

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT**

CHRISTOPHER PORCO,

Plaintiff-Appellant,

-against-

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Respondent.

Case No. 522707

**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANT-RESPONDENT'S
MOTION FOR LEAVE TO APPEAL**

PLEASE TAKE NOTICE that upon the annexed affirmation of Joseph M. Finnerty, dated April 4, 2017, and the exhibit attached thereto, the Reporters Committee for Freedom of the Press, and 15 news media organizations (“Proposed *Amici*”) will move this Court on April 17, 2017, at the Appellate Division Courthouse located at the Justice Building, 5th Floor, Empire State Plaza, Albany, New York 12223, at 10:00 a.m. for an order granting Proposed *Amici* leave to file the attached brief as *amici curiae* in support of Defendant-Respondent’s motion for leave to appeal in the above-captioned action, and for such other and further relief as the Court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, shall be served at least eight (8) days before the return date of this motion.

Dated: New York, NY
April 4, 2017

Respectfully submitted,

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**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT**

CHRISTOPHER PORCO,

Plaintiff-Appellant,

-against-

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Respondent.

Case No. 522707

**AFFIRMATION OF JOSEPH M. FINNERTY IN SUPPORT OF MOTION
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-RESPONDENT'S MOTION FOR LEAVE TO APPEAL**

I, JOSEPH M. FINNERTY, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am a partner at Barclay Damon LLP, located at 1270 Avenue of the Americas, Suite 600, New York, NY 10020, and am counsel of record for Advance Publications, Inc., The Center for Investigative Reporting, Discovery

Communications, LLC, Gannett Co., Inc., Investigative Reporting Workshop at American University, Media Law Resource Center, MPA – The Association of Magazine Media, National Press Photographers Association, NBCUniversal Media, LLC, The New York Times Company, Online News Association, Radio Television Digital News Association, the Reporters Committee for Freedom of the Press, The Seattle Times Company, and the Society of Professional Journalists (“Proposed *Amici*”). I submit this affirmation in support of the motion of Proposed *Amici* for leave to file a brief as *amici curiae* in support of Defendant-Respondent’s motion for leave to appeal in the above-captioned action.

2. Attached hereto as Exhibit A is a true and correct copy of the brief that Proposed *Amici* seek leave to file with the Court as *amici curiae* (the “Proposed *Amici* Brief”). Proposed *Amici* have duly authorized me to submit the Proposed *Amici* Brief on their behalf.

3. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors working to defend and preserve the First Amendment rights and the freedom of information interests of the news media. The Reporters Committee has provided guidance and research in First

Amendment and freedom of information litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases.

4. The interests of all other Proposed *Amici* are set forth in Appendix A to the Proposed *Amici* Brief attached hereto as Exhibit A.

5. Proposed *Amici* are news media companies and organizations that represent the interests of journalists and news media in the United States.

Proposed *Amici* seek leave to file this brief in support of Defendant-Respondent's motion for leave to appeal because the issues presented are of great importance to them. Specifically, Proposed *Amici* are concerned that allowing claims like those made against Defendant-Respondent to survive a motion to dismiss will encourage claims against members of the news media.

6. Given Proposed *Amici*'s substantial interests in this matter, as described above and in the attached Proposed *Amici* Brief, I respectfully submit that the Proposed *Amici* Brief will be of special assistance to the Court in ruling on Defendant-Respondent's motion for leave to appeal. The Proposed *Amici* Brief presents arguments that might otherwise escape the Court's consideration as to the

impact its decision could have on the news media generally, and provide further support for Defendant-Respondent's request for further review of that decision by the Court of Appeals.

7. Proposed *Amici* have attempted to obtain Plaintiff-Appellant's consent to the filing of its Proposed *Amici* Brief via a request made through U.S. Mail.

Defendant-Respondent consents to the filing of the Proposed *Amici* Brief.

8. WHEREFORE, I respectfully request that the instant motion be granted in all respects and that Proposed *Amici* be given leave to file the attached brief in this appeal.

Dated: New York, NY
 April 4, 2017

/s/ Joseph M. Finnerty
Joseph M. Finnerty

Exhibit A

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT**

CHRISTOPHER PORCO,

Plaintiff-Appellant,

-against-

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Respondent.

Case No. 522707

**BRIEF OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND
14 ADDITIONAL MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANT-RESPONDENT**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici, filing in support of Defendant-Respondent Lifetime Entertainment Services, LLC (“Lifetime”), urge this Court to grant Lifetime leave to appeal the Court’s order reversing the Supreme Court’s order granting Lifetime’s motion to dismiss and allowing Plaintiff’s commercial misappropriation claim under New York Civil Rights Law § 51 to proceed. This Court’s order addresses issues of significant importance to *amici* which warrant consideration by the Court of Appeals.

Amici are Advance Publications, Inc., the Center for Investigative Reporting, Discovery Communications, LLC, Gannett Co., Inc., Investigative Reporting Workshop at American University, Media Law Resource Center, MPA – The Association of Magazine Media, National Press Photographers Association, NBCUniversal Media, LLC, The New York Times Company, Online News Association, Radio Television Digital News Association, the Reporters Committee for Freedom of the Press, The Seattle Times Company, and the Society of Professional Journalists.

Amici publish, broadcast, produce, and distribute constitutionally protected material of interest and concern to millions of New Yorkers on a regular basis, or represent the interests of journalists and news media organizations that do.¹ *Amici*

¹ A full description of *amici* is set forth in Appendix A to this brief.

write to emphasize the significance of this case to members of the news media who routinely develop and disseminate journalistic works about matters of public interest. *Amici* depend upon the existence of clear legal protections for gathering and reporting information to the public, including information about matters of public interest that, given their format, may not readily be identified as “hard news.” Because *amici* are concerned that this Court’s decision, absent further appellate review, will create uncertainty concerning the scope of liability under Civil Rights Law § 51 and could encourage prolonged litigation against members of the news media, *amici* respectfully urge this Court to grant Lifetime’s motion for leave to appeal.

SUMMARY OF ARGUMENT

Plaintiff Christopher Porco’s complaint in this case arises out of Defendant Lifetime Entertainment’s film, *Romeo Killer: The Chris Porco Story* (“*Romeo Killer*”), a dramatized portrayal of a newsworthy event: a murder of which the Plaintiff was convicted. The Supreme Court’s order below, dismissing Plaintiff’s complaint for failure to state a cause of action, was reversed by this Court on the basis of an allegation concerning a producer’s reference in a letter to “a non-fictional program” to run “after [*Romeo Killer*] airs.” Mem. at 4. The Court held that the producer’s statement was sufficient to “suggest[]” that Lifetime “knowingly produced a materially and substantially fictitious biography” of

Plaintiff and, thus, that the allegations of his complaint were sufficient to state a cause of action under Civil Rights Law § 51 (“Section 51”). *Id.* at 2.

The news media have a substantial interest in ensuring (1) that the scope of liability under Section 51 for the creation and dissemination of factual information—regardless of format—is both clearly and narrowly defined and (2) that claims brought under Section 51 that are based on newsworthy publications are properly dismissed at the pleading stage. Given the importance of these issues to journalists and news organizations, *amici* respectfully urge this Court to grant Lifetime’s motion for leave to appeal.

ARGUMENT

- I. The Court’s decision addresses issues of substantial importance to the news media which warrant consideration by the Court of Appeals.**
 - A. The scope of liability under Section 51 and its application to alternative forms of communication about a matter of public interest affect the news media.**

As stated in this Court’s opinion, the legislature intended for Section 51 to be “strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.” Mem. at 2 (quoting *Finger v. Omni Publ’ns. Int’l*, 566 N.E.2d 141, 143 (N.Y. 1990)). Moreover, it has long been recognized that Section 51 does “not apply to reports of newsworthy events or matters of public interest.” *Id.* (quoting *Messenger ex rel. Messenger v. Gruner + Jahr*

Printing & Publ'g, 727 N.E.2d 549, 552 (N.Y.), *cert. denied*, 531 U.S. 818 (2000)).

Members of the news media, who may face frivolous lawsuits brought under Section 51 for their reporting, have a strong interest in ensuring that the scope of liability for commercial appropriation under that provision is consistently given a narrow interpretation, and that the newsworthiness exception to Section 51 is interpreted broadly enough to ensure adequate breathing space for free speech on matters of public interest, regardless of the format in which speech is presented.

In a digital age where more people are obtaining information through social media and messaging applications, news outlets are developing new ways to convey news to the public. The practice of journalism is expanding to include new types of application and web-based presentations and video productions, with some formats used to provide a first-person narrative or a stand-alone interview, while others simply present information in a traditional journalistic manner.

Many news outlets also employ a combination of different approaches to provide the public with a complete “package” of information. *The New York Times*, for example, engages the public with a number of different forms of storytelling by offering morning, evening, and live briefings, visual articles accompanied by graphics that include interactive audio and video content, and a podcast called “The Daily.” News organizations may also use non-traditional

elements and representational footage to report on crime. These various formats can appeal to a vast audience while at the same time giving individual readers and viewers a wide array of choices on how to receive information which interests them.

In short, because publishers strive to make the audience's experience of reading, watching, and/or hearing a story as captivating as the story itself, news organizations rely on multiple ways of delivering journalism. While the different methods employed may change the way a story is told, that alone does not diminish the truthfulness of one form of storytelling merely because the reporter does a follow-up using another format. For that reason, the issue presented by this case—namely, the scope of liability under Section 51 for the creation and dissemination of factual information in a dramatic format, particularly if that format is viewed as the *opposite* of a factual or “nonfiction” work—is an issue of existential significance to the news media, and one that warrants consideration by the Court of Appeals.

B. Early disposition of Section 51 claims arising out of the publication of newsworthy information is an issue of critical importance to the news media.

Journalists and news organizations play a vital role in our democracy. “The inevitable size and complexity of modern government” requires “well-organized, well-financed, professional critics to serve as a counterforce to government—

critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 541 (1977). In order to perform this function effectively for the benefit of the public, journalists and news organizations need strong protections from the threat of prolonged, frivolous litigation.

This Court’s decision reversing the Supreme Court’s order granting Lifetime’s motion to dismiss Plaintiff’s complaint calls into question when a media defendant may successfully obtain dismissal of a complaint at the pleading stage on the basis of the newsworthiness exception to Section 51 liability. Because the threat of increased and protracted litigation has a chilling effect on speech, review of this matter by the Court of Appeals is necessary to maintain New York’s robust record defending the flow of information to the public.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant Lifetime's motion for leave to appeal.

Dated: New York, NY
April 4, 2017

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 1,337.

Dated: New York, NY
 April 4, 2017

APPENDIX A: DESCRIPTION OF AMICI

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

Discovery Communications LLC satisfies curiosity and engages superfans with a portfolio of premium nonfiction, sports and kids programming brands. Reaching 3 billion cumulative viewers across pay-TV and free-to-air platforms in more than 220 countries and territories, Discovery's portfolio includes the global brands Discovery Channel, TLC, Investigation Discovery, Animal Planet, Science and Turbo/Velocity, as well as OWN: Oprah Winfrey Network in the U.S., Discovery Kids in Latin America, and Eurosport, the leading provider of locally relevant, premium sports content across Europe. Discovery reaches audiences across screens through digital platforms, as well as over-the-top and TV Everywhere offerings, including Eurosport Player, Dplay, Discovery K!ds Play and Discovery GO.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate

accountability, ranging widely from the environment and health to national security and the economy.

The Media Law Resource Center, Inc. (“MLRC”) is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

NBCUniversal Media, LLC is one of the world’s leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News

produces the “Today” show, “NBC Nightly News with Lester Holt,” “Dateline NBC” and “Meet the Press.”

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry,

works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing *amicus* brief to be served by U.S. mail to:

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