IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 5:13-CV-00143-ACC-PRL

LARRY KLAYMAN,

Plaintiff,

v.

CITY PAGES, et. al.

Defendants.

ORAL TELEPHONIC HEARING REQUESTED ON OR BEFORE OCTOBER 7, 2014

PLAINTIFF'S FIRST EXPEDITED MOTION TO COMPEL THE PRODUCTION OF CERTAIN DOCUMENTS AND APPOINT A COMPUTER EXPERT AND MOTION TO SHORTEN RESPONSE TIME

Pursuant to Fed. R. Civ. P. 37, Plaintiff Larry Klayman hereby moves this honorable Court for an order compelling Defendants Voice Media Group, Phoenix New Times, City Pages, Kenneth Avidor, Aaron Rupar and Matthew Hendley (hereinafter referred to as "Defendants"), to produce certain documents relating to three separate publications: (1) "Bradlee Dean's Attorney, Larry Klayman, Allegedly Sexually Abused His Own Children" of September 28, 2012; (2) "Birther Lawyer Fighting Joe Arpaio Recall Was Found to Have 'Inappropriately Touched' Kids" of February 22, 2013; and (3) "Larry Klayman Under Investigation by Arizona Bar" of June 18, 2013.

I. INTRODUCTION

Defendants failed to comply with the Federal Rules of Civil Procedure ("FRCP") and the Middle District of Florida's Local Rules ("Local Rules") when they deliberately neglected producing relevant blog postings and other documentation that bear directly on their state of mind and their malicious intent to harm Plaintiff both personally and professionally. Specifically, and only for the purposes of this First Motion to Compel, Defendants failed to produce – and in

some cases even address –Document request numbers (1), (2), (3), (4), (5), (6), (7), (21), (22), (23), (24), (25), (26), (27), (28), and (31).

II. SPECIFIC DOCUMENT REQUESTS

As required by the Local Rule 3.04, the following is a list of each request for production insufficiently responded to followed by a full quotation of the objection:

(1) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to Plaintiff Larry Klayman within the past five years. **Response**: Defendant objects to this request because it is overly broad as to the scope of its subject matter, seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." "[A]ny and all" materials "that refer or relate in any way to [Plaintiff] within the past five years" do not bear upon whether those three particular statements defame Plaintiff directly or by implication.

(2) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to Bradlee Dean of You Can Run But You Cannot Hide International within the past five years. **Response**: Defendant objects to this request because it is overly broad as to the scope of its subject matter, seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." "[A]ny and all materials "that refer or relate in any way to Bradlee Dean of You Can Run But You Cannot Hide International within the past five years" do not bear upon whether those three particular statements defame Plaintiff directly or by implication. Additionally, Mr. Dean is a prominent public figure in Minnesota, and searching for and collecting everything that has been published regarding him would be unduly burdensome.

(3) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to You Can Run But You Cannot Hide International within the past five years. **Response**: Defendant objects to this request because it is overly broad as to the scope of its subject matter, seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." "[A]ny and all" materials "that refer or relate in any way to You Can Run But You Cannot Hide International within the past five years" do not bear upon whether those three particular statements defame Plaintiff directly or by implication. Additionally, that organization is prominent in Minnesota, and searching for and collecting everything that has been published regarding it would be unduly burdensome.

(4) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to Sheriff Joseph Arpaio of Maricopa County, AZ within the past five years. **Response**: Defendant objects to this request because it is overly broad as to the scope of its subject matter, seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." "[A]ny and all" materials "that refer or relate in any way to Sheriff Joseph Arpaio of Maricopa County, AZ within the past five years" do not bear upon whether those three particular statements defame Plaintiff directly or by implication.

(5) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to the case of *Bradlee Dean v. NBC Universal*, filed in the District of Columbia Court of Appeals, No. 12-cv-2002 within the past five years. **Response**: Defendant objects to this request because it seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and

he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." Documents relating to a lawsuit between Bradlee Dean and NBC Universal do not bear upon whether those three particular statements defame Plaintiff directly or by implication.

(6) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to the case of Bradlee Dean v. NBC Universal, filed in the District of Columbia Superior Court, Civil Action No: 2011 CA 006055 B within the past five years. **Response**: Defendant objects to this request because it seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." Documents relating to a lawsuit between Bradlee Dean and NBC Universal do not bear upon whether those three particular statements defame Plaintiff directly or by implication.

(7) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to the case of Bradlee Dean v. NBC Universal, filed in the U.S. District Court for the District of Columbia, No. 1:12-cv-00283 within the past five years. **Response**: Defendant objects to this request because it seeks information that is not relevant to any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's claims for defamation and defamation by implication are limited to the publication of three specific statements. The first, which was published on September 28, 2012, is "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps." Plaintiff says the second was published on February 22, 2013, and he says the statement "once again falsely infer[s] that I 'inappropriately touched' children . . ." The third, which was published on June 18, 2013, is "Klayman's been in trouble with a Bar association before, as he was publically reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." Documents relating to a lawsuit between Bradlee Dean and NBC Universal do not bear upon whether those three particular statements defame Plaintiff directly or by implication.

(21) **Request:** Any and all documents, discussions and/or publications that refer or relate in any way to the article written by Matthew Hendley and published on June 18, 2013 by Phoenix New Times entitled "Larry Klayman Under Investigation by Arizona Bar." **Response**: Defendant has no such documents.

(22) **Request**: Any and all documents, discussions and/or publications that refer or relate in any way to the article written by Matthew Hendley and published on February 22, 2013,

entitled "Birther Lawyer Fighting Joe Arpaio Recall Was Found to Have 'Inappropriately Touched' Kids." **Response**: Defendant has no such documents.

(23)**Request**: Any and all documents, discussions and/or publications that refer or relate in any way to the article written by Aaron Rupar and published on September 28, 2012, entitled "Bradlee Dean's Attorney, Larry Klayman, Allegedly Sexually Abused His Own Children." **Response**: To the extent responsive documents exist, they are being produced along with these responses.

(24)**Request**: Any and all documents or discussions that refer or relate in any way to Larry Klayman and the statement "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean turn out to be total creeps," from the September 28, 2012 publication by Aaron Rupar. **Response**: Defendant has no such documents.

(25)**Request**: Any and al; documents, discussions and/or publications that refer or relate in any way to Larry Klayman and the statement "Klayman's been in trouble with a Bar association before, as he as publicly reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work," from the June 18, 2013 publication by Matthew Hendley. **Response**: Defendant has no such documents.

(26)**Request**: Any and all documents, discussions and/or publications that refer or relate in any way to Larry Klayman and the public reprimands referenced in any articles published by any Defendant. **Response**: Defendants has [sic] no such documents.

(27)**Request**: Any and all internal communication, including all documents and discussions, between any of the following parties: Matthew Hendley, Aaron Rupar, Ken Avidor aka Ken Weiner that involves Larry Klayman and any or all of the articles written about him in the Third Amended Complaint or otherwise within the past five years. **Response**: To the extent responsive documents exist, they are being produced along with these responses.

(28)**Request**: Any and all internal communication, including all documents and discussions, between any of the following parties: Matthew Hendley, Aaron Rupar, Ken Avidor aka Ken Weiner and any supervisors, editors, publishers, fact-checkers, research assistants, or any other agents of Defendants who are involved in the editing and/or publishing of material that is either printed by Defendants or posted on Defendants' websites that involves Larry Klayman and any or all of the articles written about him in the Third Amended Complaint or otherwise within past five years. **Response**: There are no such documents.

(31) **Request**: Any and all public documents regarding Larry Klayman that were relied upon in researching or writing the article written by Aaron Rupar and published on September 28, 2012, entitled "Bradlee Dean's Attorney, Larry Klayman, Allegedly Sexually Abused His Own Children," within the past five years. **Response**: To the extent this request seeks information relating to the statement "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys tight with Bradlee Dean can turn out to be total creeps," which is the only statement in that article upon which Plaintiff is suing, responsive documents will be produced. Defendant objects to this request to the extent it seeks information relating to other statements in the September 28 article because Plaintiff is not suing on those statements; thus, the request is overbroad in the scope of its subject matter, seeks information that is not relevant to

any of the issues in the action, and is not reasonably calculated to lead to the discovery of admissible evidence.

III. ARGUMENT

A. Defendants Have Failed to Comply With the Law.

"The overall purpose of discovery under the FRCP is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result." *Jones v. Z.O.E. enters. of Jax. Inc.*, No. 3:11-cv-377, 2012 U.S. Dist. LEXIS 104768, at *2 (M.D. Fla. July 27, 2012) (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)). Rule 26(b) of the FRCP defines the scope of discovery as including any matter, not privileged, that is relevant to the claim or defense of any party. "[T]he court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. (26(b).

Furthermore, courts must employ a liberal discovery standard in keeping with the spirit and purpose of the discovery rules. *Graham v. Casey's Gen. Stores*, 206 F.R.D. 251, 253 (S.D. Ind. 2002). Accordingly, discovery should ordinarily be allowed under the concept of relevancy [and that which may lead to relevant evidence] unless it is clear that the information sought has **no possible bearing** on the claims and defenses of the parties or otherwise on the subject matter of the action. *Dunkin' Donuts, Inc. v. Mary's Donuts, Inc.*, 2001 WL 34079319 *2 (S.D. Fla. Nov. 1, 2001) (emphasis added). *See PharMerica, Inc. v. Health Prime, Inc.*, 2008 WL 779329 (N.D. Georgia March 19, 2008) (Congress created liberal discovery rules and has tried to ensure both parties' ability to obtain the information needed to resolve their dispute.).

Any objections, general or specific, therefore, must show that the requested discovery has **no possible bearing** on the claims or defenses of the case. *See id*. (emphasis added) (*citing Flora v. Hamilton,* 81 F.R.D. 576, 578 (M.D.N.C.1978)); *Graham*, 206 F.R.D. at 254 ("[t]he party opposing discovery has the burden of showing the discovery is overly broad, unduly burdensome, or not relevant."). This means that the requested discovery (1) does not come within the broad scope of relevance as defined in Rule 26, or (2) is of such marginal relevance that the potential harm occasioned by discovery would far outweigh the ordinary presumption in favor of broad disclosure. *Giardina v. Lockhead Martin Corp*. 2003 WL 20276348 (E.D.La. May 30, 2003); *Gober v. City of Leesburg*, 197 F.R.D. 519 (M.D.Fla. 2000).

Applying this authority, the facts and circumstances which precipitated this action by Plaintiff require Defendants to produce the contents of blog postings, emails and other documentation relating to Larry Klayman, Sheriff Joe Arpaio and Bradlee Dean as they indeed bear on the claims of a party and most likely are relevant or at a minimum will lead to relevant evidence. The Defendants make improper shotgun-style objections, including highly repetitive objections that have no basis in law or fact. Many of Defendants' objections recite the litany that this objection "is overbroad as to the scope of its subject matter . . ." not relevant . . . [and] unduly burdensome." Below, each of the three types of objections, in addition to "Defendant has no such documents" is refuted.

1. Plaintiff's Requests Are Not Overbroad.

While Defendants correctly state that this lawsuit is the result of three publications, Defendants fatally ignore Supreme Court precedent which unequivocally states that the state of mind of the journalist is of central importance to the issue of malice. *Lando* upholds the district court's ruling, holding that " . . . because the defendant's state of mind was of 'central

importance' to the issue of malice in the case, it was obvious that the questions were relevant and 'entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his courses, or, equally significant, to prefer the veracity of one source over another." *Herbert v. Lando*, 441 U.S. 153, 157 (1979).

As the Supreme Court in *Lando* rules,

> "[r]eliance upon such state-of-mind evidence is by no means a recent development . . . it is deeply rooted in the common-law rules, predating the First Amendment, that a showing of malice on the part of the defendant permitted plaintiffs to recover punitive or enhanced damages. In *Butts*, the Court affirmed the substantial award of punitive damages . . . Neither Mr. Justice Harlan nor Mr. Chief Justice Warren raised any question as to the propriety of having the award turn on such a showing or as to the propriety of the underlying evidence, which **plainly included direct evidence going to the state of mind of the publisher and its responsible agents**."

Lando, 441 U.S. at 161-162 (emphasis added).

2. Plaintiff's Requests Are Relevant.

Courts interpret relevancy "broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). In almost all of Defendants' objections, they contend that Plaintiff "seeks information that is not relevant to any of the issues in the action . . ." This contention is ludicrous. As set forth herein, the documents sought here are not merely relevant to Plaintiff's claims, they are central to the case. Moreover, discovery rules are to be accorded "a broad and liberal treatment to effect their purpose of adequately informing litigants." *Lando*, 441 U.S. at 177. In fact, discovery requests are considered relevant if there is any possibility that the information sought may lead to the discovery of admissible evidence. *See e.g. United States v. American Telephone & Telegraph*, 461 F. Supp. 1314, 1341, n.81 (D.D.C. 1978) ("The clear policy of the rules is toward full

disclosure . . . [I]t is rare that a particular item of requested information is not 'relevant' . . ." *See also Sierra Rutile Ltd. v. Katz*, 1994 WL 185751, *3 (S.D.N.Y. 1994) (in the context of discovery, relevancy is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case."

The need for blog postings and other documentation is all the more evident in light of Defendant Ken Avidor's intentional concealment of certain records after learning he had been sued. Indeed, a person's conscious concealment of facts constitutes willful misrepresentation and this distortion bears on a Defendant's state of mind. *See Fedorenko v. United States*, 449 U.S. 490 (1981). It is virtually impossible that this willful misrepresentation would not lead to the discovery of admissible evidence. Moreover, Plaintiff sent all Defendants a letter shortly after learning of the defamatory publications seeking a correction. Not only did Defendants fail to correct their defamatory statements, but also failed to respond to Plaintiff regarding his letter. (Exhibit 1, as required by Florida Statutes 770.01, 770.02). Therefore, it is disingenuous for Defendant Avidor to testify, under oath, that the reason he took down the blog postings was because he did not want to further additional alleged damage subject to the lawsuit. Indeed, the articles are still online. There is a strong evidentiary inference that Defendants are hiding something as there is already a strong prima facie showing of concealment.

3. Plaintiff's Requests Are Not Unduly Burdensome.

Defendants refuse to produce relevant documentation to Plaintiff's requests stating, " . . . searching for and collecting everything that has been published regarding him would be unduly burdensome." The Local Rules and binding case law prohibit this conclusory objection. The sheer fact that a request for production of documents would be unduly burdensome is not in and of itself a reason for objecting to the disclosure of documents and information. *Clark v. Mellon*

Bank, NA, 1993 WL 54435 (3rd Cir. E.D.P.A. 1993). Additionally, the party resisting discovery must demonstrate specifically how the request "is unreasonable or otherwise unduly burdensome." *See Donahay v. Palm Beach Tours & Transp., Inc*. 2007 WL 1576143, *2 (S.D.Fla. 2007) (citing Fed. R. Civ. P. 33(b)(4) and *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985).

To merit consideration, "an objection must show specifically how a discovery request is overly broad, burdensome or oppressive, by submitting evidence or offering evidence which reveals the nature of the burden." *Id*. Defendants have failed to do so. In *Baine v. General Motors Corp.*, 141 F.R.D. 328 (M.D. Ala. 1991) the court explained the contours of this objection: "The law applicable to an objection to production on grounds of burdensomeness [sic] and expense is fairly clear. **The mere fact that producing documents would be burdensome and expensive and would interfere with the party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request.**" *Id*. at 330 (emphasis added).

In addition, claims of undue burden should be supported by a statement (generally an affidavit) with specific information demonstrating how the request is overly burdensome." *Bank of Magnolia v. M&P Global Financial Servs., Inc.*, 258 F.R.D. 514, 519 (S.D. Fla. 2009). Here, Defendants do not back up its recitation with any affidavit or other explanation.

4. Defendants Obtain Relevant Documents Despite "There Are No Such Documents" Objection.

It defies logic that there are virtually no written documents, discussions or publications that involve the articles at issue here. If there is a single sheet of paper, email, text message or otherwise – generated by or in the possession of any of the Defendants – that is relevant to this case, Defendants have yet to produce it. If they exist, Plaintiff is entitled them. And if no such documents exist, Defendants, instead of cunningly asserting that they do not obtain any such

documents without further explanation, need to demonstrate to this honorable Court and Plaintiff how and in what world these documents do not exist. After all, Defendant Avidor testified that he destroyed an email he sent to Defendant Rupar and Defendant Rupar acknowledged the deletion (Exhibit 2). This begs the question, what else did Defendants destroy in order to keep Plaintiff at a distance? For example, Defendant Avidor testified that he coauthored a book about Michele Bachmann and that Plaintiff is featured in it. Yet, neither book, nor copies from it were produced in discovery. Plaintiff had to buy his own book and the book shows the maliciousness towards Plaintiff and Bachmann, who Plaintiff has supported. As is true with Bradlee Dean and Sheriff Joe Arpaio, Defendants attempt to harm and destroy Michele Bachmann by also attacking Plaintiff, her friend (Exhibit 3)[1]. The book is a hit piece on Congresswoman Bachmann and everyone associated with her.

These issues, central to Plaintiff's claims of defamation and defamation by implication, are not resolved by simply reviewing the meager documents Defendant produced – most of which Plaintiff already had in his possession. The reason that the document request calls for the production of documents concerning not just Plaintiff but Sheriff Joe Arpaio and Bradlee Dean is because, as the Court can ascertain from a review of the defamatory articles at issue, Defendants attempted to harm Plaintiff and his clients Bradlee Dean and Sheriff Joe Arpaio. In this regard, by harming the clients' lawyer, Plaintiff, Defendants were able to pursue their improper political agenda and severely damage and destroy both Plaintiff and his clients. Indeed, in Defendant Aaron Rupar's article of September 28, 2012, he writes, "[i]f Dean distances himself from Klayman in light of these allegations, who will help him figure out how to reimburse Rachel Maddow and the now-defunct Minnesota Independent the nearly $25,000 in attorney's fees he

[1] Please consider the cover of the book which reflects a maliciously distorted, computer-doctored image of Congresswoman Michele Bachmann.

owes them?" This is an attempt by Defendant Rupar to destroy fundraising and the working relationship between Bradlee Dean and his lawyer, Plaintiff.

A full and accurate document production regarding Defendant Matthew Hendley is particularly relevant given his conviction of assaulting a police officer (Exhibit 4) in addition to his absolute refusal during deposition to answer pertinent questions regarding his sources.[2] It is no wonder that he writes with such distain and antipathy about Sheriff Joe Arpaio and Plaintiff – he is vengeful because of his convicted felon status for assaulting a police officer (notwithstanding his other felony conviction for vandalism). The requested document production for Defendant Hendley bears directly on his state of mind. As during the deposition there was no objection to Plaintiff questioning Defendant about his criminal past, there should be no objection now as to the mindset behind Defendant's malicious rants and ravings about Sheriff Joe Arpaio and Plaintiff in his blog postings and other personal and work-related materials.

In short, a jury cannot determine the state of mind of the Defendants without fully exploring a production of documentation about Plaintiff. And of course, such information is needed to rebut Defendants' claims at trial or Defendants' likely motion for summary judgment on or before the motion deadline of October 22, 2014, that there was no malicious intent in writing the defamatory statements.

[2] This abuse of discretion conflicts with *Garland*. There, Plaintiff Judy Garland sued CBS for breach of contract and defamation. The defamation claim was based on a column, written by Marie Torre and published in the *New York Herald Tribune*, which quoted an unnamed CBS executive making unflattering remarks about Garland. During plaintiff's deposition, Torre refused to disclose the name of her confidential source. Plaintiff moved to compel discovery, and the United States Court of Appeals for the Second Circuit, ordered Torre to reveal her source. *Garland v. Torre*, 259 F.2d 545 (2d. Cir.) *cert. denied*, 358 U.S. 910 (1958).

B. Because of Defendant's Failure to Produce Relevant Discovery Documents and Defendant's Admission of Destroying Documents from Computers, a Third-Party Computer Retrieval Expert is Necessary.

In recent years, federal courts have begun establishing a set of accepted computer inspection procedures. In light of Defendants' failure to comply with relevant discovery law, a third-party computer expert is necessary to search Defendants' work and personal computers, telephone records and cell phone records, as at least one Defendant testified under oath that he erased pertinent information regarding this case.

In determining whether to order forensic imaging of a party's computer, a court should consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for requested information, and the extent to which the responding party has complied with discovery requests. In *Wynmoor*, an insured non-profit condominium association filed a state court action to recover under a policy for losses caused by a hurricane. After removal, the insurer moved to compel production and forensic examination. There, because the requesting party demonstrated the responding party's failure to produce the requested information, the court held: "It would appear that Plaintiffs are either unwilling or unable to conduct a search of their computer systems for documents responsive to Defendant's discovery requests . . . the Court believes that a forensic examination of Plaintiffs' computers is warranted." *Wynmoor Community Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 687 (2012).

Here, a computer expert will likely be able to retrieve the purged documents from Defendants' work and personal computer and cell phones by way of a forensic image, otherwise known as a "mirror image," among other means. A mirror image will "replicate bit for bit sector for sector, all allocated and unallocated space, including slack space, on a computer hard drive."

Bennett v. Martin, 186 Ohio App.3d 412, 425, 928 N.E.2d 763 (10th District, 2009), quoting *Communications Ctr., Inc. v. Hewitt*, 2005 WL 3277983, *1 (E.D.Cal., Apr. 5, 2005). A mirror image "contains all the information in the computer, including embedded, residual, and deleted data." *Id*. The withheld documents, erased or otherwise, are both relevant and likely to lead to relevant discovery information. Thus, they are necessary to prepare for trial.

As the party failed to produce documents in *Wynmoor*, the Court here too should appoint a forensic expert to retrieve the withheld requested documents.

Finally, as shown in Exhibit 5, I hereby certify that Plaintiff attempted to amicably resolve this issue with Defendants' counsel but despite numerous emails and phone calls, Defendants' counsel has refused to cooperate. This refusal flies in the face of Supreme Court precedent as set forth above in *Herbert v. Lando* and for this reason, Defendants are not acting in good faith and thus should be required to pay attorney's fees and costs.

WHEREFORE, Plaintiff respectfully requests that this Court order Defendants to produce forthwith the documents specified herein, appoint a forensic computer expert given Defendants' attempt to conceal documents and the demonstrated destruction of a key email, and award Plaintiff all costs and attorney's fees incurred in connection with this Motion. At the Court's request, undersigned counsel will submit an affidavit setting forth such costs and fees. Plaintiff respectfully requests a telephonic hearing on or before the close of business October 7, 2014 and a shortened response time by Defendants' counsel, as the documents are needed forthwith, since the deadline to file motions on the merits (including punitive damages) is rapidly approaching on October 22, 2014.

Dated: October 2, 2014

Respectfully Submitted,

/s/ Larry Klayman

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