

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ANDREW L. COLBORN,)
)
) Plaintiff,) Case No. 19-CV-484
) Milwaukee, Wisconsin
 vs.)
) December 19, 2019
 NETFLIX INC., ET AL,) 9:35 a.m.
)
) Defendants.)
)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES CHIEF DISTRICT JUDGE

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Proceedings recorded by electronic recording,
transcript produced by computer aided transcription.

1 TRANSCRIPT OF PROCEEDINGS

2 Transcribed From Audio Recording

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4 THE CLERK: Court calls a civil case, 19-CV-484,
5 Andrew Colborn versus Netflix, Inc, et al. Please state your
6 appearances starting with the attorneys for the plaintiff.

7 MR. BURNETT: George Burnett, April Barker and Michael
8 Griesbach on behalf of the plaintiff.

9 THE CLERK: Thank you. For the defendant.

10 MR. FRIEDMAN: James Friedman of Godfrey & Kahn and
11 Leita Walker and Lee Levine of Ballard Spahr for the defendants.

12 THE COURT: The attorneys by phone.

13 MR. KELLEY: Good morning, Your Honor. This is
14 Matthew Kelley for the defendants.

15 THE COURT: Anybody else on the phone, Ms. Wrobel?
16 Okay. All right. Thank you, all. Good morning, everyone.
17 We're here this morning, as you know, because we have several
18 motions on file, most particularly Motions to Dismiss from the
19 defendants.

20 I've reviewed all the pleadings and the small rain
21 forest of trees worth of paper that you all have murdered in --
22 in briefing them and in filing attachments. I think I have a
23 little bit of a grip on what you're arguing and what you're
24 concerned about. I am more than happy to give you all
25 additional opportunity to make argument, but I should note and I

1 think, perhaps, Ms. Wroble has already told you, I have a 9:30
2 criminal matter -- I mean a 10:30, sorry, criminal matter that I
3 have to take up, so that's the amount of time that we've got
4 this morning.

5 So with that, let me just walk through what I
6 understand that we've got in front of us. We have Netflix's
7 Motion to Dismiss. That's at Docket No. 30.

8 We have the plaintiff's Motion to file -- Relief to
9 File a Second Amended Complaint. That's at Docket No. 84.

10 We have a Motion, from Chrome, Ricciardi and Demos, to
11 Dismiss for Improper Service. That's Docket No. 35.

12 And then we have two requests from the plaintiff to
13 file sur-replies or request to file two different sur-replies.

14 And then finally, we have a Motion by the plaintiff to
15 Extend the Time to Serve in the event that I conclude that
16 service was improper. Any other pending matters that anybody
17 can think of that I didn't list off? No.

18 Okay. So I think we should probably start assuming
19 that you all want to make argument, and I'll ask you on each of
20 these, but we should probably start with Netflix's Motion to
21 Dismiss. Does the defendant wish to make any further argument
22 in that regard?

23 MR. LEVINE: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. LEVINE: Do you prefer that I stand?

1 THE COURT: You know, normally I prefer that you sit
2 because that puts you closer to the microphone, but it looks
3 like somebody scooped the ElMO in just such a position that
4 I'll be listening to the ElMO talk to me if you sit.

5 MR. LEVINE: I'm happy to stand.

6 THE COURT: Just make sure that the mic is canted up.

7 MR. LEVINE: Gotcha. I won't be long, Your Honor.
8 Although, I'm happy to answer any questions that you have.

9 I'm pleased to report that unlike the motion that
10 you're going to hear next, this one boils down to a single,
11 relatively straightforward issue, and that's whether the
12 plaintiff, who is a conceded public official, has plausibly
13 alleged either in his initial or his proposed Second Amended
14 Complaint sufficient facts to plausibly allege that Netflix, as
15 opposed to the individual defendants, disseminated Making a
16 Murderer with a required actual malice, which means that they
17 did so despite a high degree of awareness that it references to
18 Officer Colborn were probably false.

19 I'm not going to belabor the concourse of the
20 plausibility standard set out in *Iqbal* & *Twombly* because I know
21 the Court's familiar with them. But I pause to emphasize that
22 in this circuit, as in every other that considered the question,
23 there is no doubt that the plausibility requirement applies to
24 the actual malice issue.

25 Seventh Circuit case on point is *Pippen v. NBC*

1 *Universal*, which we cite in our brief.

2 With that backdrop, I'll focus on why neither the
3 initial complaints swore their proposed successor plausibly
4 pleads actual malice with respect to Netflix, and that's largely
5 because the affirmative allegations contained in those pleadings
6 foreclose any plausible claim to that effect against Netflix.
7 There are at least six reasons for this.

8 First, the Second Amended Complaint affirmatively
9 pleads that it was the individual defendants, not anyone
10 employed by Netflix, who attended every day of Steven Avrey's
11 trial and reviewed all of the voluminous court filings in that
12 and other litigation involving him. And that it was therefore
13 only plausibly could have been those defendants who allegedly
14 made editing decisions that they knew falsified the trial
15 testimony and other proceedings they describe precisely because
16 they, and not anyone employed by Netflix, had either attended or
17 reviewed the record of all of those proceedings.

18 Second, the Second Amended Complaint affirmatively
19 pleads that the individual defendants who allegedly did all of
20 these things were employed by an independent production company,
21 defendant Chrome Media, not by Netflix.

22 Third, the only specific action taken by Netflix that
23 is pled on the basis of something other than information and
24 belief is that Netflix distributed *Making a Murderer* to a
25 worldwide audience.

1 Fourth, the Second Amended Complaint itself
2 affirmatively pleads that the program communicates to a
3 reasonable viewer, which presumably includes Netflix, that it is
4 an objective and accurate account of the proceedings they've
5 described, and that to quote the opposition brief to this motion
6 at Page 3, "Nothing in the broadcast indicate to viewers that
7 there have been edits".

8 Fifth, there's no allegation in the Second Amended
9 Complaint that Netflix considered or even had any reason to
10 consider that the individual defendants were either unreliable
11 or untrustworthy. Indeed, the Complaint affirmatively pleads
12 precisely the opposite pleading that at all relevant times, the
13 individual defendants, and I quote from Paragraph 16, "Have
14 avowed that they were unbiased and objective in their recalling
15 of events".

16 And finally, the Second Amended Complaint implicitly
17 acknowledges that Netflix was aware of the following undisputed
18 facts from the face of the program itself, that Steven Avery had
19 been wrongfully convicted and imprisoned for almost 20 years for
20 a crime that he did not commit; that while Avery was
21 incarcerated, plaintiff, who was then a corrections official in
22 Manitowoc County, received a call from another law enforcement
23 agency informing him that someone else had confessed to the
24 crime of which a Manitowoc County inmate, who turned out to be
25 Steven Avery, had been convicted. And that despite that

1 information, the plaintiff did not prepare a contemporaneous
2 written report at all. No apparent effort was made to
3 investigate the matter further and as a result, Avery remained
4 in prison for several more years.

5 And Netflix was also aware again from the face of the
6 program itself of the undisputed facts that following Avery's
7 ultimate release, he filed a civil lawsuit against Manitowoc
8 County that shortly thereafter he was arrested for a murder that
9 he says he didn't commit. And that despite publicly announced
10 efforts to transfer responsibility for that matter elsewhere,
11 given the obvious conflict of interest, the plaintiff
12 nevertheless participated in the search for the decedent's car
13 and a second search of Avery's home during which magically he
14 discovered the key to the decedent's vehicle, which became
15 crucial evidence against Avery.

16 Your Honor, given all of these undisputed pleaded
17 allegations, it is manifestly implausible to make the conclusory
18 assertion, as the Amended Complaint does, that Netflix
19 disseminated Making a Murderer, despite a high degree of
20 awareness, that it references this plaintiff were probably
21 false.

22 Your Honor, the law on this is straightforward. A
23 distributor, such as Netflix, cannot be said to have
24 disseminated a work of non-fiction created by someone else with
25 actual malice, be it a book, a magazine article, a film or a

1 television series with actual malice unless the work itself
2 relates information that is on its face inherently improbable,
3 or there were obvious or, as the Seventh Circuit has put it,
4 blatant reasons to doubt the reliability of the creator or
5 author.

6 We've cited a host of cases arising in the context of
7 a variety of media that articulate and apply this well-accepted
8 rule, including especially the *Saenz v. Playboy Enterprises* case
9 from the Seventh Circuit and the *Biskupic v. Cicero* case from
10 the Wisconsin Court of Appeals.

11 Your Honor, these cases and the liability standard
12 they apply demonstrate that this plaintiff cannot state a
13 plausible claim against Netflix as a matter of law.

14 I might also suggest that although they will
15 undoubtedly deny it, the plaintiff's counsel in their heart of
16 hearts know this is true, which explains why in their opposition
17 brief they rely primarily on the contention that *New York Times*
18 *v. Sullivan* should be overruled, and the actual malice standard
19 it established abandoned, a contention they concede this Court
20 is powerless to accept.

21 For these reasons, Your Honor, I respectfully submit
22 that Netflix's Motion to Dismiss should be granted, that the
23 plaintiff's Motion for Leave to File a Second Amended Complaint
24 should be denied as futile, and that the case against Netflix
25 should be dismissed with prejudice. Thank you, Your Honor. I'm

1 happy to answer any questions you might have.

2 THE COURT: Thank you. I do have a couple of
3 questions. And my first one is, I'm at a bit of a loss with
4 regard to Netflix's argument, that it was the individual
5 defendants who actually sat through and listened to the trial.
6 And that somehow or another, because they're the ones who were
7 physically present in the courtroom, that they're the only ones
8 who could have kind of gotten the general flavor of what was
9 going on in that courtroom. There was, obviously, a set of
10 transcripts, a full set of transcripts the plaintiff argues, a
11 full unedited set of transcripts. And while that might not
12 necessarily show one's facial features or expressions or tone of
13 voice, one doesn't have to sit in a courtroom to read a set of
14 transcripts and understand all the words that were said. And
15 some of the allegations here are that Netflix, in the Second
16 Amended Complaint, that Netflix was involved in editing those
17 transcripts. And some of the allegations are that it's those
18 edits that produced a misleading result.

19 So I'm curious about the significance of whose butt
20 was in a chair, forgive my saying, in the courtroom.

21 MR. LEVINE: Your Honor, that -- the physical presence
22 in the courtroom is -- is for the reasons you've stated not
23 dispositive or even particularly relevant, except in the sense
24 that the Second Amended Complaint includes as exhibits documents
25 that demonstrate, and it is otherwise undisputed, that these

1 film makers, the individual defendants, worked on this project
2 for seven years before they took it to Netflix; that they
3 literally camped out in Manitowoc County. They're the ones who
4 plowed through all the trial transcripts. They're the ones who
5 attended trial proceedings. They're the ones who read all the
6 record materials. And by the time that they came to Netflix,
7 they had multiple episodes already in rough cut. They had
8 others already scripted. They had a full story board.

9 And that in the context of a claim that a distributor,
10 like Netflix, whose job it is to distribute works to the public,
11 would have rolled up its sleeves and reviewed transcripts and
12 checked to see if the editing that the plaintiff -- that the
13 other defendants did accurately reflected what took place at the
14 trial is itself implausible, and it's all obviously pled on
15 information and belief.

16 And the Court is entitled to look with some jaundiced
17 eye at an accusation like that or an allegation like that as to
18 whether that is a reasonable inference to draw from the mere
19 fact, the only fact that's alleged in the Complaint, not on
20 information and belief, that Netflix distributed the work. It's
21 like saying the owner of a book store can be plausibly be said
22 to act with actual malice if a plaintiff puts in a Complaint on
23 information and belief the book store owner reviewed the book
24 and reviewed all of the allegations in the book against the
25 source material before they put the book on the shelves. We

1 know that that's manifestly implausible, as is this.

2 THE COURT: Another question that I have is I think I
3 heard your argument correctly, but I may not have. You said
4 that one of the arguments, in support of dismissal, is that the
5 film was distributed or was released with claims that it was
6 factually accurate, and that there was nothing to indicate that
7 there were any edits. How does that support dismissal against
8 allegations that there were, in fact, edits, and that Netflix
9 had some part in making those edits?

10 MR. LEVINE: Because the allegation that Netflix had a
11 part in making those edits, as I just stated, is itself
12 implausible. And that leaves you with the position that when
13 this stuff -- when the episodes that were already in the can
14 when the scripts for the other episodes when they were presented
15 to Netflix, that Netflix somehow developed obvious reasons to
16 doubt the accuracy of the material it was presented with on the
17 grounds that it was inherently improbable, which is the legal
18 standard under the actual malice test, for distribution of
19 material created by somebody else.

20 And that Amended Complaint itself affirmatively says
21 anybody looking at this program would think it was an objective
22 and her account of what happened, excuse me, in the underlying
23 legal proceeding. So nothing would have jumped out to Netflix
24 that said, this is inherently improbable or we have reason --
25 obvious reason to doubt that this is accurate, and that's the

1 reason why that's important.

2 THE COURT: Okay. Thank you.

3 MR. LEVINE: Thank you.

4 THE COURT: For the plaintiff, Mr. Conway.

5 MR. BURNETT: George Burnett for the plaintiff. The
6 -- I think if we get to the nub of this, the defendants'
7 position is that it would be implausible to believe that they
8 did anything more than take a final product from two novice film
9 producers, who they never worked with before, looked at it, said
10 this looks good to us, especially because these novice film
11 producers told them we're unbiased, and then disseminated it
12 worldwide.

13 The defendants' position is, is that if you believe
14 anything except for that, it's silly. If I had to summarize
15 what I hear the defendant saying, it is two things. Number one,
16 you really didn't tell us in anything, except for legalese, what
17 we did wrong. And number two, you didn't distinguish between
18 what we did wrong and what our co-defendants did wrong. And
19 therefore, the courthouse door is closed to you. That's not the
20 law.

21 I found it interesting that there's a debate going on
22 in the briefs about a case out of the Seventh Circuit, *Doe v.*
23 *Smith*. *Doe v. Smith* is a Judge Easterbrook decision that came
24 before *Iqbal* and *Twombly*, and it really in a very articulate
25 fashion describes what a pleading responsibility is. You need

1 not plead facts. You need not plead law. You need not plead
2 legal theories. You just need to give the defendant a narrative
3 informing them what they did wrong.

4 Now, the defense says that that's obsolete, that that
5 is no longer the law. We say it remains the law. After reading
6 the reply brief, I looked up, I Shepardized *Doe v. Smith*, and I
7 found that Judge Adelman has cited and quoted that decision a
8 half a dozen times. Judge Griesbach has cited and quoted that
9 decision two or three times. That decision is a clear
10 articulation of what the plaintiff must prove here.

11 This particular Complaint alleges that the defendants
12 collaborated. They put together a -- what they called a
13 documentary that was misleading and deceptive and destroyed or
14 came close to destroying Mr. Colborn's life. The Court's read
15 the allegations of damages, and I need not repeat them here. It
16 is true that anything the defendants did individually doesn't
17 carry the day.

18 For example, Netflix -- Editing a transcript alone
19 doesn't carry the day, but the combination of factors that went
20 on here does carry the day. They utilized only biased
21 witnesses, Mr. Avery, his relatives, his lawyers. They edited
22 transcripts in a misleading and deceptive fashion to communicate
23 information that was never imparted by Mr. Colborn and other
24 witnesses. They were not under any hot deadline. This was not
25 hot news as the cases call it. They had the luxury of time, the

1 opportunity to investigate and inspect.

2 Indeed, the facts seem to be that when this particular
3 publication came to Netflix, they had three rough cuts, and it
4 ended up being ten episodes or so. There are a half a dozen
5 other things that make this suspect, make actual malice
6 plausible.

7 The defendants main contention is that we didn't
8 distinguish between what they did and what their co-defendants
9 did. Well, allegations that they collaborated, that they
10 created, that they edited, that they worked together are
11 adequate. We don't have to distinguish at this stage of the
12 litigation what Netflix did right and what Netflix did wrong,
13 and it is no defense to say that you've relied on the work or
14 the reports of others to an action for defamation against a
15 public official. There is a greater obligation, especially when
16 you're faced with circumstances that should tell you, perhaps,
17 this information isn't true. After all, both of the defendants
18 were convicted, Mr. Dassey, Mr. Avery in separate trials, and
19 those convictions were affirmed on appeal. There was plenty of
20 warning signs for Netflix to take heed of. And discovery will
21 tell us just how much heed they took.

22 So unless the Court has any questions, I think that
23 just about summarizes the plaintiff's position.

24 THE COURT: Thank you, Mr. Burnett. As an aside, I
25 called you Mr. Conway. I was going to apologize to you for

1 that, but given the great respect I have for your former partner
2 and the fact that I miss him, maybe let's just chalk that up to
3 wishful thinking that I could see Mr. Conway here. I know who
4 you are.

5 MR. BURNETT: We all miss him, Your Honor.

6 THE COURT: Yeah, I know. Any rebuttal comments?

7 MR. LEVINE: Yes, Your Honor. I want to make just a
8 few brief comments. First, the *Doe v. Smith* case to which
9 Mr. Burnett refers, is clearly no longer good law. It relies on
10 the no set of facts standard set out by the Supreme Court in
11 *Conley v. Gibson*, which was expressly repudiated in *Iqbal* and
12 *Twombly*.

13 If the Court would like a current version of Judge
14 Easterbrook's views with respect to what he found *Twombly* means,
15 I commend to you the *Bank of America* case, which is cited in our
16 brief, which is remarkably similar to this one. Because in
17 response to something else that Mr. Burnett said, that is
18 another case where the plaintiff in its pleading referred
19 generically to defendants did this, defendants did that,
20 defendants did the other thing. And Judge Easterbrook expressly
21 held that in the *Iqbal* and *Twombly* world, that just doesn't cut
22 it. You have to say what each defendant did and plausibly
23 allege what that defendant did that would lead to liability.

24 And, Your Honor, in one of your own decisions, I think
25 you put it quite well in the *Anderson* case, which we also cite

1 in our Complaint, you say that *Iqbal* and *Twombly* requires the
2 plaintiff to set out who, what, where, when and why. And the
3 who is who did what is important. A general allegation that
4 defendants did this and defendants did that just doesn't cut it.

5 And in this case, it's even clearer because the
6 Complaint alleges on many, many specific occasions, and we cite
7 specific paragraphs in our papers, that the individual
8 defendants did this. The individual defendants did that. The
9 individual defendants did that. And then there's just a
10 conclusory assertion that defendants collaborated, that all
11 defendants collaborated in doing these things. That is simply
12 not sufficient under *Iqbal* and *Twombly*.

13 Two more quick points. One, is it is demonstrably
14 incorrect from the face of the program which Your Honor is
15 entitled to look at on a Motion to Dismiss because it is
16 incorporated in the pleading by reference; that it does not rely
17 only on biased witnesses favoring Mr. Avery. It has detailed
18 interviews and statements and press conferences held by the
19 prosecutors and trial proceedings involving the prosecutors in
20 telling the State's side of the story. And it reports, quite
21 explicitly, that Mr. Dassey and Mr. Avery were found guilty.
22 That wasn't kept secret from the audience. That is a center
23 piece of the thing.

24 And finally in response to Your Honor's previous
25 questions -- further response to Your Honor's previous questions

1 to me about the plausibility of the contention, the generalized
2 on information and belief contention that Netflix somehow
3 participated in the editing, the law is clear both in the *Iqbal*
4 case itself and in a host of Seventh Circuit cases, including
5 the *McCauley* case, which we cite in our brief, that where as in
6 this case, there is an obvious alternative explanation for the
7 conduct that's alleged in the complaint, you haven't pushed the
8 claim across the line from possibility to plausibility.

9 And here where it is clear and specifically pled in
10 the Complaint that Netflix was a distributor, and its common
11 knowledge and common sense that that's what Netflix does is a
12 distributor or a programming, that obvious alternative
13 explanation to the implausible notion that they sat there and
14 reviewed trial transcripts and checked it against the possible
15 film that the producers -- sections that the defendants gave
16 them somehow is a plausible contention. In the face of the
17 obvious alternative explanation, it just can't carry the day.
18 Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Levine. You all are fully
20 aware of the 12(b)(6) standard, and Mr. Levine and Mr. Burnett
21 have both discussed it, and I think everyone is in agreement
22 that the plausibility standard that Judge Easterbrook has talked
23 about and has been discussed over and over and over again in
24 Seventh Circuit cases is the appropriate one. And just as an
25 aside and just for the purposes of the record, again we're

1 talking right now in particular about the defamation claim in
2 which the plaintiff has to show a false statement communicated
3 by speech, conduct or writing. It's not privileged, and it
4 tends to harm one's reputation so as to lower him in the
5 estimation of the community or deter third persons from
6 associating or dealing with him, and that's in re *Storms v.*
7 *Action Wisconsin, Inc.*, 309 Wis.2d 704 at 722, a Wisconsin case
8 from 2008. And then we know, of course, that if the person who
9 is allegedly defamed is a public official, then we have the next
10 step, which is the actual malice step, and the one I think that
11 for the great part Netflix has focussed on.

12 It seems to me that the plaintiff has conceded that
13 the plaintiff meets the definition of a public official. But
14 what the plaintiff has argued is that particularly the Second
15 Amended Complaint alleges sufficient facts to demonstrate that
16 Netflix acted with actual malice. And, of course, actual
17 malice, under Wisconsin law, occurs when the actor either knows
18 that a statement is false or makes the statement with reckless
19 disregard for its truth or falsity. That's *Erdmann v. SF*
20 *Broadcasting*, 229 Wis.2d 156 at 169, the Court of Appeals case
21 from 1999.

22 And particularly in that reckless disregard
23 neighborhood, the plaintiff has to show that the defendant in
24 fact entertained serious doubts as to the publication or in this
25 case the productions truth. That's again from *Erdmann* at Pages

1 169 through 70.

2 And of particular note, a defendant cannot necessarily
3 escape liability simply by claiming that the defendant believed
4 that the production was truthful. That's a *St. Amant* case, 390
5 US at 732. Recklessness can be found when there are obvious
6 reasons to doubt the veracity of the information or the accuracy
7 of it. Again, from *St. Amant*.

8 Mr. Levine pointed out that the plaintiffs have made
9 an argument that that actual malice standard in *New York Times*
10 *v. Sullivan*, the Supreme Court should rethink. I'm not going to
11 spend any time on that. I'm not the boss of them obviously, and
12 that's going to have to be an argument that, perhaps, the
13 plaintiff will have an opportunity to raise in front of that
14 august body at some point in time, but I'm not the -- I'm not
15 the person to do that.

16 So when I turn to the Amended Complaint, I think that
17 the -- that Netflix's argument about lumping if you will, which
18 is lots of people did this, lots of people did that, lots of
19 people did the other things accurately characterizes the Amended
20 Complaint. However, the plaintiffs have -- The plaintiff has
21 filed a Second Amended Complaint or a proposed Amended Complaint
22 as part of the proceedings asking for leave to file that
23 proposed Amended Complaint.

24 And again, if we're simply talking the threshold issue
25 that we talk about at a 12(b)(6) stage, which is looking within

1 the four corners of that Second Amended Complaint determining
2 whether or not there have been enough facts alleged, whether on
3 information and belief or otherwise, to put the defendant on
4 notice as to what the defendant is alleged to have done. I
5 think the Second Amended Complaint is substantively different
6 than the first in a number of ways.

7 There are specific allegations as to Netflix, not just
8 everybody held hands and worked together. But as to Netflix,
9 there are specific allegations in the Second Amended Complaint.
10 For example, the fact that Netflix accepted awards for Making a
11 Murderer for writing and editing. Netflix accepted those
12 awards, that its employees were recognized in the media for
13 their role in sort of defining this -- this new genre, I'm not
14 sure that it's hugely new, but genre of television. There were
15 Netflix employers, according to the Second Amended Complaint,
16 who produced several of the individual episodes of the program.

17 There were Netflix employees who have made statements
18 to the press regarding their roles in producing the programs.
19 There is, of course, reference to collaboration with Demos and
20 Ricciardi, and those were allegations that existed in the
21 Amended Complaint, but there were employees who discussed their
22 own roles, and those were employees of Netflix.

23 The plaintiff has alleged in the Second Amended
24 Complaint that in point of fact, there were only I think three
25 episodes, rough-cut episodes that were, as Mr. Levine put it, in

1 industry speak in the can at the time that they came in and
2 pitched to Netflix. And as it turns out, there were a total of
3 ten episodes that were produced, and they weren't rough, they
4 were final episodes. And the allegation is that Netflix had a
5 role in developing the programs, in vetting them all the way
6 from pre-production through the post-production, and that
7 Netflix had a role in the final content decisions.

8 They also -- The Second Amended Complaint also alleges
9 that in October of last year, the second part, Making a Murderer
10 Part 2, was admitted -- sorry was released. And by that time,
11 Netflix had reason to be aware of criticism that had arisen over
12 Part 1 and the accuracy or lack of accuracy, depending on who's
13 doing the talking, of Part 1, and yet continued to proceed with
14 Part 2.

15 And again, the allegations in the Second Amended
16 Complaint are that Netflix specifically was heavily involved in
17 the production, the post-production and the editing of that
18 second series as well as, of course, marketing and distributing,
19 which Netflix has conceded that it was the distributor. They
20 quote -- The Amended Complaint quotes Ricciardi and Demos as
21 indicating that Netflix was a partner in the making of the
22 second series from the very beginning all the way to the end.

23 And so there are in the Second Amended Complaint,
24 specific factual allegations made as to Netflix rather than
25 simply group allegations of the defendants doing this. There

1 are still in the Second Amended Complaint some allegations that
2 are collaborative, if you will. But there are a number of
3 allegations in the Second Amended Complaint that are specific to
4 Netflix. And Netflix has also argued that, okay, so, you know
5 even if Netflix was a producer, had a role or some of its
6 employees had a role as producers or executive produces, so
7 what. You don't necessarily control a production simply because
8 you're acting as the producer or the executive producer.

9 I think exactly quoting from Netflix's brief, that is
10 because there's no connection between a person's mere status as
11 an executive producer and involvement in the editing of a film.
12 I have no earthly idea whether that was true. I was a theater
13 major in college, but I never made it to film. I just stood out
14 there on the stage and flubbed my lines, so I don't know whether
15 that's true or not. It may very well be, and that may very well
16 be an issue for summary judgment in terms of what role anyone
17 who carried a producer or an executive producer title may have
18 played and what they may have done as part of that role.

19 But we're at the 12(b)(6) stage, and the 12(b)(6)
20 stage says that the plaintiff needs to plausibly state a claim,
21 and I think the Second Amended Complaint does plausibly state a
22 claim, and it plausibly states a claim against Netflix. Again,
23 there are allegations that were transcripts that were sliced and
24 diced, and that Netflix played a role in that.

25 With regard to Netflix's argument and Mr. Levine

1 referred to it today, that even if I allow the plaintiff to
2 amend and to file the Second Amended Complaint, it would be
3 futile under Rule 15 for me to allow that because it points to a
4 whole series of cases where courts have declined to hold
5 distributors liable for defamatory content. And there are
6 numerous cases that it has pointed to both at the circuit court
7 level and at the district court level. And I agree that those
8 cases refuse to hold distributors liable. However, all of those
9 cases were very fact bound and fact intensive. It depended on
10 what the distributors knew. It depended on what other role the
11 distributor may have played, whether there was another role
12 other than distribution. And many of those cases, by the way,
13 refused to hold the distributor liable at the summary judgment
14 stage, not at the Motion to Dismiss stage after they had heard
15 evidence about what role the distributor plays.

16 I think many of the arguments that Netflix makes with
17 regard to the Second Amended Complaint sound in summary
18 judgment. They sound in, you know, wait, wait, Judge, you're
19 going to see evidence, and you're going to hear that this
20 couldn't have happened or that couldn't have happened or this is
21 not the way it went down. Maybe that will end up being true, I
22 don't know, but that's not where we are right now. Right now,
23 we're at the Motion to Dismiss stage.

24 So I am going to grant the plaintiff's Motion to File
25 a Second Amended Complaint and deny the Motion to Dismiss --

1 Netflix's Motion to Dismiss the defamation claim. I note that
2 Netflix also spends a little bit of time talking about the other
3 claims in the Second Amended Complaint, the negligence claim and
4 the intentional infliction of emotional distress claim.

5 The defendant argues that the plaintiff hasn't argued
6 what the ordinary care was that Netflix didn't show, again
7 hammering on the fact that it argues it didn't do anything other
8 than distribute, and so what standard of care could it have
9 violated?

10 I note that the plaintiff has alleged a negligence
11 claim in the alternative to the defamation claim. But be that
12 as it may, it did allege, the Second Amended Complaint, that the
13 defendant had a duty to exercise reasonable care when
14 communicating information about him, and that some of the
15 statements or information that was communicated about him either
16 was false or had been manipulated to such an extent that it
17 mislead viewers into getting a false impression, and that that
18 was a breach of that duty of care. And again, it's 12(b)(6)
19 stage, I think that is sufficient to state a claim and to state
20 the elements of a negligence claim under Wisconsin law.

21 And then the last claim of course, intentional
22 infliction of emotional distress. Netflix argues that this is
23 just another way of stating a defamation claim, and they also
24 state that the plaintiff can't prove the claim because they
25 can't -- The plaintiff can't prove that Netflix intended to

1 cause emotional distress. The plaintiff has alleged otherwise.
2 Again at the pleading stage, the plaintiff has stated a claim.
3 And so for all of these reasons, I'm going to deny Netflix's
4 Motion to Dismiss and allow the plaintiff to file a Second
5 Amended Complaint.

6 Where that takes us to next is the motions by Chrome
7 and Demos and Ricciardi and their Motion to Dismiss with regard
8 to service, and there are some related motions to that, two
9 motions to file a sur-reply, and then the Motion for An
10 Extension of Time. I just want to address those really quickly,
11 because I don't think there's a particular need to spend a whole
12 lot of time on them.

13 As you all are aware, our local rules anticipate a
14 motion to -- a response and a reply. They do not anticipate
15 sur-reply, which is why the plaintiff has sought leave to file
16 sur-replies. And generally, I would hazard to guess that my
17 colleagues and I are all on the same boat, which is that we're
18 not huge fans of sur-replies. There's a reason that we get a
19 three part -- the movant gets two kicks at the cat, and the
20 respondent gets one. However, if there are circumstances in
21 which a party is attempting to respond to a motion or an issue
22 that was really raised for the first time in a reply, we have
23 allowed sur-replies under those circumstances.

24 The plaintiff has filed two requests to file a
25 sur-reply. The first one is at Docket No. 90. And as far as I

1 can tell, unless I'm missing something, it's just addressing a
2 case, which I was aware of before the motion for sur-reply was
3 filed, that federal law applies to service after removal. State
4 law applies to service before removal. I don't see any need for
5 that sur-reply. As I indicated, I already knew about the case,
6 so I'm going to deny the motion to file -- for leave to file the
7 sur-reply to Docket No. 90. I don't think it advances the ball.

8 However, the second motion that the plaintiff filed,
9 it falls under that category that I described of seeking to
10 address an issue that came up only on reply.

11 The plaintiff has asked to file a sur-reply addressing
12 the second declaration of Defendant Demos, which was filed with
13 the defendant's reply brief. And the plaintiff says that it has
14 located or he has located records from California Secretary of
15 State that are inconsistent with Demos' second declaration. I
16 don't hear Netflix or the defendants sorry, plural, objecting to
17 my considering the records. They just say they are not
18 inconsistent. They don't change anything. They don't make a
19 difference, but I think that that is an appropriate use of a
20 sur-reply, and so I am going to grant the second motion for
21 leave to file a sur-reply, and I'll consider both the
22 information in that second motion and the defendant's arguments
23 in opposition to that information as part of determining the
24 Motion to Dismiss.

25 That then brings me to the Motion to Dismiss itself

1 and to service. And let me just, say and I'll give each of you
2 an opportunity to address what I'm about to say, but I
3 regretfully believe, for all of our sakes, that I'm not in a
4 position to resolve the Motion to Dismiss with regard to
5 effective service without an evidentiary hearing. There's a lot
6 of disagreement between the parties over who got what, who knew
7 what, who did what when. We've got flat statements in some
8 cases by people that they never received service in contrast to
9 other people who said yes, they did.

10 I've gone through all of this, and I'm happy to hear
11 from you all, but I think there are a number of factual
12 disagreements here that require flushing out at an evidentiary
13 hearing. The reason I say regretfully is because I understand
14 that that is time, effort and expense on all of your part to
15 bring witnesses in on this issue. But I think there are too
16 many inconsistencies between different versions of the events
17 for me to make that determination without hearing from some
18 folks.

19 The other thing I will note is that the other motion
20 I've not addressed is the Motion for an Extension of Time to
21 file the summons and complaint assuming that I conclude that
22 it's not -- it wasn't properly filed. I think that's obviously
23 something that address once I've made a decision about whether
24 or not service was effectuated. However, there's also the
25 statute of limitations problem there. If there wasn't proper

1 service, I don't think I can extend the time. The statute of
2 limitations has run. And if there was proper service, then I
3 can. So I think those two things are inextricably intertwined
4 to some extent. Whether or not I can give an extension of time
5 to serve is going to necessarily depend on whether or not there
6 was proper service. So I'm happy to hear from anybody who wants
7 to put an oar in the water on that. But after going over and
8 over and over the facts, I have questions that I'm not sure --
9 Everybody can argue until they're blue in the face, but I'm not
10 sure they argue -- they respond to the factual question. From
11 the defendants, given that it's you all's motion.

12 MS. WALKER: Thank you, Your Honor. To start, we
13 agree with you that the statute of limitations causes -- you
14 know, is fatal to any motion to extend the time. And it sounds
15 like you've made up your mind on the need for an evidentiary
16 hearing. I did want to just clarify, because I know the record
17 is voluminous and there's a lot of dates flying back and forth,
18 that our view is there's really only four affidavits of service
19 or affidavits of what they call due diligence that you need to
20 be looking at.

21 It's Docket Nos. 44, 49 and 50, and that's all that
22 the plaintiffs have put in the record that is not hearsay or is
23 not perjured and withdrawn that really sets forth their position
24 on when attempts to service were made and when they believe
25 service was effected. We believe it was not, but I don't know

1 that there's really a factual dispute over those affidavits.
2 Our position would be that even if you take them at face value,
3 that still doesn't constitute service. But if you feel more
4 comfortable with an evidentiary hearing, we're obviously happy
5 to comply.

6 THE COURT: Thank you. Ms. Barker.

7 MS. BARKER: Thank you, Your Honor. I'll be very
8 brief. First of all, in an effort -- First of all, if Wisconsin
9 law has to be considered, then we certainly agree with the Court
10 that an evidentiary hearing is appropriate, and I would note
11 that service -- the affidavits that were submitted by the
12 defendants are, in fact, pertinent and therefore those con
13 traditions I think do have to be resolved for even one -- for at
14 least two reasons.

15 One, is that service under Wisconsin law can be proven
16 through the written admission of the defendant such as through
17 affidavits that were submitted in this case under
18 Section 801.10(4)(c).

19 Second, I would note with respect to the argument that
20 there's hearsay in the affidavits of counsel, those statements
21 regarding what counsel was told were obviously submitted for
22 purpose of notice or knowledge of what counsel understood for
23 purposes of the reasonable diligence analysis. They were not
24 asserted for purposes of truth of the declarant statements. In
25 fact, we are submitting to the Court that the we later found out

1 that some of those declarations were false, so we do think that
2 those are material.

3 And then I think just in a very brief, perhaps, last
4 salvo to attempt to spurr everyone by seeing whether federal law
5 is something the Court would be amenable to applying and then
6 the hearing wouldn't be necessary. I would just note briefly
7 that the issue, as we saw it, is that the argument was something
8 of a moving target. 28 U.S.C. § 1448, which governs service
9 after removal where there's a defect in service or in service
10 prior to removal, was never mentioned in the initial Motion to
11 Dismiss but was -- and we mentioned it in our response, which
12 lead to the reply brief and the mention of the *Walker* case.

13 As I'm sure the Court is aware, the *Walker* case
14 specifically distinguished *Hanna v. Plumer*, holding that in
15 *Walker*, there was no conflict between Federal Rule of Civil
16 Procedure 3 and the state statute of limitations, that they
17 serve different purposes in that case because *Walker* was not a
18 removal case, and 28 U.S.C. § 1448 was not implicated.

19 Because 28 U.S.C. § 1448 is implicated, this is a
20 removal case. We think this is a *Hanna* case, *Hanna v. Plumer*,
21 which provides that where there is a direct conflict between a
22 variably promulgated federal rule and even state substantive
23 law, even the statute of limitations, which essentially was what
24 was at issue in *Plumer*. It was a limitation on when enhanced
25 service had to be accomplished on an executor in order for a

1 claim to proceed against an estate. The federal rule prevails.
2 Even if that means that somebody whose case would be dead in
3 state court gets to proceed in federal court. That's number one
4 why we think this is not a *Walker* case or this is not governed
5 by *Walker*.

6 Secondly, the state statute of limitations that the
7 defendants rely on in Section 893 is also subject to the
8 provision in Section 893 of the Wisconsin Statutes that holds
9 where 893.15 in the same chapter that holds that where or
10 provides that where a case on a Wisconsin claim is pending in a
11 foreign forum, defined to include federal courts sitting in --
12 located in Wisconsin, federal law looks to -- I'm sorry -- the
13 foreign court looks to local foreign law with respect to the
14 question of commencement of action. That's 893.15, and it
15 specifically states, in a non-Wisconsin forum, again defined to
16 include a federal court sitting in a state, the time of
17 commencement or final disposition of an action is determined by
18 the local law of the forum.

19 Therefore unlike *Walker*, this is not a case where
20 there is, in fact, a conflict. In the sense there is a conflict
21 if Wisconsin law says what the defendant say it does. But if
22 under 893.15, the federal law simply trumps the state statute of
23 limitations because Wisconsin defers to the federal rule as to
24 commencement of action, unlike the Oklahoma statute that was at
25 issue in the *Walker* case. And then I think I've used up our

1 time. Thank you, Your Honor.

2 THE COURT: Any brief response from the defendant?

3 MS. WALKER: Very briefly on *Walker*. I don't believe
4 they raised the 893.15 argument before. I may have missed it,
5 but I believe that's a new argument and, of course, it's not
6 proper at this juncture.

7 The *Walker* case is about when a suit was commenced.
8 It looked at a statute nearly identical to the Wisconsin
9 statute. And with Oklahoma, that said it's commenced upon
10 filing provided that service happens within X number of days.
11 In Oklahoma, it was 60. In Wisconsin, it's 90, and that didn't
12 happen. And everyone here agrees, and you can look at docket
13 91, one of their briefs. Everyone here agrees that this would
14 have been dead in state court. And that's the *Bartels* case,
15 Your Honor. And that's -- If it had stayed in state court and
16 if we after an evidentiary hearing showed that service didn't
17 occur in that 90-day period, we all agree here that it would
18 have been dead in state court. That's *Bartels*. And *Walker* says
19 it's dead in federal court, too. And yet they claim that
20 removal somehow resurrects it, and Your Honor that's not logical
21 and that's just not the law.

22 The cases they cite, not a single one of them, with
23 the exception of one from New York, which involved a state
24 statute very similar to the federal law. But aside from that,
25 not one of the cases they cite involves this scenario where the

1 statute of limitations ran, the service period ran, and then
2 there was removal. And we cite a lot of cases involving that
3 very situation. And uniformly, they hold removal doesn't
4 resurrect the case.

5 I just want to quote you two passages from the one
6 case they cite from the Eastern District of Michigan and then
7 from *Walker* itself. In the Eastern District of Michigan case is
8 *Mills v. Curioni*, 238 F.Supp.2d 876. And the pertinent language
9 there is, "It is only when an issue arises with respect to the
10 tolling of a statute of limitations by the commencement of an
11 action that a state law which requires something more than the
12 mere filing of a complaint to commence an action will control".

13 So what *Mills* is saying, the case they cite is somehow
14 overruling *Walker*, says is that when you have a state statute
15 where a suit is not commenced merely upon filing, but it's
16 commenced upon filing provided that service happens within a
17 certain number of days, then we're back in *Walker* territory, and
18 that's when the state law applies, and that's exactly what we
19 have here provided that is straight from the Wisconsin statute.

20 And then you can look at the *Walker* case itself, which
21 again is on all four squares with our case. And the quote there
22 is we cannot give the cause of action longer life in the federal
23 court than it would have had in the state court without adding
24 something new to the cause of action, and we may not do that
25 consistently with *Erie Railroad Co. v. Tompkins*.

1 And so, Your Honor, we understand that you think we
2 need an evidentiary hearing, but our position, supported by
3 every case cited in all the papers, is that if you find that
4 evidentiary hearing that service did not occur pre-removal or
5 pre-March 18, 2019, the case is over. Federal rules can't save
6 this. Thank you, Your Honor.

7 THE COURT: Thank you, all. All right. So you have
8 my ruling on everything except the Motion to Dismiss from Chrome
9 and Demos and Ricciardi as well as the Motion for an Extension
10 of Time. We need to terminate for today, because we have
11 another hearing that is about to begin. I will reach out to you
12 all in terms of setting up time, date so forth, get the
13 logistics for a hearing. Before I do that though I'll look at
14 the arguments that both of you have made with regard to *Walker*
15 and *Hanna* to make sure that's where we need to be. And if I
16 think that's -- it turns out that we don't need an evidentiary
17 hearing, I'll let you all know that as well. Anything else on
18 behalf of the plaintiffs this morning? How about the
19 defendants? Thank you all very much.

20 BAILIFF: All rise.

21 (Whereupon proceeding was concluded.)
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C E R T I F I C A T E

I, SUSAN ARMBRUSTER, RMR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified December 26, 2019.

/s/Susan Armbruster

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