IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN MILWAUKEE DIVISION

ANDREW L. COLBORN, **Plaintiff,** **vs.** **NETFLIX, INC.; CHROME MEDIA LLC, F/K/A SYNTHESIS FILMS, LLC; LAURA RICCIARDI; AND MOIRA DEMOS,** **Defendants.**	**Civil No.: 19-CV-484-BHL**

DECLARATION OF LEITA WALKER

I, Leita Walker, under penalty of perjury and subject to 28 U.S.C. § 1746, declare as follows:

1. I am one of the attorneys for the Defendant Netflix, Inc. ("Netflix") in the above-captioned action. I have personal knowledge of the matters set forth herein. I make this declaration in support of Defendant Netflix, Inc.'s Opposition to Plaintiff's Motion for Order Imposing Sanctions and Cross-Motion for an Award of Attorneys' Fees.

2. On March 12, 2020, before the parties had held a Rule 26(f) conference, counsel for Plaintiff Andrew Colborn improperly served on Netflix what was captioned as a "second" set of requests for production of documents, a copy of which was filed as Exhibit 1 to the Declaration of April Rockstead Barker ("Barker Decl."). *See* Barker Sanctions Decl. Ex. 1 (Dkt. 192-1). In the following weeks, I conferred repeatedly with Ms. Barker via telephone and email regarding those requests and discovery issues more broadly. As reflected in those emails, which

were earlier filed with this Court at Dkt. 164-1, I informed Ms. Barker of Netflix's position that discovery was unnecessary and unwarranted to support Colborn's opposition to Netflix's then-pending motion to dismiss the Second Amended Complaint ("SAC"). I also informed Ms. Barker (and she acknowledged) that, because of the lockdown measures imposed in California and elsewhere in response to the newly declared COVID-19 pandemic, conducting discovery would be difficult, if not impossible, for all parties as a practical matter. *See* Decl. of A. Barker in Supp. of Mot. to Compel Ex. 1 at 2 (Dkt. 164-1). These discussions occurred while I was counsel of record for all Defendants and before the Producer Defendants – Laura Ricciardi, Moira Demos, and Chrome Media – notified the Court they had retained separate counsel to represent them in this litigation. *See* Stipulaton for Substitution of Counsel (Dkt. 124).

3. During these discussions, I neither stated nor implied that Netflix had or did not have the raw footage of Steven Avery's trial in its possession. At the time, Netflix employees and counsel had limited access to the company's files because of the pandemic lockdown measures. Because I did not want to mislead opposing counsel regarding a discovery issue, even inadvertently, I did not want to make representations regarding Netflix's possession or lack of possession of the raw footage until a full search could be made and I could answer the question with confidence.

4. Once I was able to answer the question with confidence, in September 2020, I told Ms. Barker that Netflix did not have and never had the raw footage from the Avery murder trial. *See* Barker Sanctions Decl. Ex. 5 at 1 (email informing Ms. Barker Netflix did not have raw footage).

5. After the parties' unsuccessful mediation, I sent an email to Ms. Barker in March 2021 reiterating that, "to avoid any surprises," Netflix's position that the removal of this action

to federal court rendered Colborn's "first" set of discovery requests null and void. I told Ms. Barker that Netflix would answer those discovery requests if they were properly served, but urged her to modify the requests to take into account the developments in the case since it was first filed in state court. A true and correct copy of that email is attached hereto as Exhibit A. To date, neither I nor any other counsel for Netflix has received a response to this email.

6. This Court denied Defendants' pending motions to dismiss on May 26, 2021 and Netflix began identifying and collecting documents potentially relevant to this litigation within days of that order. Ultimately, it collected approximately 20,000 documents, and it used search terms to reduce that set to approximately 8,000 potentially relevant documents. Netflix has now been systematically reviewing those documents for weeks.

7. Approximately one month after the Court entered its order denying the motions to dismiss, Colborn mailed what was captioned as his "third" set of discovery requests to counsel for Netflix on June 16, 2021 (these were actually the *first* set of discovery requests properly served pursuant to the federal rules, coming more than 13 months after the parties' Rule 26(f) conference). I received those requests in my office on June 24, 2021. Netflix timely served its responses and objections to those discovery requests on July 19, 2021 and again noted its position that Colborn's "first" set of requests were never properly served. *See* Barker Sanctions Decl. Ex. 17 at 1 n.1. Colborn's counsel has not contested the scope of those responses and objections.

8. Counsel for the parties in this matter also began negotiating on an agreed protective order in this case in June 2021. *See* Barker Sanctions Decl. Ex. 16. On June 23, Kevin Vick, counsel for the Producer Defendants, circulated to counsel for the parties a proposed protective order based on this Court's template. *Id.* at 1. Ms. Barker did not respond until July

19, when she emailed a redline of the proposed protective order to me and Mr. Vick. A true and correct copy of that email is attached hereto as Exhibit B.

9. After a status conference with the Court on July 28 in which the protective order was discussed, Mr. Vick circulated to counsel for the parties on July 30 a copy of this Court's protective order template along with a proposed stipulation to address the issues raised at the conference. A true and correct copy of that email is attached hereto as Exhibit C.

10. On August 26, 2021, I emailed Ms. Barker and her co-counsel, George Burnett, a draft protocol for production of electronically stored information ("ESI"). *See* Barker Sanctions Decl. Ex. 20. As I had informed Ms. Barker on August 23, *see id.* Ex. 19, the ESI protocol addressed the format(s) in which ESI would be produced, Bates numbering of ESI, and other issues regarding ESI. *Id.* Ex. 20 at 2-13. In response to Ms. Barker's objections, I replied that Netflix wanted the ESI protocol because discovery potentially involves documents spanning many years, "and without a simple protocol we fear that Mr. Colborn will produce his responsive documents, which include not only email but also text messages and social media content, in unuseable formats, which will waste everyone's time, delay the litigation, and may necessitate involving the court." *Id.* Ex. 22 at 1.

11. The parties held a meet-and-confer telephone call on September 16, 2021. Those attending included myself, Ms. Barker, Mr. Vick, and James Friedman, who is local counsel for all Defendants.

12. During that call, I informed Ms. Barker that Netflix believed having ground rules regarding the production of ESI would be fair and beneficial to all parties. I also offered to provide an extension of time for Colborn to reply to Netflix's discovery requests, which had been served on September 3, provided that Ms. Barker requested an extension. I noted that the parties

had, in good faith and as a matter of professional courtesy, agreed to extensions of deadlines previously in the litigation.

13. In addition, I explained to Ms. Barker that drafting and discussing the ESI protocol had not delayed Netflix's collection, review and eventual production of responsive documents. I informed Ms. Barker, however, that the facts that Netflix first began negotiating with the producers of "Making a Murderer" in 2013, the series premiered in 2015, and Colborn filed suit in 2018, meant that collecting, reviewing and producing all of the records responsive to Colborn's June 2021 discovery requests would take some time. I told Ms. Barker that Netflix intended to make a small production, primarily consisting of licensing agreements, shortly after the meet-and-confer call, followed by productions of responsive documents on a rolling basis, with the goal of completing most of the production by mid-October.

14. I also informed Ms. Barker that Netflix was coordinating with Mr. Vick to review documents in the possession of both sets of defendants, to avoid duplication of efforts and the necessity for Colborn's counsel to review multiple copies of the same documents. Mr. Vick said that his law firm recently had an associate resign and that, as a result, he might need a few more weeks, beyond mid-October, to complete the Producer Defendants' production. Ms. Barker said she understood Mr. Vick's staffing situation and did not object to his taking more time. I believed, based on this conversation, that Ms. Barker understood that although Netflix's production would be largely complete by mid-October, correspondence between the Defendants, reviewed in conjunction with Mr. Vick's firm, might be delayed by two to three weeks.

15. During that call, Ms. Barker did not raise or seek to resolve any other discovery issues, nor did she threaten to file any motions to compel or for sanctions. Instead, Ms. Barker

agreed to consult with her co-counsel about the ESI protocol and the sequencing of discovery to see if an agreement could be reached.

16. Shortly after the call ended, I sent an email to Ms. Barker summarizing the discussion and asking her to let me know if she had a different understanding. Barker Sanctions Decl. Ex. 24 at 1. Ms. Barker did not respond to this email, despite that request for clarification.

17. As promised, Netflix the following day produced seven documents totaling 135 pages.

18. Netflix made a second production of documents on September 27, 2021, consisting of four Excel spreadsheets and 60 documents. Colborn's responses to Netflix's first set of discovery, served on October 6, referenced many of these documents.

19. Without any warning, Colborn filed a Motion for Order Imposing Sanctions on September 24, 2021 (Dkt. 190). In response, my colleague Mr. Friedman called Ms. Barker on September 27 and attempted to persuade her that the motion was meritless and inappropriate. Mr. Friedman asked Ms. Barker to withdraw the motion, but she refused.

20. I wrote to Ms. Barker on October 7, 2021, again pointing out the motion's lack of any basis in fact or law and again asking for it to be withdrawn. A true and correct copy of that correspondence is attached hereto as Exhibit D.

21. Netflix made another production today, October 15, 2021, consisting of 347 documents responsive to Colborn's "third" set of document requests. Thus, it believes it has now produced the bulk of nonprivileged documents in its possession that are responsive to those requests, setting aside correspondence among Defendants that I told Ms. Barker was being reviewed in coordination with Mr. Vick's firm. In addition, Netflix is investigating whether potentially relevant documents may be stored on various third-party platforms, such as Pix and

Vimeo, referenced in documents its counsel recently reviewed and produced. Netflix anticipates that any remaining responsive, nonprivileged documents will be produced within the next few weeks.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 15, 2021

/s/ *Leita Walker*__
Leita Walker

Exhibit A

Kelley, Matthew E. (DC)

From: Walker, Leita (Minn) <WalkerL@ballardspahr.com>
Sent: Monday, March 15, 2021 2:22 PM
To: April Barker
Cc: Kelley, Matthew E. (DC); Friedman, James
Subject: Colborn v. Netflix -- discovery requests

Hi, April,

With the mediation behind us, we are cognizant of Judge Ludwig's statement back in December that discovery responses will be due two weeks after he rules on the pending motions to dismiss, should any portion of the case survive. So as to avoid any surprises, we wanted to put you on notice that Netflix plans to respond only to Plaintiff's Second Request for Production of Documents to Netflix, Inc., which were served March 12, 2020. We will also provide initial disclosures within two weeks of the court's ruling, assuming the case against Netflix is not dismissed in its entirety.

We do not plan to respond to the first set of discovery requests served with the state court complaint nearly two years ago. Those discovery requests were rendered null and void by the removal to federal court. If you wish to properly serve those requests pursuant to the federal rules, we will answer them in the time frame provided by the rules or two weeks after the court rules on the pending motions, whichever is later. We do hope that, before serving those requests you'll consider developments in the case over the past two years and tailor the requests accordingly so as to simplify matters and avoid unnecessary disputes.

Sincerely,

Leita Walker

Ballard Spahr LLP

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walkerl@ballardspahr.com

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Exhibit B

Kelley, Matthew E. (DC)

From: April Barker <abarker@sbe-law.com>
Sent: Monday, July 19, 2021 3:19 PM
To: Kevin Vick; Walker, Leita (Minn)
Subject: Protective Order
Attachments: Protective Order Draft 7.19.21.docx

⚠ EXTERNAL

Kevin and Leita,

I am attaching the redlined protective order that you sent with one change to the preamble. We don't know that there really is information that warrants production under seal, but are willing to stipulate to entry of the protective order to facilitate our receiving discovery, so we are not comfortable stipulating to broad factual representations that may be applicable in other cases.

If we can now finalize this, please let me know so that we can e-file it and make arrangements for production of responsive documents.

Thank you,
April

April Rockstead Barker | Attorney
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✉ E: abarker@sbe-law.com
Web: www.sbe-law.com

Exhibit C

Kelley, Matthew E. (DC)

From: Kevin Vick <kvick@jassyvick.com>
Sent: Friday, July 30, 2021 7:53 PM
To: April Barker
Cc: Walker, Leita (Minn); Friedman, James
Subject: RE: Protective Order
Attachments: image007.wmz; Stipulation Re Proposed Protective Order, JVC Draft 07 30 21.DOCX; Protective Order, Revised Draft E.D. Wis. Model Order, 07 30 21.docx

⚠ EXTERNAL

April,

In light of your making Plaintiff's position clear at Wednesday's status conference and Judge Ludwig's comments regarding his approach to protective orders generally, I thought maybe we should just propose the E.D. Wisconsin model protective order without any changes. I styled this as a stipulation, but I drafted the stipulation to make clear that the parties (including Plaintiff) were entering into it out of a desire to expedite discovery, but it is the Defendants who are representing that they believe confidential material will be produced, as I understand that you didn't want to be seen as making any admission on that score at this point.

Please let me know your thoughts.

Best,

Kevin

JASSY VICK CAROLAN
LOS ANGELES SAN FRANCISCO

**** PLEASE NOTE NEW OFFICE ADDRESS ****

Kevin L. Vick
Jassy Vick Carolan LLP | 310-870-7048 | kvick@jassyvick.com
335 S. Grand Ave., Suite 2450 | Los Angeles, CA 90071
jassyvick.com

From: April Barker <abarker@sbe-law.com>
Sent: Tuesday, July 27, 2021 9:33 AM
To: Kevin Vick <kvick@jassyvick.com>
Cc: Walker, Leita <WalkerL@ballardspahr.com>
Subject: RE: Protective Order

Hi Kevin,

This issue may counsel in favor of styling the request for a protective order as an unopposed motion rather than a stipulation.

I am thinking that a motion could indicate something to the effect of "Plaintiff's counsel have advised that in the interests of expediting the exchange of discovery materials, they do not object to entry of the proposed protective order."

Then it would make perfect sense to replace the preamble with something to the effect of, "Based on the unopposed motion of Defendants…"

Let me know if this approach will solve the problem.

Thank you,
April

April Rockstead Barker | Attorney

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From: Kevin Vick <kvick@jassyvick.com>
Sent: Monday, July 26, 2021 5:04 PM
To: April Barker <abarker@sbe-law.com>
Cc: Walker, Leita <WalkerL@ballardspahr.com>
Subject: RE: Protective Order

April,

With regard to your redline in the preamble on page 1, I think I understand your concern. However, Section (D) of the E.D. Wis. Model Protective Order gives Plaintiff the opportunity to challenge confidentiality designations. The reason I raise this is because I worry that deleting the language in the preamble might lead Judge Ludwig to believe that the parties are in fundamental disagreement whether a protective order is appropriate, when all parties want one (even if for somewhat different reasons, at least at this point, although please keep in mind that we may ask Mr. Colborn for material in discovery that he may want to designate as confidential too). To further address your concern, we could note in the separate stipulation (which you and I discussed would accompany the proposed protective order) that while the parties all request a protective order to expedite the exchange of discovery, it is the Defendants who believe that discovery will entail the production of confidential information.

Please let me know your thoughts.

Thanks,

Kevin

**** PLEASE NOTE NEW OFFICE ADDRESS ****

Kevin L. Vick
Jassy Vick Carolan LLP | 310-870-7048 | kvick@jassyvick.com
335 S. Grand Ave., Suite 2450 | Los Angeles, CA 90071
jassyvick.com

From: April Barker <abarker@sbe-law.com>
Sent: Monday, July 19, 2021 12:19 PM
To: Kevin Vick <kvick@jassyvick.com>; Walker, Leita <WalkerL@ballardspahr.com>
Subject: Protective Order

Kevin and Leita,

I am attaching the redlined protective order that you sent with one change to the preamble. We don't know that there really is information that warrants production under seal, but are willing to stipulate to entry of the protective order to facilitate our receiving discovery, so we are not comfortable stipulating to broad factual representations that may be applicable in other cases.

If we can now finalize this, please let me know so that we can e-file it and make arrangements for production of responsive documents.

Thank you,
April

April Rockstead Barker | Attorney

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Exhibit D

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Leita Walker
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October 7, 2021

Via Email and U.S. Mail
abarker@sbe-law.com

April Rockstead Barker
SCHOTT BUBLITZ & ENGLE S.C.
640 W. Moreland Blvd.
Waukesha, WI 53188

Re: Colborn v. Netflix, et al.

Dear April:

I am writing as we begin drafting our opposition to your recently filed Motion for Sanctions in the above-referenced case, in hopes that you will withdraw that motion. If you elect not to do so, we want the record to be clear that we advised you of the following.

For the reasons discussed below, the motion is meritless. It burdens not only Netflix but the Court with briefing on "issues" that are not really issues at all—discovery in this case is proceeding according to schedule and Netflix has in no way failed to comply with its obligations under the federal rules or any order of the Court. Indeed, as I told you when we last spoke on September 16, we expect Netflix's production of documents responsive to the pending requests to be largely complete by mid-October, when our opposition to your motion is due.

You spoke with my co-counsel, James Friedman, about the meritless nature of your motion, but refused to withdraw it. Thus, we write to make a final, written request for withdrawal. If you do not withdraw the motion and we are forced to oppose it, we will seek attorneys' fees. If you believe the summary below of our prior conversations and correspondence is inaccurate in any way, please advise immediately.

Your Motion for Sanctions is inappropriate for the following reasons:

First, you failed to meet and confer. Instead, you filed the motion without any warning after a productive discussion on September 16, at which you agreed to discuss with your co-counsel the terms of a draft ESI Protocol and how the parties could sequence their respective discovery obligations. You did not threaten during that call to bring a motion to compel; certainly you did not threaten to bring a motion for sanctions or attempt to meet and confer in good faith on the

issues raised in your motion. I summarized our conversation in an email to you after the call and asked you to advise if you had a different understanding of where things stood. To this date, I have never received a response to that email. Instead, after eight days of silence and without any follow-up communication regarding the issues on which you promised to revert, you filed your motion. Suffice to say, we were shocked to receive it, especially because both Federal Rule of Civil Procedure 37 and Civil Local Rule 37 require that the parties meet and confer prior to filing of discovery-related motions.

Second, setting aside your failure to address discovery "issues" in good faith and to attempt to resolve them without the involvement of the Court, your motion and the relief it seeks is entirely inappropriate. Procedurally, it is inappropriate because it jumps over the logical first step of a motion to compel and does not—cannot—point to Netflix's violation of any federal rule or Court order. *See, e.g.*, *Mojapelo v. AMTRAK*, 748 F. App'x 68, 70-71 (7th Cir. 2019) (violation of court order granting motion to compel usually required prior to imposition of Rule 37 sanctions except where noncompliant party had received notice that "certain discovery proceedings are to occur by a specific date, and then refuses to comply"). Substantively, it is inappropriate in its scorched-earth request for a sanction that would deprive Netflix of raising a *constitutional* defense. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (The First and Fourteenth Amendment "guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'"). And factually it is inappropriate because Netflix has worked diligently to comply with its discovery obligations.

Here is the sequence of events that we will lay out for the Court if we are forced to oppose your Motion for Sanctions.

- You filed this case in state court in December 2018 but did not serve Defendants until March 2019. Defendants timely removed the case in April 2019, at which point the timing and sequence of discovery became governed by Fed. R. Civ. P. 26(d).

- Defendants collectively filed three separate motions to dismiss. For a variety of reasons, all beyond the parties' control (including a global pandemic and numerous judicial recusals and reassignments), the last of those motions was not decided until May 26, 2021, more than two years after the case was removed.

- Meanwhile, the parties did not conduct a Rule 26(f) conference until May 2020. In their joint report following that conference (Dkt. No. 141), Defendants requested that discovery be stayed. No formal stay of discovery ever issued, but the parties and the Court essentially operated as if a stay were in place. Following the May 2020 conference—the event that triggered Plaintiff's ability to serve discovery under Fed. R. Civ. P. 26(d)(1)—your client waited more than a year, until June 2021, to do so. Moreover, Judge Ludwig made clear to the parties at the

December 17, 2020 status conference that he did not expect Defendants to engage in discovery until after he decided the pending dispositive motions.

- Your client did purport to serve two sets of discovery *prior* to the Rule 26(f) conference, in contravention of the federal rules. You served one set with the original Complaint filed in state court, *before* this lawsuit was removed to federal court, *before* the original Complaint was amended (not once but twice), and *before* the Court dismissed Plaintiff's negligence claim. You served a second set in March 2020, after removal but, again, before the Rule 26(f) conference. Because Rule 26(d)(1) does not permit discovery prior to the Rule 26(f) conference, the purported service of the first and second sets of discovery did not trigger any obligation for Defendants to respond. I explained this to you, including in an email I sent you on March 15, 2021, nearly seven months ago. To date, you have never responded to that email. Nor have you ever attempted to re-serve the first set of discovery requests in accordance with the federal rules.[1]

- Consistent with Judge Ludwig's instructions, we timely served Netflix's initial disclosures and responses and objections to Plaintiff's second set of discovery two weeks after the Court denied the pending dispositive motions. Those requests sought raw footage. We responded that Netflix does not have any raw footage. We had informally told you that months prior, so Plaintiff has known this for a long time.

- More than a month after Judge Ludwig's order, on June 24, 2021, we received your client's third set of discovery requests. We had begun working with Netflix to collect potentially relevant documents even prior to receipt of this third set and we timely provided written responses and objections to the requests on July 19, 2021. You have never contested the scope of our written responses or objections.

- Thus, since early June, we have worked with Netflix to collect roughly 20,000 potentially relevant documents and to develop and test search terms targeted at reducing the review set to those documents likely to be responsive to the *three*—and there are only three—pending requests for production. Our efforts resulted in a review set of nearly 8,000 documents which we have been working diligently to review and produce on a rolling basis. We have already delivered two productions

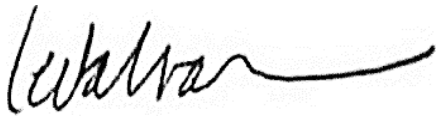
[1] Re-service of the first set of requests, in their original form, would be inappropriate given subsequent developments in this case. For example, several requests seek information related to how Defendants responded to the original Complaint. As you know, Defendants never responded to the original Complaint because you never served it before amending it. Other requests seek raw footage and we have told you repeatedly that Netflix does not have raw footage.

to you, and we expect to be substantially done with our production before your Motion for Sanctions can even be heard.[2]

Third and finally, your sudden and extreme Motion for Sanctions makes no sense in the context of this case. Discovery does not close in this case until April 8, 2022, and summary judgment motions are not due until May 13, 2022. *See* July 28, 2021, Scheduling Order (Dkt. No. 187). No depositions have been scheduled. Defendants actually proposed a shorter discovery period, but it was your legal team and Mr. Colborn who wanted more time. Likewise, it was your legal team who took nearly eight weeks to approve the filing of the protective order in this case and it is your legal team who refuses to engage on the language of a very basic and standard ESI Protocol that we sent you more than a month ago, on August 26. It is your legal team that failed to provide timely responses to Netflix's first set of discovery requests, which were served upon you on September 3, 2021 and to which you did not respond until October 6, 2021.[3]

For all of these reasons, your Motion for Sanctions is meritless and borders on frivolous. Fees are available to the prevailing party on a discovery motion, *see* 28 U.S.C. § 1927, Fed. R. Civ. P. 26(c)(3), 37(a)(5)(B), and we will not hesitate to seek them if you do not immediately withdraw your Motion for Sanctions.

Sincerely,



Leita Walker

[2] During our call on September 16, I explained to you that the only category of documents that might not be produced by mid-October are emails exchanged between Synthesis Films and Netflix. Obviously both Netflix and the producer defendants are in possession of these emails and it makes no sense for two legal teams to review the same documents—nor does it make sense for you to receive two copies of every responsive, non-privileged email the Defendants exchanged among themselves. Thus, I disclosed to you that I am coordinating review of those documents with Kevin Vick, counsel for the producers. Mr. Vick, in turn, explained to you that his law firm is currently short staffed and it might take him a few extra weeks to get through this correspondence. You did not express any concern with this approach. Rather, you told Mr. Vick that his proposed timeline was acceptable, while expressing sympathy for his situation and indicating that, if he needed even more time, that was ok with you.

[3] Any objections to Netflix's interrogatories therefore have been waived. *See* Fed. R. Civ. P. 33(b)(4).

cc: R. George Burnett
Michael Griesbach
Kevin Vick
Jean-Paul Jassy
Jeffrey Payne
James Friedman
Matt Kelley
Emmy Parsons