IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MARTIN H. LEAF,

Plaintiff,

v.

NICOLAS WINDING REFN
An Individual – citizen of Denmark,
BOLD FILMS INC.
A Delaware Corporation,
MARC PLATT PRODUCTIONS INC.
A California Corporation,
HOSSEIN AMINI, an Individual, Citizen of Iran,
ALBERT BROOKS, an Individual, Citizen of California,
GIGI PRITZKER, an Individual, Citizen of Illinois,
MARC PLATT, an Individual, Citizen of California,
MICHEL LITVAK, an Individual, Citizen of California,
JOHN PALERMO, an Individual, Citizen of California,
ADAM SIEGEL, and Individual, Citizen of California,
SONY PICTURES ENTERTAINMENT INC.,
A California Corporation,
NETFLIX INC,
A Delaware Corporation,
AMAZON.COM INC., A California Corporation,
APPLE INC.,
A California Corporation,

Civil Case No. 2:16-cv-12149-VAR-MKM

Hon. Victoria A. Roberts (presiding)

Hon. Mona K. Majzoub (referral)

GOOGLE INC.,
A Delaware Corporation,
AMERICAN MULTI-CINEMA, INC.,
A Missouri Corporation doing business as AMC Livonia 20,

Joint and Several Defendants.

SAMUEL H. GUN (P29617) 2057 Orchard Lake Road Sylvan Lake, Michigan 48320 Tel: 248-335-7970 gunneratlaw@comcast.net **MARTIN H. LEAF PLLC** Martin H. Leaf (P43202) 2055 Orchard Lake Road Sylvan Lake, MI 48320 Tel: 248-687-9993 leafmartin@gmail.com **Attorneys for Plaintiff**	**REED SMITH LLP** Harrison J. Dossick (CA Bar No. 128319) Christine M. Neuharth (CA Bar No. 263509) 1901 Avenue of the Stars, Ste. 700 Los Angeles, CA 90067 Tel: 310-734-5200 hdossick@reedsmith.com cneuharth@reedsmith.com **HONIGMAN MILLER SCHWARTZ & COHN LLP** James E. Stewart (P23254) Andrew M. Pauwels (P79167) 315 E. Eisenhower Parkway, Suite 100 Ann Arbor, MI 48108 Tel: 734-418-4256 jstewart@honigman.com apauwels@honigman.com **Attorneys for Defendants Bold Films, Inc.; Sony Pictures Entertainment Inc.; Netflix, Inc.; Amazon.com, Inc.; American Multi-Cinema, Inc.; Marc Platt Productions, Inc.; Albert Brooks; and John Palermo**

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DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

For the reasons set forth in the attached brief, Defendants, by and through their attorneys—Reed Smith LLP and Honigman Miller Schwartz and Cohn LLP for Bold Films, Inc., Sony Pictures Entertainment Inc., Netflix, Inc., Amazon.com, Inc., American Multi-Cinema, Inc., Marc Platt Productions, Inc., Albert Brooks,

and John Palermo; Reed Smith LLP and Schiff Hardin LLP for Apple Inc.; and Wilson Sonsini Goodrich and Rosati P.C. for Google, Inc.[*]—hereby move this Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing Plaintiff's Complaint in its entirety and with prejudice.

Pursuant to Local Rule 7.1, on January 3, 2016, counsel for Defendants contacted Plaintiff's counsel requesting concurrence in relief sought in this motion, and concurrence has not been reached.

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[*] Specially Appearing Party Nicolas Refn ("Refn"), who resides in Denmark, concurrently moves for dismissal under FRCP 12(b)(5) on the grounds that he was not properly served with the Summons and Complaint. Without waiving such grounds for dismissal, should the Court not grant his Rule 12(b)(5) Motion, Refn respectfully joins in this Rule 12(b)(6) Motion.

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January 6, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MARTIN H. LEAF, *Plaintiff,* *v.* NICOLAS WINDING REFN An Individual – citizen of Denmark, BOLD FILMS INC. A Delaware Corporation, MARC PLATT PRODUCTIONS INC. A California Corporation, HOSSEIN AMINI, an Individual, Citizen of Iran, ALBERT BROOKS, an Individual, Citizen of California, GIGI PRITZKER, an Individual, Citizen of Illinois, MARC PLATT, an Individual, Citizen of California, MICHEL LITVAK, an Individual, Citizen of California, JOHN PALERMO, an Individual, Citizen of California, ADAM SIEGEL, and Individual, Citizen of California, SONY PICTURES ENTERTAINMENT INC., A California Corporation, NETFLIX INC, A Delaware Corporation, AMAZON.COM INC., A California Corporation, APPLE INC., A California Corporation,	Civil Case No. 2:16-cv-12149-VAR-MKM Hon. Victoria A. Roberts (presiding) Hon. Mona K. Majzoub (referral)

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

ISSUES PRESENTED

1. Whether this Court should dismiss Plaintiff Martin Leaf's causes of action because (1) they are barred by claim and issue preclusion, (2) Plaintiff has failed to plead a claim on which relief can be granted under Rule 12(b)(6), and/or (3) the motion picture and related advertising at issue in this case is protected speech under the First Amendment, which the MCPA may not regulate?

   Answer: Yes.

STATEMENT OF CONTROLLING AUTHORITY

Defendants Bold Films, Inc., Sony Pictures Entertainment Inc., Netflix, Inc., Amazon.com, Inc., American Multi-Cinema, Inc., Marc Platt Productions, Inc., Albert Brooks, John Palermo, Apple Inc., and Google, Inc. state that the controlling and most appropriate authority for the arguments asserted and relief sought are as follows:

- Mr. Leaf has failed to state a claim upon which relief can be granted: Rule 12(b)(6) of the Federal Rules of Civil Procedure, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

- Claim and issue preclusion bars Mr. Leaf's causes of action: *Dart v. Dart*, 460 Mich. 573, 586; 597 N.W.2d 82, 88 (1999); *Wallace v. JP Morgan Chase Bank, N.A.*, No. 13-13862, 2014 WL 4772029 (E.D. Mich. Sept. 24, 2014); and *Lund v. Citibank (West) FSB*, No. 07-CV-10686-DT, 2007 WL 3408468 (E.D. Mich. Nov. 14, 2007).

- Mr. Leaf has not stated a claim under the Michigan Consumer Protection Act: MCL § 445.903(1).

- The First Amendment of the United States Constitution protects expressive works like the motion picture Drive and its related advertising: *Rogers v. Grimaldi*, 875 F.2d 994, 996 (2d Cir. 1989).

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is the second time Martin H. Leaf ("Mr. Leaf" or "Plaintiff") has asked a Michigan Court to censor the motion picture *Drive* (at times referred to as the "Picture") under the Michigan Consumer Protection Act (the "MCPA") based on his personal opinion of the film. In late September 2011, shortly after *Drive* was released theatrically in the United States, Mr. Leaf—then, as putative counsel for an acquaintance—filed suit in Oakland County Circuit Court against the Picture's domestic theatrical distributor and a local movie theater demanding class certification and injunctive relief (the "State Court Action"). The pleadings and briefs penned by Mr. Leaf throughout the three-plus year lifespan of that case posited the same uniquely personal, distorted interpretation of the Picture he now advances in this action. Once again, Mr. Leaf theorizes that *Drive* is an anti-Semitic hate film based on its supposed subliminal content and the symbolic significance he attaches to particular scenes, characters, dialogue, objects and other of its seemingly innocuous tangible elements. Mr. Leaf also claims here, as he did then, that the parties he has chosen to sue have violated sections 445.903(1)(s) and 445.903(1)(cc) of the MCPA—jointly, and as part of a conspiracy—by advertising and promoting the Picture differently than how he perceives it and for not warning the public that *Drive* actually is not what it appears to be.

All of the claims and allegations asserted in the State Court Action were fully, fairly and finally adjudicated in the Michigan state courts, and all were found to be completely without merit. In March 2012, the Oakland County Circuit Court granted summary disposition, ruling that the MCPA claims failed as a matter of law; in October 2013, the Michigan Court of Appeals affirmed that decision; and in April 2014, the Michigan Supreme Court issued an order denying leave to file a further appeal.

Mr. Leaf cannot properly re-litigate his claims in this or in any other Court. It makes no difference that Mr. Leaf now seeks to proselytize his beliefs in his own name rather than on behalf of a client. Re-pleading the *same* views and the *same* claims, under the *same* provisions of the *same* statute, concerning the *same* motion picture, mandate the *same* result. Mr. Leaf's extreme convictions about the Picture, no matter how strongly held, whether asserted in his own name or by him as an advocate for another, have no more legal merit now than in 2011.

Even if the law did not preclude Mr. Leaf from re-filing his claims in federal court, each "count" and each form of relief pleaded in his First Amended Complaint (the "FAC") fails as a matter of law. The first count under MCPA Section 445.903(1)(s) should be dismissed without leave to amend because the FAC does not and cannot allege that the Trailer omitted ***material*** facts about the

Picture in a manner that was misleading or deceitful.[1] The supposed "facts" that Mr. Leaf claims were missing from the Trailer are not facts at all, let alone ***material*** facts. Rather, what Mr. Leaf claims the Trailer (or the Creators/AMC) should have disclosed is his subjective belief that the Picture communicates a sinister subtext through symbols and subliminal speech. Beliefs, opinions and interpretations, especially concerning the supposed presence of *imperceptible* aspects of a product or service, are not objectively verifiable, material facts. The MCPA has never been and cannot now properly be applied to state a claim under the bizarre facts and circumstances Mr. Leaf advances.

The second count, also asserted only against AMC and the Creators, is under MCPA Section 445.903(1)(cc), which creates liability for "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." It, too, fails because Mr. Leaf does not and cannot establish that the Trailer *affirmatively* represented, as fact, that *Drive* was free from "Implanted Hate" (*i.e.*, subliminal anti-Semitic messages) or that "Implanted Hate" in fact is present in the Picture. The Trailer, as one would expect, makes no representations about whether the Picture does or does not contain "Implanted Hate," and the

[1] The first count is only pleaded against Refn (a citizen of Denmark who has not been properly served), Bold, Platt Productions, and Hossein Amini (a citizen of Iran, who has not been and likely never will be served), who collectively are defined in the FAC as the "Creators," and AMC, the movie theater where Mr. Leaf first saw the Trailer.

claim that it does is not a fact material to the transaction; it is the product of Mr. Leaf's imagination.

The third count for conspiracy and the request for injunctive relief likewise are not proper because each is based on the same set of fatally defective MCPA claims. Further, even if Mr. Leaf could state a claim under the MCPA against AMC or any of the Creators, which he does not and cannot, injunctive relief cannot be imposed against SPE, Netflix, Amazon, Apple, or Google (collectively, the "Distributor Defendants") because the FAC fails to allege any claim whatsoever against any one of them as a predicate for such extraordinary relief. [2]

Finally and axiomatically, no claim can exist under the MCPA, or under any other theory, because it is beyond question that works of creative expression, including motion pictures and their related advertising, are entitled to the full protections afforded by the First Amendment of the United States Constitution. Thus, even if Mr. Leaf's views about *Drive* were valid, obvious and beyond debate, no court may prevent a filmmaker from creating or a distributor from

[2] While the allegations against the Distributor Defendants are so cursory, legally meritless, and contrary to the First Amendment that they fail to state a claim as a matter of law, Netflix, Amazon, and Google (the "Online Distributors") are further shielded from any liability pursuant to Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. 230(c)(1) ("CDA"). This statute provides sweeping immunity for the providers of an "interactive computer service" for liability for publishing or distributing material provided by someone else. *See e.g., Jones v. Dirty World Ent. Recordings, LLC*, 755 F.3d 398, 406-07 (6th Cir. 2014). To the extent Plaintiff's allegations against the Online Distributors are discernable, they run squarely into this immunity.

showing a "controversial" or "offensive" motion picture, nor may a court force such parties to edit (*i.e.*, censor) content or issue a warning to appease the sensibilities of the few or the masses.

BACKGROUND FACTS AND PROCEDURAL HISTORY

A. The Trailer.[3]

Drive is a feature-length motion picture that was marketed and distributed in the United States by FilmDistrict Distribution, LLC ("FilmDistrict"), the principal defendant in the State Court Action. *See* Request for Judicial Notice in Support of Motion to Dismiss and Affidavit of James E. Stewart in support thereof (collectively, "RJN"), Ex. 1, ¶ 10 [State Court Action, First Amended Complaint ("SFAC")]. Prior to its release in theaters on September 16, 2011, FilmDistrict marketed the Picture to motion picture audiences through a short advertisement known in the motion picture industry as a "trailer." The trailer for *Drive* (the

[3] Mr. Leaf did not include a copy of the Trailer or a copy of the Picture among his exhibits to the FAC. The description of the Trailer and the description of the Picture set forth herein are similar in all material respects to the descriptions in the Motion for Summary Disposition filed in the State Court Action. *See* RJN, Ex. 3 at 4. Mr. Leaf did not take exception to either description in the State Court Action and therefore Defendants herein believe they are without controversy. Although supporting copies of the Trailer and the Picture were submitted to the Circuit Court, because all issues related thereto were fully and finally adjudicated in the State Court Action, and because the Court here can and should dismiss the claims in the FAC as a matter of law without regard to the Trailer or the Picture, Defendants herein have elected not to further burden the record. Copies are available should the Court determine that viewing the Trailer or the Picture will be of value in connection with this Motion.

"Trailer") runs for two-and-a-half minutes, and covers numerous scenes from the Picture. *See* FAC ¶ 59. Approximately fifteen seconds of the Trailer depict some of the driving/high-speed car chase scenes from the Picture, and the remainder of the footage introduces a number of the Picture's central characters and key plot elements. *Id*.

The Trailer begins with Driver's[4] declaration of his rules as a getaway driver and then quickly moves to the scene where he first meets a young, beautiful woman (Irene). *Id*. She asks what he does. Driver responds only by saying he is a stunt driver; he does not mention his other occupations. *Id*. Irene and Driver then are shown holding hands and smiling amorously as they drive together with Irene's young son. The Trailer then jumps to Bryan Cranston's character (Shannon) who tells "Bernie" (played by defendant Brooks) there is nothing Driver cannot do behind the wheel of a car. *Id*. The Trailer next shows Irene telling Driver that her husband (Standard) is returning from prison, and then shows a bloodied and beaten Standard as he explains to Driver that some men want him to "do a job for them" that he refuses to do. *Id*. Driver appears to partner with Standard on this "job" in exchange for a promise that when it's over, the men will "never go near [Standard's] family again." *Id*. The next series of clips move quickly. They show the "job" is a heist, and things do not go as planned. *Id*. Gunshots are fired,

[4] The main character in *Drive*, played by actor Ryan Gosling, is known only as "Driver" because his actual name is never revealed.

Standard falls to the ground, and Driver speeds away from the scene as he is being chased by the unknown occupants of a dark sedan. *Id*. The next few scenes make clear the job was a set-up. *Id*. Whoever is in the second car came to take the stolen money from Driver and Standard. *Id*. But that did not go as planned either. *Id*. Driver outmaneuvers his pursuers, gets away with the stolen money, and becomes the target of those who double-crossed him and Standard. *Id*. The remainder of the Trailer shows Bernie and his cohort—revealed in the Picture to be "Nino" (played by Ron Perlman)—forming plans to find Driver, get the money, and kill him. *Id*. We then see Driver engaging in fistfights, moving Irene to protect her in the build-up to a fight in an elevator, and taking other measures to safeguard Irene and her young son. *Id*. The trailer ends with Bernie's ominous warning to Driver: "Any dreams you have or plans for your future, you're going to have to put that on hold. For the rest of your life you're going to be looking over your shoulder." *Id*.

B. <u>The Picture</u>.

Each of the scenes depicted in the Trailer appears in the Picture, and the Picture's story arc follows the same general path as the Trailer. As one might expect after seeing the Trailer, the Picture develops the growing bond between Driver and Irene that soon is interrupted by Standard's return from prison and Driver's decision to help him pull off a heist to assure the safety of Irene and her

son. Though a loner by nature, Driver cannot help falling in love with Irene, which leads him to encounter the dangerous criminal underworld that follows Standard when he returns home from prison. After the heist intended to pay off Standard's debts spins out of control, Driver is left to protect Irene and her young son from a syndicate of deadly serious criminals led by two gangsters, Bernie and Nino.

C. Mr. Leaf And Ms. Deming See The Trailer At A Theater In Livonia; A Week Later They See *Drive* At A Theater In Novi.

Mr. Leaf and Sarah Deming ("Ms. Deming") went to see the movie *The Debt* at the AMC Livonia 20 theater on September 9, 2011. Before the showing of *The Debt* started, the theater played a number of "coming attractions," including the Trailer for *Drive,* which was being released the following week. FAC ¶ 58. According to the FAC, "the [Trailer] portrayed a race action/chase film involving gangsters, and the protagonist "Driver," played by Ryan Gosling" (*Id*. at ¶ 61); "[t]here was no indication whatsoever, in the trailer, that the motion picture *Drive* had a sophisticated, hidden/deceptive, scientifically advanced method of promoting an anti-Semitic agenda" (*Id*. at ¶ 62); and "[b]ased on the trailer, [Mr. Leaf] purchased a ticket for *Drive* at the Emagine Theatre in Novi, on or about September 16, 2011" (*Id*. at ¶ 66).[5] These same claims were made by Ms. Deming in the State Court Action. SFAC ¶¶ 12, 17, 38-39.

[5] When the foregoing allegations are read in conjunction with the parallel allegations in the SFAC, logic informs that Mr. Leaf and Ms. Deming were

D. Mr. Leaf Files The State Court Action On Behalf Of Ms. Deming For Injunctive And Other Relief For Alleged Violations Of The MCPA.

Mr. Leaf filed the State Court Action as counsel for Ms. Deming on September 28, 2011, twelve days after they saw *Drive*. The initial complaint named CH Novi LLC, the company that operates the Emagine movie theater in Novi, Michigan, and FilmDistrict Distribution, LLC, the motion picture distribution company that released the Picture in movie theaters in the United States (collectively, the "State Action Defendants").[6] The SFAC claimed Ms. Deming was misled in two ways by the Trailer. First, the SFAC stated Ms. Deming's belief that the Trailer promoted *Drive* "as a chase, race, or high speed action driving film, similar to the *Fast and Furious* [sic], *Fast Five*, or similar, series of movies," but then claims that in *her* view the Trailer ultimately "bore very little similarity to a chase, race, or high speed action film" because, again in *her* belief, *Drive* contained "relatively little high speed action driving." SFAC ¶¶ 12-

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together on Friday, September 9, 2011, when they saw the Trailer (and *The Debt*), and again the next Friday, September 16, 2011, when they saw the Picture. The SFAC specifically alleges that "because of that trailer, ***[Ms. Deming] caused to be purchased for [her] a ticket for DRIVE, which [she] ultimately paid for"*** and that Ms. Deming "viewed the performance of the motion picture DRIVE on or about September 16, 2011, at Defendant CH NOVI'S theater." SFAC at ¶¶ 38-39.

[6] The SFAC, filed on October 11, 2011, expanded on the allegations in the initial complaint, but did not add any additional "counts" for relief or any new parties. Although it is now clear from the FAC that Ms. Deming (and Mr. Leaf) saw the *Drive* Trailer at the AMC Livonia 20 theater (facts known to them in September 2011), defendant AMC, which owns that theater, was not named in the SFAC.

13. Second, the SFAC asserted that the Trailer failed to warn Ms. Deming that *Drive* contained—in *her* view—"extreme gratuitous defamatory dehumanizing racism to depict members of the Jewish faith" and in doing so, "promoted criminal violence against members of the Jewish faith." SFAC ¶ 17. The particular concern appeared to stem from *Ms. Deming's* belief that while "Jewish gangsters and criminals in American cinema have been portrayed as nuanced, the same as other types of gangsters," in *Drive*, "the Jews were portrayed as uniformly evil, in a cartoon stereotypical manner." SFAC ¶ 22. Nevertheless, the SFAC conceded (just as Mr. Leaf does here, *see* FAC at ¶¶ 64-65) that no film critic appeared to share *Ms. Deming's* view that *Drive* is anti-Semitic. SFAC ¶ 33.[7] Based on these allegations, the SFAC claimed that the State Court Defendants violated Sections 903(1)(c), (e), (s), and (cc) of the MCPA and sought injunctive relief and class certification.

[7] In contrast to Ms. Deming's/Mr. Leaf's thesis, Defendants are not aware of any Jewish organization that has publicly denounced the Picture, nor has *Drive* been associated with any violent acts, hate crimes or reported threats against members of the Jewish faith. Indeed, *Drive* either received or was nominated for numerous prestigious awards, including by the Motion Picture Academy of Arts and Sciences (presenters of the Oscars), the Hollywood Foreign Press Association (presenters of the Golden Globes), the Independent Spirit Awards, the Chicago Film Critics Association, the Los Angeles Film Critics Association, the National Society of Film Critics, and the New York Film Critics Circle (Source: IMDB.com).

E. The Ensuing State Court Action Proceedings.

1. The State Action Defendants Move For Summary Disposition.

The State Action Defendants moved to dismiss the SFAC on the grounds that each of the claims and requests for relief failed as a matter of law. Specifically, the State Action Defendants' Motion for Summary Disposition ("MSD") argued that no claim could exist under the MCPA or otherwise as a matter of law because (1) none of Ms. Deming's claims was based on a misrepresentation of material fact, (2) the Trailer did not fail to disclose any material facts, and (3) Ms. Deming's claims were barred by the First Amendment. RJN, Ex. 3 at pp. 7-20.

The MSD was argued on March 1, 2012. The hearing lasted some two hours. The transcript of the proceedings (the "MSD Transcript"), nearly one hundred pages in length, reflects Judge O'Brien's appreciation of the inherent flaws in Ms. Deming's claims. RJN, Ex. 5. In reaching his decision, Judge O'Brien explained that he assumed all facts alleged by Ms. Deming to be true—*i.e.*, that the Picture contained subliminal anti-Semitism, and that the Trailer did not contain any anti-Semitism (*Id*. at 88)—and nevertheless concluded that the Trailer could not be deceptive or misleading simply because it does not contain every element of the Picture. More specifically, Judge O'Brien noted that "the trailer itself does not posit positively this movie is not anti-Semitic" (*Id*. at 91-92)

and, after further noting that the Trailer depicted car chases, found "[t]hat fact does not mean that the movie did not have racing characteristics," and thus "the trailer advertising racing is not a representation of a service or a characteristic that the movie does not have." *Id*. at 89. Ultimately, Judge O'Brien stated that he had granted summary disposition "for those reasons, and [further] adopting the Defendants' reasons." *Id*. at 93. Immediately after Judge O'Brien made his ruling, Mr. Leaf withdrew his pending motion to amend the FAC and stated that he intended to file a new motion to amend.[8]

2. Mr. Leaf Files Objections to the Order Granting Summary Disposition, Files A New Motion to Amend the FAC, and Moves to Disqualify Judge O'Brien.

Defendants then submitted a standard, purposely non-controversial form of order stating merely that Defendants' motion was granted for the reasons stated on the record. Mr. Leaf thereafter filed objections and submitted his own, more complicated, proposed order. Mr. Leaf's refiled March 5, 2012 Motion for Injunction and other Relief was heard on March 14, 2012. RJN, Ex. 8. Early that morning, before the hearing commenced, Mr. Leaf filed and served an emergency

[8] Judge O'Brien admonished Mr. Leaf not to take such action: "I'm telling you quite frankly, Mr. Leaf, I'm curious how you could file a motion to amend from this point forward, and even more so, when an order is entered, which could possibly be today, reflecting the Court's pronouncement it's a summary disposition against the whole case . . . [how] could you possibly file a motion to amend on a case that has been dismissed?" RJN, Ex. 5 at 94:5-13. Mr. Leaf nevertheless refiled his motion to amend on March 5, 2012. RJN, Ex. 6.

Motion to Disqualify Judge O'Brien. RJN, Ex. 9 at p. 3. In that motion, Mr. Leaf argued (i) that Judge O'Brien should be removed for bias because he was anti-Semitic, and (ii) that his disqualification motion must be heard before Judge O'Brien ruled on his motion to amend (contained in his March 5, 2012 Motion for Injunction and Additional Relief) and before Judge O'Brien ruled on his objections to Defendants' standard form of order granting the summary disposition motion.

Judge O'Brien denied Plaintiff's disqualification motion, reviewed the competing MSD orders, and entered Defendants' proposed MSD order. RJN, Exs. 11, 7. Mr. Leaf then immediately sought review of the denial of his Motion to Disqualify by the Chief Judge (Judge Grant). RJN, Ex. 2. That motion also was denied. *Id.*

Less than a week later (April 4, 2012), Mr. Leaf moved for reconsideration of the order granting the MSD. *Id.* That motion was denied on April 19, 2012. *Id.* Ms. Deming noticed her appeal eleven days later. RJN, Ex. 12.

3. The State Appellate Proceedings.

Ms. Deming appealed both the order denying the motion to disqualify Judge O'Brien and the order granting the MSD. While the appeal was pending, Mr. Leaf filed a Motion for Summary Reversal of the order granting summary disposition. *Id.* That motion was denied on October 1, 2013. *Id.* The Court of Appeals heard oral argument of the issues on appeal the next day.

On October 15, 2013, the Court of Appeals issued its unpublished decision affirming the lower court's rulings. RJN, Ex. 13. With respect to the merits of the MCPA claims, the Court concluded that Ms. Deming had "failed, beyond the power of her own hyperbole, to support her claim." *Id.* at 2. In particular, the Court recognized she "has not shown that the film's trailer failed to reveal a material fact, as required under MCL § 445.903(1)(s)," and found that "her subjective interpretation that the film is anti-Semitic was not shared by others." *Id.* at 3. The Court further denied Ms Deming's request to amend the complaint to "add a claim that the movie *Drive* contains subliminal anti-Semitic content," which she argued would not constitute protected speech. *Id.* As the Court reasoned, "[a] lack of First Amendment protection is not a basis upon which plaintiff can state a claim. Whether the film contained unprotected subliminal content is irrelevant; the inclusion of such content does not, in and of itself, create a claim." *Id.*

After the Opinion was issued, Mr. Leaf filed a motion requesting that the Court of Appeals panel recuse itself for alleged bias. RJN, Ex. 12. Each of the Judges on the panel separately denied that motion a week later. *Id.* Mr. Leaf then unsuccessfully appealed those rulings to the Chief Judge of the Court of Appeals. *Id.* On November 5, 2013, Ms. Deming unsuccessfully moved the Court of Appeals to reconsider its opinion. *Id.*

Ms. Deming filed an application for leave to appeal to the Michigan Supreme Court on January 28, 2014 as a last resort. *Id*. That seemingly final request was denied on April 28, 2014. *Id*.

F. The Allegations, Theories, Claims And Relief Pleaded Here By Mr. Leaf, The Plaintiff, Are The Same As Those Raised By Mr. Leaf, The Attorney, In The State Court Action.

The FAC (i) rehashes the same set of facts in the State Court Action; (ii) focuses on the same extreme, unique beliefs, theories and interpretations of the Picture (including the supposed symbolic meaning of the same scenes, objects, dialogue and characters and the purported presence of sinister subliminal content) as the State Court Action; (iii) pleads violations of the same MCPA sections as the State Court Action; (iv) makes the same demands for relief as the State Court Action; and (v) directly challenges/seeks to re-litigate rulings made in the State Court Action. A complete list of the specific factual similarities would fill many pages and includes the following principal examples:

- Both actions allege that the Trailer misrepresented the true nature of the Picture. FAC, ¶¶ 61-63; SFAC ¶¶ 11-12; RJN, Ex. 4 at p 4-9;
- Both actions allege that the Trailer failed to disclose that, in the Picture, unlike in other films with ethnic characters, Jews are depicted as purely evil, having no redeeming qualities. FAC, ¶¶ 80-106; SFAC ¶ 19, 22;

- Both actions allege that the same objects, scenes, dialogue and other elements in *Drive* are symbolic, anti-Semitic references (*e.g.*, "Blood Libel" and "Kosher Slaughter"). FAC, ¶¶ 54, 110-117; SFAC ¶¶ 30-31; RJN, Ex. 4 at pp. 1, 19-21;

- Both actions allege that *Drive* contains subliminal hate speech, also referred to as "Implanted Hate." FAC, ¶55; RJN, Ex. 4 at pp. 3, 9; Ex. 6 at pp 16-17;

- Both actions allege that the motion picture *Drive* does not follow the book on which the film is based. FAC, ¶¶ 79-108; RJN, Ex. 4 at pp. 15-18; Ex. 6 at pp. 8-16;

- Both actions allege that the anti-Semitic aspects of *Drive* are comparable to obscure, Nazi-era German propaganda films. FAC, ¶ 70; RJN, Ex. 4 at pp 3, 14-15, 18, 21; and

- Both actions allege that the climactic scene in *Drive* where Driver (the "hero"/not Jewish) kills Bernie (the evil-most mobster/Jewish) subconsciously promotes the incendiary accusation that Jews are responsible for the death of Jesus. FAC, ¶ 119; RJN, Ex. 4 at pp. 19-21.

LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a district court to dismiss a complaint which fails "to state a claim upon which relief may be

granted." When faced with a Rule 12(b)(6) motion to dismiss, a district court "must construe the complaint in the light most favorable to [the plaintiff], accept all of [plaintiff's] factual allegations as true, and determine whether [the plaintiff] undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, the court does not give the presumption of truthfulness to any legal conclusions, opinions, or deductions, even if they are couched as factual allegations. *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956). A complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (*Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (internal citations omitted)), but must be sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007).

ARGUMENT

I. MR. LEAF IMPROPERLY ATTEMPTS TO RELITIGATE ISSUES THAT WERE DECIDED ON THE MERITS IN THE STATE COURT ACTION

A. *Res Judicata* Bars Relitigation of all Counts in the FAC.

"The purposes of claim preclusion are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, encourage reliance on adjudication, and promote comity between the state and federal courts." *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 744 (6th Cir.

2002) (citing *Allen v. McCurry*, 449 U.S. 90, 94, 97 (1980). "A federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state." *Dubuc*, 312 F.3d at 744 (citing Full Faith and Credit clause, 28 U.S.C. § 1738). Accordingly, where, as here, a previous action was filed in a Michigan state court, a federal court adjudicating a second action "applies Michigan preclusion law." *Wallace v. JP Morgan Chase Bank, N.A.*, No. 13-13862, 2014 WL 4772029, at *4 (E.D. Mich. Sept. 24, 2014) (citing *Dubuc*, *supra*). Under Michigan law, *res judicata* "bars a subsequent action between the same parties when the evidence or essential facts are identical," *i.e.*, "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v. Dart*, 460 Mich. 573, 586; 597 N.W.2d 82, 88 (1999) (citations omitted); *see also Wallace*, 2014 WL 4772029 at *4 (citing *Dart*); *Dubuc*, 312 F.3d at 746-47. Michigan courts have broadly applied the doctrine of *res judicata*, refusing to entertain not only claims that were already litigated, but also those that arise from the same transaction that the parties, exercising reasonable diligence, could have raised, but did not. *Dart*, 460 Mich. at 586, 597 N.W. 2d at 88; *Wallace*, 2014 WL 4772029 at *4 (citations omitted).

Here, the elements of *res judicata* are met with respect to each of the claims pleaded in the FAC. First, the State Court Action was decided on the merits. *See*

Roberts v. City of Troy, 170 Mich. App. 567, 577; 429 N.W.2d 206, 211 (1988) ("A summary judgment is a judgment on the merits which bars relitigation on the basis of *res judicata*."); *Wallace*, 2014 WL 4772029, at *4 (applying *Roberts* to summary disposition ruling in underlying state action). Second, the three claims Mr. Leaf asserts in the FAC were or could have been resolved in the State Court Action. The first two counts pleaded in the FAC (for alleged violations of MCPA sections 445.903(1)(s) and (cc)) are materially identical to Count I in the SFAC for violation of those same sections of the MCPA. In both instances, violations of the MCPA were raised on the same set of facts and legal grounds and, as described above, were fully adjudicated on the merits in the State Court Action. *Compare* FAC ¶¶ 71-149, 150-154 *with* SFAC ¶¶ 44-45; RJN, Ex. 5, at 88:12-93:4. Additionally, Mr. Leaf's third claim for civil conspiracy is barred by *res judicata* because it arises out of the same "transaction"—*i.e.*, Mr. Leaf's viewing of the Trailer and the Picture in September 2011—and, therefore, could (and should) have been raised in the previous action. *See Dubuc*, 312 F.3d at 748 (citing *Perry v. Croucher*, No. 97-3033, 165 F.3d 28, 1998 WL 661151 at *4 (6th Cir. Aug. 31, 1998)) ("the issue with claim preclusion 'is not whether the court heard this claim, the issue is whether the court *could have heard* the claim.'") (emphasis added). Further, Mr. Leaf raised this same claim in a proposed amended complaint after the

hearing on the MSD in the State Court Action, which was disposed of by the Circuit Court's subsequent order granting the MSD. *See* RJN, Ex. 6.

Third, Mr. Leaf cannot circumvent *res judicata* by bringing a subsequent action against different parties because the third element—privity among the parties—need not be established here. "Michigan courts have held that where a [defendant] seeks to assert the *res judicata* doctrine defensively, that party need not be in privity with a party to the prior action. . . . Thus this element need not be satisfied to apply *res judicata* to bar Plaintiffs' attempt to litigate claims that it raised or could have raised in [the prior action]." *Vanmeerbeeck v. M & T Bank*, No. 2:12-cv-11980, 2012 WL 2943400, at *3 (E.D. Mich. July 18, 2012).

Nevertheless, privity exists. "[T]o find privity for purposes of *res judicata*, 'a perfect identity of the parties is not required, only a 'substantial identity of interests' that are adequately presented and protected by the first litigant.'" *Id.*

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a substantial identity of interests and a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation.

Id. Ms. Deming and Mr. Leaf are in privity by virtue of the fact that Mr. Leaf represented Ms. Deming as counsel in the State Court Action. *See Wallace*, 2014 WL 4772029, at *4 ("Attorneys are considered privies of their clients for the

purpose of res judicata.") (internal citations omitted); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n. 6 (7th Cir. 1986) (attorneys, who represented party in first case, are privies with that party in second case for purposes of *res judicata*.). Privity likewise exists with respect to the Defendants in this action and the State Action Defendants. The State Court Action asserted MCPA claims against FilmDistrict, the U.S. theatrical distributor of the Picture. In this action, Mr. Leaf asserts the same MCPA claims against the Creators—*i.e*, those who wrote, directed, and produced the Picture—the parties from whom FilmDistrict derived its rights. Just as the State Court Action sought to enjoin FilmDistrict, here Mr. Leaf seeks to enjoin the Distributor Defendants.[9] The foregoing connections are more than sufficient to establish privity. *See Lintz v. Credit Adjustments, Inc*., No. 07-11357, 2008 WL 835824, at *4 (E.D. Mich. Mar. 28, 2008) ("A privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent . . . ." Privity exists because the issues at stake were the same and "Defendants are alleged to have committed the same wrongdoing . . . [and] would face the same liability.") (citations omitted).

[9] The State Court Action also named CH Novi, LLC, which operates the Emagine movie theater where Ms. Deming and Mr. Leaf saw the Picture, and in this action Mr. Leaf similarly names AMC, the parent company of the AMC Livonia 20 movie theater where he and Ms. Deming viewed the Trailer for the Picture. Both motion picture theaters derived their rights from the Creators via FilmDistrict.

B. <u>The Issues Raised In Mr. Leaf's Civil Conspiracy Claim Were Already Adjudicated In The State Action</u>.

In Michigan, three elements must be met to bar a party from relitigating an issue in a new action pursuant to the doctrine of collateral estoppel:

> (1) a question of fact essential to the judgment [in the second action] must have been actually litigated and determined by a valid and final judgment [in the first action]; (2) the same parties [or their privies] must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel.

Lund v. Citibank (West) FSB, 2007 WL 3408468, at *2 (E.D. Mich. Nov. 14, 2007)(first, second and fourth sets of brackets in original); *Leahy v. Orion Twp*., 269 Mich. App. 527, 530; 711 N.W.2d 438, 441 (2006) ("[C]ollateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.").

These elements are met here with respect to Mr. Leaf's civil conspiracy allegations. First, the crux of the claim—whether the MCPA was violated by inclusion of alleged anti-Semitic content in the Picture—was adjudicated and fully determined in the State Court Action, through a final disposition on appeal. RJN, Ex. 5 at 88:24-92:10. Second, as discussed above, the parties in this action are privies of the parties present in the State Court Action. Finally, mutuality of estoppel—which means that "one taking advantage of the earlier adjudication

would have been bound by it, had it gone against him" (*Monat v. State Farm Ins. Co.*, 469 Mich. 679, 684-85; 677 N.W.2d 843, 846-47 (2004))—is not required when collateral estoppel is "asserted defensively [by a defendant] to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Id.* at 691-92.

II. THE FAC FAILS TO STATE A CLAIM UNDER THE MCPA

The MCPA "authorizes any person who suffers loss as a result of unfair, unconscionable, or deceptive trade practices to bring an action to enjoin the prohibited conduct, obtain declaratory relief, or recover damages." *Alston v. Advanced Brands & Importing, Inc.*, No. Civ. 05-72629, 2006 WL 1374514, at *5 (E.D. Mich. May 19, 2006). The purpose of the MCPA is to protect consumers by prohibiting unfair practices in trade or commerce. *See* MCL § 445.903(1). However, the MCPA is not intended to indiscriminately afford relief for any consumer complaint against anyone in the chain of commerce, and Michigan courts have not hesitated to dismiss MCPA claims where, as here, a plaintiff has failed to state a claim under any of its specific subdivisions. *See, e.g., Kussy v. Home Depot U.S.A., Inc.*, No. 06-12899, 2006 WL 3447146, at *5-6 (E.D. Mich. Nov. 28, 2006) (dismissing § 445.903(1)(c), (s), and (cc) claims under Fed. R. Civ. P. 12(b)(6)); *Dochenetz v. Elliot Leveling, Inc.*, No. 257057, 2005 WL 3481446, at *4 (Mich. Ct. App. Dec. 20, 2005) (dismissing MCPA claims under MCR

2.116(C)(8)); *Chimenti v. Apple Vacations, Inc.*, No. 208446, 2000 WL 33401822, at *2-3 (Mich. Ct. App. Nov. 17, 2000) (same under MCR 2.116(C)(8) and (C)(10)); *Trice v. Oakland Dev. Ltd. P'ship*, No. 278392, 2008 WL 7488023, at *13-14 (Mich. Ct. App. Dec. 16, 2008) (affirming MCR 2.116(C)(10) dismissal of claims under MCPA § 445.903(1)(c), (e) and (s)).

A. Mr. Leaf Has Failed To State A Claim Under MCPA Section 445.903(1)(s).

Mr. Leaf's first cause of action for violation of Section 445.903(1)(s) of the MCPA contends that "Defendant Creators, while developing the [Picture], . . . creat[ed] and embed[ed] nonconscious anti-Semitic and anti-Christian messages in the [Picture], in tandem with subtle anti-Semitic messages, *i.e.*, Implanted Hate," which they failed to reveal to Mr. Leaf. FAC ¶¶ 72, 132-133. He further contends that AMC failed to reveal that the Picture contained Implanted Hate against Jews and anti-Semitic messages "when plaintiff saw the trailer for *Drive* at [AMC's] *AMC Livonia 20*" theater. FAC ¶¶ 146-147.

A claim under Section (s) requires the plaintiff to allege (i) a failure to disclose a *material fact*, the "omission of which tends to mislead or deceive the consumer," and (ii) that the undisclosed fact "could not reasonably be known by the consumer." MCL § 445.903(1)(s). As to the first prong, "[t]o be material, the representation need not 'relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact.'" *Zine v. Chrysler Corp.*, 236

Mich. App. 261, 283; 600 N.W.2d 384, 398 (Mich. Ct. App. 1999) (citations omitted, brackets in original). And, with respect to the second prong, "the issue is not whether the omission is misleading to a reasonable consumer but *whether the consumer could reasonably be expected to discover the omission at issue*." *Id.* at 284 (emphasis added). The FAC fails to satisfy either of these requirements.

First, Mr. Leaf fails to allege a misleading material *fact*. Mr. Leaf's subjective view of the supposed anti-Semitism in the Picture is not a verifiable *fact*. Rather, it is merely the subjective *opinion* of a single consumer. Moreover, Mr. Leaf's admission that neither the marketing associated with the Picture—in particular, the Trailer—nor movie reviews made any mention of anti-Semitic, racist, or hateful content in the Picture (*see* FAC ¶¶ 62-65) confirms that this was not a material fact about the movie.

Second, this claim also fails because Mr. Leaf concedes that, although he claims it is "nonconscious," *i.e.*, not perceived by the viewer, he was able to discern the alleged anti-Semitic content in the Picture. *See* FAC ¶ 32, 67, 80-131. In other words, the "material fact" he contends defendants concealed was, in fact, revealed to him. Assuming his interpretation is correct, Mr. Leaf fails to explain why any other consumer would not equally be able to recognize the content for what he says it is. Additionally, Mr. Leaf could reasonably and readily have discovered information about the content of the Picture, including the Jewish

ethnicity of some of the characters and their roles as antagonists, before he went to the theater to see it. In fact, at least as early as its opening day—September 16, 2011—numerous critics had published reviews about the Picture in both local (*Detroit Free Press* and *Detroit News*) and nationwide news and popular culture sources (*Rolling Stone* magazine and *USA Today*). *See* RJN, Ex. 14 (reviews reporting, *e.g.*, that the Picture: (i) "is really an art house action movie;" (ii) "is filled with nuance and subtlety rarely found in muscle car melodramas;" (iii) engages in more character and relationship development than one might expect from a crime drama; and (iv) "contains brutal and bloody violence."). Moreover, information about the Jewish gangsters, Bernie and Nino, was readily available to Mr. Leaf. For example, the "Cast" section on the film's website identifies Bernie and Nino as mobsters who are Jewish and the "Story" section describes them as "deadly serious criminals." *See* RJN, Ex. 15. Thus, while Defendants deny that the Picture contains any anti-Semitic content, either subconscious or overt, to the extent that Mr. Leaf perceives the portrayal of Jewish criminals in the Picture as anti-Semitic, he had ample means and opportunity to ascertain information about its messaging and content before he decided to see the movie.

B. Mr. Leaf's Claim Under Section 445.903(1)(CC) Of The MCPA Also Is Legally Defective.

In his second claim for violation of Section 445.903(1)(cc) of the MCPA,[10] Mr. Leaf asserts that the Trailer for the Picture "gave no indication that Drive contained Implanted Hate, or promoted anti-Semitism." FAC ¶ 152. Section (cc) proscribes "[f]ailing to reveal facts that are material to the transaction in light of representations of fact *made in a positive manner*." (Emphasis added). Mr. Leaf has again failed to state a claim under this section of the MCPA because his allegations fail to demonstrate that the Creators or AMC made positive factual representations in the Trailer, as required under Section (cc).

F.T.C. v. Simeon Mgmt. Corp., 532 F.2d 708, 716 (9th Cir. 1976), which concerns a similarly defective false advertising claim, is instructive here. There, the Ninth Circuit affirmed a denial of the Federal Trade Commission's ("FTC") request, pursuant to 15 U.S.C. § 55(a), to enjoin the defendants' efforts to advertise a weight loss program. Like Section (cc) of the MCPA, Section 55(a) of the Federal Trade Commission Act addresses false advertising arising from a defendant's failure to reveal material facts in light of representations made by the defendant. *F.T.C.*, 532 F.2d at 716. The FTC asserted that the defendants' advertisements failed to disclose a lack of scientific evidence showing that a drug used in their weight loss program was more effective than drug-free dieting. The

[10] The second claim, just like the first, is directed solely at the Creators and AMC.

Ninth Circuit ruled that the FTC had not shown a likelihood of success because none of the defendants' advertising included any information about the use of drugs in their weight reduction program. *Id.* (an "advertisement is misleading only if it fails to disclose facts necessary to dissipate false assumptions likely to arise in light of the representations actually made").

Just as in the *F.T.C.* case, the FAC fails to allege a single *affirmative* representation made in the promotional materials associated with the Picture, or in the Picture itself, that would require a corrective disclosure. To that end, Mr. Leaf has not alleged that any promotional material, including the Trailer, makes any mention one way or the other about whether the Picture may be interpreted to be anti-Semitic. Instead, he claims that any indication of anti-Semitic content was completely absent from the Trailer. *See* FAC ¶ 152. Thus, even accepting Mr. Leaf's interpretation as true, as is required for purposes of this motion, no disclosure of any additional facts would be required under Section (cc).

III. MR. LEAF'S CLAIMS ARE BARRED BY THE FIRST AMENDMENT

A. Motion Pictures And Their Related Advertising Are Forms Of Speech Protected By The First Amendment.

Motion pictures are protected under the First Amendment because "[t]hey may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which

characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). They are protected regardless of whether they are fictitious, made for profit, or intended to entertain audiences. *Id*. at 501-02. It is equally well settled that the First Amendment protection of artistic works extends to promoting the works as well. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995) (dismissing false advertising claim regarding advertisement of book). "The critical question is whether the promotional material relates to a speech product that is itself protected." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.C. Cir. 1995) (citation omitted). "'Defendants' economic motivation . . . is not enough to turn the statements into commercial speech.'" *Id.* (ellipses in *original*)). *See also Bowens v. Aftermath Ent.*, No. 250984, 2005 WL 900603, at *7 (Mich. Ct. App. Apr. 19, 2005) (advertising "incidental" to entertainment protected by First Amendment is itself "privileged" under First Amendment); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (in denying challenge to movie advertisement, court held that use "was for the purpose of First Amendment expression: the creation, production, and promotion of a motion picture").

In *Rogers v. Grimaldi*, 875 F.2d 994, 995-96 (2d Cir. 1989), Ginger Rogers claimed that the title of a fictional movie called "Ginger and Fred" misleadingly made it seem like the movie was about Rogers and Fred Astaire, even though it only "obliquely relate[d]" to them. She presented evidence to support her claims

that the title actually misled the public through market research and anecdotal evidence, "including the fact that when MGM/UA publicists first heard the film's title (and before they saw the movie), they began gathering old photographs of Rogers and Astaire for possible use in an advertising campaign." *Id*. at 997.

The Second Circuit in *Rogers* recognized that "[t]itles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion." *Id*. at 998. "The artistic and commercial elements of titles are inextricably intertwined" insofar as "[f]ilm-makers and authors frequently rely on word-play, ambiguity, irony, and allusion in titling their works." *Id*. For those and other reasons, "the expressive element of titles requires more protection than the labeling of ordinary commercial products." *Id*. Thus, the court held that "[w]here a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work, it is not false advertising under the Lanham Act." *Id*. at 1000. Further, the court expressly stated that the construction of the Lanham Act avoids a clash with the First Amendment by "insulat[ing] from restriction titles with at least minimal artistic relevance that are ambiguous or only implicitly misleading." *Id*. After acknowledging that "some members of the public would draw the incorrect inference that Rogers had some involvement with the film," and that there was evidence of some actual confusion, the court held "that risk of misunderstanding, not engendered by any overt claim in the title, *is so outweighed*

by the interests in artistic expression as to preclude application of the Lanham Act." *Id*. at 1001 (emphasis added).

Like a title to a movie, a trailer can be a measure of expression in addition to being a way of marketing the movie to the public. To the extent it contains scenes from a movie, those scenes carry the artistic expression and concomitant First Amendment protection with them. *Cf. Nichols v. Moore*, 334 F. Supp. 2d 944, 957 (E.D. Mich. 2004) ("there is little question that an advertisement for [a movie] containing a clip" from the movie is protected as well). And the Trailer here was composed *completely* of scenes from the movie. The scenes clearly were artistically arranged to give a view of the story arc of the Picture and convey its intense drama. Thus, it is entitled to First Amendment protection, and under the standard pronounced by *Rogers*, 875 F.3d at1000, is only subject to restriction under consumer protection law if it is "explicitly misleading." *Cf. Cliff Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989) (*Rogers* is not limited to titles and is generally applicable to Lanham Act claims involving works of artistic expression). As is discussed above, *see*, pp. 23-28, *infra*, the FAC does not and cannot allege that the Trailer makes any explicitly misleading statements about the Picture.

The Sixth Circuit has adopted the Second Circuit's reasoning from *Rogers* and has recognized that, in the more specific context of promoting works protected

by the First Amendment, even implicitly misleading speech is protected. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 926 (6th Cir. 2003) ("where the defendant has articulated a colorable claim that the use of a celebrity's identity is protected by the First Amendment, the likelihood of confusion test"—which is designed to evaluate whether use of the celebrity's identity is likely to mislead consumers—"is not appropriate because it fails to adequately consider the interests protected by the First Amendment"); *see also id.* at 928 ("the public interest in free expression should prevail if the use of the celebrity's image has artistic relevance, *unless it is used in such a way that it explicitly misleads* as to the source of the work") (emphasis added) (citing *Rogers* and *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002)). Thus, the First Amendment protects the Trailer, and the MCPA cannot apply to it.

IV. THE THIRD COUNT FOR CIVIL CONSPIRACY, PREDICATED ON THE FATALLY FLAWED MCPA CLAIMS, MUST BE DISMISSED

In his third count, Mr. Leaf alleges the Picture's director (Refn), screenwriter (Amini) and producer/actor (Brooks) conspired to create an anti-Semitic hate film. FAC ¶¶ 156, 158-160, 162. To state a claim for civil conspiracy, Mr. Leaf would have to allege facts sufficient to demonstrate that defendants engaged in "(1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful

means." *Mays v. Three Rivers Rubber Corp*., 135 Mich.App. 42, 48; 352 N.W.2d 339, 341 (Mich. Ct. App. 1984).

Because Mr. Leaf has failed to state a claim under the MCPA, he has not established, and cannot establish, the necessary element of unlawfulness to state a claim for conspiracy. Thus, count three also must be dismissed as a matter of law.

V. MR. LEAF HAS FAILED TO ARTICULATE A CLAIM FOR RECOVERY AGAINST THE DISTRIBUTOR DEFENDANTS UNDER ANY LEGAL THEORY

In addition to his three standalone causes of action, Mr. Leaf purports to seek injunctive relief against Defendants SPE, Amazon, Netflix, Google and Apple (defined above as the "Distributor Defendants"). *See* FAC at p. 36. He claims that they should be enjoined "from selling, distributing, transmitting, downloading, showing or displaying *Drive*, without removing . . . [the] messages that employ the deceptive method of Implanted Hate and/or promote anti-Semitism" because, "[w]ithout such injunctive relief, said Defendants will continue to violate the Michigan Consumer Protection Act, MCL § 445.903(1), *et seq*." *Id*. Under the MCPA, injunctive relief is available in some circumstances to prevent parties from "engaging . . . in a method, act, or practice which is unlawful under Section 3" of the MCPA. *See* MCL § 445.911(1)(b). "Injunctive relief is "an extraordinary remedy that courts normally grant only when '(1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of

irreparable injury.'" *Mays v. Three Rivers Rubber Corp.*, 135 Mich.App. 42, 48; 593 N.W.2d 595, 603 (Mich. Ct. App. 1999).

Here, Mr. Leaf has failed to demonstrate that he is entitled to recovery against the Distributor Defendants under any legal theory. Indeed, none of his three causes of action is even alleged against any of the Distributor Defendants. *See* FAC ¶¶ 71-154. And there are certainly no facts alleged in the FAC concerning actions or conduct of any of those Defendants that could subject them to liability under the MCPA, much less overcome their First Amendment protection for distributing the Picture. Any bid for injunctive relief against these Defendants fails for that reason alone. But even if Mr. Leaf had made substantive allegations against the Distributor Defendants, any such claim under the MCPA would be legally deficient for the same reasons those claims fail as to the other Defendants in this action. As a matter of law, therefore, Mr. Leaf is not entitled to any relief, injunctive or otherwise, against the Distributor Defendants. Finally, as noted, any effort to seek relief against the Online Distributors is categorically barred by Section 230(c)(1) of the CDA.

CONCLUSION

For the foregoing reasons, as a matter of law, the FAC fails to state a claim upon which relief can be granted. Accordingly, Defendants respectfully submit that the FAC shall be dismissed in its entirety, with prejudice.

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January 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2017, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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