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**

DEFENDANT NETFLIX, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO SUBPOENA TO MICHAEL GRIESBACH

At the request of the Court, Defendant Netflix, Inc., ("Netflix") respectfully submits this supplemental brief regarding the Wisconsin Reporter's Privilege in support of its motion for an order directing Mr. Griesbach to produce documents responsive to its third-party subpoena (the "Subpoena").

INTRODUCTION

The circumstances surrounding Netflix's motion to compel the production of documents by Michael Griesbach are unusual, as the parties, Mr. Griesbach, and the Court all acknowledge. That is, it is unusual for a party's legal counsel to also be a fact witness in the matter based on the counsel's activities *prior to* taking on the party's representation. That, however, is precisely the situation Mr. Griesbach has brought upon himself. As Netflix detailed in its opening brief, Dkt. 206, Mr. Griesbach was "obsessed" with the Steven Avery case for more than 15 years before Plaintiff Andrew Colborn ever retained him as his counsel, first during his time as an assistant district attorney for Manitowoc County, Wisconsin, and then as the author of two books about the Avery case and about the documentary series at the heart of this matter, *Making a Murderer*.

Thus, as this Court recognized at a hearing on May 25, Netflix is not trying to *turn Mr. Griesbach into* a fact witness. Rather, Mr. Griesbach simply *is* a fact witness. Despite this, Mr. Griesbach has, to date, refused to produce even a single document responsive to the Subpoena and has raised various arguments against compelled disclosure, all of which—save one—the Court rejected at the May 25 hearing on Netflix's motion. The issue on which the Court reserved judgment is whether Mr. Griesbach is protected from compelled disclosure by the Wisconsin Reporter's Privilege, Wis. Stat. § 885.14. The Court requested supplemental briefing on that issue, which Netflix now provides.

Netflix recognizes the significance and importance of the reporter's privilege, and does not make arguments against its application lightly. Netflix concedes that, had Mr. Griesbach remained an author rather than a legal advocate, he might have found some refuge in that statute. But he did not. As detailed below and in Netflix's reply brief in support of this Motion, Dkt. 221, Mr. Griesbach waived any protection he may once have had under the reporter's privilege for two independent reasons.

First, Mr. Griesbach failed to assert the protection of the privilege in his written objections to the Subpoena. On this basis alone, he waived the privilege as a procedural matter. *Second*, by becoming counsel of record for Mr. Colborn (who featured prominently in Mr. Griesbach's books) and by using information he gathered for his books to litigate Mr. Colborn's claims against Netflix, Mr. Griesbach surrendered any claim to be a journalist and waived the privilege as a substantive matter. Stated differently, by using materials he gathered as an author as a sword in this proceeding, for which he is counsel of record, he can no longer hide behind the shield the statute's protections might otherwise provide.

On either, or both, of these bases, the Court should compel Mr. Griesbach to produce documents responsive to the Subpoena.[1]

[1] Further, whatever the Court decides on the issue of privilege, Netflix maintains that at least some of the documents responsive to the Subpoena are subject to compelled disclosure because they were not "obtained or prepared" by Mr. Griesbach in the "news person's capacity [of] gathering, receiving, or preparing news or information for potential dissemination to the public." Wis. Stat. § 885.14(2)(a). These include documents responsive to Request Nos. 7-11 in the Subpoena.

I. MR. GRIESBACH WAIVED ANY PROTECTION THE WISCONSIN REPORTER'S PRIVILEGE MAY HAVE AFFORDED HIM

a. By Failing to Object to the Subpoena on the Basis of the Reporter's Privilege, Mr. Griesbach Waived any Claim of Privilege He May Have Had

As a threshold matter, Mr. Griesbach's characterization of these documents as "journalistic materials" under the Wisconsin statute came too late. He thus waived any protection the Wisconsin statute may have afforded him by failing to assert the privilege in his written objections to the Subpoena. As the Seventh Circuit has made clear, "Rule 45(c)(2)(B) requires the objecting party to raise its objection before 'the earlier of the time specified for compliance or 14 days after the subpoena is served" "so that discovery does not become a game." *Ott v. City of Milwaukee*, 682 F.3d 552, 558 (7th Cir. 2012) (quoting Fed. R. Civ. P. 45(c)(2)(B) and citing *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998)); *see also Richter v. Mut. Of Omaha Ins. Co.*, 2006 U.S. Dist. LEXIS 26845, at * 8 (E.D. Wis. May 5, 2006) (objections asserted 19 days after service of third-party subpoena deemed waived because Rule 45's 14-day time limit is to be "strictly construe[d]," and the "failure to timely file an objection *will result in waiver* of the right to object to enforcement of the subpoena.") (emphasis added); *Appleton Papers Inc. v. George A. Whiting Paper Co*., 2009 U.S. Dist. LEXIS 71322, at *8 (E.D. Wis. July 31, 2009) (finding objections, "the first inkling" of which "came roughly a month" after service of subpoena, waived for failure to comply with 14-day requirement).

Netflix served the Subpoena on Mr. Griesbach on February 10, 2022, *see* Second Decl. of Leita Walker ¶ 2 & Ex. 9, thereby obligating Mr. Griesbach to assert *all objections* to the subpoena by February 24, 2022. Counsel for Mr. Griesbach served on Netflix objections to the Subpoena on February 24, but failed to assert *any* privilege, the reporter's privilege or otherwise. *See* Decl. of L. Walker at Ex. 2, Dkt. 207 (omitting any mention of any privilege, including the reporter's privilege). As Mr. Griesbach acknowledged, his counsel first asserted the privilege

two weeks later at a March 11 meet and confer—*29 days after* Netflix served the Subpoena on Mr. Griesbach and *15 days after* service of Mr. Griesbach's written objections.[2] On this basis alone, Mr. Griesbach should be ordered to comply with the Subpoena.

b. Even if Mr. Griesbach Had Timely Raised the Reporter's Privilege, He Waived the Protections of the Privilege When He Took on the Representation of Mr. Colborn

As Netflix argued at length in its Reply brief, Mr. Griesbach waived the privilege in a separate, independent way: by morphing from an alleged journalist into a legal advocate when he became counsel of record for Mr. Colborn and began using and sharing his journalistic work product to pursue a damage award against Netflix of more than $10 million. Second Walker Decl. Ex. 10 (Pl's Responses to Chrome's First Interrogatories at 6).

Simon v. Northwestern University, 321 F.R.D. 328 (N.D. Ill. 2017), dealt with a nearly identical situation and is thus directly on point. Netflix discussed that case at length in its Reply brief and will not rehash that discussion here except to address Mr. Griesbach's two arguments from the May 25 hearing, both of which lack merit.

Mr. Griesbach first argued that *Simon* is distinguishable on its facts, though his argument suggests a fundamental misunderstanding of that case. The facts of *Simon* are eerily similar to those here: Andrew Hale created a work of nonfiction (albeit a film, rather than a book) about the plaintiff, a man named Alstory Simon. Mr. Hale's work of nonfiction was supportive of Mr.

[2] Indeed, even if controlling case law pointed to judicial discretion rather than mandatory waiver, there is no reason here for leniency. Four days after Mr. Griesbach served his written objections, Mr. Colborn produced to the parties in this matter a significant number of text message communications and withheld from that production all communications with journalists on the basis that the text exchanges were protected by the Wisconsin Reporter's Privilege. In other words, at the very time Mr. Griesbach was preparing his written objections with his legal counsel, he was acutely aware of the protection afforded journalists by the statute but failed to mention that statute in his written objections.

Simon and questioned whether accusations of misconduct against him were accurate. Then Mr. Hale became Mr. Simon's attorney. As the court in *Simon* concluded, Mr. Hale waived the reporter's privilege by joining the plaintiff's legal team.[3] Just the same, Mr. Griesbach created a work of nonfiction about Mr. Colborn, the Plaintiff here, which was supportive of Mr. Colborn and which questioned whether accusations against him were accurate. And then Mr. Griesbach became Mr. Colborn's attorney. Just as the *Simon* court concluded, so too should this Court conclude that, through his actions, Mr. Griesbach placed himself beyond the bounds of protection under the reporter's privilege.

Second, Mr. Greisbach argued that this Court should distinguish the *Simon* case as it interpreted the Illinois reporter's privilege, and the Wisconsin privilege is different, pointing specifically to Wis. Stat. § 885.14(4), which states that "disclosure to another person or dissemination to the public of news, information, or the identity of a source . . . by a news person does not constitute a waiver of the protection from compelled disclosure." Wis. Stat. § 885.14(4). As discussed at the hearing, there is a dearth of case law on Wisconsin's relatively new reporter's privilege and subsequent research has revealed a dearth of legislative history, as well. But both common sense and case law from other jurisdictions reveal the futility of Mr. Griesbach's position and confirm that, whatever he might have safely disclosed *as a journalist* without waiving the privilege, he waived the privilege when he assumed the role of counsel for Mr. Colborn in this action.

As the undersigned explained on May 25, Wis. Stat. § 885.14(4) is a provision typical of many state reporter's privilege laws and reflects the fact that journalists are in the business of not

[3] At the May 25 hearing, now-discharged counsel for Mr. Griesbach seemed to argue that Mr. Hale's documentary was the subject of plaintiff's defamation claim in *Simon* and that this somehow was material to the outcome of the case. That is patently incorrect.

just gathering news, but also publishing news, and that publishing *some* of what they gather does not waive the privilege for what they hold back. If it did, the privilege would be pointless because no journalist gathers information only to lock it all up and keep it secret. As the *Simon* court explained, "[a] reporter gathers information from her sources for the very purposes of disclosing the information. Thus, a reporter obviously cannot waive her privilege as to undisclosed source information by sharing other portions of the gathered source information with the public." 321 F.R.D. at 333; *see also People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1044 (Ill. 1st Dist. Ct. App. 1980) ("Thus, to find that [the journalist] waived his privilege, simply because he revealed some of his sources . . . would defeat the express purpose of this legislation."), *rev'd on other grounds* 87 Ill. 2d 167 (1981)*; In re Venezia*, 191 N.J. 259, 273 (2007) ("publication of an article does not constitute a waiver of a reporter's privilege to refuse to disclose information obtained in the course of pursuing his professional activities, even if the source of the article is identified."); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (holding that the privilege extends to unpublished materials in the possession of CBS); *Saxton v. Ark. Gazette Co.*, 264 Ark. 133, 136 (1978) ("Neither can we agree with appellant's contention that appellee . . ., by the voluntary disclosure of the identity of one of her sources, waived whatever privilege she had."); *In re Paul*, 270 Ga. 680, 686 (1999) ("Contrary to the state's contention, publication of part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter because it would chill the free flow of information to the public.") (marks and citation omitted)); *In re Taylor*, 412 Pa. 32, 44 (1963) ("a waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper.").

Separately, the *Silverstein* case—which is cited in *Simon*—also sheds light on what the phrase "disclosure to another person" in Wis. Stat. § 885.14(4) means. Specifically, *Silverstein* addressed whether a journalist had waived the protection of the reporter's privilege by disclosing some of his sources to a prosecutor in a criminal matter. As the court concluded, there was no indication that the journalist had "personally motivated" the actions of the prosecutor in investigating the matter at hand. *Silverstein*, 89 Ill. App. 3d at 1045. Rather, his "regular contacts" with the attorney "were clearly within the scope of [his] role as a newspaper reporter and any information [he] may have given [the attorney] concerning his news-gathering efforts, most of which was made public in [his] articles, did not cause [him] to forfeit his privilege as a reporter." *Id*. As the court made clear however, had the journalist "abandoned the role of newspaper reporter and *assumed the duties of an investigator*, then arguably he waived his reporter's privilege." *Id*. (internal marks omitted) (emphasis added).

In other words, sometimes journalists need to tell their sources certain unpublished information to provide context for the questions they pose and the information they seek, and those sorts of disclosures do not constitute a waiver of the privilege, either—as both the Wisconsin statute and other courts around the country recognize. For example, in *In re Venezia*, the New Jersey Supreme Court explained that the state's reporter's privilege could be waived but that it is "[d]isclosure of information . . . by a newsperson *outside* of the newsgathering and news reporting process [that] constitutes a waiver of the privilege." 191 N.J. at 271 (emphasis added). Courts have also held that it is one thing to disclose information for the purpose of newsgathering and quite another to disclose information in pursuit of an agenda—and that the latter constitutes waiver even though the former does not. For example, in *Ayala v. Ayers*, a federal court noted that "[i]n the interests of fairness, a journalist/author should not be permitted

to disclose information to advance the interests of one litigant, and then invoke the journalist's privilege to prevent discovery of this same information by another litigant." 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009).[4] Similarly, the Second Circuit Court of Appeals has held that "[t]hose who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all." *Chevron Corp. v. Berlinger*, 629 F.3d 297, 307-08 (2d Cir. 2011); *see also Pinkard v. Johnson*, 118 F.R.D. 517, 523 (M.D. Ala. 1987) ("A reporter is not free to give a sworn statement to a litigant, and later invoke the qualified reporter privilege to keep this information from the Court.").[5]

[4] The journalist in that action "admit[ted] that he [was] biased in favor of Petitioner, and it can be assumed that [he] wished to be of assistance to Petitioner's counsel. It would be unfair and improper to allow [him] to invoke the journalist's privilege with respect to this same material now that Respondent's counsel wants to see it." *Id.*

[55] *See also Wheeler v. Goulart*, 593 A.2d 173, 175 (D.C. Ct. App. 1991) ("[A]ppellant cannot choose to disclose to others in 1986 – with no request for confidentiality *and under circumstances which did not involve any newsgathering function* – that Fulwood was her source for the classified information . . . and then choose in 1991 – as a witness in a judicial proceeding – not to make this same disclosure." (emphasis added)); *News-Journal Corp. v. Carson*, 741 So. 2d 572, 574 (Fla 5th DCA 1999) ("Although the statute provides that publication or broadcasting the information does not waive the privilege, the act of filing a document in the public records [of a lawsuit] is a different matter."); *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 101 (2000) ("We emphasize that our decision today extends protection only to the journalist's newsgathering and dissemination activities within the journalist's professional capacity. Nevada's news shield statute provides no protection for information gathered in other capacities. We further recognize that although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations . . . in which the news shield statute might have to yield so that justice may be served."). And as the Second Circuit articulated in a broader discussion about evidentiary privileges, "[w]hether fairness requires disclosure is best decided on a case by case basis, and depends primarily on the specific context in which the privilege is asserted. For example, we look to see whether the privilege holder took affirmative steps to inject privileged materials into the litigation." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal marks and citations omitted).

Thus, for example, if a journalist is investigating a news tip—what amounts to a rumor—she typically has to share the tip with her sources in order to assess its validity. The journalist may ultimately decide the tip is baseless and never publish anything about it, but the fact that she shared it with discrete individuals as part of her investigative efforts does not, itself, waive the privilege such that she could be compelled to testify about the tip.[6] Similarly, a journalist attempting to determine if a leaked document is authentic may need to share the document or information about it to other sources before deciding whether or how to report on it. In short, piecemeal disclosure of unpublished information *in the context of a journalist's newsgathering and publishing activities* does not waive the privilege, and the "disclosure to another person" language in Wis. Stat. § 885.14(4) simply makes that clear.

But that's not what we're talking about here. Netflix is not claiming Mr. Griesbach waived the reporter's privilege by giving unpublished information to his publisher or his agent or even his sources in the course of writing and publishing his books. Rather, it is arguing that he is a journalist-turned-counsel just like the filmmaker in *Simon* and that, just like that filmmaker, he waived the privilege when he stopped using his journalistic work product to inform and enlighten the public and started using it to "personally motivate[]" Mr. Colborn's legal strategy in his attempt to win a multi-million dollar lawsuit against Netflix. *See Silverstein*, 89 Ill. App. 3d at 1045.

Like the filmmaker in *Simon*, Mr. Griesbach appears to not "recognize the consequences of acting as a reporter and a lawyer on the same matter." 321 F.R.D. at 334. Mr. Griesbach "'shared' all of the information he gathered during the [research and writing of his books] when

[6] In addition to sources, journalists sometimes need to share unpublished information with their editors, publishers, and lawyers, among others, and Wis. Stat. § 885.14(4) likewise allows for that.

he joined [Mr. Colborn's] legal team" and thus "he has placed at risk all of the source information that may have been shielded by the reporter's privilege." *Id*. at 333, 336. Moreover, whatever Mr. Griesbach might have safely shared as a journalist, he "clearly acted outside the scope of a reporter when he became an attorney on Plaintiff's legal team," and "[a]fter serving as Plaintiff's counsel for more than two years, [the attorney] cannot artificially divest himself of that status in order to take advantage of the reporter's privilege." *Id.* at 332. When Mr. Griesbach "filed an appearance on Plaintiff's case, he abandoned the role of reporter and transitioned to the role of legal advocate. . . . Assertion of the reporter's privilege in this context is well beyond the scope of the statute." *Id*. at 332-33.

This all makes perfect sense in light of the policies animating journalist's privileges around the country—i.e., that subpoenas should not distract journalists from their important, constitutionally protected work of gathering and reporting news, nor burden journalists or their newsrooms with unnecessary expense, nor threaten journalists' independence (and reputations for neutrality) by positioning them as an extension of law enforcement or as advocates for private litigants. *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1998); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Silkwood v. Keer-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring) ("Certainly, we do not hold . . . that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.'").

Subpoenas to attorneys such as Mr. Griesbach simply do not threaten these policies. Compelling Mr. Griesbach's compliance with the subpoena cannot inhibit his newsgathering activities or undermine future claims of "journalistic objectivity" in any way materially different

than what he voluntarily accepted, even invited, when, nearly four years ago, he voluntarily abandoned any semblance of neutrality and agreed to sue Netflix on Mr. Colborn's behalf. Similarly, as counsel of record, Mr. Griesbach quickly became and remains deeply involved in this lawsuit, and compelling his compliance with the subpoena simply cannot burden or distract him in any manner materially greater than the burden he already faces as counsel of record. Simply stated, the policy considerations behind the privilege no longer apply to Mr. Griesbach, and on this basis as well, Mr. Griesbach should be compelled to comply with the subpoena.

II. THE COURT NEED NOT—AND SHOULD NOT—ADDRESS THE FOUR-FACTOR TEST FOR OVERCOMING THE PRIVILEGE

Even in the absence of waiver, pursuant to Wisconsin's Reporter's Privilege, a court may order discovery of a journalist's newsgathering materials if four conditions are met:

1. The news, information, or identity of the source is highly relevant to the . . . proceeding.
2. The news, information, or identity of the source is necessary to the maintenance of a party's . . . defense, or to the proof of an issue material to the . . . proceeding.
3. The news, information, or identity of the source is not obtainable from any alternative source for the . . . proceeding.
4. There is an overriding public interest in the disclosure of the news, information, or identity of the source.

Wis. Stat. § 885.14. At the May 25 hearing, counsel for Mr. Griesbach repeatedly argued that Netflix had failed to satisfy these four conditions and thus its motion to compel should be denied.

This argument raised interesting questions about whether Netflix could meet those conditions, but ignored that *Netflix has never actually tried to do so*. Indeed, Netflix has been deliberately silent on whether—in the unlikely event the Court deems the privilege unwaived—the privilege has been overcome. Netflix has been silent on this issue not only because the case for waiver is so strong that argument on the four conditions is superfluous but also because it believes so strongly in the importance of the privilege that it does not wish to chip away at its

protections in a way that could harm *bona fide* news persons who do important work in this State. Moreover, this case, given its unusual fact pattern, is hardly the best vehicle for analyzing the contours of the four-factor test. For all of these reasons, and also because any written order on the four-factor test would likely carry disproportionate weight given the lack of published decisions interpreting the statute, Netflix discourages the Court from issuing any *dicta* on whether the test has been or could be satisfied.

That said, without attempting to show that it has satisfied all four factors, Netflix directs the Court's attention to the fourth and final one, which requires examination of the public interest. As the case law discussed above makes clear, courts take an unfavorable view toward journalists who try to put a thumb on the scales of justice by using the privilege as both a shield and a sword, offering information to help one party, while withholding information from another. *See supra* at 7-8. As a California court said, providing selective access to litigants of newsgathering material is simply not fair. *See Ayala*, 668 F. Supp. 2d at 1250. And as a Nevada court made clear, there are certain circumstances where justice requires that a journalist be compelled to provide discovery of their newsgathering material. *See Diaz*, 116 Nev. at 88.

Here we have more than a thumb on a scale—more than mere selective or strategic disclosure by a journalist. Instead, we have a long-time lawyer and two-time author who has completely abandoned any journalistic principles of neutrality and objectivity he once held in pursuit of a multi-million dollar damage award that he hopes to obtain through use of journalistic work product that he mistakenly believes is somehow still sacrosanct.

For 15 years before Mr. Colborn retained him as counsel, Mr. Griesbach "obsessed" over the Avery saga, first as a prosecutor and then as the author of two books on the matter. Whether Mr. Griesbach, a fact witness in this case who even appears in *Making a Murderer* itself, should

have accepted representation of Mr. Colborn is a question for another day, but the fact remains that once Mr. Griesbach became counsel for Mr. Colborn, he unquestionably drew on his lengthy history with the facts at issue in this litigation to benefit Mr. Colborn, indeed even asking the fact-checker of his book, Ms. Schuler, to edit an early draft of Mr. Colborn's first complaint in this lawsuit. Second Walker Decl. Ex. 11 (COLBORN-004587). Prohibiting Netflix from receiving access to the same information that Mr. Griesbach accumulated prior to his representation of Mr. Colborn places Netflix at a distinct disadvantage that exists as a direct consequence of Mr. Griesbach's actions in this matter. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

CONCLUSION

For the foregoing reasons, and for those stated in Netflix's earlier briefing on this matter, Netflix respectfully requests that the Court find that Mr. Griesbach waived any privilege to which he may once have been entitled under Wisconsin's Reporter's Privilege, and that Mr. Griesbach be compelled to comply in full with the Subpoena.

Dated: June 8, 2022

Respectfully submitted,

s/ James A. Friedman

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Counsel for Netflix, Inc.

Exhibit 9

AFFIDAVIT OF SERVICE

State of Wisconsin **County of EASTERN DISTRICT**

Case Number: 19-CV-484

Plaintiff:
ANDREW L. COLBORN,

vs.

Defendant:
NETFLIX, INC ET AL.,

For:
GODFREY & KAHN S.C.
P.O. Box 2728
Appleton, WI 54912

Received by Patrick L. Zelzer and Associates to be served on **MICHAEL GRIESBACH, 851 N. 15TH STREET, MANITOWOC, WI 54220**.

I, Patrick Zelzer, being duly sworn, depose and say that on the **10th day of February, 2022** at **10:37 am**, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION.** with the date and hour of service endorsed thereon by me, to: **MICHAEL GRIESBACH** at the address of: **851 N. 15TH STREET, MANITOWOC, WI 54220**, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn to before me on the 10th day of February, 2022 by the affiant who is personally known to me.

Jill A. Zelzer
NOTARY PUBLIC
12-14-25

JILL A ZELZER NOTARY PUBLIC STATE OF WISCONSIN

Patrick Zelzer
Process Server

Patrick L. Zelzer and Associates
P.O BOX 12554
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Our Job Serial Number: ZEL-2022000361
Service Fee: $125.00

Exhibit 10

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

ANDREW L. COLBORN,

Plaintiff,

Case No. 19-CV-484

NETFLIX, INC.,
CHROME MEDIA, LLC, f/k/a
SYNTHESIS FILMS, LLC,
LAURA RICCIARDI, and MOIRA DEMOS,

Defendants.

PLAINTIFF'S RESPONSES TO DEFENDANT CHROME MEDIA LLC'S FIRST SET OF INTERROGATORIES

Plaintiff, Andrew L. Colborn, by and through his attorneys, Law Firm of Conway, Olejniczak and Jerry, S.C., responds to Defendant Chrome Media LLC's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

To the extent that any of the Interrogatories call for information which is protected by the attorney-client privilege, work-product doctrine or otherwise immune from discovery, Plaintiff hereby objects to furnishing any such information and such information is not being provided.

To the extent that any of the Interrogatories go beyond the scope of Fed.R.Civ.P. 26, Plaintiff objects and will comply only to the extent of the obligations set forth therein.

Plaintiff also objects to the wording of Defendants' requests on the basis that Wisconsin law requires that defamatory broadcasts be considered in their entirety, not just as a collection of allegedly separate statement. The entire MAM broadcasts must be considered with respect to

their falsity and Defendants' knowledge of falsity and/or reckless disregard of the truth with respect to the broadcasts. Plaintiff objects to the Interrogatories to the extent they suggest or imply otherwise.

Discovery and investigation are continuing in this matter and Plaintiff reserves the right to amend and/or supplement these responses accordingly. In addition, Plaintiff's counsel has only just been able to format produced raw footage to viewable format and have not had the opportunity to view it yet, and again, Plaintiff reserves the right to supplement his responses accordingly.

Subject to the foregoing objections and the specific objections asserted below, Plaintiff respectfully submits, without in any way conceding relevancy, or admissibility, the following responses to the Interrogatories:

INTERROGATORY NO. 1: Identify with specificity all "spliced and omitted portions of Plaintiff's trial testimony as set forth in Exhibit A and B" that you contend "distort the facts and nature of the 1994 or 1995 telephone call…[and] led viewers to falsely conclude that Plaintiff bears responsibility for seven or eight of Avery's 18 years of wrongful imprisonment, providing him [Colborn] with a motive to frame Avery for Halbach's murder," as alleged in Paragraph 27 of the Second Amended Complaint.

RESPONSE NO 1: Subject to Plaintiff's General Objections, Plaintiff refers to the summaries attached in chart form hereto. Discovery and investigation are ongoing, and Plaintiff reserves the right to supplement his responses accordingly.

INTERROGATORY NO. 2: For each "spliced and omitted portion" identified in your response to Interrogatory No. 1, state how that spliced or omitted portion "distort[ed] the facts and nature of the 1994 or 1995 telephone call…[and] let viewers to falsely conclude that Plaintiff bears responsibility for seven or eight of Avery's 18 years of wrongful imprisonment, providing him [Colborn] with a motive to frame Avery for Halbach's murder," as alleged in Paragraph 27 of the Second Amended Complaint.

RESPONSE NO 2: Subject to Plaintiff's General Objections, Plaintiff refers to the summaries attached in chart form hereto. Discovery and investigation are ongoing, and Plaintiff reserves the right to supplement his responses accordingly.

INTERROGATORY NO. 3: Describe in detail all facts that you contend support your allegation in Paragraph 33 of the Second Amended Complaint that "Defendants knew of [the]

falsity" of Steven Avery's criminal attorneys' "suggest[ion] that Plaintiff was looking directly at Halbach's vehicle when he called dispatch."

RESPONSE NO 3: Subject to Plaintiff's General Objections, Plaintiff responds as follows: Plaintiff's testimony at the civil trial regarding the call that he made to dispatch was reasonable and credible and he specifically denied that he was looking at Halbach's vehicle during his testimony.

In addition, upon information and belief, the Defendants had reviewed the Avery Trial Court's Decision and Order dated January 30, 2007, which explained that any theory regarding any alleged involvement of Plaintiff in planting Avery's blood in Halbach's vehicle was extremely weak and rested on an unexplained contradiction:

> **[as] pointed out by the State at oral argument: How could Lenk or Colbom have known that Teresa Halbach was dead at the time they are alleged to have planted the defendant's blood in her vehicle? Under the defendant's theory, either Lenk, Colbom, or both would have had to have formulated a plan involving their own commission of serious felonies and executed that plan within a very short period of time, motivated apparently only by their embarrassment for not allegedly having acted more responsibly on information that could have led to Mr. Avery's exoneration back in 1995 or 1996.**

Decision and Order at p. 11.

It was only due to the extremely low bar afforded criminal defendants by law to attempt to offer theories to attempt to exculpate themselves that this theory was even allowed to be presented by the judge. Under any common-sense or reasonable standard, the assertion that Plaintiff had found Halbach' vehicle prior to the time that she was known to have been deceased was obviously false.

Defendants are educated persons; both have advanced degrees. In addition, Ms. Ricciardi has a law degree and practiced law for some time after graduation. Accordingly, it is reasonable to infer that both Ricciardi and Demos knew that there was no reasonable basis to believe that Plaintiff planted blood in Avery's car, that any theories to the contrary border on the fantastic and are patently ludicrous, and therefore, that they knew they were false.

INTERROGATORY NO. 4: Describe in detail all facts that you contend support your allegation in Paragraph 40 of the Second Amended Complaint that "defendants manipulated facts to convince viewers that MTSO officers, possibly including plaintiff, secreted Avery's blood from a vial still kept in evidence from his wrongful conviction case, and planted it in Halbach's car."

RESPONSE NO 4: Subject to Plaintiff's General Objections, Plaintiff responds as follows: The facts that support the allegation that Defendants manipulated the facts

in question are set forth in the remainder of Paragraph 40 of the Second Amended Complaint. Upon information and belief, Defendants had reviewed the Avery Trial Court's Decision and Order dated January 30, 2007 in which the Court noted the fact that the State intended to present evidence that the hole in the blood vial stopper had been created by the phlebotomist who withdrew Mr. Avery's blood on January 2, 1996.

INTERROGATORY NO. 5: Describe in detail all facts that you contend support your allegation in Paragraph 64 of the Second Amended Complaint that the Challenged Statement "tended to harm [you] and actually and irreparably harmed and damaged [your] reputation, lowering [you] in the estimation of the community and subjecting [you] to hostility, hatred and ridicule, and deterring third persons from associating or dealing with [you]."

RESPONSE NO 5: Subject to Plaintiff's General Objections, Plaintiff responds as follows: Plaintiff's counsel will be producing copies of numerous recorded voicemails that Plaintiff received from threatening and verbally abusive MAM viewers across the world, and Plaintiff designates those documents in response to this Interrogatory; Plaintiff's counsel will also be producing copies of email messages and online posts to the same effect; in addition, Plaintiff will testify regarding the countless telephone calls that he received at his personal residence and at work that were not recorded. Due to the intense verbal abuse that Plaintiff suffered from the public at large following the MAM broadcast, Plaintiff eventually resigned from the Sheriff's Department earlier than intended. In addition, the effect of the abuse on Plaintiff has contributed to the demise of Plaintiff's marriage of multiple decades. Plaintiff also incorporates in this response his response to Interrogatory No. 8, below. Damages are ongoing. Plaintiff reserves the right to supplement this response as discovery and investigation continue.

INTERROGATORY NO. 6: For each of the Challenged Statements, describe in detail all facts that you contend support your allegation that the Producer Defendants published that Challenged Statement with knowledge of their falsity or reckless disregard of their truth or falsity.

RESPONSE NO 6: Subject to Plaintiff's General Objections, Plaintiff refers to the summaries attached in chart form hereto.

INTERROGATORY NO. 7: For each material fact that you allege was omitted from Making a Murderer, state that omitted fact and describe in detail why you believe that the Producer Defendants had knowledge that omission of the fact would cause Making a Murderer to be false or that the Producer Defendants omitted the fact with reckless disregard of the series' truth or falsity.

RESPONSE NO 7: Subject to Plaintiff's General Objections, Plaintiff refers to the summaries attached in chart form hereto, and to the allegations of the specific paragraphs of the Second Amended Complaint that are described as "Challenged Statements," as the factual basis for many of the allegations is set forth therein,

including detailed descriptions of the specific alterations to and omissions of trial testimony by the Defendants. Defendants knew the alterations changed the impact of the testimony and it is evident that they made them for that reason, in order to continue to tell their story. This is further corroborated in the document productions by Netflix, which demonstrate the involvement of Netflix personnel in attempting to make the story more dramatic and to emphasize Plaintiff as an alleged villain of the story. (See Plaintiff's Responses to First Set of Interrogatories of Netflix, Inc.) Discovery and investigation are ongoing, and Plaintiff reserves the right to supplement his responses accordingly.

INTERROGATORY NO. 8: Describe in detail all items of damage you contend you sustained as a result of the Producer Defendants' acts or omissions alleged in the Second Amended Complaint.

RESPONSE NO 8: Subject to his General Objections, Plaintiff responds as follows: Making a Murderer damaged if not destroyed my reputation, my health and my personal life. My reputation as a police officer, so important to maintain as trustworthy and being with integrity as well as honest, was severely damaged as millions viewed and believed the falsehood that was Making a Murderer. In the social media realm my reputation was totally destroyed as I was, and still am portrayed as the poster child for corruption. I began to fear that this annihilation of my reputation would affect the weight of my courtroom testimony on other cases, effectively ruining my career as a police officer. My health was affected as I did and continue to live in a state of constant hypervigilance, as Making a Murder prompted a multitude of death threats to me and towards my family. Never being able to totally relax, as well as constantly anticipating an attack on me and/or a member of my family has caused me to develop both hypertension and anxiety, which has to be treated with prescription medication. Due to the stress caused by MAM, I have trouble sleeping and I find myself often angry and irritable. I no longer feel I can trust anyone totally ever again. My personal life has also been greatly damaged as a result of MAM. My inability to go back to the person I was before MAM has destroyed my 30 year marriage and the marriage ended in divorce. I have lost family members and friends because of MAM's false narrative, reckless agenda and portrayal of me, which is only exacerbated by the social media crazies who continually, 7 years after its release, claim that I am a corrupt evil person and that MAM is truthful. I am often confronted by total strangers who inform me that they despise me for "what I've done" regarding Steven Avery. I'm not allowed to be present at any media event at my current employer as my presence could be disruptive.

INTERROGATORY NO. 9: For each item of damages that you identified in Interrogatory No. 8, identify the amount of damages you are claiming and your method for calculating such amount.

RESPONSE NO 9: Subject to his General Objections, Plaintiff responds as follows: The damage to my reputation prompted me to retire from law enforcement

4 years earlier than I had wanted too, costing me at least $400,000. The value of the damage to my personal life, the destruction of my marriage and the loss of friends and family, personal health and wellbeing, sense of calm and sense of safety and security, and general damage to my reputation I am requesting be determined at trial by the jury. In my personal opinion, a value of a million dollars per Episode of MAM 1 and 2 would not even cover the loss of personal happiness caused by Defendants, yet Defendants have undoubtedly been enriched by at least that amount through what they took from me.

INTERROGATORY NO. 10: Identify all persons with knowledge of facts relating to the damages you describe in Interrogatory No. 8, and the substance of each person's knowledge.

RESPONSE NO 10: Subject to his General Objections, Plaintiff responds as follows: I have discussed the facts of the damages detailed in my response to Interrogatory No. 8 with very few people due to my newfound inability to trust anyone. I have disclosed those damages to my healthcare providers, and to the law firms who represent me in this suit. I have also disclosed how MAM damaged me personally to the law firm representing me in my divorce case. I further have disclosed how MAM has caused me damage to the producers of an upcoming documentary entitled Convicting a Murderer during interviews with them. Beyond that, I rarely, if ever discuss how MAM caused me damages, I instead only defend myself, my fellow deputies, my former agency and law enforcement in general when asked or confronted about Netflix or the producers of MAM or MAM itself.

INTERROGATORY NO. 11: Identify every health care provider that you have seen for treatment of any condition(s) that you believe was caused or exacerbated by Making a Murderer, and for each, describe that nature of the symptoms for which you sought treatment, the diagnosis you received, all medication(s) you were prescribed, and all treatments and therapy you received and the dates of the treatments and therapy.

RESPONSE NO 11: Subject to his General Objections, Plaintiff designates his previously produced health care records in response to this Interrogatory, without waiving the confidentiality designations in said prior production, which are incorporated by reference herein. Plaintiff further responds that he has seen the following providers that he has seen for anxiety relating to the effects of MAM: Theresa J. Kruegerjunk, NP, of Prevea on December 28, 2018, noted as having "presented for" anxiety; follow-up June 28, 2019. Plaintiff has taken Busiprone / Buspar as a result of his anxiety caused by MAM. Plaintiff believes that the stress is also adversely affecting his blood pressure, for which he takes Lisinopril. Damages are ongoing, and Plaintiff reserves the right to supplement this response.

As to Objections:

Dated this 28th day of January, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff, Andrew L. Colborn

By: _____ for

George Burnett

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AS TO RESPONSES:

STATE OF WISCONSIN)
) ss:
COUNTY OF _____)

ANDREW L. COLBORN, being first duly sworn on oath, states that he has read the foregoing responses to the Interrogatories and that the same are true to the best of his knowledge at this time. Further, he reserves the right to amend the responses should later discovered information suggest that any of the foregoing responses are incorrect or incomplete.

_____
ANDREW L. COLBORN

Subscribed and sworn to before me
this _____ day of _____, 2022.

_____
Notary Public, _____ County, Wis.
My Commission is permanent.

Exhibit 11

To: Barb[bcolbornrn@hotmail.com]
From: andy colborn
Sent: Thur 12/13/2018 1:53:37 AM
Subject: Fwd: Pages 1-9
MAMâ€™s omission and distortion of material, significant evidence and facts.docx
ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: Michael Griesbach <attymgriesbach@gmail.com>
Date: December 10, 2018 at 12:54:32 PM CST
To: bs.squared@yahoo.com
Cc: andy colborn <fantomfixer@hotmail.com>
Subject: Re: Pages 1-9

> It doesn't have to be filed until 12/18 (3 years after MAM's release), but I don't want to wait til then. I'm shooting for Wed but will obviously be speaking with Andy before anything is filed. We still have some things to decide, incl whether to bring Ferak in now or implead him and the others in later. I'm inclined to not further complicate this right now, there's plenty of time to bring him in. Andy and I will also coordinate the timing of filing, serving the defendants, and preparing a media release. I know we have lots to talk about Andy, but let me get the complaint finished first. I agree with you, Brenda, that it makes more sense for you to wait to edit until you have the "final" version of each section of the complaint. (I've attached a "final" revised draft of the omissions and distortions section if you want to review.) If you have additional significant instances of MAM lies we could probably still work them in, but it's not essential since we're not limited going forward to what we included in the complaint. On the other hand, we want to wow them as much as we can. Use your discretion. THANKS!

On Mon, Dec 10, 2018 at 12:29 PM Brenda Schuler <bs.squared@yahoo.com> wrote:

> Thanks Mike. This is a big project and it’s looking really great. Nice job.
> Should I not continue on with the rest of the pages if you have made updates already? It doesn’t really make sense if you have an updated version and I’m updating an old one.

Is the whole thing due on the 11th? Or just the three claims? I think I have other examples of editing in MaM to make Colborn look sketchy that could be included if you wish, but may not work if the entire doc is due on the 11th.

On Dec 10, 2018, at 12:11 PM, Michael Griesbach <attymgriesbach@gmail.com> wrote:

Thanks Brenda. I appreciate your filling in the dates and number of years, etc, and I agree with most of your thoughts. Unfortunately, I've also made edits in the last few days, but I'll compare my edits with yours and go from there. Attached is the revised draft of the first claim for relief, defamation of character. The claims themselves are not lengthy becasue they adopt by reference the facts as already stated in the body of the complaint. However, they are where the case rises and falls under the law. I hope to have the other two claims (intentional infliction of emotional stress and negligence) finished late today. Best to both of you. Lets go slay some dragons!

On Mon, Dec 10, 2018 at 11:35 AM Brenda Schuler <bs.squared@yahoo.com> wrote:

Note, there are comments for many of the suggestions so you can just "hover" over them to see why.

Sent from my iPhone

On Dec 10, 2018, at 11:31 AM, Brenda L <bs.squared@yahoo.com> wrote:

HI there,
I wanted to send over what I had so far.

There is one part, with Tyson and Kucharski that you may want to change since the babysitting comment is with Tyson referring to the 11/5 initial search and the prior part is the 11/8 search with Kucharski. My personal feeling is that part is not strong enough to consider an example of deceptive editing since the question they pull Tyson's splice from is a very similar and followup question to the babysitting one. Just my thoughts.

Please let me know if you have questions so far. I'll send an update when I get more done.

<Colborn Complaint, draft of second section.docx>

--

Atty Michael C Griesbach

(920) 320-1358

attymgriesbach@gmail.com

Additionally, to ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including any attachments, was not intended or written to be used, and cannot be used, by any person for the purpose of (i) avoiding any penalties that may be imposed by the Internal Revenue Service, or (ii) promoting, marketing or recommending to another person any tax-related matter addressed herein. Thank you for your cooperation.

<COUNT I.docx>

--

Atty Michael C Griesbach

(920) 320-1358

attymgriesbach@gmail.com