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To be Argued by:
DAVID A. SCHULZ, ESQ.
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New York Supreme Court
Appellate Division—Third Department

Case No.: 531681

CHRISTOPHER PORCO and JOAN PORCO,

Plaintiffs-Respondents-Cross-Appellants,

– against –

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellant-Cross-Respondent.

BRIEF FOR DEFENDANT-APPELLANT-CROSS-RESPONDENT

BALLARD SPAHR LLP
David A. Schulz, Esq.
Charles D. Tobin, Esq.
Elizabeth Seidlin-Bernstein, Esq.
Attorneys for Defendant-Appellant-Cross-Respondent
1675 Broadway, 19th Floor
New York, New York 10019
(212) 223-0200
schulzd@ballardspahr.com
tobinc@ballardspahr.com
seidline@ballardspahr.com

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PRELIMINARY STATEMENT

This appeal presents important questions about the rights of filmmakers, playwrights, authors, and artists to tell dramatic and newsworthy stories—specifically, whether individuals can invoke the narrow prohibition in Civil Rights Law § 51 ("Section 51") against the unauthorized use of a name or image for "advertising purposes or for the purposes of trade" to control how they are portrayed in those stories, or prevent them from being told at all. The trial court's broad interpretation of Section 51 would allow just that. It fails to provide expressive speech the breathing room required by the First Amendment and is not supported by the precedent the trial court cites.

At issue is a film televised by defendant-appellant-cross-respondent Lifetime Entertainment Services LLC ("Lifetime") that tells in a dramatized format the story of a crime committed by plaintiff-respondent-cross-appellant Christopher Porco ("Porco"). The Lifetime film ("Film") portrays the circumstances surrounding Porco's vicious slaying of his father and maiming of his mother, plaintiff-respondent-cross-appellant Joan Porco ("Mrs. Porco").

Nearly four years ago, this Court reversed the pre-answer dismissal of Porco's lawsuit challenging the Film under Section 51. It concluded that the complaint, read liberally, sufficiently alleged that the Film was a "materially and substantially fictitious biography" so that, if proven, the use of Porco's name in the

Film might be considered a use "for the purposes of trade" under Section 51 as applied in *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967).

Before the Court now is the denial by the trial court (Hon. Mark L. Powers) of Lifetime's motion for summary judgment seeking dismissal on the grounds that Section 51 does not apply to the Film because it does not purport to be a documentary, that plaintiffs cannot meet their burden to prove that the Film is "materially and substantially fictitious," and that the First Amendment bars plaintiffs' theory of liability. In support of this motion, Lifetime submitted the Film and an identification of 151 undisputed facts about Porco and his crime that the Film accurately presents, together with an extensive record providing the evidentiary source for each fact.

In the face of this exhaustive record, the trial court noted that plaintiffs could not seriously contend that the Film's "depictions of the crimes, investigation as a whole, or trial" were false. JR25. Moreover, the dramatizations in the Film identified by plaintiffs as the basis for their claims, according to the court, were insufficient to render the film "mainly a product of the imagination" as required by *Messenger v. Gruner + Jahr Printing and Publishing*, 94 N.Y.2d 436, 445 (2000) (per curiam). JR25.

Nonetheless, the court found a jury question about whether the Film's use of invented dialogue, composite characters, and imagined "interviews," and its

characterization of Porco as a "Romeo," amounted to "material and substantial fictionalization" of the newsworthy story. JR22-23. In so holding, the trial court failed to recognize that Section 51 does not apply to a dramatic work like the Film that is presented as fictionalized. Then, in applying the law to the Film, the court misallocated the burdens of proof and confused the use of dramatic devices and artistic license with the falsification of material facts. The summary judgment record establishes that plaintiffs have no Section 51 claim and, if they did, the First Amendment would prohibit it.

STATEMENT OF THE ISSUES PRESENTED

1. Whether using a person's name in a film based upon a newsworthy event but presented to viewers as a dramatization constitutes a use "for the purposes of trade" within the meaning of Civil Rights Law § 51?

The trial court did not decide this issue.

2. If so, whether plaintiffs can survive a motion for summary judgment on their Section 51 claims without forecasting evidence sufficient to establish that the Film was presented as true but was so materially and substantially false that it simply exploited the commercial value of their names?

The trial court answered this question "yes."

3. Whether the dramatic devices used in telling a story drawn from real life, such as composite characters, invented dialogue, and compressed time, constitute evidence that the story told is materially and substantially untrue?

The trial court answered this question "yes."

4. Whether imposing liability on an expressive work that dramatizes a newsworthy event in a non-defamatory manner is permitted by the First Amendment to the U.S. Constitution?

The trial court answered this question "yes."

STATEMENT OF FACTS

Lifetime is a cable television network. JR223 ¶¶23-25. In 2012, Lifetime acquired the rights to a movie that tells the story of the shocking crime and subsequent conviction of Christopher Porco. JR208 ¶2, JR220-221 ¶¶5,9. Titled *Romeo Killer: The Chris Porco Story*, the Film was written by an independent screenwriter and produced by several production companies, none of whom are parties to this lawsuit. JR208 ¶3.

The Film's script was based on facts drawn largely from police records, judicial records, and contemporaneous press coverage, which was extensive given the substantial public interest in the incomprehensible crime. JR216 ¶¶43-45. These records provided the raw materials used by the Film's creators in piecing together their story about how and why this crime occurred.

Lifetime placed the key records before the trial court in support of its motion, and provided a Statement of Undisputed Facts identifying (a) facts not genuinely in dispute, (b) where each fact appears in the Film, and (c) evidence establishing the truth of each fact. JR1004-1050. Plaintiffs did not directly refute the truth of any of these facts and conceded many; instead, they objected that facts are presented in the Film through fictional characters and imagined scenes. *See* JR730-833, JR1305-1316, JR1368-1379.

A. Undisputed Facts Concerning Christopher Porco's Crime and Conviction

Lifetime identified 151 undisputed material facts that concern everything from the setting of events in Upstate New York and the structure of the Porco family to the way the crime was committed, investigated, and prosecuted. These undisputed facts are set out in the summary judgment record at JR1004-1050,[1] and summarized here in brief.

1. Christopher Porco and his family.

In Fall 2004, Porco was a 21-year-old economics major at the University of Rochester who had a long-distance girlfriend. JR1004-1011(Nos.4,16,25-27,33-34). He lied to his classmates that he came from wealth and spent money freely—

[1] In identifying an undisputed fact in the Film, this Brief cites the page(s) and row number(s) in the Joint Record where a fact appears in the Statement of Undisputed Facts, which in turn identifies where the fact appears in the Film and the evidentiary record establishing its truth.

purchasing a yellow Jeep, buying his classmates drinks, and taking foreign trips. JR1006-1009, JR1033-1035(Nos.15,22,24,105,106,113).

Porco's background was more modest. JR1004-1008(Nos.2,22). His father, Peter Porco ("Peter"), was an attorney working for the court system. His mother was a loving parent and devout Catholic. JR1004-1005, JR1012-1013 (Nos.5,8,39,40). Peter and Joan Porco lived in the house on Brockley Drive in Delmar where their sons grew up with the family dog, Barrister. JR1004-1005(Nos.3,12). Porco's older brother, Johnathan, was an officer in the Navy stationed on a submarine. JR1005(Nos.9-10).

In 2003, Porco was forced to leave the University of Rochester due to failing grades, but was allowed to return after enrolling at a community college for a semester. JR1006-1008(Nos.17-21,29); JR1377 ¶26. Porco failed all his community college classes but was readmitted to the university based on a transcript he had altered. JR1007-1008(Nos.19-21).

Porco also had money problems, which he tried to keep 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. JR1034(Nos.108-10).

Porco's parents became increasingly troubled by his poor academic performance, financial irresponsibility, and deceptions. JR1010, JR1035(Nos.30,32,114). In November 2004, Peter threatened to file a forgery

affidavit against his son if he continued to abuse his credit. JR1035(No.115). A week before he was killed, Peter expressed the concern that his son might be a "sociopath." JR1035(No.116).

2. The way the crime was carried out.

On the morning of November 15, 2004, Peter did not show up for work. JR1004, JR1019(Nos.1,61). After attempting to reach him by phone, one of his colleagues sent a court officer to the Porco home. JR1019(No.61). When the officer arrived, he found a key in the lock on the front door, which investigators later concluded was a spare key taken from its hiding place in a flowerpot. JR1013, JR1019(Nos.41,62). Inside, the officer discovered blood throughout the house and Peter's body on the floor downstairs, bludgeoned to death. JR1019-1022(Nos.62,68-69). The officer called for the police and an ambulance. JR1019(No.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. JR1019-1020(Nos.63-65); JR1376 ¶21. He went upstairs to the master bedroom and found Mrs. Porco in bed, covered in blood. JR1022(No.71). Her skull was split open and she was unable to speak due to a fractured jaw. JR1014(No.49).

While paramedics attended to Mrs. Porco, Detective Bowdish asked her a series of yes or no questions. He asked whether she could hear him, and she nodded yes. JR1022(No.71). He asked whether her son Johnathan had done this to her, and she shook her head no. JR1022(No.72). He asked whether her son Christopher had done this to her, and she nodded her head yes. JR1023(No.73). He again asked whether Christopher had done this to her, and she again nodded her head yes. *Id*. Mrs. Porco was then transported to the hospital. JR1023(No.75).

At the crime scene, investigators found evidence that both victims had been attacked in their bed while they slept. JR1014(No.47). The weapon was an ax taken from the garage. JR1013(No.42). Despite his severe injuries, Peter had arisen after the attack, gone into the master bathroom and then down to the kitchen, where he tried to empty the dishwasher and make his lunch. JR1014(No.48). Eventually he collapsed on the floor downstairs, where he was found dead. JR1014, JR1022(Nos.48,69).

Investigators determined that the alarm system had been deactivated at 2:14 a.m. by someone who knew the master code. JR1013(No.43). Only a handful of people—including each member of the Porco family—knew that code, and Johnathan was stationed on a submarine at the time. JR1013(No.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. JR1014(Nos.45,46).

3. The police investigation of the crime.

Porco was at the University of Rochester, more than three hours away from his family home in Delmar, when his girlfriend told him by instant message that something had happened near his house. JR1024(No.78); JR1374 ¶6. He also got a call from a reporter seeking comment on the crime. JR1025(No.79); JR1374 ¶8. Porco then called the police but did not get any additional information. JR1025(No.81).

That night, Porco went to the hospital to visit his mother. JR1026(No.82). Police found him there and transported him to the station, where they took a saliva sample and interviewed him for several hours. JR1026(Nos.83-84). Over the course of the interview, the police investigators confronted Porco with his lies to classmates about coming from a wealthy background, the growing tension with his parents, and his knowledge of his parents' life insurance policies. JR1026-1027 (No.86). They pressured him to "be a man" and admit what he had done. JR1027(No.88). The police also informed Porco that his mother had identified him as the attacker. JR1027(No.87). Porco denied having any involvement and told 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. JR1027-1029 (Nos.89,93).

The investigation continued over a period of months. JR1018(No.60). Police impounded Porco's Jeep Wrangler and took it apart, but found no blood, DNA, or any other physical evidence. JR1032(No.100). Investigators also found no blood or DNA on Porco's clothes or in his dorm room. JR1032(No.102). They investigated Porco's whereabouts on the night of the crime and did not find a single eyewitness who had seen him sleeping in the lounge as he claimed. JR1029(No.94). A female classmate had seen him going for a run on campus around 8:45 the morning after the crime. JR1030(No.96).

In an instant message conversation, Porco's roommate from the university told Porco 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." JR1030(No.95).

Investigators located surveillance video from the university that showed Porco'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. JR1028(No.91). Two toll collectors on the New York State Thruway recalled seeing Porco'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. JR1029(No.92). Based on this evidence, the police developed a timeline that

placed Porco at his parents' house at the time of the crime. JR1028-1029 (Nos.91-92).

Investigators interviewed Mrs. Porco at the hospital while she recovered. She denied having any memory of the attack or of implicating her son in it by nodding her head at the crime scene. JR1017, JR1030(Nos.55,97); JR1368-1369 ¶¶3-4. She later told the court, "I believe him to be innocent with all my heart." JR1017(No.55). When asked by police whether anyone had animosity toward her and her husband, the only person she could think of was whoever had broken into their house and stolen their computers. JR1031(No.98).

Eventually, the police uncovered evidence that Porco was the perpetrator of that earlier burglary at the family's house, during which he took his parents' laptops and a camera and staged the house to look like there had been a break-in. JR1036(Nos.119,121). They also found evidence that Porco had stolen laptops from the veterinary clinic where he worked and from classmates at the university. JR1009, JR1037(Nos.23,122). He later sold electronic equipment on eBay. JR1036(No.120).

4. Events following the crime.

After the attacks, Porco was suspended from the university and worked at a veterinary clinic owned by family friends. JR1010, JR1018(Nos.31,57). Plaintiffs both went to live with the veterinarians in their home. JR1017(No.56).

The crime shocked the Delmar community, and many who knew the Porco family expressed disbelief that Christopher could have committed it. JR1015(No.51). The daughter of Anthony Arduini, one of the detectives assigned to the case, had dated Porco. JR1011, JR1020-1021(Nos.37,66-67); JR1373 ¶4. On the morning the crime was discovered, the first thing Detective Arduini did after hearing the news was check on his daughter at school to be sure she had not run off with Porco. JR1023-1024(No.77). Some of Porco's most vocal supporters were young women. JR1015(No.52).

Mrs. Porco did not waver in her support of her son. JR1017(No.55). Porco maintained his innocence and vowed to sue the police and the university for their conduct toward him. JR1018(Nos.58-59). After the crime, he was frequently seen around town drinking in bars with different women. JR1012-1016(Nos.38,53).

5. The trial and conviction of Christopher Porco.

One year after the crime, Porco was charged with the murder of his father and the attempted murder of his mother. JR1037(No.124). He was arrested and spent one month in jail before being released on bail. JR1038(No.125). Mrs. Porco submitted a written 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. JR1039(No.128). The lead prosecutor was Chief Assistant District Attorney Mike

McDermott, and Porco was represented by Terence Kindlon. JR1038-1039(Nos.126-27).

At trial, the prosecution presented its theory of the case—that by the time Peter discovered that his son had forged his signature on two large loans, Porco's life was unraveling, and he drove to Delmar on the night of the attacks with murder on his mind. JR1039(Nos.129-30).

Many witnesses testified during the trial, including:

- Porco's girlfriend at the time of the crime (their relationship ended prior to trial), who testified that Porco told her about arguments with his parents over money and grades and that he often used the spare key hidden in the flower pot;
- Detective Bowdish, who testified about the evidence investigators had uncovered and about Mrs. Porco's responses to his questioning at the scene of the crime;
- Several of Porco's fraternity brothers, including his former roommate, who testified that they did not see Porco in the dormitory lounge on the night of the crime;
- One of the veterinarians Porco worked for, who testified that Porco was experienced in cleaning up bloody messes from his work at the veterinary clinic; and
- Mrs. Porco, who testified to her belief in her son's innocence and her view that investigators had been biased against him from the start.

JR1043-1048(Nos.141-45). Porco did not take the stand. JR1043(No.140).

Porco's legal team argued that the prosecution's case was entirely circumstantial and that it was "silly" to think that Porco would violently attack his parents for money. JR1043(No.139). They portrayed the investigators as

bumbling and inexperienced, and accused them of jumping to the conclusion that Porco was the culprit, disregarding any other possibility. JR1040-1042 (Nos.133,138). They claimed that Porco's uncle was a member of the Bonanno crime family who had become a federal government "snitch," and suggested that the attacks could have been mafia retribution for that betrayal. JR1041(No.136).

Porco's lawyers discounted Mrs. Porco's head nod, arguing that she was too badly hurt at the time to make such an identification. JR1039-1040(No.132). They speculated that Detective Arduini had tampered with a toll booth ticket because he hated Porco for dating his daughter. JR1040-1041(Nos.134-35). And they argued that police tried to "cover him in slime" because there was no real evidence against Porco. JR1043(No.139).

In his summation ADA McDermott set out the circumstantial evidence against Porco and told the jury, "Christopher is either guilty or he's the unluckiest man on the planet." JR1039(No.131). The jury deliberated for only six hours before reaching a guilty verdict on both counts. JR1049(Nos.146-47). When the verdict was announced, Porco's young female supporters could be heard sobbing in the courtroom. JR1049(No.148).

Outside the courthouse after the verdict, Kindlon told reporters, "We stand before you crushed." JR1049-1050(No.149). The police chief later commented,

"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.*

Porco received a sentence of 50 years to life at Clinton Correctional Facility. JR1050(No.150). He has exhausted all appeals. JR1050(No.151).

B. Undisputed Facts Concerning the Film

The Film tells the story of Porco's crime and conviction through the familiar format of a docudrama, a dramatic portrayal based upon a true event.[2] The story told through the Film includes all the facts about the Porco family and Christopher's crime set out in Section A above. The Film weaves together these real-life facts into a compelling 90-minute story that explores the personality traits and motivations that might have led Porco to commit the crime and Mrs. Porco to remain steadfast in her support of her son.

The Film closely tracks the actual trajectory of Porco's case, often in minute detail. Through flashback scenes, the Film presents the prosecutor's theories of the motive for the crime, the substance of arguments between Christopher and his parents, and the events of the crime itself, as they were presented in trial testimony. *See, e.g.*, JR248 at 00:09:08.05-00:11:23.24; *id.* at 00:28:33.00-00:28:53.00. Many

[2] The record includes a video recording of the complete Film with time codes inserted for ease of reference, as well as a transcription of the Film synced to those time codes. JR211-212 ¶25, JR248-335. Citations to Film time codes refer to both the Film and the transcript.

figures in the Film—including the Porco family, ADA McDermott, defense counsel Kindlon, and Judge Berry—appear under their real names. *See* JR1004-1005, JR1019, JR1029, JR1038-1039(Nos.5,9,12,61,92,126-28). Much of the Film's dialogue is drawn nearly verbatim from primary sources, such as the transcript of Christopher's police interrogation, transcripts of the criminal proceedings, and Porco family emails and correspondence.[3]

The Film makes clear that it is a docudrama, not a documentary. The first words that appear on the screen are: "Based on a true story." JR248 at 00:00:01.22. The opening and closing credits show that the Film was written by a screenwriter and the characters are portrayed by actors. *Id.* at 00:00:46.25-00:01:55.16, 01:28:51.01-01:29:34.10. The Film makes explicit that it is not a true-to-life portrayal of the events depicted, 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.

As a docudrama, the Film makes use of dramatic devices typical of the genre. Some dialogue is invented or takes place in a different setting than it did in real life. Some characters based on real people are given fictional names—for

[3] The record includes a table with examples of dialogue in the Film taken verbatim or near verbatim from official records and news reports. JR1051-1060.

example, Porco's girlfriend at the time of the crime, Sarah Fischer, is called "Rachel" in the Film. JR1010(No. 33). Other characters in this streamlined storytelling are composites of real people. For example, "Detective Sullivan" is a composite character based on Detectives Bowdish and Arduini; "Brody" is a composite of Porco's college roommate, Matthew Ambrosio, and other fraternity brothers who testified at the trial; "Betsy" is a composite of plaintiffs' veterinarian friends Elaine LaForte and John Kearney; and defense counsel Kindlon is a composite of the actual lawyer with that name as well as his wife, Laurie Shanks, who also represented Porco in his criminal case. JR1017-1020, JR1030, JR1048(Nos.56,63,66,95,145); JR1376 ¶16; JR1380-1381 ¶¶2,7. Imagined interviews of some characters frame the Film's larger themes, such as Porco's manipulation of those around him and the unwillingness of Porco's friends and family to accept that he could have committed the crime. *E.g.*, JR248 at 00:00:06.95-00:00:38.13, 00:17:52.22-00:17:59.14, 00:27:25.25-00:27:42:06.

STATEMENT OF THE CASE

A. Procedural Posture of this Appeal

Porco commenced this action in Clinton County Supreme Court on January 29, 2013, filing a Complaint asserting a single claim under Section 51 for the unauthorized use of his name, and alleging sight unseen that the Film was a "substantially fictionalized account" of events leading to his incarceration. JR208-

209 ¶¶4-5. The Complaint sought only injunctive relief to prevent the Film from being televised. *See* JR208-209 ¶4.

After a number of interim battles, including the dismissal of the case under CPLR 3211 and its subsequent reinstatement by this Court,[4] on March 12, 2018 plaintiffs filed a Second Amended Complaint. This revised pleading includes Mrs. Porco as a named plaintiff, advancing her own Section 51 claim, and contains factual allegations to support a claimed republication of the Film, in anticipation of a statute of limitations defense. JR211 ¶20, JR220-227. Both plaintiffs seek money damages and injunctive relief. JR220-227. Neither plaintiff claims to be defamed by the Film, and the Second Amended Complaint continues to aver only that the Film is "a substantially fictionalized account" of the crime and conviction. JR221 ¶10. Lifetime answered the Second Amended Complaint on April 2, 2018. JR228-238.

The parties then pursued discovery limited largely to the truth or falsity of facts presented in the Film. JR211-214 ¶¶23-37. Lifetime submitted interrogatories asking each plaintiff to identify what facts in the Film they contended to be "substantially fictionalized" as they alleged. JR211-215 ¶¶23,41; JR239-247; JR730-833. And in response to plaintiffs' disclosure requests,

[4] The case has been before this Court three times before. *See* JR95-99 (reversing injunction); JR106-110 (reversing Rule 3211 dismissal); JR134-137 (dismissing appeal of non-appealable ruling on statute of limitations).

Lifetime produced documents and information relating to the contents of the Film and the creative process.[5] JR1063-1065 ¶3. Lifetime also obtained the complete court record from Porco's conviction and provided a copy to plaintiffs' counsel. JR212-215 ¶¶27,39.

On July 31, 2018, Lifetime moved under CPLR 3212 for summary judgment dismissing the complaint with prejudice. Lifetime's motion contended that plaintiffs had no Section 51 claim because the Film did not purport to be a documentary, plaintiffs could not demonstrate that it was materially and substantially fictitious and, if Section 51 liability could be imposed on the undisputed factual record, it violated the First Amendment.[6] JR31-94. In support, Lifetime identified the undisputed facts accurately presented in the Film and provided evidentiary support for each fact. JR208-1060.

After seeking and obtaining further discovery, more than a year later plaintiffs submitted their opposition to Lifetime's motion for summary judgment, and cross-moved for (1) partial summary judgment on Section 51 liability and (2) reconsideration of Lifetime's motion to dismiss Mrs. Porco's claim as time

[5] Plaintiffs' dispute over the adequacy of discovery is subject of a separate pending appeal, Case No. 529946.

[6] While it would also be plaintiffs' burden to demonstrate at trial that Lifetime intentionally falsified the Film, Lifetime moved only on the threshold issue of whether plaintiffs could demonstrate material and substantial falsity. JR13.

barred. JR1061-1062. Accompanying their September 16, 2019 filing were affidavits from each plaintiff purportedly identifying aspects of the Film they considered "fictitious" or "fabricated." JR1368-1379. Plaintiffs also submitted an affirmation by Porco's defense counsel Shanks identifying parts of the Film she found inaccurate. JR1380-1394. While plaintiffs objected to ways facts were presented in the Film, their submissions did not directly dispute the truth of facts identified in Lifetime's statement of undisputed facts. JR1004-1050.

B. The Summary Judgment Order Now on Appeal

On May 15, 2020 the trial court denied the parties' cross-motions for summary judgment. JR7-28. Justice Powers began by acknowledging that "[g]enerally, portrayals of newsworthy events fall outside the scope of" Section 51, "as they are not for advertising purposes or purposes of trade." JR14. He further recognized that the constitutional protection for speech and the press "extends to entertainment" so that "[f]reedom of discussion" can "fulfill its historic function," and because "[d]rawing a line between entertaining content and informing content for First Amendment protection is too elusive." JR15 (internal marks omitted). The court even noted in a footnote that a Section 51 plaintiff cannot "recover for a fictionalized account of true events where it is obvious to the viewer that the content is fictitious," but did not address whether the Film was such an obviously

fictionalized account. JR17 n.2 (citing *Hicks v. Casablanca Records*, 464 F. Supp. 426, 431-33 (S.D.N.Y. 1978)).

The trial court instead turned to assessing whether the newsworthiness exception applied to the Film, noting that imposing Section 51 liability "based on knowingly false content" would not violate the First Amendment. JR16. According to the court, the standards articulated in *Messenger* govern application of the newsworthiness exception, and those standards dictate that the use of a person's name or likeness in connection with "newsworthy content" does not violate Section 51 if the person bears a "real relationship" to that content. JR16-17. But when newsworthy content is seriously "infected with fiction, dramatization or embellishment," according to the trial court, it can no longer be considered newsworthy. JR17 (internal marks). In such a case, Section 51 liability can be imposed on a fictionalized account, even if "the true story such content is based on" is itself newsworthy. *Id.*

Taking up the evidentiary record submitted by Lifetime, the court first considered a variety of hearsay objections interposed by plaintiffs, rejecting some and accepting others. JR18-21. Based just on the evidence it deemed admissible, the trial court identified dozens of "true facts" portrayed in the Film. JR19. But Justice Powers considered it to be Lifetime's burden on summary judgment to demonstrate that the Film was not materially and substantially fictitious. JR21-22.

So even while acknowledging that the Film "contains many elements drawn from truth," the court found Lifetime had not met its burden because it admitted the Film: (1) used "invented dialogue" and "mov[ed] conversations between characters to different settings than that in which they actually took place," (2) made up fictional names for some characters and created composite characters based on multiple real-life people, (3) presented "imagined interviews" to advance the Film's themes, and (4) suggested that Porco was "a man with many romantic interests" by using the *Romeo Killer* title. JR22-23.

The court also rejected plaintiffs' cross-motion for partial summary judgment on liability. It catalogued the many "fabrications" and "fictionalizations" claimed by plaintiffs and found them all insufficient to establish material falsity. As the court put it, "[t]hough the cited inaccuracies are disturbing to plaintiffs, they do not render the film 'mainly a product of the imagination' as a matter of law." JR25 (quoting *Messenger*, 94 N.Y.2d at 445). The court also took note that plaintiffs did "not assert that the depictions of the crimes, investigation as a whole, or trial, with the exception of Joan's testimony, are false."[7] *Id.*

[7] The reference to "Joan's testimony" appears to reflect plaintiffs' objection that the Film portrayed Mrs. Porco testifying at Christopher's bail hearing when she simply attended as a spectator. JR1370 ¶12. In reality, Mrs. Porco submitted letters to the criminal court and the Albany *Times Union* that contained, nearly verbatim, what the Film presented her saying at the hearing. JR891 at 41-42; JR1038(No.125); JR923; JR947; JR1054.

In denying the cross-motions, the trial court acknowledged that, "generally, whether content is newsworthy is a question of law for the Court." JR26. But whether the Film in this case is newsworthy, the court concluded, "depends on a finding that it is not materially and substantially fictitious," and "[m]ateriality is a question for the trier of fact." *Id.* The court found it difficult "to conceive of any evidence that either party might submit on a summary judgment motion that could establish, as a matter of law, that the film is, or is not, materially and substantially fictitious," because "deciding whether the film comports with the truth is largely a matter of opinion." *Id.*

The trial court also denied plaintiffs' motion to reconsider Lifetime's prior motion to dismiss Mrs. Porco's claims as time-barred, finding no basis to do so. JR26-27.

SUMMARY OF ARGUMENT

In denying summary judgment to Lifetime, the trial court erred as a matter of law in several respects:

1. The trial court failed to recognize that Section 51 has no application to expressive works that do not purport to be true-to-life presentations of actual events. While the Film was not before this Court on the earlier appeal of Lifetime's motion to dismiss, it is now. The Film makes plain that it is a docudrama, a story "based on" Porco's crime and conviction presented in the form

of an entertaining movie. The Film reflects its creators' interpretation of events and their effort to make sense of a senseless crime. Under controlling Court of Appeals precedent, Section 51 has no application to such a dramatized portrayal.

2. The trial court misapplied the standard for determining when Section 51 liability may be imposed on an expressive work that purports to provide a true account of a newsworthy event. Even if the Film is considered to be a purportedly true, strictly biographical account (contrary to its own disclaimers), no liability exists under Section 51 because its subject matter is newsworthy and plaintiffs have a real relationship to the newsworthy content. This exception from Section 51 liability applies unless a biographical work presented as true is so materially false that it can be seen as nothing more than an attempt to exploit the commercial value of the plaintiff's name.

In applying the newsworthiness exception to the Film, the trial court made two reversible errors. First, it wrongly placed upon Lifetime the burden to establish that the story presented in the Film is not materially and substantially false. It was Lifetime's burden to demonstrate that the Film's content is newsworthy and has a real relationship to plaintiffs; it is plaintiffs' burden to establish that the Film is so materially and substantially falsified that Lifetime forfeited the newsworthiness exception. This allocation of burdens is mandated by

Court of Appeals precedent and compelled by the First Amendment. The failure to correctly assign burdens drove the erroneous outcome below.

Regardless of who bears the burden, the trial court erroneously found a factual dispute as to whether the dramatic choices made in telling plaintiffs' story caused the Film to forfeit the newsworthiness exception to Section 51 liability. This is wrong as a matter of law—objecting to the way a story is told is not the same as demonstrating that the story told is materially and substantially untrue. Section 51 does not require a jury trial on whether the Film's use of invented dialogue, composite characters, and compressed time, and its title description of Porco as a "Romeo," amount to "material" fictionalization. Section 51 liability can exist only if the Film presents as true material facts about Porco's crime and conviction that are so substantially untrue that they render the Film "mainly a product of the imagination" that seeks to exploit the commercial value of plaintiffs' names. *Messenger*, 94 N.Y.2d at 445. The trial court agreed that it did not, and Section 51 thus has no proper application to the Film. At best, plaintiffs may have identified a triable issue of fact about whether the Film presents them in a false light, but neither Section 51 nor any other New York law encompasses such a claim.

3. On the undisputed facts, imposing Section 51 liability on Lifetime would violate the U.S. Constitution. The First Amendment bars the imposition of liability

on an expressive work about a newsworthy issue unless it presents knowingly and materially false facts, and even then, there must be a sufficiently compelling reason to justify the punishment. Targeting non-defamatory, newsworthy speech based on how a person is portrayed—not whether the portrayal is true or false—advances no compelling interest and is not allowed.

ARGUMENT

I.
ON THE UNDISPUTED RECORD FACTS, PLAINTIFFS HAVE NO CLAIM UNDER SECTION 51

Section 51 provides a private right of action for the use of a person's "name, portrait, picture, or voice" without consent "for advertising purposes or for the purposes of trade." N.Y. Civ. Rights Law § 51. This provision was enacted more than a century ago in response to *Roberson v. Rochester Folding Box Co.*, a case brought by a young woman whose image had been printed without her consent on posters advertising Franklin Mills Flour and "conspicuously posted and displayed in stores, warehouses and saloons." 171 N.Y. 538, 542 (1902). The Court of Appeals dismissed her claim, holding that New York had no common law right of privacy that would allow Roberson to prevent this use of her image or to recover damages. *Id.* at 556-57; *see also Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 119-20 (2018) (discussing the legislative intent in enacting Section 51).

Civil Rights Law sections 50 and 51 were the Legislature's response. These sections created "a limited statutory right of privacy," authorized injunctive relief to protect it, and imposed both criminal and civil penalties for its violation. *Id.* These protections were narrowly aimed at the specific type of privacy invasion at issue in *Roberson*—the unauthorized use of a person's name or image in commerce to promote a product or service. *Messenger*, 94 N.Y.2d at 441. Given this purpose, the Court of Appeals repeatedly has underscored that the scope of privacy protected by Section 51 is to be narrowly construed to bar commercial misappropriation and does not include claims for "false light" invasion of privacy. *Id.* at 441, 448; *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123-24 (1993); *see also* William L. Prosser, *Privacy*, 48 Cal. L. Rev 383, 402-03 (1960).

The trial court's expansive application of Section 51 to a work of drama fundamentally misstated the limited scope of the law. The court failed to recognize that Section 51 has no application to a dramatic work, misallocated the evidentiary burdens that would apply if the Film had purported to be pure non-fiction, and confused the dramatization of plaintiffs' story with its material falsification.

A. The Trial Court Failed to Appreciate the Very Limited Way Section 51 Applies to Expressive Works

1. Expressive works are generally exempt from Section 51 liability, whether their purpose is to report the news or to entertain.

When Section 51 was enacted in 1903, the scope of constitutional protection afforded to speech and the press was constrained. Indeed, courts did not even apply the First Amendment to the U.S. Constitution to the States until 1925. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment). And it was not until decades later that the Supreme Court held that full First Amendment protection extended to works of fiction and entertainment. *See generally Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 797-98 (2011) (discussing the history of First Amendment protection for expressive works).

New York courts nonetheless quickly recognized that the Legislature did not intend Section 51 to apply generally to news accounts even though newspapers and magazines were produced commercially for profit. *See Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 56 (1913) (excepting news from Section 51 because reporting the news was not "within the evil sought to be remedied by that act"); *Colyer v. Richard K. Fox Publ'g Co.*, 162 A.D. 297, 299-300 (2d Dep't 1914) (rejecting Section 51 liability for use of an image in a magazine). But the courts also found that the "newsworthiness" exception to liability should not apply when a name or image was used simply to amuse an audience and enrich the maker of the work.

Binns, 210 N.Y. at 58; *see also, e.g.*, *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707 (1938) (holding that use of a photo in a newsreel did not violate Section 51, but subsequent use of same photo in a movie did); *Sutton v. Hearst Corp.*, 277 A.D. 155, 156-57 (1st Dep't 1950) (recognizing Section 51 claim for use of plaintiff's photo in "a pictorial article" that distorted events "to amuse and astonish the reading public" and increase the publisher's profits); *see also Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359 (1952) (reviewing the evolution of Section 51's newsworthiness exception).

The narrow scope originally accorded the newsworthiness exception to Section 51 liability had to be reconsidered after the U.S. Supreme Court rejected its underlying premise that the First Amendment applied only to newsworthy works. In *Winters v. New York*, the Supreme Court held that held that books pandering to readers with stories of "bloodshed or lust" were entitled to the same First Amendment protection afforded to the news because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right." 333 U.S. 507, 510 (1948). Just a few years later, the Court held that fictional motion pictures are also "a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The Court observed that "motion pictures are a significant medium for the

communication of ideas" and their importance "as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Id.*

In response, New York courts expanded the judicial exception to Section 51 liability to include works of entertainment where their fictional nature was evident. In *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452 (1st Dep't), *aff'd on opinion below*, 15 N.Y.2d (1965), the Court of Appeals held that Section 51 could not be applied to a book and movie telling a farcical story about the University of Notre Dame because fictional works were constitutionally protected after *Winters* and *Joseph Burstyn* and the challenged works were clearly fictional. Rejecting the earlier Section 51 line between works that "inform" and those that simply "amuse," the Court of Appeals acknowledged that "entertainment" is "a form of expression deserving of substantial freedom." 22 A.D.2d at 458 (internal marks omitted).

In most recently addressing the scope of Section 51, the Court of Appeals reaffirmed its broad exemption of expressive works like movies, "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 marks omitted). The Court cited with approval decisions rejecting Section 51 liability for works of humor, art and satire. *Id.* (citing *Altbach v. Kulon*, 302 A.D.2d 655, 658-59 (3d Dep't 2003) (dismissing Section 51 challenge to an

oil painting caricaturing town official as a devil); *Hampton v. Guare*, 195 A.D.2d 366, 366-67 (1st Dep't 1993) (dismissing challenge to the play "Six Degrees of Separation," which was "inspired" by plaintiff's crimes); *Notre Dame*, 22 A.D.2d at 457-58).

This broad exemption from Section 51 liability applies notwithstanding that an expressive work is made for a profit. Using a name or likeness in an expressive work is not a use for purposes of advertising or trade, regardless of a profit motive. *Messenger*, 94 N.Y.2d at 442; *see also Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140 (1985); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440 (1982). Unless an expressive work is an advertisement or an "advertisement in disguise," it is generally exempt from Section 51 liability. *Messenger*, 94 N.Y.2d at 444.

2. Section 51 liability for a newsworthy work can exist only where the work purports to be true but is materially false.

Section 51 liability may be imposed on an expressive work that is not an advertisement or promotional piece only in a very narrow circumstance, if at all. The Court of Appeals has indicated that an expressive work that purports to provide a true account of newsworthy events, but is materially and substantially false, may be subject to liability under Section 51 if it amounts to "nothing more than [an] attempt[] to trade on the persona" of a famous person. *Messenger*, 94 N.Y.2d at 446. Stated differently, the newsworthiness exception to liability is forfeited in the "rare case" where a work presented as non-fiction is "so infected

with fiction that it cannot be said to fulfill the purpose of the newsworthiness exception" to liability. *Alfano v. NGHT, Inc*., 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009). "The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not." *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328 (1966), *vacated by* 387 U.S. 239 (1967) (per curiam), *reinstated in relevant part by* 21 N.Y.2d 124 (1967).

The Court of Appeals most recently restated the test for determining when the newsworthiness exception is forfeited in *Messenger.* In that case, the photograph of a random 14-year-old model was used to illustrate a magazine's advice column featuring a letter that purported to be from a teenage girl who got drunk and had sex with three men. 94 N.Y.2d at 439. Because the issue of teen sex was newsworthy, and the image of a teenager had a real relationship to that issue, Section 51 did not apply, no matter how fictional the facts described in the article. *Id.* at 444-45.

Messenger explained that this exception to liability may be forfeited if a famous plaintiff's name is attached to a purportedly true biographical account that is mostly made up and simply seeks to exploit the commercial value of the name. *Messenger*, 94 N.Y.2d at 445-46. The Court in *Messenger* cited just two times in the twentieth century when it had found such liability from the misuse of a famous name, the 1913 *Binns* case and the 1967 *Spahn* case:

- John Binns was a wireless operator who became a celebrity after rescuing passengers from a sinking ship in 1909, and he asserted a Section 51 claim based a film presented to be "a true picture of the plaintiff and exhibited to the public as such," even though the portrayal was "mainly a product of the imagination." *Binns*, 210 N.Y. at 56, 57.

- Warren Spahn was a famous baseball player who brought a Section 51 claim based upon a book that "purport[ed] to be his biography," *Spahn*, 18 N.Y.2d at 328, but "made no effort and had no intention to follow the facts concerning [his] life." *Spahn*, 21 N.Y.2d at 127.

In both cases, the exploitation of a famous name in a largely made-up account was deemed "for the purposes of trade."[8] As this Court noted on an earlier appeal in this case, *Spahn* involved "an 'all-pervasive' use of imaginary incidents," and "the entire account" in *Binns* was "mainly a product of the imagination." JR108.

This Court found the *allegations* in Porco's complaint sufficient to state the type of Section 51 claim allowed in *Spahn* against a newsworthy work purporting to be true that was materially false. JR109. In this appeal, the undisputed record *facts* now show that plaintiffs have no such claim.

[8] Other courts, too, recognize that the use of a famous name in a made-up news item can be considered a commercial misappropriation. In *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983), for example, the *National Enquirer* published an article about Eastwood's involvement in a "love triangle" with two other celebrities that Eastwood alleged to be completely fabricated. *Id.* at 345. The court held that Eastwood had a viable claim under California's statutory equivalent of Section 51 if his famous name and likeness were in an article that was entirely false, but was "presented as true" to entice readers to purchase a copy of the tabloid. *Id.* at 349.

B. The Trial Court Erred as a Matter of Law in Finding that Section 51 Liability Could be Imposed on the Lifetime Film

The trial court found that *Messenger* states the controlling standard—that the newsworthiness exception to Section 51 does not apply to a purportedly true, newsworthy account if it is materially and substantially fictitious. *See* JR16-17. But the court failed to recognize that Section 51 liability does not apply in the first place to a work that is presented as fictional. The court then compounded this error by misstating the parties' burdens and by erroneously equating the use of dramatic storytelling devices with material falsification of the story.

Plaintiffs have no Section 51 claim because the Film was presented to viewers as dramatic entertainment, not-a-true to life documentary, and plaintiffs cannot in any event demonstrate that the material facts presented in the Film are substantially false. For each of these independent reasons, the opinion below should be reversed and judgment entered dismissing plaintiffs' claims.

1. Because the Film was presented as a fictionalized account, Section 51 does not impose liability for its use of plaintiffs' names.

As demonstrated above, Section 51 has no application to fiction, art, and other expressive works that do not purport to be literally true accounts of historic fact. *Lohan*, 31 N.Y.3d at 120; *Notre Dame*, 22 A.D.2d at 454-57. This principle applies fully to works that are "based upon" or "inspired by" actual events. *See, e.g.*, *Waters v. Moore*, 70 Misc. 2d 372, 375 (Sup. Ct. Nassau Cty. 1972)

(distinguishing the biography in *Spahn* from a book identifying itself as "based on an actual event"); *Rosemont Enters., Inc. v. McGraw-Hill Book Co.*, 85 Misc. 2d 583, 587 (Sup. Ct. N.Y. Cty. 1975) (no Section 51 liability for an imagined "autobiography" that was presented as fictional); *Hicks*, 464 F. Supp. at 433 (no Section 51 liability where a fictionalized account of a public figure was evidently fictitious).[9] If a fictionalized expressive work is not presented as an entirely true account, Section 51 simply has no application.

In *Time, Inc. v. Hill*, the U.S. Supreme Court underscored this distinction, finding no constitutional constraint to Section 51 liability so long as Section 51 is limited to works that contain a knowing and material falsification of a fact presented as true. 385 U.S. 374 (1967). It found Section 51 consistent with the First Amendment based expressly on its reading of *Spahn* as limiting Section 51 to the unauthorized publication of a materially and knowingly falsified book that "purported to be" a true biography. *Id.* at 385; *see also Leopold v. Levin*, 259 N.E.2d 250, 256 (Ill. 1970) (distinguishing biography at issue in *Spahn* from

[9] In passing a new post-mortem right of publicity bill earlier this year, the Legislature made clear that it holds this same understanding that Section 51 has no application to fictionalized works. *See* S05959, Gen. Assemb. 2019-2020 (N.Y. 2020). The new law will expressly impose no liability on any "fictional or non-fictional entertainment," *id.*, § 50-f(2)(d)(i), and this limitation was imposed specifically to align the new right of publicity with the scope of liability under Section 51. *See* Mem. in Support of A05605, Bill Jacket, S05959 (July 23, 2020) at 12 (new bill protects "essential first amendment rights consistent with current law while maintaining the current status of the right of privacy law").

movie, play, and book "suggested" by a notorious murder that were self-evidently dramatized and "not represented to be otherwise"); *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 804, 810 (Fla. 2005) (holding that the use of a real person's name in a movie "based on a true story" is not a commercial misappropriation). As the Restatement (Third) of Unfair Competition similarly explains, the "[u]se of another's identity in a novel, play, or motion picture is . . . not ordinarily an infringement" unless "the name or likeness is used solely to attract attention to a work that is not related to the identified person." Restatement (Third) of Unfair Competition § 47 cmt. c.

The trial court did not deny or dispute this limitation on Section 51 liability. To the contrary, it acknowledged that a Section 51 plaintiff may not "recover for a fictionalized account of true events where it is obvious to the viewer that the content is fictitious." JR17 n.2 (citing *Hicks*, 464 F. Supp. at 431-33). But the court then inexplicably failed to apply this controlling principle.

Lifetime has no liability under Section 51 because the Film was presented as a dramatic rendition of a true story, not a documentary. While the Film and its contents were not before this Court when it reversed the trial court's grant of Lifetime's motion to dismiss,[10] the summary judgment record establishes the

[10] This Court emphasized that the Film was not part of the factual record at that procedural stage and the content of the Film itself was not then considered. JA109 n.2.

Film's full disclosure that it is a "dramatization" of events, only "based on a true story." JR248 at 00:00:01.22, 01:28:33.73. The Film includes an express disclaimer that "some names have been changed, some characters are composites and certain other characters and events have been fictionalized." *Id.* at 01:28:33.73. And, if it were not self-evident, the opening and closing credits show that the Film was written by a screenwriter and the characters are portrayed by actors. *Id.* at 00:00:46.25-00:01:55.16, 01:28:51.01-01:29:34.10. Lifetime even underscored the Film's fictionalized status by televising a CBS-made documentary about Porco's crime and the real people involved immediately following the national premiere of the Film. JR1205.

The Film 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. 2020) ("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.").

Even without the types of disclaimers presented in the Film, "[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), *cert. denied*, 2019 U.S. LEXIS 69 (Jan. 7, 2019); *see also*, *e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 512-13 (1991) (disclosing that a work is a "docudrama or historical fiction" suggests that "quotations should not be interpreted as the actual statements of the speaker to whom they are attributed"); *Lovingood v. Discovery Commc'ns, Inc.*, 800 F. App'x 840, 847-48 (11th Cir. 2020) (viewers understand that docudramas do not "present verbatim dialogue from the pages of history" and that condensing newsworthy events into a dramatic film requires "selective editing of real history not only for time but also for clarity, flow, and emotional impact"), *cert. denied*, 207 L. Ed. 145 (May 26, 2020); *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995) (most viewers "are aware by now that parts of such programs are more fiction than fact"); *Davis*, 654 F. Supp. at 658 ("[s]elf-evidently a docudrama partakes of author's license").

The Film thus stands in stark contrast to the works presented as true accounts in *Binns* and *Spahn.* Because the Film was presented as a dramatic

rendition only "based on" real events, it is exempt from Section 51 to the same extent as the book and movie at issue in the *Notre Dame* case. As the Court of Appeals ruled there, in adopting the opinion of the First Department, Section 51 does not extend to material that "rational readers or viewers" would understand to be fictionalized. 22 A.D.2d at 455. For this reason alone, the trial court's denial of Lifetime's motion for summary judgment should be reversed.

2. Even considered as presenting a true story, the Film's use of plaintiffs' names does not violate Section 51.

Without addressing the Film's status as a docudrama, the trial court proceeded to analyze the Film as a work of non-fiction and then made two further reversible errors in applying the speech-protective standard that governs such purportedly true accounts. The court wrongly put the summary judgment burden on Lifetime to show that the Film was substantially true, and it then found that the use of dramatic devices to tell aspects of the story constituted evidence of a material falsification of the story told for the purpose of defeating summary judgment.

a. The trial court wrongly put the burden on Lifetime to prove that the Film is not materially false.

There is no serious dispute that the content of the Film is newsworthy and that plaintiffs have a real relationship to the story it tells. The trial court recognized that "the underlying story of Peter's murder, the attempted murder of

Joan, and Christopher's conviction is newsworthy." JR18. Plaintiffs never disputed this point, and their complaint concedes it. JR220 ¶5 ("The crimes that led to [Porco's] trial and the trial itself were subject to extensive media coverage."). Indeed, the subject matter of the Film is newsworthy as a matter of law. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (finding "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions" to be "without question events of legitimate concern to the public"); *Alfano*, 623 F. Supp. 2d at 359 (docudrama about organized crime addressed a "newsworthy" matter).

Because the plaintiffs have a real relationship to the newsworthy story the Film tells, the newsworthiness exception precludes Section 51 liability unless Lifetime is shown to have "invented biographies of plaintiffs' lives" in an "attempt[] to trade on" their names. *Messenger*, 94 N.Y.2d at 446. Even considering the Film as non-fiction, to defeat summary judgment it was plaintiffs' burden to demonstrate a genuine dispute as to whether the story told is so materially and substantially false that the Film is simply an effort to exploit the commercial value of their names. They did not and cannot do so.

The trial court erred in concluding that Lifetime should bear the burden on summary judgment to "establish that the film is not materially and substantially fictitious." JR21-22. In any action that seeks to impose liability on the

falsification of speech, the plaintiff must bear the burden of showing falsity. Putting the burden of proving truth upon those "who publish speech of public concern" impermissibly "deters such speech because of the fear that liability will unjustifiably result." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *see also Spahn*, 21 N.Y.2d at 127 (describing plaintiff's burden to demonstrate "material and substantial falsification"); *Molony v. Boy Comics Publishers*, 277 A.D. 166, 171 (1st Dep't 1950) (Section 51 bears burden of showing that work "is based on fiction rather than fact"). Lifetime's burden on summary judgment was only to proffer admissible evidence of facts accurately portrayed in the Film, which then shifted the burden to plaintiffs to prove the Film is materially and substantially false. *See Nekos v. Kraus*, 62 A.D.3d 1144, 1145-46 (3d Dep't 2009) (explaining shifting burdens on summary judgment with respect to falsity element of defamation).

b. The trial court mistook the use of dramatic devices and artistic license for material falsification.

The trial court compounded its error by finding that dramatic devices used in the Film to tell aspects of plaintiffs' story raise a question for the jury over the accuracy of the material facts about the story told. Specifically, it found a jury question based upon Lifetime's admission that the Film (1) "invented dialogue" and "mov[ed] conversations to different settings than that in which they actually took place," (2) "ascribed fictional names and created characters that are

composites of more than one actual person," (3) "portrays imagined interviews of some of the characters which are used to advance themes of Porco's manipulation and his friends' and family's denial that he committed the crimes," and (4) used "an apparent dramatization" in the title "*Romeo Killer.*" JR22; *see also* JR23 (repeating conclusion of jury question based on "the acknowledged dramatizations, composite characters, fictional dialogue and film title"). The first three of these issues concern only the way the story was told, not the truth of the facts presented; the last is an objection to the Film's creators' subjective characterization of Porco. None of these four identify a genuine dispute over the material *facts* in the Film.

Regardless of who bears the burden, the dramatic choices identified by the trial court do not, individually or collectively, create a question of fact about the substantial truth of the Film's story. Narrative devices, including "simulated dialogue, composite characters, and a telescoping of events," are fully capable of portraying the "essence" of fact, even if they are not the "literal truth." *Davis*, 654 F. Supp. at 658; *see also, e.g.*, *Masson*, 501 U.S. at 517 (no liability for "use of quotations to attribute words not in fact spoken" if "gist" of statements is substantially true); *Greene v. Paramount Pictures Corp.*, 813 F. App'x 728, 731 (2d Cir. 2020) (no liability where filmmakers "creat[ed] various composite characters who did not correspond to any single human being" and "assigned fictitious names" to characters); *Lovingood v. Discovery Commc'ns, Inc.*, 275 F.

Supp. 3d 1301, 1313 (N.D. Ala. 2017) ("changing the location in which a conversation took place and reducing the number of people involved in the conversation is not the sort of false information" that is actionable in a docudrama), *aff'd*, 800 F. App'x 840 (11th Cir. 2020). The open questions identified by the court involve the techniques of storytelling, not the truth of the facts told.

The difference between technique and truth is critical. For example, in opposing summary judgment, plaintiffs contended that the Film falsely depicted Mrs. Porco testifying at the bail hearing. JR1370 ¶12. The undisputed record establishes, however, that the Film presents, nearly *verbatim*, sentiments expressed in writing by Mrs. Porco, but portrays her saying them at the bail hearing for dramatic effect. JR891 at 41-42; JR1038(No.125); JR923; JR947; JR1054. The accurate substance of Mrs. Porco's sentiments is the relevant issue, not the dramatic device used to present them.

Plaintiffs' numerous claims of material falsification are all of the same ilk. For example:

- Plaintiffs did not deny that that the Film accurately conveys the substance of email exchanges between Porco and his parents about his financial problems and lies to cover them up (which were read into evidence at Porco's trial), but objected that the Film does so in the form of in-person conversations between Porco and his parents, rather than showing the characters sending and receiving the emails. *Compare* JR1051-1054; JR489, JR520, JR524-525, JR527-528, JR572, JR589, JR616; JR19 *with* JR1369-1370 ¶¶7,10; JR1377 ¶27;

- Plaintiffs did not deny that the Film accurately depicts Porco on the day after the crime having a computer conversation with his long-distance girlfriend, who told him that her sister reported police activity on Brockley Drive, but objected that the communication actually occurred at a different time of day and that Porco did not learn the police activity was in front of his home until later that day. *Compare* JR1024(No.78) *with* JR1374 ¶6.

- Plaintiffs did not deny that the Film accurately portrays Porco working for veterinarian friends after the crime, and that plaintiffs both stayed with them during the trial, but objected that it uses a composite veterinarian character and some invented conversations to convey those facts. *Compare* JR1017-1018(Nos.56-57); JR10 *with* JR1371 ¶15; JR1376 ¶16; and

- Plaintiffs did not deny that the Film accurately conveys both the guilty verdict and Mrs. Porco's dismay, but objected that it shows her reacting to the verdict in the courtroom, rather than in her hotel room. *Compare* JR1060; JR11 *with* JR1371 ¶17.

As these examples make plain, it is the Film's storytelling techniques to which the plaintiffs object, not the truth of the story itself. Their interrogatory answers confirm that plaintiffs consider any aspect of the Film that is not entirely true to life, as when "fictional characters are interacting with real persons," to be "inherently false." JR732; JR830.

Courts have consistently recognized that such "literary license to fit historical detail into a suitable dramatic context" is entirely permissible and appropriate. *Davis*, 654 F. Supp. at 658; *see also Molony*, 277 A.D. at 171 (no Section 51 liability merely because "persons are impersonated who are in the public eye, and the events dramatized"); *Meeropol v. Nizer*, 381 F. Supp. 29, 35,

38 (S.D.N.Y. 1974) (no Section 51 liability for using "approximations of conversations" or other "deviations from or embellishments upon" the facts obtained from sources), *aff'd in relevant part*, 560 F.2d 1061, 1065 (2d Cir. 1977). Storytellers need, and the New York law provides, the right to present true facts in altered settings. The record shows that the Film did nothing more.

None of the many "falsifications" cited by plaintiffs in opposing summary judgment refutes the substantial truth of the story told in the Film and, tellingly, plaintiffs did not directly refute any of the 151 undisputed facts upon which Lifetime moved for summary judgment. JR1004-1050; JR1368-1394. If using the types of dramatic devices cited by plaintiffs required a jury assessment of the materiality of the fictionalization, virtually any film telling a story based upon a real event would be subject to a jury trial on a Section 51 claim.[11] Films using the names of real people to tell important stories, like *The Social Network* (story of Facebook's founding), *Sully* (story of emergency plane landing in the Hudson River), or *The Post* (story of historic Pentagon Papers disclosure), would all face the risks of litigation, costs of discovery and trial, and potential civil or criminal

[11] And contrary to the trial court's conclusion that "[m]ateriality is a question for the trier of fact," JR26, courts routinely dismiss speech-based claims as a matter of law when the plaintiff fails to prove that a material fact is substantially false. *See, e.g.*, *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 252-53 (2014); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383 (1977); *Cusimano v. United Health Servs. Hosps., Inc.*, 91 A.D.3d 1149, 1151 (3d Dep't 2012).

sanctions. When asked at oral argument, plaintiff's counsel acknowledged that four of the Oscar-nominated best pictures that year—*BlacKkKlansman*, *Bohemian Rhapsody*, *Green Book*, and *Vice*—all faced potential Section 51 liability under this sweeping approach that treats fictional elements as falsehoods when telling a story based on true events. JR79:18-80:11.

Nor does the trial court's identification of the Film's title, *Romeo Killer*, as "another dramatic element," create a jury fact about material falsification. The court noted "that Porco had a girlfriend at the time of the crime, briefly dated the daughter of Detective Arduini, and had letters of support from four female friends at his sentencing hearing," but considered these "romantic interests" insufficient to warrant the "Romeo" label.[12] JR22-23. Any implication conveyed by the title is not evidence of material falsification, but, at most, a matter of opinion that receives absolute protection under the State and Federal constitutions. *See generally Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991).

Overall, the trial court's approach would impose Section 51 liability for what is essentially a claim for "false light invasion of privacy," that is, for portraying an individual unflatteringly as someone that person is not. But the Court of Appeals has repeatedly made clear that Section 51 imposes no such

[12] The trial court overlooked additional evidence that Christopher dated multiple women after the crime and while he was under police investigation. JR1012-1015(Nos.38,53); JR991; JR987; JR989.

liability, and false light is not recognized anywhere in the laws of this State. *See Messenger*, 94 N.Y.2d at 448; *Howell*, 81 N.Y.2d at 123-24; *see also Alfano*, 623 F. Supp. 2d at 360 n.4.

Moreover, under the trial court's approach the danger zone between fully protected newsworthy content and fully protected works of fiction is entirely undefined and left to a jury as "a matter of opinion." JR26. On top of its other fatal problems, this approach renders Section 51 void for vagueness and unenforceable because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (outlining conditions under which a statute is "impermissibly vague"). Such lack of guidance is particularly intolerable in the context of regulations of speech, where vagueness "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). The trial court fundamentally misconstrued Section 51.

The trial court reached its erroneous result by relying upon pre–*Notre Dame* precedent and framing the factual issue as "whether the [Film is] educational or informative, or whether the [Film's] primary purpose, as the complaint alleges, was to amuse and astonish." JR26 (quoting *Sutton*, 277 A.D. at 156-57). This ignores the U.S. Supreme Court's admonition in *Winters* that "[t]he line between

the informing and the entertaining is too elusive" for the protection of free speech, 333 U.S. at 510, and contravenes the Court of Appeals' rejection of the distinction between news and entertainment as the basis of Section 51 liability in *Notre Dame*.

The "acknowledged dramatizations, composite characters, fictional dialogue, and film title" identified by the trial court as the basis for denying Lifetime's summary judgment motion, JR23, do not create a material question of fact about the substantial truth of the story told in the Film. Summary judgment should have been entered dismissing the Complaint.

c. *The summary judgment record establishes the substantial truth of the story told in the Film.*

Even if the burden could properly be placed on Lifetime, the undisputed record establishes that the story told in the Film is not materially and substantially false. After thoroughly combing through plaintiffs' claims of fabrication and falsification, the trial court concluded that plaintiffs did "not assert that the depictions of the crimes, investigation as a whole, or trial, with the exception of Joan's testimony, are false."[13] JR25. The summary judgment record leaves no doubt that the story told in the Film is substantially true.

[13] As discussed above, the reference to "Joan's testimony" is apparently the Film's depiction of Mrs. Porco saying things at the bail hearing that she instead said in writing. *See supra* n.7.

The trial court expressly found that the Film "contains many elements drawn from [the] truth" of plaintiffs' story, JR22, and concluded that the guilty verdict at Porco's trial necessarily established the truth of the Film's portrayal of how the crime was committed, which closely tracked the evidence at trial. JR20-21. The trial court also found indisputably true a litany of facts presented in the Film concerning the Porco family, the police investigation, the public response to the crime, and the trial in which Porco was convicted. JR8-11, JR18-19 n.3. Among the Film's many true facts the court identified were:

- The makeup of the Porco family, the location of the crime, and the manner in which it was carried out;
- The details of the police investigation, including specific statements made by Porco and others;
- The absence of physical evidence linking Porco to the crime and the inculpatory evidence used to establish Porco's guilt at trial;
- The evidence presented at trial of Porco's motive, including high credit card balances, prior theft of his mother's computer, and his father's anger over Porco's handling of his finances;
- The prosecution's theory of the crime presented and the defense offered at trial by Porco's counsel; and
- Mrs. Porco's lack of memory of the night of the crime and her belief in her son's innocence.

See JR19 n.3.

In addition to the undisputed facts accepted by the trial court, Lifetime identified additional true facts portrayed in the Film that the trial court erroneously

declined to consider because it found them supported by inadmissible hearsay. *See* JR18-21. The court did not consider, for example, the truth of facts in the Film that had been contemporaneously reported in local newspapers, or recounted in a book and documentaries about the crime. But this evidence was offered for a non-hearsay purpose—regardless of the truth of the facts reported, these reports show that the Film was not "mainly a product of the imagination." *Messenger*, 94 N.Y.2d at 445. The trial court also mistakenly declined to consider facts in the Film drawn from sworn testimony during Porco's trial, even though CPLR 3212(b) permits consideration on summary judgment of "any item of proof as reliable as an affidavit." *State v. Metz*, 241 A.D.2d 192, 199 (1st Dep't 1998). Trial testimony given under oath is "arguably far more reliable than an affidavit," *id.* at 200, and there was no reason to disregard the testimony on summary judgment given that plaintiffs made no effort at all to dispute its truth "with affidavits or other proof," *id.*

The extensive summary judgment record demonstrates that plaintiffs have no Section 51 claim. As the trial court itself concluded, the inaccuracies identified by plaintiffs "are disturbing" to them, but "they do not render the film mainly a product of the imagination as a matter of law." JR25 (internal marks omitted). Thus, even if the Film had been presented as an entirely true account, plaintiffs plainly have no claim. The trial court's decision should be reversed, and summary

judgment should be entered dismissing plaintiffs' Complaint for this reason as well.

II.
IF SECTION 51 IMPOSES LIABILITY ON THE LIFETIME FILM, IT IS UNCONSTITUTIONAL

To the extent this Court agrees that Section 51 does not impose liability on the Film, it need not address the constitutionality of the trial court's interpretation of the statute. If, however, this Court determines on the summary judgment record that the existence of Section 51 liability remains a question for the jury, it must consider whether the U.S. Constitution permits such a result. It does not.

The trial court's ruling poses a grave threat to the expressive rights of screenwriters, playwrights, and authors generally. If permitted to stand, its decision would effectively give individuals involved in a newsworthy event a veto power over how they are portrayed in movies, plays, and books based upon those events, and even whether the stories can be told at all. As recognized in *Notre Dame*, if Section 51 applied so broadly "the apprehension of criminal or civil sanctions that would understandably be entertained by cautious souls" would have an impermissibly "inhibiting effect on freedom of expression." 22 A.D.2d at 457.

The trial court dismissed any constitutional concern out of hand, asserting that "liability based on knowingly false content does not run afoul of the First Amendment." JR16. In doing so, it relied on the U.S. Supreme Court's decision

in *Time, Inc. v. Hill*, and this Court's earlier ruling on the sufficiency of Porco's original complaint, *id.*, but neither decision supports the constitutionality of Section 51 as construed by the trial court.

Hill involved a Time magazine article that falsely described a Broadway play that was based on events drawn from three different crimes involving hostage situations, as presenting the true account of a crime in which James Hill and his family were held hostage. 385 U.S. at 376-79. The plaintiff alleged that this depiction was knowingly and materially false. *Id.* at 378. In that context, the Supreme Court held that "the constitutional protections for speech and press preclude the application of [Section 51] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88. It allowed that Hill could assert a claim consistent with the First Amendment if he could prove a knowing and substantial falsity, but it set aside the jury verdict in that case, in part because the jury instructions did not clearly differentiate "falsification" from "fictionalization." *Id.* at 386.

Hill does not answer the constitutional question presented in this case for two reasons: (1) the Supreme Court in *Hill* precluded Section 51 liability as barred by the First Amendment unless it was based upon a knowing and materially false *fact*, which the trial court here did not require, and (2) as the Supreme Court itself

later explained, in deciding *Hill* the Court thought "it was adjudicating a 'false light' privacy case involving a matter of public interest, not a case involving . . . 'appropriation' of a name or likeness for the purposes of trade." *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562, 571-73 (1977) (citations omitted). The Court of Appeals has since made clear a false light claim is not cognizable under Section 51. *See Messenger*, 94 N.Y.2d at 448; *Howell*, 81 N.Y.2d at 123-24.

Nor does this Court's earlier opinion in this case resolve the constitutional issue. It relied upon *Spahn*, which addressed the constitutional constraint by holding that a work must be "infected with material and substantial falsification."[14] 21 N.Y.2d at 127. Again, that is not the standard applied by the trial court. To the contrary, the trials court's focus on fictionalization and dramatic devices requires no material falsity at all. None of the cited precedent finds it permissible under the First Amendment to sanction an expressive work based on a true, newsworthy story that presents no substantially false material fact.

[14] It is not clear that the Supreme Court considered *Spahn*'s application of Section 51 after *Hill* to accord with the First Amendment. It had accepted for review the Court of Appeals' initial decision in *Spahn*,18 N.Y.2d 324, and then remanded the case for reconsideration in light of *Hill*. *See* 387 U.S. 239 (1967) (remanding *Spahn*). When the Court of Appeals affirmed its original judgment, 21 N.Y.2d 124, the Supreme Court noted probable jurisdiction and put the case back on its docket. *See* 393 U.S. 818 (1968). The case was then resolved by the parties and the Supreme Court dismissed the appeal. *See* 393 U.S. 1046 (1969).

Moreover, since 1967 the U.S. Supreme Court has expanded the scope of constitutional protection afforded to speech on matters of public concern, even when the speech is knowingly false. In *United States v. Alvarez*, for example, the Court held that some knowingly false speech must be protected to ensure "an open and vigorous expression of views in public and private conversation." 567 U.S. 709, 718 (2012). This holding followed several others limiting a state's ability to punish inaccurate statements and fictionalizations. *See, e.g.*, *Hepps*, 475 U.S. at 778-779 (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) (rejecting rule imposing "strict liability on a publisher for false factual assertions" that would have an "undoubted 'chilling' effect on speech"); *Masson*, 501 U.S. 517 (holding that First Amendment sometimes insulates even "a deliberate alteration of the words uttered by a plaintiff").

Since *Hill,* the Supreme Court has allowed the imposition of liability on false, newsworthy speech in only two contexts: commercial speech and defamation. *See Alvarez*, 567 U.S. at 717 (identifying categories of unprotected speech); *Brown*, 564 U.S. at 791 (same). To the extent that Section 51 regulates advertising and promotional speech, it may be a permissible regulation of commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*,

447 U.S. 557, 563 (1980) (First Amendment "accords a lesser protection to commercial speech"). But to the extent Section 51 sanctions newsworthy, expressive speech that is neither materially false nor defamatory, it violates the First Amendment.

Most recently, in *Reed v. Town of Gilbert*, the Supreme Court held that "[c]ontent-based laws" that target speech based on its content, like Section 51, "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 576 U.S. 155, 163 (2015). When Section 51 is properly cabined to the domain of commercial speech, its restrictions can withstand constitutional scrutiny; but when a Section 51–type claim is asserted against an expressive work, whether "factual and biographical or fictional," it simply does not "outweigh the value of free expression." *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461-62 (Cal. 1979) (Bird, C.J., concurring); *see also Sarver v. Chartier*, 813 F.3d 891, 905-06 (9th Cir. 2016) (finding no compelling state interest in applying right of publicity, "a content-based speech restriction," to expressive works about "the stories of real individuals").

Courts around the country have consistently found no constitutional justification for imposing Section 51–type liability on docudramas and similar expressive works. For example, a California appellate court recently dismissed on

First Amendment grounds a lawsuit challenging the unauthorized portrayal of a famous actress in a television docudrama. The court rejected her right of publicity claim because the First Amendment fully protects "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." *de Havilland*, 230 Cal. Rptr. 3d at 638 (internal marks omitted). Individuals do "not own history," the court explained, and no one has "the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people." *Id.* at 630.

This holding is consistent with many others around the country that have rejected liability claims for the use of a plaintiff's name or identity. For example:

- In *Sarver v. Chartier*, the Ninth Circuit found the use of the plaintiff's name and likeness in a fictionalized film about his life to be fully protected by the First Amendment. 813 F.3d at 902-06;
- *Moore v. Weinstein Co., LLC* held that the First Amendment protected the use of the plaintiff's identity in a film about soul singers that "added significant expressive elements." 545 F. App'x 405, 409 (6th Cir. 2013);
- *Matthews v. Wozencraft* held that the First Amendment protected the use of the plaintiff's persona in a novel. 15 F.3d 432, 438 n.5, 440 (5th Cir. 1994);
- *Brown v. Showtime Networks, Inc.* held that "a right of publicity cause of action may not be maintained against expressive works, whether factual or fictional." 394 F. Supp. 3d 418, 437 (S.D.N.Y. 2019) (internal marks omitted);

- *Ruffin-Steinback v. dePasse* dismissed a right of publicity claim arising from docudrama because the "First Amendment considerations" that protect "depictions of life stories" are "no less relevant whether the work is fictional, nonfictional or a combination of the two." 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001);

- *Seale v. Gramercy Pictures* held that the First Amendment protected the use of the plaintiff's persona in a dramatized film about the Black Panthers. 949 F. Supp. 331, 337-38 (E.D. Pa. 1996); and

- *Tyne v. Time Warner Entertainment Co.* held that the First Amendment protected the use of the plaintiffs' names in a book and movie about their lives that took fictional liberties. 901 So. 2d 802, 810 (Fla. 2005).

Consistent with these widespread holdings, imposing liability on Lifetime on the undisputed facts of this case would plainly violate the First Amendment.

Indeed, while the Court of Appeals has not yet had occasion to address the constitutionality of Section 51 as applied to a docudrama, in *Lohan* it recently agreed that the "freedom of speech and the press . . . transcends the right to privacy," 31 N.Y.3d at 120 (internal marks omitted). Other New York courts, including this one, have also recognized that imposing liability for the use of a real person's identity in a non-defamatory work would contravene the First Amendment. *See, e.g.*, *Altbach*, 302 A.D.2d at 657-58 ("artistic expressions . . . are entitled to protection under the First Amendment and excepted from New York's privacy protections"); *Foster v. Svenson*, 128 A.D.3d 150, 156 (1st Dep't 2015) (newsworthiness exception to Section 51 necessary to protect "literary and

artistic expression"); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769 (1st Dep't 1980) ("right of free expression" barred claim for use of Marilyn Monroe's identity in book); *Sondik v. Kimmel*, 33 Misc. 3d 1237(A), 2011 N.Y. Misc. LEXIS 60732, at *13 (Sup. Ct. Kings Cty. Dec. 15, 2011) ("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); *Hicks*, 464 F. Supp. at 431-33 (First Amendment barred a Section 51 claim arising from the fictionalized use of Agatha Christie's name and character); *Rogers v. Grimaldi*, 875 F.2d 994, 998-1005 (2d Cir. 1989) (claims arising from the use of Ginger Rogers' name in the title of a film were precluded based on "First Amendment values," as the title was related to the content of the fictional film).

The trial court's ruling is unconstitutional because its removal of any obligation to establish material falsity essentially grants individuals a veto over how they are portrayed in expressive works. That flatly violates the First Amendment and cannot be squared with New York's "rich tradition" of "providing the broadest possible protection" to free speech and press. *Immuno AG*, 77 N.Y.2d at 249; *see also Brown*, 394 F. Supp. 3d at 439 ("no acquisition agreement is required where First Amendment concerns are implicated").

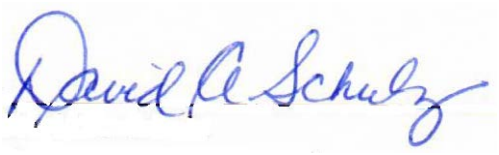
CONCLUSION

For each and all the foregoing reasons, this Court should reverse the trial court order denying Lifetime's motion for summary judgment and dismiss plaintiffs' Second Amended Complaint in its entirety, with prejudice.

Dated: September 30, 2020

Respectfully submitted,

BALLARD SPAHR LLP



By:_____
David A. Schulz
Charles D. Tobin
Elizabeth Seidlin-Bernstein
1675 Broadway, 19th Floor
New York, NY 10019-5820
Telephone: 212.223.0200
Facsimile: 212.223.1942
schulzd@ballardspahr.com
tobinc@ballardspahr.com
seidline@ballardspahr.com

Attorneys for Defendant-Appellant-Cross-Respondent Lifetime Entertainment Services, LLC

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