



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 3

A. The True Facts Depicted In The Movie ..... 4

    1. *Christopher Porco and his family* ..... 4

    2. *The crime* ..... 5

    3. *The investigation of the crime* ..... 7

    4. *The response to the crime* ..... 8

    5. *The prosecution and conviction of Christopher Porco* ..... 10

    6. *The substantial public interest in the crime and the response of the criminal justice system* ..... 12

B. The Dramatic Portrayal Of These Facts In The Movie ..... 12

C. Procedural History ..... 14

D. Disclosures To Date ..... 16

ARGUMENT ..... 19

I. ON THE UNDISPUTED MATERIAL FACTS, PLAINTIFFS CANNOT ESTABLISH ANY CLAIM UNDER SECTION 51 ..... 19

    A. The Use Of A Name In A Movie Is Not A Use “For Advertising Purposes, Or For The Purposes Of Trade” Within The Meaning Of Section 51 ..... 21

    B. Section 51 Does Not Apply To The Nonconsensual Use Of A Name That Bears A “Real Relationship” To Newsworthy Events ..... 24

    C. On The Undisputed Facts, Plaintiffs’ Names Bear A Real Relationship To The Newsworthy Events Depicted In The Movie ..... 28

        1. *The Movie’s setting* ..... 28

        2. *The Movie’s portrayal of the Porco family* ..... 29

3.	<i>The Movie’s portrayal of the crime</i> .....	29
4.	<i>The Movie’s portrayal of the investigation</i> .....	30
5.	<i>The Movie’s portrayal of the response to the crime</i> .....	30
6.	<i>The Movie’s portrayal of the prosecution and trial</i> .....	31
D.	Plaintiffs’ Theory Of Section 51 Liability Has Been Squarely Rejected By The Court Of Appeals .....	32
II.	PLAINTIFFS’ CLAIMS ARE ALSO BARRED BY THE FIRST AMENDMENT.....	34
	CONCLUSION.....	39

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Abdelrazig v. Essence Communications</i> , 225 A.D.2d 498 (1st Dep’t 1996) .....	25
<i>Alfano v. NGHT, Inc.</i> , 623 F. Supp. 2d 355 (E.D.N.Y. 2009) .....	23, 25, 27
<i>Altbach v. Kulon</i> , 302 A.D.2d 655 (3d Dep’t 2003) .....	22, 23
<i>Arrington v. N.Y. Times Co.</i> , 55 N.Y.2d 433 (1982) .....	20, 23, 5
<i>Bement v. N.Y.P. Holdings, Inc.</i> , 307 A.D.2d 86 (1st Dep’t 2003) .....	27
<i>Beverley v. Choices Women’s Medical Center, Inc.</i> , 78 N.Y.2d 745 (1991) .....	20
<i>Binns v. Vitagraph Co. of America</i> , 210 N.Y. 51 (1913) .....	26
<i>Costanza v. Seinfeld</i> , 279 A.D.2d 255 (1st Dep’t 2001) .....	22
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975) .....	25
<i>Davis v. Costa-Gavras</i> , 654 F. Supp. 653 (S.D.N.Y. 1987) .....	21
<i>de Havilland v. FX Networks, LLC</i> , 230 Cal. Rptr. 3d 625 (Ct. App. 2018) .....	21, 36
<i>Delan v. CBS</i> , 91 A.D.2d 255 (2d Dep’t 1983) .....	23
<i>Eastwood v. Superior Court</i> , 198 Cal. Rptr. 342 (Ct. App. 1983) .....	26
<i>Finger v. Omni Publications International, Ltd.</i> , 77 N.Y.2d 138 (1990) .....	19, 20, 25
<i>Flores v. Mosler Safe Co.</i> , 7 N.Y.2d 276 (1959) .....	20

<i>Foster v. Svenson</i> , 128 A.D.3d 150 (1st Dep’t 2015) .....	35
<i>Frank v. NBC</i> , 119 A.D.2d 252 (2d Dep’t 1986) .....	22
<i>Freihofer v. Hearst Corp.</i> , 65 N.Y.2d 135 (1985) .....	23
<i>Frosch v. Grosset &amp; Dunlap, Inc.</i> , 75 A.D.2d 768 (1st Dep’t 1980) .....	23
<i>Glickman v. Stern</i> , 19 Media L. Rep. (BNA) 1769 (Sup. Ct. N.Y. Cty. 1991) .....	23
<i>Gravano v. Take-Two Interactive Software, Inc.</i> , 142 A.D.3d 776 (1st Dep’t 2016) .....	27
<i>Guglielmi v. Spelling-Goldberg Productions</i> , 603 P.2d 454 (Cal. 1979) .....	36, 37
<i>Hampton v. Guare</i> , 195 A.D.2d 366 (1st Dep’t 1993) .....	22
<i>Hicks v. Casablanca Records</i> , 464 F. Supp. 426 (S.D.N.Y. 1978) .....	22, 26, 35
<i>Howell v. N.Y. Post Co.</i> , 81 N.Y.2d 115 (1993) .....	20, 34
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988) .....	35
<i>Kipper v. NYP Holdings Co.</i> , 12 N.Y.3d 348 (2009) .....	35
<i>Lemerond v. Twentieth Century Fox Film Corp.</i> , 2008 WL 918579 (S.D.N.Y. Mar. 31, 2008) .....	22
<i>Lohan v. Take-Two Interactive Software, Inc.</i> , 31 N.Y.3d 111 (2018) .....	20, 22
<i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496 (1991) .....	21, 22
<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994) .....	37, 38

<i>Meeropol v. Nizer</i> , 560 F.2d 1061 (2d Cir. 1977).....	27
<i>Messenger v. Gruner + Jahr Printing &amp; Publishing</i> , 94 N.Y.2d 436 (2000).....	<i>passim</i>
<i>Partington v. Bugliosi</i> , 56 F.3d 1147 (9th Cir. 1995) .....	22
<i>People v. Porco</i> , 30 A.D.3d 543 (2d Dep’t 2006).....	12
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986).....	35
<i>Porco v. Lifetime Entertainment Services, LLC</i> , 116 A.D.3d 1264 (3d Dep’t 2014) .....	15
<i>Porco v. Lifetime Entertainment Services, LLC</i> , 48 Misc. 3d 419 (Sup. Ct. Clinton Cty. 2015) .....	15
<i>Porco v. Lifetime Entertainment Services, LLC</i> , 147 A.D.3d 1253 (3d Dep’t 2017).....	<i>passim</i>
<i>Rogers v. Grimaldi</i> , 695 F. Supp. 112 (S.D.N.Y. 1988) .....	22, 35
<i>Sarver v. Chartier</i> , 813 F.3d 891 (9th Cir. 2016) .....	37, 38
<i>Seale v. Gramercy Pictures</i> , 949 F. Supp. 331 (E.D. Pa. 1996).....	37, 38
<i>Sondik v. Kimmel</i> , 33 Misc. 3d 1237(A), 2011 WL 6381452 (Sup. Ct. Kings Cty. Dec. 15, 2011) .....	35
<i>Spahn v. Julian Messner, Inc.</i> , 18 N.Y.2d 324 (1966).....	26
<i>Spahn v. Julian Messner, Inc.</i> , 21 N.Y.2d 124 (1967).....	15, 26, 34
<i>Stephano v. News Group Publications</i> , 64 N.Y.2d 174 (1984).....	20, 23, 25
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	34

<i>Tyne v. Time Warner Entertainment Co.</i> , 901 So. 2d 802 (Fla. 2005).....	36, 37
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012).....	35
<i>Velez v. VV Publishing Corp.</i> , 135 A.D.2d 47 (1st Dep’t 1988) .....	23
<i>Waters v. Moore</i> , 70 Misc. 2d 372 (Sup. Ct. Nassau Cty. 1972).....	26
<i>Weber v. Multimedia Entertainment, Inc.</i> , 2000 WL 526726 (S.D.N.Y. May 2, 2000) .....	33
<b>Statutes &amp; Other Authorities</b>	
2 J. Thomas McCarthy, <i>Rights of Publicity &amp; Privacy</i> § 8:74 (2d ed. 2018).....	21
New York Civil Rights Law § 51 .....	<i>passim</i>
Restatement (Second) of Torts § 652D cmt. g.....	26
U.S. Const. amend. I.....	<i>passim</i>

Defendant Lifetime Entertainment Services, LLC (“Lifetime”) respectfully submits this memorandum in support of its motion pursuant to CPLR 3212 for summary judgment dismissing all claims asserted in the Second Amended Complaint with prejudice.

### **PRELIMINARY STATEMENT**

This misguided lawsuit began as an effort to censor Lifetime for making a movie about an almost unfathomable act of violence committed by plaintiff Christopher Porco against his own parents. Based on little more than seeing some promotional materials about Lifetime’s plans to televise the movie, Porco initiated this action in January 2013, asserting that showing the movie without his consent would violate New York Civil Rights Law § 51 (“Section 51”). The Complaint sought only an injunction to prevent Lifetime from telling the story of the crime for which Porco stood convicted—brutally killing his father and savaging his mother with an ax as they slept at home in their bed.

Without even first seeing the movie himself, Porco filed this lawsuit from his prison cell alleging that the movie was a “substantially fictionalized account” because it had a script, reported the story of his crime through actors, and was being promoted as “inspired by a true story.” His initial Complaint identified not a single fact in the movie that he alleged to be untrue.

On March 23, 2013, Lifetime televised *Romeo Killer: The Chris Porco Story* (the “Movie”). Five years later, after two rounds of litigation before the Appellate Division over Porco’s right to a preliminary injunction (he had none) and the adequacy of his bare-bones pleading (it was held sufficient), Porco amended his Complaint to seek money damages and to add his mother, Joan Porco, as a plaintiff. Their joint amended pleading still failed to identify even one material fact presented in the Movie that they alleged to be false. When Lifetime issued interrogatories seeking the factual basis for plaintiffs’ claim of “substantial

fictionalization,” they took more than seven months to respond, and even then answered only after being given a deadline to do so by this Court.

The reason for all this foot-dragging is obvious. As demonstrated below, the Movie tells the true story of the crime committed by Christopher Porco as described in court filings, trial transcripts, and contemporaneous reporting about the widely publicized events. After months reviewing the Movie and a complete transcription of its contents provided by Lifetime, plaintiffs remain unable to identify material untrue facts in the Movie’s portrayal of the crime, its investigation, or the trial of Christopher Porco (hereinafter “Christopher”).

To be sure, the Movie is not a documentary, and it does not purport to be one. The Movie typifies a well-known genre of artistic expression fully protected by the First Amendment—“docudramas” that educate, enlighten, and entertain the public through engaging portrayals of newsworthy events. The Movie does not hide that the story it tells “is a dramatization *based on* a true story,” and makes clear that “some names have been changed, some characters are composites and certain other characters and events have been fictionalized.” It seeks, in an entirely lawful way, to inform the public about a highly newsworthy crime and to shed light on what may have motivated such an incomprehensible act of violence.

Significantly, plaintiffs assert no claim for libel, nor could they; nothing false and defamatory about them appears in the Movie. Plaintiffs assert a right to money damages solely under Section 51 for the unauthorized use of their names. But where a creative work tells the story of a newsworthy event, Section 51 imposes liability for the use of a person’s name *only* if the work is an advertisement in disguise or the person had “no real relationship” to the events depicted. Plaintiffs can make no such showing because the Movie is not an advertisement and, on undisputed facts, the Movie has a real and substantial relationship to them.

Plaintiffs’ theory of liability rests on the Movie’s use of composite characters, scripted dialogue, and other dramatic devices to tell their story on television in a materially accurate, compelling fashion in 90 minutes. Their theory of liability would turn a claim under Section 51 into a claim for false light invasion of privacy, but the Court of Appeals has rejected such liability under New York law—repeatedly. And courts around the country have uniformly held that the First Amendment squarely bars a state-law claim based upon a fictionalized retelling of a newsworthy event.

In reinstating Christopher’s original Complaint, the Third Department held that it sufficiently alleged “material and substantial fictionalization” to allow the case to go forward. *Porco v. Lifetime Entm’t Servs., LLC (Porco)*, 147 A.D.3d 1253, 1254-55 (3d Dep’t 2017). The Movie was not before the Court on that initial motion to dismiss, nor were any of the facts concerning Christopher’s crime and prosecution—facts that plaintiffs cannot genuinely dispute. With the Movie and those undisputed facts now before this Court, plaintiffs have no claim. Summary judgment should be entered dismissing the Amended Complaint, with prejudice, at this time.

### **STATEMENT OF FACTS**

The following facts concerning plaintiff Christopher Porco, the crime he committed, its investigation, and his criminal trial are accurately presented in the Movie and are not seriously in dispute, as established by the Affirmation of David A. Schulz (“Schulz Aff.”) and the exhibits thereto.

**A. The True Facts Depicted In The Movie**

*1. Christopher Porco and his family*

In Fall 2004, Christopher was a 21-year-old economics major at the University of Rochester, a member of the Sigma Phi Epsilon fraternity, and a former member of the ROTC and the varsity swim team. A. 4, 16, 25-27.<sup>1</sup> Christopher had a long-distance girlfriend who attended another university. A. 33-34. He led his classmates to believe that he came from a wealthy family, with a father who was an affluent lawyer and a large inheritance from his grandmother. A. 22, 105. He spent money freely—purchasing a yellow Jeep Wrangler, buying his classmates drinks, meeting with a financial planner, and taking trips to places like London and Acapulco. A. 15, 24, 106, 113.

In reality, Christopher came from a more modest upbringing in Delmar, New York. A. 2, 22. His father, Peter Porco (hereinafter “Peter”), was an attorney who worked for the court system. A. 5, 8. His mother, plaintiff Joan Porco (hereinafter “Joan”), was a loving parent and a devout Catholic. A. 39, 40. Peter and Joan lived in the house where Christopher grew up, at 36 Brockley Drive, with the family dog, Barrister. A. 3, 12. Christopher’s older brother, Johnathan Porco (hereinafter “Johnathan”), was an officer in the Navy stationed on a submarine. A. 9-10.

Christopher struggled academically. In 2003, he was forced to leave the University of Rochester due to failing grades, which he attributed to a bout of mononucleosis and a professor losing his final exam. A. 17-18, 29. He was allowed to return after enrolling at a community college for a semester. A. 19-21. Christopher had actually failed all of his community college

---

<sup>1</sup> For the convenience of the Court, Lifetime has prepared a Statement of Undisputed Facts, annexed hereto as Appendix A. This Statement sets out in numbered format (a) the facts Lifetime contends are not genuinely in dispute, (b) where each fact appears in the Movie, and (c) the evidentiary record establishing the truth of the fact. This Statement is cited herein as “A. \_\_,” providing the row number from the left-hand column where the cited fact can be located in Appendix A.

classes that semester, but was readmitted to the University of Rochester based on a transcript that he altered to make it appear as if he had received good grades. *Id.*

Christopher also had money problems, which he kept from his parents. He ran up credit card debt and forged his father's signature on the loan for his Jeep and on a student loan of over \$30,000 for tuition at the University of Rochester. A. 108-10. He had previously told his father the student loan debt would be only \$2,000, claiming that the university had forgiven his tuition because of the lost exam. A. 18, 108. Christopher also owed money to the IRS and to Saratoga Springs for a traffic ticket. A. 111-12.

Christopher's parents became increasingly troubled by his poor academic performance, financial irresponsibility, and deceptions. A. 30, 32, 114. In November 2004, Peter threatened to file a forgery affidavit against Christopher if he continued to abuse his credit. A. 115. A week before he was killed, Peter expressed the concern that Christopher might be a "sociopath." A. 116.

## 2. *The crime*

On the morning of November 15, 2004, Peter did not show up for work. A. 1, 61. After attempting to reach him by phone, one of his colleagues sent a court officer to the Porco home to check on him. A. 61. When the officer arrived, he found a key in the lock on the front door, which investigators later concluded was the Porco family's spare key taken from its hiding place in a flower pot. A. 41, 62. Inside, the officer discovered a gruesome scene: blood throughout the house and Peter Porco's body on the floor downstairs, bludgeoned to death. A. 62, 68-69. The officer called for the police and an ambulance. A. 62.

The first detective to arrive was Christopher Bowdish, who was acquainted with the Porco family from his investigation of a previous break-in at their house and knew they had two sons. A. 63-65. Upon learning that a second victim was still alive upstairs, he went up to the

master bedroom and found Joan in bed, covered in blood. A. 71. Her skull was split open, exposing her brain, she was missing one eye, and she was unable to speak due to a fractured jaw. A. 49.

While paramedics attended to Joan, Detective Bowdish asked her a series of yes or no questions. A. 71-74. He asked whether she could hear him, and she nodded yes. A. 71. He asked whether her son Johnathan had done this to her, and she shook her head no. A. 72. He asked whether her son Christopher had done this to her, and she nodded her head yes. A. 73. He again asked whether Christopher had done this to her, and she again nodded her head yes. *Id.* Joan was then transported to the hospital for treatment. A. 75.

At the crime scene, investigators found evidence that both Peter and Joan had been attacked from Joan's side of the bed while they slept. A. 47. The weapon was an ax taken from the garage of the Porco home. A. 42. Despite his severe injuries, Peter had arisen from his bed after the attack, gone into the master bathroom and then gone down to the kitchen, where he tried to empty the dishwasher and make his lunch. A. 48. Eventually he collapsed on the floor downstairs, where he was found dead. A. 48, 69. In the kitchen, police found a check made out by Peter to Saratoga Springs for the traffic ticket that Christopher had received. A. 76. They also found Joan's purse with her wallet and checkbook still inside, suggesting a burglary was not the motive for the vicious attack. A. 70.

Investigators determined that the alarm system had been deactivated at 2:14 a.m. by someone who knew the master code. A. 43. Only a handful of people—including Peter, Joan, Johnathan, and Christopher—knew that code, and Johnathan was stationed on a submarine at the time. A. 44. The alarm system panel had also been smashed to make it look like a break-in, and the phone lines had been cut shortly before 5:00 a.m. A. 45, 46.

### 3. *The investigation of the crime*

Christopher was at the University of Rochester, more than three hours away from Delmar, when his girlfriend told him via instant message that something had happened on Brockley Drive. A. 78. He also got a call from a reporter who was seeking comment on the crime. A. 79. Christopher then called the police but did not get any additional information. A. 81. He told friends he had been trying to call his parents without success before being notified of the crime. A. 80.

That night, Christopher went to the hospital to visit his mother. A. 82. The police found him there and transported him to the station, where they took a saliva sample and interviewed him for several hours. A. 83-84. Over the course of the interview, the police confronted Christopher with his lies to classmates about coming from a wealthy background, the growing tension with his parents, and his knowledge that his parents had life insurance policies. A. 86. They pressured him to “be a man” and admit what he had done. A. 88. The police also revealed to Christopher during the interview that his mother had identified him as the attacker. A. 87. Christopher denied having any involvement and told the police he had slept in the lounge of his dormitory on the night of the crime after giving up his dorm room to a visiting fraternity member. A. 89, 93. At the end of the interview, the police did not take Christopher into custody. A. 90.

The investigation continued over a period of months. A. 60. Police impounded Christopher’s Jeep Wrangler and took it apart, but they found no blood, DNA, or any other physical evidence. A. 100. The vehicle was returned to Christopher while the investigation continued. A. 101. Investigators also found no blood or DNA on Christopher’s clothes or in his dorm room. A. 102. They looked into Christopher’s whereabouts on the night of the crime and found that not a single eyewitness had seen him sleeping in the lounge that night. A. 94. A

female classmate had seen him going for a run on campus around 8:45 the morning after the crime. A. 96.

Investigators located surveillance video from the University of Rochester that showed Christopher's Jeep Wrangler leaving campus at 10:36 on the night of the crime and heading back toward campus at 8:30 the following morning. A. 91. Two toll collectors on the New York State Thruway recalled seeing Christopher's distinctive yellow vehicle that night, the first entering the Thruway in the direction of Delmar at 10:45 p.m. and the second exiting in the vicinity of Delmar at 1:51 a.m. A. 92. Based on this evidence, the police developed a timeline that placed Christopher at the Porco house at the time of the crime. A. 91-92.

Investigators interviewed Joan at the hospital while she recovered from her wounds, and she denied having any memory of the attacks or of implicating Christopher in them by nodding her head at the crime scene. A. 55, 97. She later told the court, "I believe him to be innocent with all my heart." A. 55. When asked by police whether anyone had animosity toward her and her husband, Joan said the only person she could think of was whoever had broken into their house and stolen their computers. A. 98.

Eventually, the police uncovered evidence that Christopher was the perpetrator of that earlier burglary at the Porco house, during which he took his parents' laptops and a camera and staged the house to look like there had been a break-in. A. 119, 121. They also found evidence that Christopher had stolen laptops from the veterinary clinic where he worked and from classmates at the University of Rochester. A. 23, 122. He later sold electronic equipment on eBay. A. 120.

#### *4. The response to the crime*

Not long after the brutal attacks at the Porco home, Christopher was suspended from the University of Rochester. A. 31. He returned to work at the veterinary clinic, which was owned

by family friends. A. 57. Christopher and Joan also went to live with the veterinarians in their home. A. 56. Christopher retained criminal defense attorney Terence Kindlon to represent him. A. 50.

The crime shocked the Delmar community, and many who knew the Porco family expressed disbelief that Christopher could have committed it. A. 51. The daughter of Anthony Arduini, one of the detectives assigned to the case, had dated Christopher. A. 37, 66-67. On the morning the crime was discovered at the Porco house, the first thing Detective Arduini reportedly did after hearing the news was check on his daughter at school to be sure she had not run off with Christopher. A. 77. Some of Christopher's most vocal supporters were young women. A. 52. Others who knew Christopher were less convinced of his innocence. In an instant message conversation after the crime, Christopher's roommate from the University of Rochester told Christopher he had not seen him on the night of the attack, and pleaded, "[J]ust tell me you were somewhere . . . . Just tell me you're going [to] be fine." A. 95.

Joan did not waver in her support of her son. A. 55. Christopher maintained his innocence and vowed to sue the police and the university for their conduct toward him. A. 58-59. After the crime, he was frequently seen around town drinking in bars with different women. A. 38, 53. Observers noted his "strangely arrogant and showy public behavior." A. 53.

5. *The prosecution and conviction of Christopher Porco*

One year after the crime, Christopher was charged with the murder of his father and the attempted murder of his mother. A. 124. He was arrested and spent one month in jail before being released on bail. A. 125. Joan submitted a statement to the court in support of Christopher's release and made her first public appearance since the crime at the bail hearing. *Id.*

The case went to trial in mid-2006 before the Honorable Jeffrey G. Berry. A. 128. The lead prosecutor was Chief Assistant District Attorney Mike McDermott, and Christopher continued to be represented by Kindlon. A. 126-27.

At trial, the prosecution presented its theory of the case—that by the time Peter found out that his son had forged his signature on two large loans, Christopher's life was unraveling, and that he drove to Delmar on the night of the attacks with murder on his mind. A. 129-30.

Many witnesses testified during the trial, including:

- Christopher's girlfriend at the time of the crime (their relationship ended prior to trial), who testified during the prosecution's case in chief that Christopher told her he had argued with his parents about money and grades. She also testified that he often used the spare key hidden in the flower pot, which investigators had found in the lock of the front door at the crime scene;
- Detective Bowdish, who testified about the evidence investigators had uncovered and about Joan's responses to his questioning at the scene of the crime;
- Several of Christopher's fraternity brothers, including his former roommate, who testified that they did not see Christopher in the dormitory lounge on the night of the crime;
- The veterinarians Christopher worked for, one of whom testified that Christopher was experienced in cleaning up bloody messes from his work at the veterinary clinic; and
- Joan, who testified about her belief in Christopher's innocence and her view that investigators had been biased against her son from the start.

A. 141-45. Christopher did not take the stand. A. 140.

Christopher's legal team called the case an "abomination" and advanced a number of theories in his defense. A. 139. They argued that the prosecution's case was entirely circumstantial and that it was "silly" to think that Christopher would violently attack his parents for money. *Id.* They portrayed the investigators assigned to the Porco case as bumbling and inexperienced, noting that the local police rarely handled murder investigations. A. 138. They said that investigators had immediately jumped to the conclusion that Christopher was the culprit, disregarding any other possibility. A. 133. For example, they claimed that Christopher's uncle was known to be a member of the Bonanno crime family who had become a federal government "snitch," and suggested that the attacks on Peter and Joan could have been the mafia's retribution for that betrayal. A. 136. They also pointed to testimony that Joan had seen a stranger in the driveway of the Porco home only weeks before the attacks. A. 137.

Christopher's lawyers discounted Joan's head nod, arguing that she was too badly hurt at the time to make such an identification. A. 132. And they speculated that Detective Arduini had tampered with a toll booth ticket introduced into evidence because he hated Christopher for dating his daughter. A. 134-35. Without any real evidence against Christopher, Kindlon argued, the police just tried to "cover him in slime." A. 139.

In his summation ADA McDermott set out the voluminous circumstantial evidence against Christopher and told the jury, "Mr. Porco is either guilty or he's the unluckiest man on the planet." A. 131. The jury deliberated for only six hours before reaching a verdict: guilty on both counts. A. 146-47. When the verdict was announced, Christopher's young female supporters could be heard sobbing in the courtroom. A. 148.

Standing outside the courthouse after the verdict came down, Kindlon told reporters, "We stand before you crushed." A. 149. The police chief later commented to the press, "At the end

of the day, there are no winners or losers. My heart goes out to the Porco family and all the people affected by this.” *Id.*

Christopher received a sentence of 50 years to life at Clinton Correctional Facility, a maximum security prison. A. 150. He has exhausted all of his appeals. A. 151. He continues to maintain his innocence. Schulz Aff. Ex. 1 (Second Am. Compl.) ¶ 4.

6. *The substantial public interest in the crime and the response of the criminal justice system*

The case against Christopher received extensive news coverage at the time. *Id.* Ex. 1 ¶ 5. The Albany *Times Union* alone published hundreds of articles on the crime and prosecution, Schulz Aff. ¶ 45, and Christopher was granted a change of venue due to “the intense, localized, and prejudicial pretrial publicity.” *People v. Porco*, 30 A.D.3d 543 (2d Dep’t 2006).

In 2008, local television news reporter Steve Ference published a book, *November Memories: Inside the Christopher Porco Case*, that provides a detailed journalistic account of the Porco case. See Schulz Aff. Ex. 20 (complete copy of *November Memories*). The case was also the subject of a documentary called “Memory of Murder” that first aired on CBS *48 Hours Mystery* in 2006 and an episode of *Forensic Files* called “Family Ties” that first aired on TruTV in 2009. See *id.* Ex. 21 (complete copy of “Memory of Murder”); *Forensic Files, Family Ties (The Christopher Porco case)*, July 17, 2009, [https://www.youtube.com/watch?v=D6QnbdA\\_mVY](https://www.youtube.com/watch?v=D6QnbdA_mVY).

**B. The Dramatic Portrayal Of These Facts In The Movie**

Given the substantial public interest in the Porco story, Lifetime acquired the rights to a television movie about Christopher’s crime in 2012. Schulz Aff. ¶ 2 & Ex. 1 ¶ 9. The Movie was written by an independent screenwriter and produced by several production companies, none

of whom are parties to this lawsuit. Schulz Aff. ¶ 3. The Movie premiered for a national television audience on Saturday, March 23, 2013. Schulz Aff. ¶ 9; *Porco*, 147 A.D.3d at 1253.

The Movie makes clear from the outset that it is a docudrama, not a documentary. The very first words that appear on the screen, even before the opening credits, are “based on a true story.” Movie at 00:00:01.22.<sup>2</sup> And the Movie provides further clarification at the end, displaying before the closing credits: “While this film is a dramatization based on a true story, some names have been changed, some characters are composites and certain other characters and events have been fictionalized.” *Id.* at 01:28:33.73.

While presenting a dramatized version of the story of Christopher’s crime, the Movie is substantially true to the actual events in all material respects. It presents accurately the essence of each fact set out in Section I.A above. *See* Appendix A (citing corresponding time codes of Movie for each fact). The Movie faithfully portrays the trajectory of the Porco case, often in minute detail, from the morning that the crime was discovered through Christopher’s conviction for murder and attempted murder. Through flashback scenes, the Movie accurately presents the prosecutor’s theories of the motivation for the crime, the substance of the arguments between Christopher and his parents over money and grades, and the unfolding of the crime itself as described at trial. *See, e.g.*, Movie at 00:09:08.05 – 00:11:23.24; *id.* at 00:28:33.00 – 00:28:53.00. Many of the figures in the story—members of the Porco family, ADA McDermott, defense counsel Kindlon, Judge Berry, and others—appear in the Movie under their real names. *See* A 5, 9, 12, 61, 92, 126-28. And much of the Movie’s dialogue is drawn nearly verbatim

---

<sup>2</sup> In February 2018, Lifetime produced to plaintiffs a complete copy of the Movie as originally televised with time codes inserted in the lower left corner of the screen for ease of reference, along with a transcription of the Movie synced to those time codes. Schulz Aff. ¶ 25. Citations to Movie time codes refer to both the Movie and the transcript, copies of which are provided at Schulz Aff. Exs. 5 & 6.

from primary sources, such as the transcript of Christopher’s police interrogation, transcripts of the criminal proceedings, and Porco family emails and correspondence.<sup>3</sup>

As typical of dramatic retellings of true stories, some of the dialogue in the Movie is invented or takes place in a different setting than it did in real life. Also, some characters in the Movie based on real people are given fictional names—for example, Christopher’s girlfriend at the time of the crime, Sarah Fischer, is called “Rachel” in the Movie. Other characters in the Movie are composites of real people, whose roles and actions are merged to simplify and streamline the storytelling. For example, “Detective Sullivan” is a composite character based on Detectives Bowdish and Arduini; “Brody” is a composite of Christopher’s college roommate, Mathew Ambrosio, and other fraternity brothers who testified at the trial; “Betsy” is a composite of the Porcos’ veterinarian friends Elaine LaForte and John Kearney. The Movie also includes imagined interviews of some characters as a framing device to advance the Movie’s larger themes, such as Christopher’s manipulation of those around him and the unwillingness of Christopher’s friends and family to accept that he could have committed such a terrible crime.

### C. **Procedural History**

On January 29, 2013, two months before the Movie was scheduled to premiere on Lifetime, Christopher filed his Complaint and simultaneously submitted an order to show cause requesting a preliminary injunction to bar the broadcast. *See* Schulz Aff. ¶ 4. The Complaint asserted that the Movie was a “substantially fictionalized account” of the events leading to Christopher’s incarceration, but did not identify anything in the Movie that was fictionalized. *Id.* ¶ 5. Two weeks later, on February 12, 2013, Christopher filed an amended order to show cause for a temporary restraining order barring any broadcast of the Movie before a ruling on his

---

<sup>3</sup> Annexed hereto as Appendix B is an identification of examples of dialogue in the Movie taken verbatim or near-verbatim from official records or news reports.

motion for a preliminary injunction. *Id.* ¶ 6. On March 19, 2013, the Honorable Robert J. Muller entered an order temporarily enjoining the television premiere of the Movie scheduled for March 23, 2013, pending a ruling on the request for a preliminary injunction. *Id.* ¶ 7.

Lifetime filed an emergency motion with the Appellate Division for a stay of that injunction, and on March 21, 2013 an interim stay was granted by a single Third Department judge. *Id.* ¶ 8. The Movie was then televised two days later as scheduled. *Id.* ¶ 9. The following month a panel of the Appellate Division confirmed the stay and vacated the injunction pending Lifetime’s appeal on the merits. *Id.* ¶ 10.

After full briefing, on April 17, 2014, the Appellate Division reversed the injunction, finding that it was an unconstitutional prior restraint on speech and holding that Christopher had failed to show any immediate and irreparable harm from the televising of the Movie. *Id.* ¶ 11; *Porco*, 116 A.D.3d 1264, 1265-67 (3d Dep’t 2014).

Lifetime then moved to dismiss Christopher’s Complaint pursuant to CPLR 3211(a)(7) for failure to state a claim. *Schulz Aff.* ¶ 12. On April 15, 2015, this Court granted the motion and dismissed the case. *Id.* ¶ 13. Justice Muller found that the Movie addressed a newsworthy subject, and thus did not give rise to a claim under Section 51 on the facts alleged. *Porco*, 48 Misc. 3d 419, 421-23 (Sup. Ct. Clinton Cty. 2015). Christopher appealed the dismissal, and the case returned to the Third Department. *Schulz Aff.* ¶ 14.

On February 23, 2017, the Appellate Division reversed. *Id.* Giving the Complaint “the benefit of every favorable inference,” the Third Department concluded that its allegation that Lifetime had “knowingly produced a materially and substantially fictitious biography” sufficient at least to state a claim under Section 51 as construed by the Court of Appeals in *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 129 (1967). *Porco*, 147 A.D.3d at 1254-55. The Appellate

Division denied Lifetime’s motion for leave to reargue or to appeal to the Court of Appeals on June 1, 2017. *Schulz Aff.* ¶ 15.

Lifetime filed its verified answer on June 27, 2017. *Id.* ¶ 16. Christopher then filed an Amended Complaint on July 31, 2017, adding for the first time a claim for money damages and adding his mother, Joan, as a new plaintiff. *Id.* ¶ 17. In August 2017, Lifetime moved to dismiss Joan, arguing that her claims were time-barred, and plaintiffs cross-moved for leave to further amend their Complaint to allege facts demonstrating a republication of the Movie by Lifetime within one year of Joan joining the case. *Id.* ¶ 18.

On February 1, 2018, this Court entered an order agreeing with Lifetime that Joan’s Section 51 claim does not relate back to her son’s, but denying the motion to dismiss her claim without prejudice for discovery to proceed on republication. *Id.* ¶ 19. On March 12, 2018, plaintiffs filed a Second Amended Complaint that added factual allegations concerning republication, but still failed to identify any false facts in the Movie. *Id.* ¶ 20 & Ex. 1. Lifetime answered the Second Amended Complaint on April 2, 2018. *Id.* ¶ 21 & Ex. 2. Joan has noticed but not yet perfected an appeal of this Court’s ruling that her claims do not relate back to Christopher’s. *Id.* ¶ 22.

**D. Disclosures To Date**

In November 2017, while discovery was stayed pending Lifetime’s motion to dismiss Joan’s claims, Lifetime served a limited set of interrogatories on each plaintiff, acknowledging that plaintiffs’ time to respond would not start running until the motion was decided. *See Schulz Aff.* ¶ 23 & Exs. 3, 4. This was done to expedite the discovery process once the stay lifted, as these interrogatories simply asked plaintiffs to identify what facts in the Movie were “substantially fictionalized” as they alleged. *See Schulz Aff.* ¶ 24. The Third Department had identified the allegation of material and substantial fictionalization as central to its determination

that the Complaint stated a viable claim, and Lifetime anticipated that identification of the alleged fictionalization would facilitate the prompt resolution of this case. *Id.*; *see also Porco*, 147 A.D.3d at 1255-56.

Once the motion to dismiss Joan's claims was denied without prejudice to renew, and the discovery stay lifted, on February 4, 2018 Lifetime served a request for documents and noticed the deposition of Joan for a mutually acceptable date to be set after receiving Joan's responses to the outstanding requests. *Schulz Aff.* ¶ 27. The document requests were largely limited to seeking records relevant to establishing the truth about events depicted in the Movie, including specifically the records from Christopher's criminal case. *Id.*

A considerable effort was made over the following months to come to agreement on a bifurcated discovery process that would limit discovery initially to the truth or falsity of the facts presented in the Movie. *Id.* ¶ 29. This bifurcation was first proposed to plaintiffs' counsel in November as an efficient way to get a legal ruling on the scope of Section 51 liability as applied to the Movie itself, before undertaking discovery and trial preparation on other issues that would be entirely unnecessary if plaintiffs have no Section 51 claim as a matter of law. *Id.* No firm agreement about phasing discovery was reached. *Id.*

In the meantime, in order to move forward with its disclosed plan for an early summary judgment motion, Lifetime continued to push for plaintiffs to respond to the interrogatories on the Movie's alleged false facts that had been served back in November. *Id.* ¶ 30. Responses were repeatedly promised, but never forthcoming. *Id.* With the May 31, 2018 discovery cutoff approaching, and plaintiffs having provided no discovery at all, plaintiffs' counsel requested a status conference to address the need for a revised pre-trial schedule. *Id.* ¶ 31.

During a June 18, 2018 telephone conference, plaintiffs’ counsel disclosed that he had “finally” obtained interrogatory responses from his clients and could provide them within two weeks. *Id.* ¶ 32. For its part, Lifetime informed the Court what it had long told plaintiffs’ counsel—that it intended to file an early summary judgment motion. *Id.* Although Lifetime had yet to receive the documents requested from plaintiffs, counsel explained that Lifetime had now succeeded in obtaining official records of Christopher’s prosecution directly from the court. *Id.* ¶ 33. Once plaintiffs provided their identification of the facts in the Movie alleged to be materially and substantially false, Lifetime’s counsel did not anticipate the need for additional discovery—by either side—to resolve the legal issues that would be presented on summary judgment. *Id.*

The Court then directed the parties to respond to the outstanding discovery requests by July 2, 2018 and directed Lifetime to file its summary judgment motion thereafter “in short order.” *Id.* ¶ 34.<sup>4</sup>

On July 2, 2018, the parties exchanged written responses to the outstanding discovery demands.<sup>5</sup> *Id.* ¶ 37. On July 10, 2018, after plaintiffs agreed to split the cost incurred by Lifetime to obtain the records, Lifetime produced to plaintiffs a complete copy of the criminal case file it had obtained from the court. *Id.* ¶ 39.

---

<sup>4</sup> The week following the scheduling conference, plaintiffs surprisingly announced that they intended to take twelve depositions on short notice over the four-day period between July 17-20, and also served interrogatories on Lifetime for the first time. *See* Schulz Aff. ¶ 35. Lifetime notified plaintiffs’ counsel that only two of the individuals identified in the deposition notices are current Lifetime employees and that none of the disclosure sought from these witnesses should be relevant and necessary to respond to Lifetime’s forthcoming motion for summary judgment. *Id.* ¶ 36. Ultimately, plaintiffs’ counsel refrained from pushing forward with this discovery from Lifetime before this motion for summary judgment was filed. *Id.*

<sup>5</sup> The parties served their responses and objections to the document requests without producing documents. Lifetime requested a confidentiality stipulation, which has now been agreed upon, but documents had not yet been exchanged as of the filing of this motion.

In their long-anticipated interrogatory responses, both plaintiffs stated that they “construe the falsity of the Movie literally,” so that they consider every aspect of the Movie to be materially and substantially false where “fictional characters are interacting with real persons in real life.” *Id.* Ex. 16 at 3; *see also id.* Ex. 17 at 3. Both plaintiffs also objected to “the overall theme, title and presentation of the Movie,” which they assert “leaves out many if not most actual facts and events.” *Id.* Ex. 16 at 3; *id.* Ex. 17 at 3-4.

Notably, plaintiffs nowhere identify as false the material facts presented in the Movie concerning Christopher’s crime—where it occurred, when it occurred, how it was carried out, how it was investigated, the evidence presented at trial, or the prosecution’s theory of the motive for the crime. Christopher’s responses instead identify 35 elements of the Movie that he contends are false, while Joan identifies 9 such elements. *Id.* Exs. 16, 17. The fictionalization plaintiffs identify largely involves the use of scripted dialogue, composite characters, or other dramatic devices to advance the story being told. Plaintiffs do not identify the material *facts* they contend to be untrue; instead, they appear to object to the presentation of substantially true facts in a dramatized fashion. The evidence demonstrating the substantial truth of the facts conveyed in the allegedly fictional elements identified in plaintiffs’ interrogatory responses is set forth in Exhibits 18 and 19 to the Schulz Affirmation.

## ARGUMENT

### I.

#### **ON THE UNDISPUTED MATERIAL FACTS, PLAINTIFFS CANNOT ESTABLISH ANY CLAIM UNDER SECTION 51**

To establish a claim under Section 51, a plaintiff must demonstrate that: (1) defendant used his or her “name, portrait, picture, or voice” within the State of New York, (2) “for advertising purposes or for the purposes of trade,” (3) without “written consent.” N.Y. Civ. Rights Law § 51; *see Finger v. Omni Publ’ns Int’l, Ltd.*, 77 N.Y.2d 138, 141 (1990).

“Advertising purposes” in Section 51 means “an advertisement or solicitation for patronage of a particular product or service.” *Beverley v. Choices Women’s Med. Ctr., Inc.*, 78 N.Y.2d 745, 751 (1991). A use for “purposes of trade” under Section 51 means a use that would “draw trade to [the] firm.” *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 284 (1959). Under either term, Section 51 on its face bars the *promotional* use of a person’s name without consent, and nothing more. *See, e.g., Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 120 (2018); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 439 (1982).

Recognizing that “freedom of speech . . . transcends the right to privacy,” the New York Court of Appeals just this year underscored that Section 51 has consistently been construed “to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest guaranteed by the First Amendment.” *Lohan*, 31 N.Y.3d at 120 (internal quotation marks omitted). The Court of Appeals has articulated three principles governing Section 51’s application to ensure that its scope is properly constricted:

- First, the terms of Section 51 must be “narrowly construed” and “strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.” *Messenger v. Gruner + Jahr Printing & Publ’g*, 94 N.Y.2d 436, 441 (2000) (per curiam) (quoting *Finger*, 77 N.Y.2d at 141).
- Second, Section 51 can never be applied “to reports of newsworthy events or matters of public interest.” *Messenger*, 94 N.Y.2d at 441; *see also Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123 (1993).
- Third, what is considered “newsworthy” for purposes of limiting liability under Section 51 must be broadly construed to protect “the statutory—and constitutional—value of uninhibited discussion of newsworthy topics.” *Messenger*, 94 N.Y.2d at 442; *see also Stephano v. News Grp. Publ’ns*, 64 N.Y.2d 174, 184 (1984).

Applying these settled principles to the undisputed facts now before the Court, it is abundantly clear that, as a matter of law, plaintiffs have no claim under Section 51.

**A. The Use Of A Name In A Movie Is Not A Use “For Advertising Purposes, Or For The Purposes Of Trade” Within The Meaning Of Section 51**

Expressive works like the Movie do not sacrifice their protections against a Section 51 claim simply because they are not works of conventional journalism. The Movie is part of a well-established genre of films and television programs—generally known as docudramas—that use the narrative techniques of fiction to portray newsworthy events involving real people. As one New York court has explained:

The docudrama is a dramatization of an historical event or lives of real people, using actors or actresses. Docudramas utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes.

*Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y. 1987); *see also* 2 J. Thomas McCarthy, *Rights of Publicity & Privacy* § 8:74 n.2 (2d ed. 2018) (“The word ‘docudrama’ is a combination of ‘documentary’ and ‘drama’ and implies a stage or film dramatization either closely or loosely based upon actual events with fictional dramatic elements embellishing the hard facts.”).

The docudrama is a widespread and popular storytelling format that educates and entertains, as exemplified by such Academy Award–winning movies as *The Post*, *The Hurt Locker*, and *Argo*. A docudrama “[s]elf-evidently . . . partakes of author’s license—it is a creative interpretation of reality.” *Davis*, 654 F. Supp. at 658. In viewing works identified as “inspired by” or “based on” true events, audiences understand that not every aspect will be entirely factual. As a California court just recently explained, “[v]iewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined.” *de Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 643 (Ct. App. 2018); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 512-13 (1991) (“an acknowledgment that the work is so-called docudrama or historical fiction . . . might indicate that the quotations should not be interpreted as the actual statements of the speaker to

whom they are attributed”); *Partington v. Bugliosi*, 56 F.3d 1147, 1154-55 (9th Cir. 1995) (“the general tenor of the docudrama also tends to negate the impression that the statements involved represented a false assertion of objective fact”).

The nonconsensual use of a person’s name in such a creative work does not constitute a use for “purposes of trade” within Section 51, even if a work is *entirely* fictional. The courts of this State have explicitly concluded that “works of humor, art, fiction, and satire do not come within the ambit of section 51.” *Lohan*, 31 N.Y.3d at 120 (citations omitted); *see also, e.g., Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep’t 2003) (painting constituted “artistic expression” that was “excepted from New York’s privacy protections”); *Frank v. NBC*, 119 A.D.2d 252, 256 (2d Dep’t 1986) (no claim for use of plaintiff’s name in Saturday Night Live skit); *Lemerond v. Twentieth Century Fox Film Corp.*, 2008 WL 918579, at \*1-3 (S.D.N.Y. Mar. 31, 2008) (no claim arising from depiction of plaintiff in film involving fictional character Borat); *Costanza v. Seinfeld*, 279 A.D.2d 255, 255-56 (1st Dep’t 2001) (no claim for use of plaintiff’s persona in television comedy); *Rogers v. Grimaldi*, 695 F. Supp. 112, 124 (S.D.N.Y. 1988) (no claim for use of Ginger Rogers’ name in title of fictional film), *aff’d*, 875 F.2d 994 (2d Cir. 1989); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430-33 (S.D.N.Y. 1978) (no claim for fictionalized depiction of plaintiff in a novel).

Likewise, a Section 51 claim does not arise from the nonconsensual use of a name in a dramatized retelling of a newsworthy event. *See, e.g., Hampton v. Guare*, 195 A.D.2d 366, 366-67 (1st Dep’t 1993) (no claim arising from play inspired by plaintiff’s crimes). Neither the wording of Section 51 nor its legislative purpose supports the drawing of a distinction between works of pure fiction and stories about newsworthy events told using composite characters, scripted dialogue, and other editorial devices that make the work more entertaining or convey the

author's interpretation of the event and the motivations of the participants. The First Department made just this point in affirming the dismissal of a Section 51 claim in a case arising out of the publication of a biography of Marilyn Monroe containing fictionalized elements:

[I]t does not matter whether the book is properly described as a biography, a fictional biography, or any other kind of literary work. It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services.

*Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769 (1st Dep't 1980).

That Lifetime engages in commerce and has a commercial motive to televise expressive works does not alter this conclusion. "It is the content of the [work] and not the defendant's motive or primary motive to increase circulation which determines whether" plaintiff has a viable claim under Section 51. *Stephano*, 64 N.Y.2d at 184-185; *see also Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140 (1985) (no claim under Section 51 where alleged motive for use of name in sensational story was "to promote circulation"); *Arrington*, 55 N.Y.2d at 440 (no claim under Section 51 for use of image in publication "carried on for a profit"); *Glickman v. Stern*, 19 Media L. Rep. (BNA) 1769, 1774-76 (Sup. Ct. N.Y. Cty. 1991) (Schulz Aff. Ex. 60) (no claim under Section 51 despite allegation that use was for purpose of increasing ratings), *aff'd*, 188 A.D.2d 387 (1st Dep't 1992); *Delan v. CBS*, 91 A.D.2d 255, 259 (2d Dep't 1983) (no claim under Section 51 "notwithstanding the inclusion of commercials" in television show).<sup>6</sup>

---

<sup>6</sup> Lifetime's alleged ancillary or incidental use of plaintiffs' names in promotional materials for the Movie does not independently support a Section 51 claim. *See, e.g., Altbach*, 302 A.D.2d at 658 (no claim under Section 51 for use in promotional flyers that was "ancillary to a protected artistic expression"); *Velez v. VV Publ'g Corp.*, 135 A.D.2d 47, 49 (1st Dep't 1988) (recognizing "incidental use exemption" to Section 51); *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009) ("incidental use" of plaintiff's image in an advertisement for newsworthy media to "prove its worth and illustrate its content" does not violate Section 51) (internal quotation marks omitted); *see also Schulz Aff. Ex. 1* ¶ 12.

In short, the narrow construction New York courts have given to Section 51 does not sweep in all uses of a person's name in expressive works. Docudramas, such as the Movie, are entirely outside the scope of Section 51 liability under circumstances like those in this case.

**B. Section 51 Does Not Apply To The Nonconsensual Use Of A Name That Bears A "Real Relationship" To Newsworthy Events**

Plaintiffs seek to avoid this conclusion by arguing that the Movie falls within a narrow category of expressive works that purport to be biographical, but are so substantially falsified that they constitute nothing more than an effort to profit from the promotional value of a famous name. The effort is entirely misdirected.

As established above, using a person's name in connection with a fictionalized version of a newsworthy subject generally does *not* constitute a use for purposes of advertising or trade and does not come within the scope of Section 51. This was definitively decided in *Messenger*. In that case the Second Circuit certified to the Court of Appeals the precise question of whether Section 51 imposed liability for the "substantially fictionalized" use of a person's image in a newsworthy publication, and the Court of Appeals squarely answered this question "in the negative." *Messenger*, 94 N.Y.2d at 440-41.

*Messenger* involved a fictionalized depiction of the plaintiff as a drunken teen who had sex with three men. Plaintiff was a random teenager whose photo was used in this fictional portrayal without her consent, but because the issue of teen sex was newsworthy, and there was a "real relationship" between the image of a teen and the newsworthy topic, no liability existed under Section 51. *Id.* at 448. *Messenger* reaffirmed the principle that even a "substantially fictionalized" use of a person's image in a newsworthy publication, as a matter of law, is *not* actionable under Section 51 unless either: (1) the newsworthy publication is itself "an advertisement in disguise," or (2) the person whose name or likeness is used bears no "real

relationship” to the newsworthy publication. *Id.* at 444-45; *see also Finger*, 77 N.Y.2d at 143 (no Section 51 claim for use of image of “six healthy and attractive children with their parents” because “there is a ‘real relationship’ between the fertility theme of the article and the large family depicted in the photograph”); *Arrington*, 55 N.Y.2d at 440 (no Section 51 claim for use of plaintiff’s image to illustrate an article on the “black middle class” where “[t]he asserted lack of a ‘real relationship’ boils down . . . to [plaintiff’s] conviction that his views are not consonant with those of the author”); *Abdelrazig v. Essence Commc’ns*, 225 A.D.2d 498, 498 (1st Dep’t 1996) (no Section 51 claim for use of picture of plaintiff in “African garb” to illustrate “fashion trends in the Black community” because “it cannot be said, as a matter of law, that there is no ‘real relationship’ between the article . . . and the photograph”); *Stephano*, 64 N.Y.2d at 179-86 (no Section 51 claim for use of a picture of plaintiff wearing leather bomber jacket in column about “new and unusual products and services” which the court found was “generally devoted to newsworthy items”). Neither exception to the newsworthiness bar to Section 51 liability applies to the Movie.

As a threshold matter, plaintiffs concede that the Movie depicts a newsworthy event. Schulz Aff. Ex. 1 ¶ 5 (“The crimes that led to [Christopher’s] trial and the trial itself were subject to extensive media coverage.”). Even absent this concession, there can be no serious dispute that the Movie does indeed portray a newsworthy event. As the U.S. Supreme Court recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975), “[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.” *See also Alfano*, 623 F. Supp. at 359 (fictionalized docudrama about organized crime addressed a “newsworthy” matter under

Section 51); Restatement (Second) of Torts § 652D cmt. g (“publications concerning homicide and other crimes, arrests [and] police raids” are matters of legitimate public concern). The newsworthiness of the Movie is neither in dispute nor in doubt.

Throughout the long history of this lawsuit plaintiffs have never claimed that the Movie is an “advertisement in disguise” or that their names bear no “real relationship” to the events portrayed in the Movie, nor would they have any basis to do so. Rather, plaintiffs contend that Section 51 liability exists simply for the use of a person’s name in a “substantially fictionalized” biography. On the undisputed facts of this case, the contention is utterly baseless.

The Court of Appeals on two long-ago occasions did allow a claim under Section 51 for the “material and substantial falsification” of a person’s biography, but neither of those cases supports plaintiffs’ claims. *See Spahn*, 21 N.Y.2d 124; *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913). As the *Messenger* Court explained, *Binns* and *Spahn* each involved such entirely “invented biographies of plaintiffs’ lives” that the plaintiffs bore no real relationship to the published works, and the works themselves could be seen as “nothing more than attempts to trade on the persona of Warren Spahn or John Binns.”<sup>7</sup> *Messenger*, 94 N.Y.2d. at 445-46. *Cf. Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 348-49 (Ct. App. 1983) (finding liability for the use of Clint Eastwood’s name in a completely fabricated but non-defamatory news report).

---

<sup>7</sup> *Binns* and *Spahn* have no application here for the additional reason that those cases both involved works that held themselves out to be something they were not. The film at issue in *Binns* was subtitled “A True Story of the Wreck of the Republic,” and was actually “represented by the defendant to be a true picture of the plaintiff.” 210 N.Y. at 57. Likewise, *Spahn* concerned a book by the defendants that “purport[ed]” to be a biography. *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328 (1966). In contrast, the Movie expressly discloses that it is “a dramatization based on a true story,” that some of its “characters are composites,” and that other characters and events are “fictionalized.” Movie at 01:28:33.73. For that reason, too, *Binns* and *Spahn* are readily distinguished from this case. *See Waters v. Moore*, 70 Misc. 2d 372, 375 (Sup. Ct. Nassau Cty. 1972) (“In *Spahn*, of course, the plaintiff’s name was used repeatedly in a book which purported to be his biography. [The book at issue here] identifies itself as ‘fictitious’, albeit based on an actual event, [and] does not purport to be a biography . . . It is thus significantly distinguishable.”); *Hicks*, 464 F. Supp. at 433 (Section 51 does not apply “where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious”).

Under *Messenger*, the Section 51 test is not whether a plaintiff’s purported biography contains “substantial fictionalization,” but whether the story told is so wholly invented that the work itself bears no real relationship to the plaintiff.

Indeed, following *Messenger*, courts have consistently rejected claims asserting Section 51 liability for the “substantial fictionalization” of a newsworthy subject. For example, in *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 88-93 (1st Dep’t 2003), the First Department applied *Messenger* to reject a Section 51 fictionalization claim arising from the use of plaintiff’s name and likeness in a newspaper account of a planned film of her life story. As plaintiffs do here, Bement alleged that the film substantially fictionalized her biography, and further alleged that the newspaper account knowingly republished the fictions. *Id.* The First Department readily dismissed the claim because the subject of the article was newsworthy and plaintiff’s image bore a real relationship to the article. *Id.* at 90-91; *see also Gravano v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776, 777 (1st Dep’t 2016) (no Section 51 claims arising from alleged use of plaintiffs’ images as “avatars” in video game because game did not constitute “advertising” or “trade”), *aff’d on other grounds*, 31 N.Y.3d 988 (2018). The federal court have similarly rejected fictionalization claims under Section 51. *See, e.g., Meeropol v. Nizer*, 560 F.2d 1061, 1064-68 (2d Cir. 1977) (no Section 51 claim for a fictionalized account of Julius and Ethel Rosenberg trial); *Alfano*, 623 F. Supp. 2d at 359-60 (rejecting Section 51 claim based on the use of plaintiff’s image without consent to illustrate a docudrama about organized crime).

As this consistent line of precedent makes clear, no Section 51 claim exists for the “substantial fictionalization” of a newsworthy event, unless the name used bears no real relationship to the newsworthy event portrayed or the challenged work is an advertisement in disguise. Plaintiffs have made no such claims here and the undisputed facts show they cannot.

**C. On The Undisputed Facts, Plaintiffs' Names Bear A Real Relationship To The Newsworthy Events Depicted In The Movie**

The Movie was not before the Third Department when it held that Christopher's original Complaint sufficiently alleged "material and substantial fictionalization" to allow the case to go forward. Construing the Complaint's allegations in the light most favorable to plaintiff, who was proceeding *pro se* at the time, the Appellate Division found that it could be understood to allege that the Movie exhibited the same degree of falsification as was present in *Spahn* and *Binns* (*i.e.*, that there was no real relationship between Christopher's story and the story presented in the Movie). *Porco*, 147 A.D.3d at 1254-56. The undisputed facts now before the Court fully refute plaintiffs' allegation.

The summary judgment record precludes any finding that the story presented in the Movie was so entirely invented that plaintiffs' names bear no real relationship to the events portrayed. The factual inquiry is not how many dramatic elements or scripted conversations were written into the Movie to tell the story concisely and entertainingly, but whether the facts presented so materially and substantially falsify the story of Christopher's crime that the Movie itself bears no real relationship to plaintiffs. As summarized below and set forth in detail in Appendix A, the Movie is a faithful retelling of the material facts concerning Christopher's crime and prosecution.

1. *The Movie's setting.* The Movie depicts the crime in the same time of year (Fall) and the same place (the Porco house on Brockley Drive in Delmar, New York) as it actually occurred. A. 1-3. Christopher is accurately portrayed as a student at the University of Rochester, located three hours away—a fact that becomes important in establishing his whereabouts at the time of the crime. A. 4.

2. *The Movie's portrayal of the Porco family.* The Movie truthfully conveys the material details of the lives of the Porco family members. It depicts Peter as a respected lawyer who had grown increasingly worried about his son Christopher's behavior. A. 7, 8, 32, 116. It shows Joan as a loving mother who has steadfastly supported Christopher despite the horrific crime he was convicted of perpetrating against her and Peter. A. 40. It refers to Christopher's brother, Johnathan, who was a Naval officer stationed on a submarine at the time of the crime, and the family dog, Barrister. A. 9-12. The Movie accurately renders Christopher as a handsome and intelligent young man who nonetheless struggled academically and lied to his friends and family about many things, especially his financial status. A. 14, 17-24. It shows how Christopher's parents became aware of the extent of his money troubles and deceptions and began to withdraw their financial support. A. 32, 115. The Movie also portrays Christopher as a person with ongoing relationships with women, both before and after the crime. A. 33-34, 37-38.

3. *The Movie's portrayal of the crime.* The Movie correctly portrays all material details of the brutal attacks on Peter and Joan as described in official records. It demonstrates how the perpetrator entered the Porco house using a spare key kept in a flower pot, deactivated the alarm system using a master code known only to a few people, took an ax from the garage, attacked Peter and Joan with it while they slept in their bed, and staged the crime scene to make it look like a break-in by smashing the alarm system panel and cutting the phone lines. A. 41-46. The Movie shows how Peter arose from the bed after he was attacked and started to go about his morning routine before dying downstairs. A. 48. It also reveals the severe injuries that Joan sustained, as well as her extraordinary recovery. A. 49, 97.

4. *The Movie's portrayal of the investigation.* The Movie accurately depicts the material details of the lengthy criminal investigation that eventually led to Christopher's conviction, beginning with the morning the crime was discovered. It shows Peter's coworker attempting to reach him by phone after he failed to show up for work, then sending a court officer to the Porco house to check on him. A. 61. It shows the bloody crime scene that greeted the court officer, and the clues gathered by investigators as they combed through the house. A. 62, 68-70, 76. It shows Joan's head nod implicating Christopher while she lay severely injured in her bed that later became a centerpiece of the prosecution. A. 71-74.

The Movie shows Christopher being notified of the crime while communicating with his long-distance girlfriend over the computer and going to visit his mother at the hospital that same night, where he was intercepted by the police and taken to the station for an interview. A. 78, 82-90. It shows much of the evidence assembled by investigators, including surveillance camera footage and testimony from toll collectors, used to disprove Christopher's claim that he was in his dormitory lounge at the University of Rochester when the crime took place. A. 91-94. It shows the lack of physical evidence tying Christopher to the crime. A. 99-100, 102-03. It shows Joan, once she had recovered enough to communicate, having no memory of the crime or of implicating Christopher in it. A. 55. It also shows the investigators' theories about Christopher's motivation for the crime (his mounting financial troubles and conflicts with his parents, who had life insurance) and his modus operandi (staging the crime scene as he had when stealing computers from his parents and the veterinary clinic where he was employed in the past). A. 104-23.

5. *The Movie's portrayal of the response to the crime.* The Movie conveys the material aspects of the response to the attacks. It shows the extensive media coverage of the

shocking crime. A. 54. It shows Christopher's suspension from the University of Rochester and his return to work at the veterinary clinic owned by a family friend. A. 31, 57. It shows both Christopher and Joan going to live with the veterinarian in her home. A. 56. It shows Joan's continued support of Christopher in the face of accusations that he was the culprit in the attacks. A. 55. It shows the disbelief of many members of the community that Christopher could have committed such a crime. A. 51. And it shows Christopher's defiant conduct after the crime, including his maintaining an active social life and his threats to sue the police and the university. A. 53, 58.

6. *The Movie's portrayal of the prosecution and trial.* The Movie culminates with an accurate portrayal of Christopher's prosecution and trial. It shows Christopher's arrest for the murder of his father and the attempted murder of his mother, and his release on bail one month later thanks to Joan's entreaty to the court on his behalf. A. 124-25. It depicts many of the major trial participants, including Judge Berry and lead counsel on both sides, as well as testimony from Christopher's girlfriend at the time of the crime, Christopher and Joan's veterinarian friend, Christopher's fraternity brother and roommate, the detective who witnessed Joan's head nod, and Joan herself. A. 126-28, 141-45. It illustrates the themes put forth by both sides in support of their positions. A. 129-39. And, finally, it shows the verdict of guilty on both counts and conveys that Christopher was sentenced to 50 years to life and has exhausted all of his appeals. A. 147, 150-51.

In sum, as the record reflects, the Movie accurately presents the material facts relating to Christopher's crime and prosecution, and Joan's role in them. The record fully establishes a real relationship between the plaintiffs and the events portrayed in the Movie, which precludes liability under Section 51.

**D. Plaintiffs’ Theory Of Section 51 Liability Has Been Squarely Rejected By The Court Of Appeals**

After months of delay in responding to written discovery, rather than identifying any material facts about the crime, the investigation, or the trial that they claim to be substantially false in the Movie, plaintiffs’ interrogatory responses object mostly to the dramatic devices used to tell this story. Plaintiffs contend that any scene in which “fictional characters are interacting with real persons in real life is inherently false,” fault the Movie for not including everything that occurred, and ambiguously object that things in the Movie “are not necessarily factual” even when they “have a basis in an actual event, allegation, testimony in real life.” Schulz Aff. Ex. 16 at 3; *id.* Ex. 17 at 3-4.

In blunderbuss fashion, Christopher claims that nearly every line of the Movie is false, even scenes in which most of the dialogue is drawn virtually verbatim from primary sources. To give just one example, Christopher complains that a scene in the Movie depicting Joan’s trial testimony is false even though virtually every line in the scene comes directly from the trial transcript, simply because the defense lawyer shown examining Joan in the movie was a composite of the two defense lawyers who defended Christopher at the trial. *See id.* Ex. 18 at Element 34; *see also* Movie at 1:17:49.75 – 1:19:11.12; App’x B at 7-8. For most of the identified elements, Christopher’s only explanation for the alleged falsity is that “[t]he interaction depicted never occurred,” and in some instances that certain characters in the scene are “fictional.” But, as demonstrated in Appendices A and B to this Memorandum and Exhibit 18 to the Schulz Affirmation, the vast majority of these interactions and characters are grounded in true facts as established by official records and journalistic accounts, even if they did not occur in real life precisely the way they are dramatized on screen.

Joan's interrogatory responses quibble about exactly where or when certain interactions took place, no matter how closely their portrayal in the Movie hews to reality in other ways. For example, Joan claims that a scene in the Movie depicting her making her first public appearance after the crime to testify at Christopher's bail hearing is false because, among other things, she did not actually speak at the bail hearing. Schulz Aff. Ex. 19 at Element 5; *see also* Movie at 00:51:48.18 – 00:55:14.77. But Joan did make her first public appearance at Christopher's bail hearing, she did submit a letter to the Court on Christopher's behalf, and almost every word of her testimony in the Movie is drawn verbatim from the public statements Joan made in support of her son. *See* Schulz Aff. Ex. 19 at Element 5; App'x B at 4. To contend that scenes like this are "materially and substantially" false is preposterous.

At bottom, the interrogatory responses reveal that plaintiffs have no factual basis to contend that their names have "no real relationship" to the story the Movie tells, and they have never made such a claim. Rather, plaintiffs object that any dramatization of their story presents them in a false light, but Section 51 imposes no liability for such a claim. The Court of Appeals has left no doubt on just this point: "[W]hen a plaintiff's likeness is used to illustrate a newsworthy article, the plaintiff may not recover under sections 50 and 51 even if the use of the likeness creates a false impression about the plaintiff." *Messenger*, 94 N.Y.2d at 447; *see also* *Weber v. Multimedia Entm't, Inc.*, 2000 WL 526726, at \*7 (S.D.N.Y. May 2, 2000) (dismissing sections 50 and 51 claims where plaintiff's appearance in a newsworthy program about teenage prostitution bore a real relationship to issues presented, even if she only pretended to be a prostitute). As *Messenger* explains, allowing liability to be imposed under Section 51 for "substantial fictionalization" that creates false impressions about a plaintiff, rather than for using a plaintiff's name to advertise a product or imply an endorsement, would render Section 51

“indistinguishable from the common-law tort of false light invasion of privacy.” 94 N.Y.2d at 448. New York does not recognize that tort under Section 51 or otherwise, as the Court of Appeals repeatedly has held. *See, e.g., id.; Howell*, 81 N.Y.2d at 123.

Plaintiffs’ belated identification of the factual basis of their Section 51 claim, in short, only further confirms that no such claim exists.

## **II.** **PLAINTIFFS’ CLAIMS ARE ALSO BARRED BY THE FIRST AMENDMENT**

Summary judgment should be granted for a separate and independent reason: If plaintiffs’ view of the liability imposed on expressive speech by Section 51 were correct, the law would violate the First Amendment.

The Court of Appeals in *Messenger* did not need to address the constitutional issues that would be raised by imposing Section 51 liability on a fictionalized account of a newsworthy event, because *Messenger* rejected substantial fictionalization as a basis for liability. *Spahn*, on the other hand, rejected a constitutional defense to Section 51 liability for material and substantial falsification in its 1967 holding.<sup>8</sup> 21 N.Y.2d at 127-29. That holding has no valid application to the Movie in light of subsequent U.S. Supreme Court rulings on the scope of First Amendment.

In a series of decisions over the 50 years since *Spahn*, the U.S. Supreme Court has held that the First Amendment protects false speech and bars states in various contexts from imposing restrictions on newsworthy speech even in situations where the speech is not factually correct. In

---

<sup>8</sup> At the same time, the Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), found that Section 51 did not violate the recently articulated First Amendment protections of false defamatory speech because, as construed by the Court of Appeals in *Spahn*, Section 51 requires a material, knowing falsehood. The Court recognized, however, that a bright line could not be drawn between the “informing” and the “entertaining” aspects of a publication without infringing on constitutional freedoms, *id.* at 388-89, and did not hold that the dramatization of a newsworthy event removed the constitutional protection from speech.

*United States v. Alvarez*, 567 U.S. 709, 718 (2012), for example, the Court held that some false statements must be protected “if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.” This holding follows several other rulings that limit a state’s ability to punish inaccurate statements and fictionalizations in various contexts. *See, e.g., Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778-779 (1986) (to avoid chilling true speech on matters of public concern, “the Court has been willing to insulate even demonstrably false speech from liability”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (rule imposing “strict liability on a publisher for false factual assertions would have an undoubted ‘chilling’ effect on speech”); *accord Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 355 (2009) (First Amendment requires that “publishers must have sufficient ‘breathing space’”).

To impose liability under Section 51 when a newsworthy story is retold in dramatic fashion would contravene the First Amendment protection recognized in these holdings, as several courts have already recognized in addressing Section 51 claims. *See Foster v. Svenson*, 128 A.D.3d 150, 156 (1st Dep’t 2015) (newsworthy exception to Section 51 necessary to protect “literary and artistic expression”); *Hicks*, 464 F. Supp. at 431-33 (First Amendment barred Section 51 claim arising from fictionalized use of Agatha Christie name and character); *Sondik v. Kimmel*, 33 Misc. 3d 1237(A), 2011 WL 6381452, at \*4 (Sup. Ct. Kings Cty. Dec. 15, 2011) (noting that “serious First Amendment concerns” would require dismissal even if Section 51 applied in the entertainment context and newsworthiness exception did not apply), *aff’d*, 131 A.D.3d 1041 (2d Dep’t 2015); *Rogers*, 695 F. Supp. at 124 (claim for use of Ginger Rogers’ name in title of film precluded under the First Amendment as the title was related to the content of the fictional film).

Appellate courts around the country have reached the same conclusion about the First Amendment’s protection of dramatic depictions of newsworthy events. Just recently, an appellate court in California granted a motion to strike a complaint by a famous actress who alleged statutory and common law privacy claims based on her portrayal in a television docudrama. *de Havilland*, 230 Cal. Rptr. 3d at 625. The court held that the challenged docudrama was “speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.” *Id.* at 638 (internal quotation marks omitted).

The same conclusion was reached in an influential concurring opinion by the Chief Justice of the California Supreme Court in *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454 (Cal. 1979) (en banc). Plaintiff in that case brought a misappropriation claim on behalf of the actor Rudolph Valentino for the use of his name, likeness, and personality in a film that allegedly was a “fictionalized version” of Valentino’s life. *Id.* at 455. The concurrence rejected plaintiff’s contention that the film was not entitled to constitutional protection because it was fictionalized and falsely portrayed Valentino’s life. *Id.* at 455-64. Put succinctly, “entertainment is entitled to the same constitutional protection as the exposition of ideas.” *Id.* at 458-59 (Bird, C.J., concurring); *see also de Havilland*, 230 Cal. Rptr. 3d at 638 (describing widespread reliance on *Guglielmi* concurrence).

The First Amendment was again held to protect docudramas in *Tyne v. Time Warner Entertainment Co.*, 901 So. 2d 802 (Fla. 2005), a case alleging misappropriation based on the use of plaintiffs’ names in the book and film *The Perfect Storm*. The challenged film was a dramatized account of true events that took fictional liberties with plaintiffs’ biographies,

relationships, and depictions. *Id.* at 804. The Eleventh Circuit certified to the Florida Supreme Court the question of whether Florida’s misappropriation statute applied to such expressive works. In answering the certified question, the Florida court noted that right of publicity claims have generally been limited to the promotion of a product or service. In the context of an expressive work, however, whether “factual and biographical or fictional,” it held that the First Amendment bars such claims altogether. *Id.* at 810 (quoting *Guglielmi*, 603 P.2d at 461 (Bird, C.J., concurring)); *see also Matthews v. Wozencraft*, 15 F.3d 432, 438 n.5, 440 (5th Cir. 1994) (First Amendment protects use of persona in novel); *Sarver v. Chartier*, 813 F.3d 891, 902-06 (9th Cir. 2016) (First Amendment protects use of plaintiff’s name and likeness in fictionalized film about his life); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (First Amendment protects use of plaintiff’s persona in dramatized film about Black Panthers).

This same reasoning applies fully here. If Section 51 actually did create a claim based on the dramatization of a newsworthy story, involving the types of editorial devices reflected in the record here, summary judgment should still be entered because imposing liability on these facts would be unconstitutional. The First Amendment to the United States Constitution prohibits a State from imposing restrictions on such expressive, non-defamatory speech.

It bears emphasis that under the misguided theory of Section 51 liability advanced by plaintiffs, any dramatic work about, based on, or inspired by real people would require the permission of the subjects—virtually anyone who disagreed with another’s retelling of their story could enjoin it. Imposing such liability would massively restrict the very programs through which much of society gains an understanding of important events and an appreciation for how our institutions of government operate. Newsworthy events like the murder prosecutions of O.J.

Simpson, Jodie Arias, or Amanda Knox are routinely retold through made-for-TV movies, as are the inspiring life stories of historic figures like Coretta Scott King or Rosa Parks.

Similarly, theatrical motion pictures regularly tell the newsworthy stories of real people in a dramatized fashion, including such notable recent examples as *The Post* (based on the publication of the Pentagon Papers), *The Hurt Locker* (based on the experiences of a team of explosive ordnance disposal technicians in Iraq), *Argo* (based on the experiences of six Americans who escaped being taken hostage during the Iranian hostage crisis), *The Wolf of Wall Street* (based on the life of stockbroker Jordan Belfort, imprisoned for fraud), *Milk* (based on the life of gay rights activist and politician Harvey Milk), *Charlie Wilson's War* (based on the story of U.S. Congressman Charlie Wilson and his work with the CIA), *Zero Dark Thirty* (based on the manhunt for Osama Bin Laden), and *The Bang-Bang Club* (based on the story of four photojournalists documenting the Apartheid era in South Africa). The First Amendment protects all such creative works against Section 51 liability, regardless of the “substantial fictionalization” that may have been utilized to convey the gist of the newsworthy story in an engaging way.

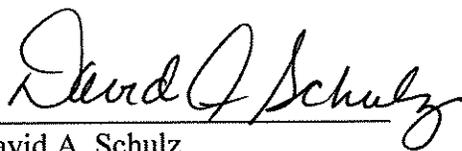
The continued presence and popularity of these works reflects the important public interest served by this form of expression. And whether one calls it history, art, docudrama, “based on” or “inspired by,” works of this type have always received First Amendment protection. *See, e.g., Matthews*, 15 F.3d at 438 n.5, 440; *Sarver*, 813 F.3d at 902-06; *Seale*, 949 F. Supp. at 337.

## CONCLUSION

For all the foregoing reasons, Lifetime respectfully requests that this Court enter summary judgment in its favor as to all claims in the Second Amended Complaint and dismiss the case with prejudice.

Dated: July 30, 2018

Respectfully submitted,  
BALLARD SPAHR LLP

By:   
David A. Schulz  
Charles D. Tobin (admitted *pro hac vice*)  
Elizabeth Seidlin-Bernstein

1675 Broadway, 19th Floor  
New York, NY 10019-5820  
Telephone: 212.223.0200  
Facsimile: 212.223.1942

*Attorneys for Defendant Lifetime Entertainment  
Services, LLC*