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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
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14 JACKIE TABAS AND KATHERINE
15 ROSENBERG-WOHL, ON BEHALF OF
16 THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,

17 Plaintiff,

18 vs.

19 MOVIEPASS, INC., HELIOS AND
20 MATHESON ANALYTICS INC., TED
21 FARNSWORTH, STUART BENSON, MITCH
22 LOWE, AND DOES 1-10,

23 Defendants.

Case No. 3:18-cv-7087

COMPLAINT [CLASS ACTION]

24
25 1. Plaintiffs, Jackie Tabas and Katherine Rosenberg-Wohl, on behalf of themselves and all
26 others similarly situated (“Plaintiffs”), by and through the undersigned counsel, bring this
27 Complaint against Defendants MoviePass, Inc. (“MOVIEPASS”), Helios and Matheson
28

1 Analytics Inc. (“HMNY”), Ted Farnsworth (“FARNSWORTH”), Stuart Benson
2 (“BENSON”), Mitch Lowe (“LOWE”), and Does 1-10 (together, “Defendants”) for
3 damages, restitution, declaratory and injunctive relief, and in support thereof state as
4 follows:
5

6 **JURISDICTION AND VENUE**

7
8 2. This court has federal jurisdiction pursuant to 28 U.S.C. § 1331 under RICO (12th Claim
9 for Relief). This Court also has federal diversity jurisdiction pursuant to 28 U.S.C. § 1332
10 because the citizenship of the parties is completely diverse and the amount in controversy
11 exceeds \$75,000. Plaintiffs are citizens of California. Defendants are corporate citizens of
12 New York incorporated in Delaware and individuals, who, on information and belief, live
13 in New York. This Court has supplemental jurisdiction over the balance of the claims
14 asserted herein under 28 U.S.C. § 1367.
15

16 3. Defendants are subject to personal jurisdiction throughout California pursuant to 28
17 U.S.C. §§ 1391(b)(2) and (3) because they enter into contracts with consumers such as
18 Plaintiffs who reside there or cause their business entities to do so.
19

20 4. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) because Defendants
21 seek to do and do business in this county/District, Defendants have transacted business
22 with Plaintiffs in this county/District, and Defendants are subject to personal jurisdiction
23 in this county/District. *See* Exhibit 1.
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28 **FACTUAL ALLEGATIONS**

1 MOVIEPASS: the Dream, the Financial Reality, and HMNY’s “Bet the Company”

2 Mistake

3 5. MOVIEPASS is a company, as its name implies, that sells consumers subscriptions to go
4 out to see movies in movie theaters. For a subscription, a consumer pays MOVIEPASS a
5 monthly fee, for which she gains access to the movies in showing in movie theaters,
6 nationwide. Using an app that the consumer downloads to his or her phone, the consumer
7 identifies the movies playing in the area, selects a movie of choice at a showtime of
8 choice, goes to the theater and uses the MOVIEPASS card as a debit card, transferring
9 payment for the movie selected from MOVIEPASS to the theater.
10

11
12 6. LOWE is the CEO of MOVIEPASS and Stacy Spikes is Co-Chairman. LOWE is the
13 person responsible for day to day decision-making involving MOVIEPASS and
14 interacting with MOVIEPASS’ corporate parent, HMNY.

15 7. From its start in 2011, MOVIEPASS has struggled to find its proper model, both in terms
16 of what it offers and its price. As it grew in size, MOVIEPASS tried several pricing
17 structures, from 2-3 films/month, to “unlimited” plans with pricing based on market size.
18 In December 2016, the service had 20,000 subscribers.

19
20 8. On August 15, 2017, a majority interest in MOVIEPASS was purchased by the data
21 analytics firm Helios and Matheson Analytics Inc. (“HMNY”). MOVIEPASS had a
22 growing customer database. HMNY had money. The prize sought by HMNY’s
23 investment was the moviegoining habit data of MOVIEPASS customers. HMNY wanted to
24 sell this data. HMNY subsequently doubled down on its bet, increasing its ownership of
25 MOVIEPASS to 91.8% and initiating a merger of MOVIEPASS into HMNY.
26
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28

1 9. The cash infusion allowed MOVIEPASS growth to explode. Following HMNY's
2 investment in August 2017, MOVIEPASS membership shot up from the 20,000
3 subscribers of December 2016 to 400,000 in September, 2017. The number was 600,000
4 in October, 2017, 1 million in December, 2017 2 million in February, 2018 and 3 million
5 in June 2018.

6
7 10. To fund this growth, HMNY has mortgaged its future. While MOVIEPASS membership
8 continues to increase, the company has struggled to find a model that allows it to be
9 profitable. MOVIEPASS survives on HMNY cash, and HMNY has increasingly bet its
10 company on the ultimate profitability of MOVIEPASS data. The net income of HMNY in
11 2017 was \$151M. In April 2018 HMNY sold \$150M in stock. A considerable portion of
12 the proceeds went to fund MOVIEPASS. In May 2018, HMNY lost \$40M. In July,
13 HMNY filed to raise another \$1.2B to keep MOVIEPASS alive. In August, HMNY
14 reported a loss of \$100M in the second quarter.

15
16
17 11. In August, 2018, investors brought a class action lawsuit in the Southern District of New
18 York against HMNY, FARNSWORTH and BENSON. October, 2018 the Attorney
19 General's office in New York opened an investigation into how the company had been
20 communicating about its financial situation with its investors. Late that month, HMNY
21 announced its intention to spin off MOVIEPASS in an attempt to insulate HMNY from
22 the MOVIEPASS investment. As of November 16, 2018, HMNY stock was selling on
23 NASDAQ at just over a penny a share.

24
25 The Basis for the Lawsuit

26 12. Innovation is risky: investors risk losing everything in the calculated hope of a big
27 payout. Investors know the risks. But consumers are not investors. They part with a small
28

1 amount of money for a promised good or service. They trust in the good will of their
2 contracting partners. Their contracts are to be honored, even when the company from
3 which they bought a service struggles financially. If anyone is to lose money, it is the
4 company owners and investors – shareholders big and small. These are the individuals
5 and entities that stood to gain considerably if their bet paid off.
6

7 13. Here, HMNY continually took steps to protect itself at the expense of MOVIEPASS
8 subscribers. From the time it acquired majority ownership of MOVIEPASS, HMNY
9 instructed MOVIEPASS to make promises too vague to be enforceable contracts, and
10 breached promises it was obliged to honor. It viewed the MOVIEPASS customer base as
11 data, not people. Its focus was upon increasing the database, not keeping its financial
12 commitments to MOVIEPASS customers. MOVIEPASS customers were not the only
13 victims here: HMNY, FARNSWORTH, BENSON AND LOWE operated an association
14 in fact to manage a criminal enterprise within the otherwise legitimate businesses of
15 MOVIEPASS and HMNY (alternatively, by taking over the previously legitimate
16 business of MOVIEPASS itself), demanding that MOVIEPASS effectuate its breaches of
17 contract and fraud by email communication with its customers. FARNSWORTH and
18 BENSON, due to their respective responsibilities as CEO and CFO of HMNY,
19 necessarily generated and carried out this activity through LOWE, CEO of their
20 subsidiary. For example:
21
22
23

24 14. HMNY directed MOVIEPASS to break, and MOVIEPASS broke, MP's monthly
25 contracts with consumers at least as of mid-July, 2018, removing most desirable movies
26 and rendering the contracts worthless, all the while representing that these actions were
27 consistent with MP's contractual commitments and simply designed to enhance them.
28

1 15. As of 8/24/18, HMNY directed MOVIEPASS to cancel, and MOVIEPASS cancelled, the
2 one-year subscription plan and took from consumers the financial value of the remaining
3 months on these contracts, because (1) they truncated service for remainder of the year;
4 and (2) while they may have offered certain consumers a refund for the remainder, (a)
5 they gave only one week to accept, and (b) if a consumer were to opt out, the consumer
6 was precluded from signing up even for the monthly service for 9 months. Also, HMNY
7 directed MOVIEPASS not to provide, and MOVIEPASS did not provide, a refund –
8 whether promptly, easily, or at all -- when asked. Also, HMNY directed MOVIEPASS
9 not to provide, and MOVIEPASS did not provide, access for consumers -- even truncated
10 access -- for the remainder of the year for which consumers had paid.
11
12

13 16. HMNY directed MOVIEPASS to offer, and MOVIEPASS offered, monthly
14 subscriptions which were too vague to be enforceable contracts, while nonetheless taking
15 consumers' money for these subscriptions.
16

17 17. HMNY directed MOVIEPASS to offer, and MOVIEPASS offered, monthly
18 subscriptions which offered consumers the choice of movies they wanted to see, all the
19 while knowing this was not likely to be true and continually pulling specific movies and
20 theaters from the list of availability.
21

22 18. Simultaneously with its fraud and breach of contract, HMNY made it virtually impossible
23 for consumers to resolve any concerns. HMNY itself was nonexistent on MOVIEPASS
24 websites. HMNY directed MOVIEPASS to offer customer service in name, but in fact
25 responses to email inquiries would consist of boilerplate language. MOVIEPASS, at the
26 direction of HMNY, continually changed its language and removed the prior versions of
27 terms and conditions from the MOVIEPASS website, making it impossible for
28

1 consumers to know the terms that actually applied when they signed up. Originally not
2 offering arbitration as a way of resolving disputes, once it did so, even if a consumer
3 wished to arbitrate a dispute, HMNY made sure that it was never clear just where a
4 consumer was to submit this request and what the consumer was supposed to do to
5 commence arbitration. And when consumers did submit a request to arbitrate with
6 MOVIEPASS, HMNY made sure that MOVIEPASS met those requests with silence.
7

8 Plaintiffs

9 19. Jackie Tabas (“TABAS”) is a consumer who has been, and is presently, a MOVIEPASS
10 subscriber. She signed up for monthly membership on 11/20/17, paying \$9.95/month.
11 She pays a certain amount each month in exchange for the offer from MOVIEPASS to
12 make available a certain number of movies that she wants to see. TABAS has had
13 increasing difficulty finding movies that she wishes to see available on the MOVIEPASS
14 app.
15

16 20. Katherine Rosenberg-Wohl (“ROSENBERG-WOHL”) is a consumer who signed up for
17 the MOVIEPASS one-year subscription plan at \$89.95 on 11/17/17. She pays a certain
18 amount on an annual basis in exchange for the offer from MOVIEPASS to make
19 available a certain number of movies that she wants to see. ROSENBERG-WOHL had
20 increasing difficulty finding movies that she wished to see available on the MOVIEPASS
21 app. She canceled it on 8/3/18. MOVIEPASS told ROSENBERG-WOHL that upon
22 canceling her plan, she would not receive a refund but would remain able to access her
23 plan through the end of the term for which she had paid. That was not true, and
24 MOVIEPASS knew it. ROSENBERG-WOHL has been unable to access her plan
25 repeatedly during this time period. Any complaint she made remained unaddressed.
26
27
28

1 **CLASS ACTION ALLEGATIONS**

2 21. **Class definition.**

- 3 a. Consumers who have purchased monthly subscriptions but have not been able to
4 find the promised number of movies they want to see.
5
6 b. Consumers who have purchased monthly subscriptions but have not been able to
7 find a reasonable number of movies they want to see for the price paid.
8
9 c. Consumers who have purchased annual subscriptions but have not been able to
10 find movies they want to see.
11
12 d. Consumers who have purchased annual subscriptions but have not been able to
13 find a reasonable number of movies for the price paid.
14
15 e. Consumers who have canceled subscriptions but have not been able to use their
16 membership for the remainder of the term.
17
18 f. Consumers who have canceled subscriptions but have not been able to obtain a
19 refund.
20
21 g. Consumers who have found that their cards do not work even though a movie is
22 available at a specific theater.
23
24 h. The foregoing classes are national in scope. Subclasses exist for California
25 consumers.

26 22. Numerosity. There are so many potential class members that individual joinder of class
27 members is impractical.

28 23. Commonality. There are questions of law or fact common to class members.

 24. Typicality. Claims of Plaintiffs as class representative are typical of those of absent class
 members.

1 25. Adequacy of representation. Class counsel and Plaintiffs intend to fairly and adequately
2 protect the interests of absent class members. Plaintiffs also anticipate adding named
3 class members before seeking certification.
4

5 **FIRST CLAIM FOR RELIEF**

6 **(Breach of Contract) [MOVIEPASS]**

7 26. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-25
8 of this Complaint as if fully set forth herein.

9 27. MOVIEPASS has breached Plaintiffs' contracts by failing to honor their terms and
10 frustrating their purpose.
11

12 **SECOND CLAIM FOR RELIEF**

13 **(Breach of Contract) [MOVIEPASS]**

14 28. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-27
15 of this Complaint as if fully set forth herein.

16 29. MOVIEPASS has breached Plaintiffs' contracts by violating the terms of good faith and
17 fair dealing implied by fact and law in each of these contracts.
18

19 **THIRD CLAIM FOR RELIEF**

20 **(Breach of Contract) [MOVIEPASS]**

21 30. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-29
22 of this Complaint as if fully set forth herein.
23

24 31. MOVIEPASS has breached Plaintiffs' contracts by retaining the financial benefits
25 provided to MOVIEPASS by Plaintiffs while refusing either a refund or continued access
26 to the service.
27

28 **FOURTH CLAIM FOR RELIEF [MOVIEPASS]**

(Continuous Service Offer, Cal. Bus. & Prof. Code § 17602(a)(1))

1
2 32. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-31
3 of this Complaint as if fully set forth herein.

4
5 33. MOVIEPASS failed to disclose the terms of the continuous service offer, including the
6 minimum purchase obligation, recurring charge, continuation until cancellation, length of
7 term and cancellation policy. It did not.

8 34. MOVIEPASS should have disclosed the above identified terms in a clear and
9 conspicuous manner, in a way that could be appreciated before the offer was fulfilled,
10 and in visual proximity to its request for a consumer's consent. It did not.

11
12 35. As a result of MOVIEPASS' conduct, Plaintiffs have paid for a product they did not seek
13 out, did not agree to, and have never been given adequate opportunity to cancel.

14 **FIFTH CLAIM FOR RELIEF [MOVIEPASS]**

15 **(Auto-Renewal Offer, Cal. Bus. & Prof. Code § 17602)**

16
17 36. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-35
18 of this Complaint as if fully set forth herein.

19 37. Before the time a consumer renews a MOVIEPASS subscription, MOVIEPASS should
20 disclose the terms of the auto-renewal offer, including the minimum purchase obligation,
21 recurring charge, continuation until cancellation, length of term and cancellation policy.
22 It has not.

23
24 38. MOVIEPASS should have disclosed the above-identified terms in a clear and
25 conspicuous manner, in a way that could be appreciated before the offer was fulfilled,
26 and in visual proximity to its request for a consumer's consent. It has not.

1 39. MOVIEPASS is prohibited from charging the consumer's credit card for auto-renewal
2 without obtaining that consumer's affirmative consent. It has not.

3 40. MOVIEPASS is required to provide an acknowledgement of the auto-renewal terms, the
4 cancellation policy, and the cancellation information in a form easily retainable. It has
5 not.

6 41. MOVIEPASS is required to provide an acknowledgement of the auto-renewal terms, the
7 cancellation policy, and the cancellation information in a form easily retainable. It has
8 not.

9 42. The cancellation information to be provided should include a number/email/address or
10 other easy mechanism described clearly. If the mechanism for obtaining MOVIEPASS is
11 online, as it was in every case here, the mechanism for cancellation must be on-line.
12 MOVIEPASS has not complied.

13 43. As a result of MOVIEPASS' conduct, Plaintiffs have paid for a product they did not seek
14 out, did not agree to, and have never been given adequate opportunity to cancel.

15 **SIXTH CLAIM FOR RELIEF [MOVIEPASS]**

16 ***(Quantum Meruit)***

17 44. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-43
18 of this Complaint as if fully set forth herein.

19 45. None of the subscriptions entered into were contracts because the content/inventory was
20 exclusively controlled by MOVIEPASS. As a result, Plaintiffs paid far more than the
21 benefit they received, and MOVIEPASS has retained Plaintiffs' money.

22 **SEVENTH CLAIM FOR RELIEF [MOVIEPASS]**

23 ***(Unjust Enrichment)***

1 46. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-45
2 of this Complaint as if fully set forth herein.

3 47. Under all of the subscriptions, Plaintiffs paid far more than the benefit they received, and
4 MOVIEPASS has retained Plaintiffs' money.
5

6 **EIGHTH CLAIM FOR RELIEF [MOVIE PASS]**

7 **(CLRA) (CA plaintiffs only)**

8 48. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-47
9 of this Complaint as if fully set forth herein.

10 49. This conduct is in violation, *inter alia*, of California Civil Code sections: CLRA §§
11 1770(a)(6) – “[a]dvertising goods or services with intent not to sell them as advertised;”
12 (7) – “[a]dvertising goods or services with intent not to supply reasonably expectable
13 demand, unless the advertisement discloses a limitation of quantity;” (10) – “[m]aking
14 false or misleading statements concerning reasons for price reductions;” and (12) –
15 “[r]epresenting that the subject of a transaction has been supplied in accordance with a
16 previous representation when it has not.”
17

18
19 50. Notice was sent by Plaintiffs under CLRA § 1782(a)(2) offering Defendants the chance
20 to correct, replace or otherwise rectify the goods/services described above. *See* Exhibit 2.
21

22 **NINTH CLAIM FOR RELIEF [MOVIE PASS]**

23 **(FAL) (CA plaintiffs only)**

24 51. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-50
25 of this Complaint as if fully set forth herein.

26 52. This conduct constitutes the making false or misleading statements under the California
27 FAL [Cal. Bus. and Prof. Code §§ 17500; 17535].
28

1 **TENTH CLAIM FOR RELIEF [FARNSWORTH, BENSON, HMNY]**

2 **(Inducement To Breach MOVIEPASS Contracts)**

3 53. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-52
4 of this Complaint as if fully set forth herein.

5
6 54. This conduct constitutes inducement to MOVIEPASS to breach its contracts with its
7 consumers.

8 **ELEVENTH CLAIM FOR RELIEF [FARNSWORTH, BENSON, HMNY,
9 MOVIEPASS]**

10 **(UCL) (CA plaintiffs only)**

11
12 55. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-54
13 of this Complaint as if fully set forth herein.

14 56. This conduct is unlawful, fraudulent and unfair under the California Unfair Competition
15 law [Cal. Bus. and Prof. Code §§ 17200; 17204].

16 **TWELFTH CLAIM FOR RELIEF [FARNSWORTH, BENSON, LOWE, HMNY]
17 (RICO)**

18
19 57. Plaintiffs incorporate by reference and hereby re-allege the allegations of paragraphs 1-56
20 of this Complaint as if fully set forth herein.

21 58. Persons who took actions that are culpable, identified above, are HMNY itself,
22 FARNSWORTH, BENSON, AND LOWE. The enterprise is an association in fact
23 organized to determine how to operate MOVIEPASS, within the otherwise legitimate
24 business entities, HMNY and MOVIEPASS.
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1 59. Alternatively, persons who took actions that are culpable, identified above, are HMNY
2 itself, FARNSWORTH and BENSON. The enterprise is the MOVIEPASS operation
3 itself, otherwise operating as a legitimate business entity.

4
5 60. As alleged above, Defendants have pursued this enterprise by committing two or more
6 acts of wire fraud via email correspondence to MOVIEPASS consumers.

7 **DEMAND FOR RELIEF**

8 WHEREFORE, Plaintiffs pray for judgment against all Defendants that:

- 9 A. Defendants be preliminarily and permanently enjoined from committing the acts alleged
10 herein as well as be declared in violation of each of these laws;
11
12 B. Defendants be ordered to pay Plaintiffs' actual, consequential, incidental and special
13 damages;
14
15 C. Defendants be ordered to pay nominal damages;
16
17 D. Defendants be ordered to provide restitution to Plaintiffs;
18
19 E. Defendants be ordered to pay Plaintiffs' attorneys' fees and costs to the extent available
20 under the statutes sued hereunder;
21
22 F. Defendants be ordered to pay civil penalties;
23
24 G. Defendants be ordered to pay interest;
25
26 H. Plaintiffs be awarded punitive and/or exemplary damages; and
27
28 I. Plaintiffs be awarded such other and further relief as the Court deems just and proper.

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JURY DEMAND

61. Plaintiffs respectfully requests a jury trial on all issues triable thereby.

Dated this 20th of November, 2018.

/s/ David M. Rosenberg-Wohl
David M. Rosenberg-Wohl
HERSHENSON ROSENBERG-WOHL
A PROFESSIONAL CORPORATION