 6:01 PM EDT
Updated: Apr 30, 2014 6:38 PM EDT

By myFOXDetroit.com Staff - email

MADISON HEIGHTS, Mich. (WJBK) - Jahmel Binion of Madison Heights, Mich. has the rare disorder ectodermal dysplasia, a condition characterized by a reduced ability to sweat, missing teeth and abnormal hair growth.

He tells FOX 2's Randy Wimbley he's been getting teased his whole life, but never thought he'd be bullied by celebrities after posting a "selfie" on social media.

He says people began recognizing him from a picture on Shaquille O'Neal's Instagram account. Former University of Michigan athlete Trey Burke and rapper Waka Flocka Flame are also said to have also joined in on the teasing.

The photo on Shaq's Instagram has been taken down.

Wimbley contacted Shaq via Twitter, officials with Burke's team, Utah Jazz, and Waka Flocka Flame's record label. No one responded.

Binion says this has inspired him to start an anti-bullying campaign on Facebook called 'Hug Don't Judge'

UPDATED TO ADD: Binion received apologies from all three via Twitter and personal phone calls

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FAQ

This is a short list of our most frequently asked questions. For more information about Instagram, or if you need support, please visit our support center.

What is Instagram?

Instagram is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone, then choose a filter to transform the image into a memory to keep around forever. We're building Instagram to allow you to experience moments in your friends' lives through pictures as they happen. We imagine a world more connected through photos.

How much is your app?

\$0.00 - available for free in the Apple App Store and Google Play store.

Where does the name come from?

When we were kids we loved playing around with cameras. We loved how different types of old cameras marketed themselves as "instant" - something we take for granted today. We also felt that the snapshots people were taking were kind of like telegrams in that they got sent over the wire to others - so we figured why not combine the two?

How did the idea come about?

We love taking photos. We always assumed taking interesting photos required a big bulky camera and a couple years of art school. But as mobile phone cameras got better and better, we decided to challenge that assumption. We created Instagram to solve three simple problems:

1. Mobile photos always come out looking mediocre. Our awesome looking filters transform your photos into professional looking snapshots.
2. Sharing on multiple platforms is a pain - we help you take a picture once, then share it (instantly) on multiple services.
3. Most uploading experiences are clumsy and take forever - we've optimized the experience to be fast and efficient.

What other services are you compatible with?

Currently, you can share your photos on a photo-by-photo basis on Flickr, Facebook, and Twitter. Additionally, if you specify a location with your photo, you can opt to have us check you in on Foursquare. Going forward, we plan on supporting additional services but have nothing else to announce at this time.

Are you hiring?

Absolutely, yes. If you're a talented engineer or designer, we want to talk to you. Check out our jobs page.

I have a technical problem or support issue I need resolved, who do I email?

The best way to get in touch with us is to visit our support center.

Is there an API or developer program?

Developers can register for our api at our developer site.

How does privacy work?

We have adopted a follower model that means if you're "public" on Instagram, anyone can subscribe to follow your photos. We do, however, have a special private option. In this mode, a user can make sure he/she must approve all follow requests before they go through.

Who can see my photos?

All photos are public by default which means they are visible to anyone using Instagram or on the instagram.com website. If you choose to make your account private, then only people who follow you on Instagram will be able to see your photos.

How can I print my photos?

We save all the photos you process with Instagram to your camera roll. You can then sync with your computer and print as many as you'd like.

When are you going to make the app for Blackberry, Windows Phone 7, iPad, etc?

We are currently working on making the iPhone and Android experiences as solid as possible. Only then will we consider other platforms, but currently we have nothing to announce.

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You (and also any third party for whom you operate an account or activity on the Service) agree to defend (at Instagram's request), indemnify and hold the Instagram Parties harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney's fees and costs, arising out of or in any way connected with any of the following (including as a result of your direct activities on the Service or those conducted on your behalf): (i) your Content or your access to or use of the Service; (ii) your breach or alleged breach of these Terms of Use; (iii) your violation of any third-party right, including without limitation, any intellectual property right, publicity, confidentiality, property or privacy right; (iv) your violation of any laws, rules, regulations, codes, statutes, ordinances or orders of any governmental and quasi-governmental authorities, including, without limitation, all regulatory, administrative and legislative authorities; or (v) any misrepresentation made by you. You will cooperate as fully required by Instagram in the defense of any claim. Instagram reserves the right to assume the exclusive defense and control of any matter subject to indemnification by you, and you will not in any event settle any claim without the prior written consent of Instagram.

Arbitration

Except if you opt-out or for disputes relating to: (1) your or Instagram's intellectual property (such as trademarks, trade dress, domain names, trade secrets, copyrights and patents); (2) violations of the API Terms; or (3) violations of provisions 13 or 15 of the Basic Terms, above ("Excluded Disputes"), you agree that all disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram, including without limitation disputes related to these Terms of Use, your use of the Service, and/or rights of privacy and/or publicity, will be resolved by binding, individual arbitration under the American Arbitration Association's rules for arbitration of consumer-related disputes and you and Instagram hereby expressly waive trial by jury. As an alternative, you may bring your claim in your local "small claims" court, if permitted by that small claims court's rules. You may bring claims only on your own behalf. Neither you nor Instagram will participate in a class action or class-wide arbitration for any claims covered by this agreement. You also agree not to participate in claims brought in a private attorney general

Acceptance of this dispute resolution provision will be governed by the Federal Arbitration Act. If the event the American Arbitration Association is unwilling or unable to set a hearing date within one hundred and sixty (160) days of filing the case, then either Instagram or you can elect to have the arbitration administered instead by the Judicial Arbitration and Mediation Services. Judgment on the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Any provision of applicable law notwithstanding, the arbitrator will not have authority to award damages, remedies or awards that conflict with these Terms of Use.

You may opt out of this agreement to arbitrate. If you do so, neither you nor Instagram can require the other to participate in an arbitration proceeding. To opt out, you must notify Instagram in writing within 30 days of the date that you first became subject to this arbitration provision. You must use this address to opt out:

Instagram, LLC ATTN: Arbitration Opt-out 1601 Willow Rd. Menlo Park, CA 94025

You must include your name and residence address, the email address you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement.

If the prohibition against class actions and other claims brought on behalf of third parties contained above is found to be unenforceable, then all of the preceding language in this Arbitration section will be null and void. This arbitration agreement will survive the termination of your relationship with Instagram.

Time Limitation on Claims

You agree that any claim you may have arising out of or related to your relationship with Instagram must be filed within one year after such claim arose; otherwise, your claim is permanently barred.

Governing Law & Venue

These Terms of Use are governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of law AND WILL SPECIFICALLY NOT BE GOVERNED BY THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IF OTHERWISE APPLICABLE. For any action at law or in equity relating to the arbitration provision of these Terms of Use, the Excluded Disputes or if you opt out of the agreement to arbitrate, you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County for the purpose of litigating all such disputes.

If any provision of these Terms of Use is held to be unlawful, void, or for any reason unenforceable during arbitration or by a court of competent jurisdiction, then that provision will be deemed severable from these Terms of Use and will not affect the validity and enforceability of any remaining provisions. Instagram's failure to insist upon or enforce strict performance of any provision of these Terms will not be construed as a waiver of any provision or right. No waiver of any of these Terms will be deemed a further or continuing waiver of such term or condition or any other term or condition. Instagram reserves the right to change this dispute resolution provision, but any such changes will not apply to disputes arising before the effective date of the amendment. This dispute resolution provision will survive the termination of any or all of your transactions with Instagram.

Entire Agreement

If you are using the Service on behalf of a legal entity, you represent that you are authorized to enter into an agreement on behalf of that legal entity. These Terms of Use constitute the entire agreement between you and Instagram and governs your use of the Service, superseding any prior agreements between you and Instagram. You will not assign the Terms of Use or assign any rights or delegate any obligations hereunder, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of Instagram. Any purported assignment or delegation by you without the appropriate prior written consent of Instagram will be null and void. Instagram may assign these Terms of Use or any rights hereunder without your consent. If any provision of these Terms of Use is found by a court of competent jurisdiction to be invalid or otherwise unenforceable, the parties nevertheless agree that such portion will be deemed severable from these Terms of Use and will not affect the validity and enforceability of the remaining provisions, and the remaining provisions of the Terms of Use remain in full force and effect. Neither the course of conduct between the parties nor trade practice will act to modify the Terms of Use. These Terms of Use do not confer any third-party beneficiary rights.

Territorial Restrictions

The information provided within the Service is not intended for distribution to or use by any person or entity in any jurisdiction or country where such distribution or use would be contrary to law or regulation or which would subject Instagram to any registration requirement within such jurisdiction or country. We reserve the right to limit the availability of the Service or any portion of the Service, to any person, geographic area, or jurisdiction, at any time and in our sole discretion, and to limit the quantities of any content, program, product, service or other feature that Instagram provides.

Software related to or made available by the Service may be subject to United States export controls. Thus, no software from the Service may be downloaded, exported or re-exported: (a) into (or to a national or resident of) any country to which the United States has embargoed goods; or (b) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Deny Orders. By downloading any software related to the Service, you represent and warrant that you are not located in, under the control of, or a national or resident of, any such country or on any such list.

The effective date of these Terms of Use is January 19, 2013. These Terms of Use were written in English (US). To the extent any translated version of these Terms of Use conflicts with the English version, the English version controls.

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EXHIBIT H

theJasmineBRAND.com

ABOUT

Company

Jobs

FAQ

LEGAL

Terms

Privacy

API Terms

Libraries

Privacy Policy

Important Update

In September 2012, we announced that Instagram had been acquired by Facebook. We knew that by teaming up with Facebook, we could build a better Instagram for you. Since then, we've been collaborating with Facebook's team on ways to do just that. As part of our new collaboration, we've learned that by being able to share insights and information with each other, we can build better experiences for our users.

We're updating our Privacy Policy to highlight this new collaboration, but we want to make sure you understand that you still have control over who sees your photos. You still get to choose who can see your Instagram photos, and you still get to choose whether you post your photos on Facebook. So while we're looking forward to working closely with Facebook to build better experiences, we aren't changing the core features of the app that you've come to know and love.

Our new Privacy Policy is effective on January 19, 2013. To learn about how we treat information collected prior to January 19, 2013, please click here.

Privacy Policy

Effective date: January 19, 2013

Welcome to Instagram ("Instagram," "we," "us" or "our"). Instagram provides a fast, beautiful and fun way for you to share media through our content-sharing platform. Just snap a photo, choose a filter to transform the look and feel, add comments (if you like) and share!

- Our Privacy Policy explains how we and some of the companies we work with collect, use, share and protect information in relation to our mobile services, web site, and any software provided on or in connection with Instagram Services (collectively, the "Service"), and your choices about the collection and use of your information.
- By using our Service you understand and agree that we are providing a platform for you to post content, including photos, comments and other materials ("User Content"), to the Service and to share User Content publicly. This means that other Users may search for, see, use, or share any of your User Content that you make publicly available through the Service, consistent with the terms and conditions of this Privacy Policy and our Terms of Use (which can be found at <http://instagram.com/legal/terms>).
- Our Policy applies to all visitors, users, and others who access the Service ("Users").

Click on the links below to jump to each section of this Policy:

1. Information We Collect
2. How We Use Your Information
3. Sharing of Your Information
4. How We Store Your Information
5. Your Choices About Your Information
6. Children's Privacy
7. Other Websites and Services
8. How to Contact Us About a Deceased User
9. How to Contact Us
10. Changes to Our Privacy Policy

1. INFORMATION WE COLLECT

We collect the following types of information.

Information you provide us directly:

- Your username, password and e-mail address when you register for an Instagram account.
- Profile information that you provide for your user profile (e.g., first and last name, picture, phone number). This information allows us to help you or others be "found" on Instagram.
- User Content (e.g., photos, comments, and other materials) that you post to the Service.
- Communications between you and Instagram. For example, we may send you Service-related emails (e.g., account verification, changes/updates to features of the Service, technical and security notices). Note that you may not opt out of Service-related e-mails.

Finding your friends on Instagram:

- If you choose, you can use our "Find friends" feature to locate other people with Instagram accounts either through (i) your contacts list, (ii) third-party social media sites or (iii) through a search of names and usernames on Instagram.
- If you choose to find your friends through (i) your device's contacts list, then Instagram will access your contacts list

link to a third-party service and you understand that any information that such service may provide to us will be governed by this Privacy Policy.

- If you choose to find your friends (iii) through a search of names or usernames on Instagram then simply type a name to search and we will perform a search on our Service.
- **Note about "Invite Friends" feature:** If you choose to invite someone to the Service through our "Invite friends" feature, you may select a person directly from the contacts list on your device and send a text or email from your personal account. You understand and agree that you are responsible for any charges that apply to communications sent from your device, and because this invitation is coming directly from your personal account, Instagram does not have access to or control this communication.

Analytics information:

- We use third-party analytics tools to help us measure traffic and usage trends for the Service. These tools collect information sent by your device or our Service, including the web pages you visit, add-ons, and other information that assists us in improving the Service. We collect and use this analytics information with analytics information from other Users so that it cannot reasonably be used to identify any particular individual User.

Cookies and similar technologies:

- When you visit the Service, we may use cookies and similar technologies like pixels, web beacons, and local storage to collect information about how you use Instagram and provide features to you.
- We may ask advertisers or other partners to serve ads or services to your devices, which may use cookies or similar technologies placed by us or the third party.
- More information is available in our About Cookies section

Log file information:

- Log file information is automatically reported by your browser each time you make a request to access (i.e., visit) a web page or app. It can also be provided when the content of the webpage or app is downloaded to your browser or device.
- When you use our Service, our servers automatically record certain log file information, including your web request, Internet Protocol ("IP") address, browser type, referring / exit pages and URLs, number of clicks and how you interact with links on the Service, domain names, landing pages, pages viewed, and other such information. We may also collect similar information from emails sent to our Users which then help us track which emails are opened and which links are clicked by recipients. The information allows for more accurate reporting and improvement of the Service.

Device identifiers:

- When you use a mobile device like a tablet or phone to access our Service, we may access, collect, monitor, store on your device, and/or remotely store one or more "device identifiers." Device identifiers are small data files or similar data structures stored on or associated with your mobile device, which uniquely identify your mobile device. A device identifier may be data stored in connection with the device hardware, data stored in connection with the device's operating system or other software, or data sent to the device by Instagram.
- A device identifier may deliver information to us or to a third party partner about how you browse and use the Service and may help us or others provide reports or personalized content and ads. Some features of the Service may not function properly if use or availability of device identifiers is impaired or disabled.

Metadata:

- Metadata is usually technical data that is associated with User Content. For example, Metadata can describe how, when and by whom a piece of User Content was collected and how that content is formatted.
- Users can add or may have Metadata added to their User Content including a hashtag (e.g., to mark keywords when you post a photo), geotag (e.g., to mark your location to a photo), comments or other data. This makes your User Content more searchable by others and more interactive. If you geotag your photo or tag your photo using other's APIs then, your latitude and longitude will be stored with the photo and searchable (e.g., through a location or map feature) if your photo is made public by you in accordance with your privacy settings.

2. HOW WE USE YOUR INFORMATION

In addition to some of the specific uses of information we describe in this Privacy Policy, we may use information that we receive to:

- help you efficiently access your information after you sign in
- remember information so you will not have to re-enter it during your visit or the next time you visit the Service;
- provide personalized content and information to you and others, which could include online ads or other forms of marketing
- provide, improve, test, and monitor the effectiveness of our Service
- develop and test new products and features
- monitor metrics such as total number of visitors, traffic, and demographic patterns
- diagnose or fix technology problems

3. SHARING OF YOUR INFORMATION

We will not rent or sell your information to third parties outside Instagram (or the group of companies of which Instagram is a part) without your consent, except as noted in this Policy.

Parties with whom we may share your information:

- We may share User Content and your information (including but not limited to, information from cookies, log files, device identifiers, location data, and usage data) with businesses that are legally part of the same group of companies that Instagram is part of, or that become part of that group ("Affiliates"). Affiliates may use this information to help provide, understand, and improve the Service (including by providing analytics) and Affiliates' own services (including by providing you with better and more relevant experiences). But these Affiliates will honor the choices you make about who can see your photos.
- We also may share your information as well as information from tools like cookies, log files, and device identifiers and location data, with third-party organizations that help us provide the Service to you ("Service Providers"). Our Service Providers will be given access to your information as is reasonably necessary to provide the Service under reasonable confidentiality terms.
- We may also share certain information such as cookie data with third-party advertising partners. This information would allow third-party ad networks to, among other things, deliver targeted advertisements that they believe will be of most interest to you.
- We may remove parts of data that can identify you and share anonymized data with other parties. We may also combine your information with other information in a way that it is no longer associated with you and share that aggregated information.

Parties with whom you may choose to share your User Content:

- Any information or content that you voluntarily disclose for posting to the Service, such as User Content, becomes available to the public, as controlled by any applicable privacy settings that you set. To change your privacy settings on the Service, please change your profile setting. Once you have shared User Content or made it public, that User Content may be re-shared by others.
- Subject to your profile and privacy settings, any User Content that you make public is searchable by other Users and subject to use under our Instagram API. The use of the Instagram API is subject to the API Terms of Use which incorporates the terms of this Privacy Policy.
- If you remove information that you posted to the Service, copies may remain viewable in cached and archived pages of the Service, or if other Users or third parties using the Instagram API have copied or saved that information.

What happens in the event of a change of control:

- If we sell or otherwise transfer part or the whole of Instagram or our assets to another organization (e.g., in the course of a transaction like a merger, acquisition, bankruptcy, dissolution, liquidation), your information such as name and email address, User Content and any other information collected through the Service may be among the items sold or transferred. You will continue to own your User Content. The buyer or transferee will have to honor the commitments we have made in this Privacy Policy.

Responding to legal requests and preventing harm:

- We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.

4. HOW WE STORE YOUR INFORMATION

Storage and Processing:

- Your information collected through the Service may be stored and processed in the United States or any other country in which Instagram, its Affiliates or Service Providers maintain facilities.
- Instagram, its Affiliates, or Service Providers may transfer information that we collect about you, including personal information across borders and from your country or jurisdiction to other countries or jurisdictions around the world. If you are located in the European Union or other regions with laws governing data collection and use that may differ from U.S. law, please note that we may transfer information, including personal information, to a country and jurisdiction that does not have the same data protection laws as your jurisdiction.
- By registering for and using the Service you consent to the transfer of information to the U.S. or to any other country in which Instagram, its Affiliates or Service Providers maintain facilities and the use and disclosure of information about you as described in this Privacy Policy.

Take reasonable steps such as requesting a credit/password to verify your identity before granting you access to your account. However, Instagram cannot ensure the security of any information you transmit to Instagram or guarantee that information on the Service may not be accessed, disclosed, altered, or destroyed.

- Please do your part to help us. You are responsible for maintaining the secrecy of your unique password and account information, and for controlling access to emails between you and Instagram, at all times. Your privacy settings may also be affected by changes the social media services you connect to Instagram make to their services. We are not responsible for the functionality, privacy, or security measures of any other organization.

5. YOUR CHOICES ABOUT YOUR INFORMATION

Your account information and profile/privacy settings:

- Update your account at any time by logging in and changing your profile settings.
- Unsubscribe from email communications from us by clicking on the "unsubscribe link" provided in such communications. As noted above, you may not opt out of Service-related communications (e.g., account verification, purchase and billing confirmations and reminders, changes/updates to features of the Service, technical and security notices).
- Learn more about reviewing or modifying your account information.

How long we keep your User Content:

- Following termination or deactivation of your account, Instagram, its Affiliates, or its Service Providers may retain information (including your profile information) and User Content for a commercially reasonable time for backup, archival, and/or audit purposes.
- Learn more about deleting your account.

6. CHILDREN'S PRIVACY

Instagram does not knowingly collect or solicit any information from anyone under the age of 13 or knowingly allow such persons to register for the Service. The Service and its content are not directed at children under the age of 13. In the event that we learn that we have collected personal information from a child under age 13 without parental consent, we will delete that information as quickly as possible. If you believe that we might have any information from or about a child under 13, please contact us.

7. OTHER WEB SITES AND SERVICES

We are not responsible for the practices employed by any websites or services linked to or from our Service, including the information or content contained within them. Please remember that when you use a link to go from our Service to another website or service, our Privacy Policy does not apply to those third-party websites or services. Your browsing and interaction on any third-party website or service, including those that have a link on our website, are subject to that third party's own rules and policies. In addition, you agree that we are not responsible and do not have control over any third-parties that you authorize to access your User Content. If you are using a third-party website or service and you allow them to access your User Content you do so at your own risk.

8. HOW TO CONTACT US ABOUT A DECEASED USER

In the event of the death of an Instagram User, please contact us. We will usually conduct our communication via email; should we require any other information, we will contact you at the email address you have provided in your request.

9. HOW TO CONTACT US

If you have any questions about this Privacy Policy or the Service, please find the appropriate support channel in the Instagram Help Center at which to contact us.

10. CHANGES TO OUR PRIVACY POLICY

Instagram may modify or update this Privacy Policy from time to time, so please review it periodically. We may provide you additional forms of notice of modifications or updates as appropriate under the circumstances. Your continued use of Instagram or the Service after any modification to this Privacy Policy will constitute your acceptance of such modification.

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EXHIBIT I

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- Kevin Hirsch
Edit Profile
- News Feed
- Messages
- Events
- Find Friends
- Apps
- Games
- Words With Friends
- Film Contest
- North Valley Cutest...
- Best Italian Chef C...
- MuscleTech Ultima...
- VTech's Holiday S...
- Champps Mystery...
- Orbitz 50 Faves
- Win the World!
- Embassy Suites 36...
- Harry Potter Studio...
- Embassy Suites 36...
- Ultrabook Sweepst...
- 2012 Life's Ultimat...
- \$1000TMGiftCard...
- Bud Light Hotel Sw...
- Games Feed 20+
- Friends
- Close Friends
- Groups
- Added to the... 3
- Stevenson Elemen...
- Manage Your Groups
- Create Group
- Find New Groups
- Interests
- Pages and Public...
- Pages
- Pages Feed 20+
- Like Pages
- Create Page
- Developer
- Insights
- Events
- Create Event



I WAS BORN TO BE DIFFERENT NOT

- YOUR APPS
- RECOMMENDED GAMES

HUG DONT JUDGE.

Join this group to see the discussion, post and comment.

Join Group

Members (22,327)

Admins

- Nichole Kegerreis Bledsoe
- Keri Lynn Melinger
- Emily Evans
- Tonisha Renee Perry
- Asia Biniort
- Jahmel Birdon

Other Members

- Keith Cardwell
- Clair Mavity Nye
- Joshua Emmanue
- April Miller
- Gillum Real Real Savage
- Kim High
- Paul Chapman
- Karine Joannis
- Becky Athon
- Betty Brownson Cote
- Kiarra So Lovely Lee
- Kathleen Myers
- Giuseppe Mosca
- Desty Rogers
- Leila Emme
- KiWea Blessedb eyonbel ief Spoons
- Tommy Feerney
- Kimberly Durden
- Leta Swanie
- Delra Shamone Seabrook
- Tamera A Porter
- Nicole Prayed Up Payton

ABOUT

Closed Group

THIS PAGE IS TO SUPPORT MY ANTI BULLYING AND CYBER BULLYING ORGANIZATION. PLEASE BE RESPECTFUL BE POSITIVE AND SHARE THIS WITH THE WORLD. TIME TO MAKE A DIFFERENCE

CREATE NEW GROUPS

Groups make it easier than ever to share with friends, family and teammates.

+ Create Group

SUGGESTED GROUPS

- Exposing The Rotschilids-Talmud-The Protocols of Zion
16,755 members
+ Join
- PTSD BREAK THE SILENCE Group Support
9,756 members
+ Join
- ADHD WELCOME HOME!
2,004 members
+ Join
- Never Lose Neverland
3,510 members
+ Join
- Panic Disorder (PD)
3,949 members
+ Join

PEOPLE YOU MAY KNOW

- Barry Bean
10 mutual friends
+ Add Friend
- Benjamin Wilenkin
20 mutual friends
+ Add Friend
- Ryan Rozycki
1 mutual friend
+ Add Friend

RECOMMENDED PAGES

- MMAFighting.com - The Mixed Martial Arts News Website
440,709 people like this.
+ Like
- SFG The San Francisco Globe
Emily Bean Fish and Tod Seitz like this.
+ Like

- Eliot El Lee September 1 2014: Dusting of snow. — at City of Golden, CO.
- Leslie Gruber Herskovit likes Wendi Davis Douglas's post on her ow Timeline
- Sara Hedges listened to Mecca by Wild Beasts on Spotify.
- Jeff Dwoskin likes First the Series's photo.
- Dan Shere Trying to show kids how cool rap was ba in my day, I blasted "...
- Sara MacWilliams likes Franklinstein Frenzy.
- Tamika Curry Smith like Natural Nolts's photo.
- Matthew Drake commented on his own status.
- Sarah Voutyras likes Lmrnfad's photo.

- Kevin...
- Danny Rodden
- Franky Dauterod
- Al...
- Los James

Turn on chat to see who's available.

thejasminebrand.com

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAHMEL BINION,

Plaintiff,

Case No:

Hon.

v

MCCC No: 14-2983-NO

SHAQUILLE O'NEAL, ALPHONSO CLARK
"TREY" BURKE, III and JUAQUIN MALPHURS
a/k/a WAKA FLOCKA FLAME,

Hon. John C. Foster

Defendants.

JOHN W. HENKE, III (P39294)
HENKE LAW GROUP
Attorney for Plaintiff
29800 Telegraph Road
Southfield, MI 48034
(248) 353-6500
jwhenke@aol.com

MICHAEL F. JACOBSON (P47059)
KEVIN B. HIRSCH (P58757)
JAFFE, RAITT, HEUER & WEISS, P.C.
Attorney for Defendant Trey Burke
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
mjacobson@jaffelaw.com
khirsch@jaffelaw.com

DEFENDANT ALFONSO CLARK "TREY" BURKE'S
NOTICE OF REMOVAL

Defendant Alfonso Clark "Trey" Burke, III ("Burke"), through his undersigned counsel, removes this action pursuant to 28 U.S.C. § 1441 *et seq.* to the United States District Court for the Eastern District of Michigan. In support of this notice of removal, Burke states as follows:

1. On or about July 30, 2014, a civil lawsuit was commenced and is now pending in the Macomb County Circuit Court in Michigan as Case No. 14-2983-NO (the "Lawsuit"). A Copy of the Complaint is attached as **Exhibit A** in accordance with 28 U.S.C. § 1446(a) and is incorporated herein by reference. Other than the Complaint, no pleadings or orders have been served upon or otherwise received by Burke.

2. The pending action is a civil action over which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1332. Specifically, the Court has diversity jurisdiction over this case under 28 U.S.C. § 1332(a). Accordingly, Burke may remove the case to this Court under 28 U.S.C. § 1441(a) because this is a civil action between citizens of different states, and the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest or costs.

3. Plaintiff Jahmel Binion is an individual that resides in Macomb County, Michigan.

4. Defendant Burke is an individual that resides in Salt Lake City, Utah.

5. Upon information and belief, Defendant Shaquille O'Neal ("O'Neal") is an individual that resides in Florida and Massachusetts.

6. Upon information and belief, Defendant Juaquin Malphurs a/k/a Waka Flocka Flame ("Malphurs"), is an individual that resides in Georgia.

7. Plaintiff's Complaint alleges that Defendant O'Neal "mocked and ridiculed" Plaintiff by publishing a picture on Instagram and Twitter and that Defendants Burke and Malphurs republished the photograph posted by O'Neal and published their own photographs "mocking and ridiculing" Plaintiff. Plaintiff's Complaint contains counts for invasion of privacy, intentional infliction of emotional distress, defamation and general negligence.

8. The Complaint does not allege the amount in controversy between Plaintiff and Defendants, other than to state that "the plaintiff has suffered damages in excess of \$25,000."

9. Upon information and belief, the amount in controversy at issue between the parties exceeds \$75,000.00.

10. Venue is proper in this district and division under 28 U.S.C. § 1441(a) because this district and division embrace the place where the removed action has been pending.

11. The Lawsuit is one which may be removed to this Court by Defendant Burke pursuant to the provisions of 28 U.S.C. § 1441(b) and the procedures set forth in 28 U.S.C. § 1446.

12. Burke files this Notice of Removal without admitting any of the facts alleged in Plaintiff's Complaint.

13. Burke received a copy of the Complaint in this Lawsuit through service on August 7, 2014. Upon information and belief, none of the other Defendants have been served.

14. Therefore, this Notice of Removal is being timely filed on September 5, 2014, less than 30 days since Burke received Plaintiff's Complaint, as mandated by 28 U.S.C. § 1446(b).

15. A copy of this Notice of Removal is being promptly served on counsel of record for Plaintiff, pursuant to 28 U.S.C. § 1446(d).

16. A copy of this Notice of Removal is being promptly filed with the Clerk of the Macomb County Circuit Court in Mt. Clemens, Michigan, pursuant to 28 U.S.C. § 1446(d).

WHEREFORE, Defendant Burke respectfully request that this action be removed from the Macomb County Circuit Court in Mt. Clemens, Michigan to the United States District Court for the Eastern District of Michigan.

Respectfully submitted,

JAFFE, RAITT, HEUER, & WEISS, P.C.

By: /s/ Michael F. Jacobson
Michael F. Jacobson (P47059)
Kevin B. Hirsch (P58757)
Attorneys for Defendant Trey Burke
27777 Franklin Road, Suite 2500
Southfield, MI 48034-8214
(248) 351-3000

Dated: September 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I caused the Notice of Removal to be electronically filed with the Clerk of the Court using the ECF system, which sent notification of such filing upon all ECF Participants.

Respectfully submitted by:

JAFFE RAITT HEUER & WEISS, P.C.

By: /s/ Michael F. Jacobson
Michael F. Jacobson (P47059)
Kevin B. Hirsch (P58757)
Attorneys for Defendant Trey Burke
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EXHIBIT A

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STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF MACOMB

JAHMEL BINION

Plaintiff,

14-2983-N0

Case No.

v.

SHAQUILLE O'NEAL, ALPHONSO CLARK
"TREY" BURKE, III and JUAQUIN MALPHURS
a/k/a WAKA FLOCKA FLAME,

HON>

JOHN C FOSTER

Defendants.

CHARLETTA SABAUGH
MACOMB COUNTY CLERK
MT. CLEMENS, MICHIGAN

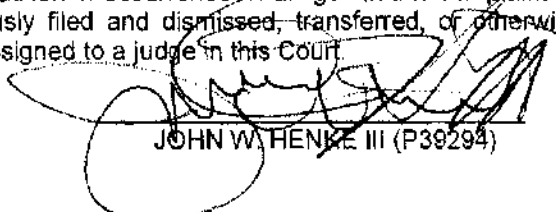
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FILED

JOHN W. HENKE, III (P39294)
HENKE LAW GROUP
Attorney for Plaintiff
29800 Telegraph Road
Southfield, MI 48034
(248) 353-6500
jwhenke@aol.com

COMPLAINT

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this Court.



JOHN W. HENKE III (P39294)

Plaintiff, JAHMEL BINION, through his attorney, JOHN W. HENKE, III, states as follows as his complaint against defendants, Shaquille O'Neal, Trey Burke and Juaquin Malphurs, A/K/A Waka Flocka Flame:

COMMON ALLEGATIONS

1. Plaintiff is a resident of Macomb County, Michigan.
2. Defendant O'Neal maintains residences in Florida and Massachusetts.
3. Defendant Alphonso Clark "Trey" Burke, III maintains a residence in Salt Lake City, Utah.
4. Defendant Malphurs maintains a residence in Mc Donough, Georgia.
5. The offensive communications were communicated nationwide and globally to over 8.4 million recipients, including recipients in Macomb County, Michigan.
6. Plaintiff Jahmel Binion suffers from a rare condition called ectodermal dysplasia.
7. Symptoms of ectodermal dysplasia include abnormalities in the hair, nails, sweat glands and teeth.
8. In April of 2014, defendant O'Neal obtained a photograph of the plaintiff showing the plaintiff's disfigured appearance due to ectodermal dysplasia.
9. Defendant O'Neal mocked and ridiculed plaintiff by publishing on Instagram and Twitter the plaintiff's picture and a picture of O'Neal attempting to make a similar face. Attached as **Exhibit "A"** is the picture O'Neal posted.
10. Defendant O'Neal has an estimated half million Instagram followers and 8.46 million Twitter followers.
11. Defendant Trey Burke republished defendant O'Neal's photograph and published his own photograph mocking and ridiculing the plaintiff.

12. Defendant Juaquin Malphurs, a/k/a Waka Flocka Flame, republished defendant O'Neal's photograph and published his own photograph mocking and ridiculing the plaintiff.

COUNT I – INVASION OF PRIVACY

13. Plaintiff hereby restates and realleges paragraphs 1 through 12 as though fully set forth herein.

14. The plaintiff has a privacy interest in his appearance and medical condition.

15. Defendants' publication of photos mocking the plaintiff constituted an unwarranted intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

16. Defendants' publication of photos mocking the plaintiff constituted a public disclosure of embarrassing private facts about the plaintiff.

17. Defendants' publication of photos mocking the plaintiff constituted publicity which placed the plaintiff in a false light in the public eye.

18. Defendants' publication of photos mocking the plaintiff constituted appropriation, for the defendants' advantage, of the plaintiff's name or likeness.

19. As the result of the defendants' conduct, the plaintiff has suffered damages in excess of \$25,000.

COUNT II – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20. Plaintiff hereby restates and realleges paragraphs 1 through 19 as though fully set forth herein.

21. The defendants' publication of photos mocking the plaintiff was widely regarded as extreme and outrageous conduct.

22. The defendants' acts of publishing the photos were intentional, and were done with reckless disregard to the harm that might be caused to the plaintiff.

23. As the result of the publications the plaintiff has suffered severe emotional distress.

24. As the result of the defendants' conduct, the plaintiff has suffered damages in excess of \$25,000.

COUNT III – DEFAMATION

25. Plaintiff hereby restates and realleges paragraphs 1 through 24 as though fully set forth herein.

26. A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community.

27. The defendants' communications clearly implied that the plaintiff was an appropriate object of mockery, ridicule and shame.

28. The defendants' communications had the effect of lowering the plaintiff's reputation in the eyes of those who respected the views and opinions of the defendants.

29. The defendants' communications were false because the plaintiff's medical condition is not an appropriate reason for mockery, ridicule and shame.

30. As the result of the defendants' conduct, the plaintiff has suffered damages in excess of \$25,000.

COUNT IV – GENERAL NEGLIGENCE

31. Plaintiff hereby restates and realleges paragraphs 1 through 30 as though fully set forth herein.

32. The defendants mocked and ridiculed the plaintiff, a person completely unknown to themselves, in public forums where their activity would be widely disseminated.

33. Such conduct involves an unreasonable risk of harm.

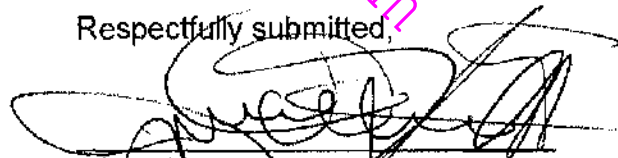
34. Such conduct violates the general duty to conform to the legal standard of reasonable conduct in the light of the apparent risk.

35. Such conduct would foreseeably result in emotional harm and injury to the person being mocked and ridiculed.

36. As the result of the defendants' conduct, the plaintiff has suffered damages in excess of \$25,000.

WHEREFORE, your Plaintiff respectfully REQUESTS THAT THIS Court enter judgment in this matter for damages in excess of \$25,000.

Respectfully submitted,



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Dated: 9/28/14.



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14/08/14

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