IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cody Lundin, Plaintiff, v. Discovery Communications Incorporated, et al., Defendants.	No. CV-16-01568-PHX-ROS **ORDER**

Defendants believe Plaintiff Cody Lundin's claims for defamation and false light are barred by a contractual provision whereby Lundin allegedly released all claims he may ever wish to assert against Defendants. Lundin believes the contractual provision is not enforceable. As set out below, Lundin is correct. And because Lundin may continue to pursue his claims, the Court must resolve the parties other disputes, including numerous discovery disputes.

BACKGROUND

The facts viewed in the light most favorable to Lundin are as follows. Lundin is an "internationally recognized professional survival instructor." (Doc. 20 at 2). In September 2009, Lundin signed a "Talent Agreement" with a subsidiary of Defendant Discovery Communications, Inc., to co-host a reality TV show titled "Dual Survivor." According to that agreement, Lundin would provide all "preproduction, production and postproduction services customarily rendered by on-camera hosts." (Doc. 60-1 at 5). That agreement contained a section titled "Assumption of Risk" that, according to

Defendants, contained a waiver of all claims Lundin may wish to assert in connection with his services.

The "Assumption of Risk" portion began by stating Lundin's survival activities "may constitute dangerous and/or strenuous activities" that have "inherent risks." The portion then stated Lundin was "assum[ing] any and all risks, known or unknown, associated with" his activities. In addition, Lundin agreed

> to defend, indemnify and hold harmless and to voluntary release discharge, waive and relinquish any and all actions or causes of action against [Discovery Communications' subsidiary and its] respective parent companies, subsidiaries, affiliates, successors, officers, agents, employees, licensees and assigns . . . from any and all claims, demands, liabilities (including, but not limited to, personal injury, property damage and wrongful death) resulting in any manner from [Lundin's activities], whether caused by negligence or otherwise.

(Doc. 60-1 at 13).

After he signed that agreement, Lundin co-hosted Dual Survivor for a few years. During that time, Defendant Original Media LLC produced the show, Defendant Brian Nashel was the "Executive Producer and Show Runner," and Defendant Discovery Communications Inc. was the entity responsible for airing the show. The show was popular but, eventually, Lundin clashed with his co-host and was terminated. After that termination, Original Media and Nashel edited footage such that Lundin's final episode depicted him as mentally unstable. After Discovery Communications aired that episode, Lundin filed the present suit alleging the episode had defamed him and depicted him in a false light.

Lundin filed his original complaint on May 20, 2016. (Doc. 1). In completing the Civil Cover Sheet accompanying the complaint, Lundin's counsel selected "No" when stating whether Lundin was seeking a jury trial. (Doc. 1-2 at 2). In addition, the complaint itself did not contain a general jury demand. Instead, the complaint's only references to a jury trial were in the paragraphs demanding punitive damages for each of Lundin's claims. Those paragraphs stated Lundin was seeking punitive damages "in an

amount to be determined by a jury." (Doc. 1 at 20, 22). Lundin served that complaint and Defendants filed a motion to dismiss.

On January 24, 2017, the Court granted in part and denied in part the motion to dismiss. Lundin was given the opportunity to amend his complaint, which he did on January 30, 2017. The amended complaint again lacked any general jury trial demand. Instead, the amended complaint merely retained the language requesting a jury determine the appropriate amount of punitive damages. (Doc. 20 at 25-26). Defendants answered that complaint on February 27, 2017. (Doc. 25). Defendants did not demand a jury trial in their answer. A few weeks after Defendants filed their answer Lundin discovered he had not made a general jury trial demand. That discovery prompted Lundin to file a "Motion for Jury Trial" on May 4, 2017, approximately one year after filing suit and approximately two months after Defendants filed their answer. (Doc. 31).

According to Lundin's motion, his counsel "did not make an express jury trial demand for unknown reasons that they cannot explain or justify." (Doc. 31 at 9). Having acknowledged that failure, the motion argues the Court should still allow a jury trial on all aspects of Lundin's claims. Defendants oppose the motion and argue Ninth Circuit authority precludes holding a jury trial in these circumstances. (Doc. 38). Because the jury trial issue was not time-sensitive, the Court did not resolve the issue immediately and the parties proceeded with discovery.

While discovery was ongoing, Defendants filed a motion for summary judgment. That motion argues the Talent Agreement's "Assumption of Risk" portion bars Lundin's claims. Lundin disagrees, claiming that portion is not enforceable on public policy grounds. In filing his opposition, Lundin cited certain documents Defendants had produced. Lundin argued those documents should be publicly available while Defendants objected, claiming the documents must be filed under seal. Before the motion for summary judgment could be resolved, the parties submitted two statements of discovery disputes. Those statements outline numerous discovery disputes, many of which the parties should have been able to resolve on their own.

ANALYSIS

Granting Defendants' motion for summary judgment would render moot the parties' disagreements regarding a jury trial and all their discovery disputes. The motion for summary judgment, therefore, is the first substantive issue that must be resolved. Before addressing that motion, however, the Court must determine whether documents referenced in Lundin's summary judgment opposition should be filed under seal.

I. Documents Will Not be Filed Under Seal

In filing his opposition to the motion for summary judgment, Lundin cited and submitted "45 emails and one transcript of a 'clip show.'" (Doc. 66 at 1). Defendants produced those documents during discovery and, when doing so, Defendants marked them as "confidential." Lundin does not believe the documents qualify as confidential and he believes they should be filed on the publically available docket. According to Defendants, the documents should be filed under seal because the documents are irrelevant to the summary judgment motions, Lundin seeks to file them to embarrass Defendants, and they contain confidential business information.

Because the documents were submitted in connection with the summary judgment briefing, there is a strong presumption in favor of the documents being publicly available. As the party seeking to seal the documents, the burden is on Defendants to "overcome[e] this strong presumption by meeting the 'compelling reasons' standard." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). That standard allows for the sealing of records if the records are being filed "to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Id.* at 1179. The standard does not allow for sealing based merely on the possibility the records "may lead to a litigant's embarrassment, incrimination, or exposure to further litigation." *Id.*

Here, Defendants' arguments in support of filing the documents under seal are not convincing. First, the documents are not completely irrelevant to the issues presented in the summary judgment motion. The documents allegedly establish Lundin's claims involve intentional conduct. That was unnecessary as it was clear from Lundin's

allegations that his claims were based on intentional conduct. But nothing prohibited Lundin from providing evidence allegedly showing intentional conduct was at issue. Accordingly, the documents are sufficiently relevant to allow for their filing. Next, the documents may embarrass Defendants but that that is not enough to require they be filed under seal. *Id.* And finally, the documents do not contain significantly sensitive business information. The documents do not contain anything unique or unusual regarding Defendants' process in creating the show. Rather, the documents contain general observations about how certain episodes should be structured. For example, one email notes the episode should "tease" that one of the co-hosts is leaving and the episode should show some "fights" and "some other build up under the narration." (Doc. 63-1 at 36). Defendants have not established these generic ideas about how an episode should be structured qualify as confidential business information.

Defendants have not met the high standard for sealing documents connected to a summary judgment motion. Therefore, the Motion to Seal will be denied. Lundin will be required to file an unredacted version of his statement of facts as well as the accompanying documents.

II. Contractual Release Does Not Bar Lundin's Claims

According to Defendants' motion for summary judgment, Lundin released his defamation and false light claims when he signed the Talent Agreement. Defendants point to that agreement's "Assumption of Risk" portion which states, in relevant part, that Lundin was releasing "any and all claims, demands, liabilities . . . resulting in any manner from [Lundin's services], whether caused by negligence or otherwise." In Defendants' view, this "exculpatory clause" bars Lundin's claims. Lundin presents a number of arguments against enforcement of this clause but the Court need not address all of those arguments because there is a basic contractual doctrine that precludes Defendants' interpretation.

The parties agree application of the Talent Agreement is "governed by the law of Maryland." (Doc. 60-1 at 20). Under Maryland law, "exculpatory clauses are generally

valid, and the public policy of freedom of contract is best served by enforcing the provisions of the clause[s]." *Wolf v. Ford*, 644 A.2d 522, 525 (Md. 1994). Maryland courts, however, have concluded "the public interest" prohibits enforcement of exculpatory clauses in some circumstances. *Id.* One such circumstance is that "a party will not be permitted to excuse its liability for intentional harms or for the more extreme forms of negligence, i.e., reckless, wanton, or gross." *Id.* In other words, exculpatory clauses only bar claims sounding in certain types of negligence. *See BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 351 (Md. 2013) (noting exculpatory clause must "clearly and specifically" release liability "caused by the defendant's negligence"). If intentional acts are at issue, exculpatory clauses do not apply. Two federal opinions have addressed this aspect of Maryland law in the particular context of claims for defamation.

In *Tharpe v. Lawidjaja*, the plaintiff was a model who had posed for photographs by the defendant, a photographer. 8 F. Supp. 3d 743 (W.D. Va. 2014). In doing so, the plaintiff had executed an agreement that "release[d] and discharge[d] [the defendant] from any and all claims and demands arising out of or in connection with the use of the photographs." *Id.* at 779. The defendant later published altered versions of the photographs that the plaintiff believed constituted, among other things, defamation. The plaintiff filed suit, alleging various intentional tort claims including defamation. The defendant attempted to invoke the exculpatory clause as barring the claims but the court made short work of this argument.

The *Tharpe* court held "exculpatory clauses are permitted in Maryland." *Id.* But the court also held Maryland law does not allow enforcement of an exculpatory clause "to excuse [a party's] liability for intentional harms." *Id.* (emphasis omitted). Because the plaintiff's claims were based on "intentional harms," such as defamation, the exculpatory clause did not bar his claims. *Id.* at 781.

The other federal decision, *Ziemkiewicz v. R+L Carriers, Inc.*, involved a relatively complicated factual background involving a suit by a truck driver against his former employer. 996 F. Supp. 2d 378 (D. Md. 2014). Somewhat simplified, the driver

had quit after a confrontation with his employer regarding damaged freight. The parties disagreed on whether, at the time the driver quit, he knew he had been selected for a random drug test. The employer believed the driver had known about the drug test. Thus, the employer believed the driver's decision to quit should be deemed the functional equivalent of refusing to take the drug test. The driver, however, claimed he did not know he had been selected for a drug test at the time he quit. Therefore, the driver believed it would be false for the employer to represent he refused to take the test.

After leaving that employer, the driver applied for positions with other companies. In doing so, the driver executed "forms releasing former employers from liability for claims arising out of the reporting of drug and alcohol screening records." *Id.* at 396. The driver's former employer allegedly informed his prospective employers that the driver had refused to take a drug test. The driver believed those representations were false and he sued his former employer for defamation.

In discussing the viability of the driver's defamation claim, the court concluded the former employer was entitled to invoke the exculpatory clauses the driver had signed when applying with other companies. But even though those exculpatory clauses would be enforceable in response to some claims, the exculpatory clauses were irrelevant given the claim at issue. That is, the driver's defamation claim "involve[d] intentional or reckless misconduct, and such claims cannot be waived as a matter of Maryland . . . law." *Id.* at 397. Citing Maryland cases, the court went on to note "[p]ublic policy dictates that a plaintiff cannot prospectively contract to be willfully injured by another in the future." *Id.* As a matter of "law and public policy, [the driver] could not have waived his claims based on future willful, intentional, or reckless misconduct." *Id.* at 398.

In light of these cases, as well as the underlying decisions by Maryland courts, Maryland law does not allow enforcement of an exculpatory clause to bar intentional torts, such as defamation. Defendants concede Maryland has a general rule to this effect but they claim courts have imposed a special exception in "the reality television or documentary context." (Doc. 59 at 9). In that context, Defendants contend Maryland

courts would find exculpatory clauses valid, even when the underlying claims are based on "intentionally tortious conduct." (Doc. 59 at 5). Defendants cite a number of cases from other jurisdictions applying exculpatory clauses to bar intentional torts in the reality TV context. Those cases, however, do not address the issue in sufficient detail to provide any guidance. And one of the cases Defendants cite actually proves their position is incorrect.

Defendants cite *Klapper v. Graziano* which involved defamation claims in the reality TV context. 970 N.Y.S.2d 355 (Sup. Ct. 2013). There, the plaintiff was a plastic surgeon who agreed to appear on a show titled "Mob Wives." *Id.* at 357. The plaintiff "performed a 'full body lift' procedure" on one of the show's regular participants and the procedure and the participant's experience were discussed in numerous episodes. *Id.* The participant suffered complications during and after the surgery which led to the participant making numerous statements to the effect that she had "almost died" as a result of her "plastic surgery nightmare." *Id.* at 358. The plaintiff believed those comments were defamatory and he sued both the network that had broadcast the episodes as well as the participant who had made the statements. The network sought dismissal based on an exculpatory clause contained in a release the plaintiff had signed prior to appearing on the show. The trial court agreed the exculpatory clause applied but its reasoning was questionable.

The court began by explaining exculpatory clauses are valid under New York law provided they are "sufficiently clear and unambiguous." *Id.* at 360. The court's analysis, however, turned to application of exculpatory clauses in the context of negligence. The court reasoned exculpatory clauses involve "attempts to limit a party's own negligence" and they must "be strictly construed and looked upon with disfavor." *Id.* There are some circumstances, such as "negligence which results in some form of bodily injury," where courts will not enforce exculpatory clauses. *Id.* Apparently not recognizing that citation to actions involving "negligence" was of little use when dealing with intentional torts, the court then concluded the particular release was valid and barred the plaintiff's claims

because the circumstances of the particular release raised no problems with its enforcement.

Defendants cite this decision as proof a special rule should apply in the reality TV context. But they do not explain why the court's repeated reference to "negligence" was correct in the context of a case alleging intentional torts. Moreover, the appellate decision in that case cuts directly against Defendants' claim that a special rule exists.

The appellate court agreed the exculpatory clause barred the suit. *Klapper v. Graziano*, 10 N.Y.S.3d 560 (N.Y. App. Div. 2015). In reaching that conclusion, the appellate court made clear exculpatory clauses apply only to claims involving negligence. That is, the plaintiff's allegations were "insufficient to demonstrate willful or grossly negligent acts or intentional misconduct which would render the [exculpatory clause] unenforceable." *Klapper v. Graziano*, 10 N.Y.S.3d 560, 562 (N.Y. App. Div. 2015). In support of this, the court cited another New York decision that had held an exculpatory clause "will not apply to [bar claims based on] willful or grossly negligent acts." *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416 (N.Y. 1983). Accordingly, the court seemed to believe that had the plaintiff's claim actually involved intentional conduct, the exculpatory clause would not apply. And while the plaintiff had labeled his claim as one for "defamation," his allegations involved only "vague, unsubstantiated claims of conspiracy and concerted action" without any "allegation that the [network] did anything other than what would normally be expected of the producers of a reality show." *Id.* Without clear allegations of intentional misconduct, the release was enforceable.

Based on the appellate decision in *Klapper*, it does not appear there is any special exception similar to what Defendants propose. None of the other cases Defendants cite provide any basis to question that conclusion. In fact, the other decisions do not appear to grapple with the application of exculpatory clauses to intentional torts at all. Because there is no special rule to apply in the reality TV context, the exculpatory clause does not bar Lundin's claims and Defendants' motion for summary judgment will be denied.

III. Lundin is Not Entitled to a Jury Trial on All Issues

Lundin requests the Court "enter an order finding that a jury trial demand has been sufficiently made, or . . . enter an order relieving him from his counsel's error in failing to make a sufficient and timely demand." (Doc. 31 at 1). Under current Ninth Circuit law, Lundin's limited references to a jury trial were not sufficient to require a jury trial on all issues and the circumstances surrounding his untimely demand for a jury trial do not merit the Court ordering a jury trial on all issues.

Federal Rule of Civil Procedure 38 "provides that a party may demand a trial by jury of *any issue* triable of right by a jury." *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1065 (9th Cir. 2005). Such a demand must be made within fourteen days of "the last pleading directed to the issue." Fed. R. Civ. P. 38(b)(1). In making a jury trial demand, a party may "specify the issues that it wishes to have tried by a jury" or make a general demand which will result in a jury trial of "all issues so triable." Fed. R. Civ. P. 38(c). This framework means "a jury demand will be deemed to cover all issues only if it doesn't specify particular issues." *Lutz*, 403 F.3d at 1065. If a jury demand *does* specify particular issues, it will not be deemed a general demand.

Because of the importance of the jury trial right, courts "indulge every reasonable presumption against waiver" of that right. *Id.* at 1064. This "allows a great deal of flexibility in how [a jury demand] is made." *Id.* And provided a "careful reader" can determine "a jury trial is requested on an issue," a court must allow for a jury trial on that issue. *Id.* For example, in *Lutz* the plaintiff's complaint did not contain a general jury trial demand. The complaint did, however, request "[j]udgment in favor of Plaintiff for such back pay and value of lost employment benefits as may be found by a jury." *Id.* The Ninth Circuit concluded that reference to a jury trial was sufficient to require a jury decide the back pay issue but it was not sufficient to allow a jury decide any other issue.

Here, Lundin did not make a general jury trial demand in connection with his original complaint or his amended complaint. In fact, his civil cover sheet affirmatively disclaimed that a jury trial was demanded. It was not until May 4, 2017—approximately

two months after Defendants filed their answer—that Lundin made a general jury trial demand. (Doc. 25). Accordingly, it is undisputed Lundin did not make a timely general jury trial demand. It is also undisputed, however, that Lundin requested punitive damages "in an amount to be determined by a jury." This presents effectively the same situation as presented in *Lutz*. Lundin's complaint requested a jury determine the amount of punitive damages and he is entitled to such a jury determination. But by specifying a jury should determine the amount of punitive damages, Lundin implicitly stated he was not demanding a jury determine any other issue.

Anticipating the Court will conclude he did not make a general jury trial demand, Lundin invokes Federal Rule of Civil Procedure 39(b). The relevant portion of that rule provides

> Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

Unfortunately for Lundin, the Ninth Circuit has interpreted Rule 39(b) as conferring "virtually no discretion" to excuse a failure to demand a jury trial based on "oversight or inadvertence." *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976). The Ninth Circuit has repeatedly and explicitly affirmed this holding. *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001) ("An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown."); *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (a "good faith mistake as to the deadline for demanding a jury trial establishes no more than inadvertence, which is not a sufficient basis to grant relief from an untimely jury demand"). Because the failure to demand a jury trial was an oversight, there is no plausible avenue to grant Lundin relief under Rule 39(b).

Making a last-ditch effort to obtain a jury trial on all issues, Lundin argues the Court should follow the path set out in *Baldwin v. United States*, 823 F. Supp. 2d 1087, 1111 (D. N. Mar. I. 2011). There, the district judge crafted a way around existing Ninth Circuit authority regarding untimely jury trial demands. Under that approach, a party

may file a motion to extend the time to file his jury trial demand. That motion would be filed under Federal Rule of Civil Procedure 6(b), the general rule regarding extensions of time, instead of directly under Rule 39(b). *Id.* at 1114. The *Baldwin* court concluded this was a viable approach because Rule 6(b) applies to the other rules and Rule 6(b) allows for extensions based on "excusable neglect." The Court is skeptical the Ninth Circuit's clear guidance on Rule 39(b) is subject to such easy evasion by invocation of a different procedural rule. But even assuming Rule 6(b) could be invoked as contemplated by the *Baldwin* court, Lundin has not established he is entitled to relief under that approach.

There is a four-part test for determining if an extension of time is merited under Rule 6(b). *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004). That test requires an evaluation of the prejudice to Defendants, whether Lundin was acting in bad faith, the length of the delay, and the reason for the delay. *Id.* Here, there is little prejudice to Defendants and there is no indication Lundin was acting in bad faith. But Lundin's delay was substantial and there was no compelling reason for the delay. In these circumstances, the latter factors outweigh the former and Lundin is not entitled to relief under Rule 6(b), assuming it were found to apply.

Lundin is entitled to a jury trial regarding punitive damages but not regarding any other issue. How this division of responsibility will occur, including the possibility of an advisory jury, is a matter for another day closer to trial. Lundin's request for a jury trial on all issues will be denied.

IV. Discovery Disputes

The parties have a contentious relationship and that appears to have infected their attorneys. The parties have a total of fourteen separate discovery disputes, many of which the attorneys should have been able to resolve on their own. The Court will resolve the present disputes but the parties and their counsel should re-evaluate their approach to this litigation. In particular, both sides must be more reasonable in propounding and responding to discovery. The Court will not hesitate to impose sanctions should the parties continue to be inflexible and unreasonable.

Some of the disputes involve all of the parties while other do not. Most of the disputes are between Lundin and Defendant Discovery Communications, Inc. ("Discovery"). A few of the disputes also involved Defendants Original Media, LLC, and Brian Nashel (collectively, "Original Media"). Where appropriate, Discovery and Original Media are referred to as "Defendants."

A. Discovery's RFP No. 6

Discovery requested "the production of all communications between Plaintiff . . . and any other person . . . concerning the allegedly defamatory episode." This included "social media exchanges regarding the Episode between Plaintiff and others." (Doc. 90 at 2). Lundin provided responsive communications but Discovery believes Lundin has not produced certain "articles and interviews." Lundin avers he has produced everything he is able to produce and Discovery must pursue third-party subpoenas to obtain any additional information, such as "articles and interviews" within the possession of non-parties.

The Court cannot order Lundin to produce documents he does not have. Lundin's counsel have represented they produced all responsive documents in Lundin's possession, custody, or control. Absent evidence that representation was false or in bad faith, Discovery is not entitled to relief regarding this issue.

B. Discovery's RFP No. 7

Discovery requested "all communications between Plaintiff . . . and any other person . . . concerning [this] lawsuit or the potential for a lawsuit." (Doc. 90 at 3). In particular, Discovery seeks production of Lundin's "social media exchanges" regarding this lawsuit. Lundin claims he has produced all responsive material and he "does not have more" to produce.

Again, the Court cannot order Lundin to produce documents he does not have. Absent some evidence that Lundin is acting in bad faith by withholding documents, the Court must rely on the representation that nothing else exists. Discovery is not entitled to relief on this issue.

C. Discovery's RFP No. 25

Discovery requested production of "all communications on Plaintiff's social media regarding the Episode, this litigation, Plaintiff's school, or his books and merchandising for the last five years." (Doc. 90 at 4). Lundin presents two inconsistent responses. First, he claims to have produced "*everything* he has posted on any account for the past five years." Second, he claims he cannot produce his "responses to . . . comments, 'likes,' etc. because . . . he rarely responds to any of them." (Doc. 90 at 4). There is no explanation for the inconsistency between Lundin producing "everything" but not producing "comments." Moreover, there is no explanation how the alleged rarity of Lundin's "comments" allow for his failure to produce.

Lundin must produce the requested social media communications. If he has already produced "everything," he obviously cannot produce more. But if he has not produced his "comments" etc., then he must produce them. The fact that he "rarely" responds to comments is immaterial. This includes supplementation as necessary should Lundin continue to make posts or comment on previous posts.

D. Lundin's Request for Video and Audio Files

Lundin requested Discovery and Original Media produce all the "editing timelines and video and audio files" connected to the allegedly defamatory episode. Discovery does not believe the evidence is relevant but is willing to produce what it has available. The cost of doing so, however, would be $17,808.00. In an effort to reduce that cost, Discovery "invited Plaintiff to visit Discovery's offices in Virginia, where the tapes are maintained, to view the unaired footage and select the footage he wishes to pay to have copied." Lundin refused that offer. As for Original Media, it claims to not have the information Lundin seeks.

Lundin believes Discovery should be required to produce the evidence, and bear the entire cost of doing so, because this evidence is "possibly the most important . . . physical evidence in this case." (Doc. 90 at 5). Assuming Lundin is correct that this evidence is crucial, he should be willing to travel to Virginia and select the footage to be

copied or pay the costs associated with production of the footage. Lundin has not explained why he is unwilling to travel so that the cost of production might be reduced. Nor has Lundin established the $17,808 cost identified by Discovery is inaccurate or why Discovery should be expected to bear that cost. At present, therefore, Lundin must either travel to Virginia or pay the full cost of production. If Lundin can establish travel is not possible and the cost is inflated, the Court will entertain a request that the parties split the cost.

E. Lundin's Request for Publication Dates

Lundin seeks production of "the dates and sources of all publications of the Subject Episode." (Doc. 90 at 7). In particular, Lundin seeks the "dates when Discovery . . . published the episode" as well as the dates other entities, "such as Hulu, Amazon and the like" published the episode. Discovery states it has already produced files showing when it published the episode and that it does not have additional information regarding the publication dates by other entities. Original Media claims to lack any of the information Lundin is seeking.

Again, the Court cannot require Discovery or Original Media produce information they do not have. Discovery has produced the dates it published the episode and, to the extent he believes necessary, Lundin can request the non-parties provide additional information.

F. Lundin's Request for Foreign Publication Information

Lundin seeks information regarding the publication of the episode outside the United States. Discovery claims any publication of the episode outside the United States "is beyond the jurisdictional reach of this Court." Therefore, Discovery has refused to produce responsive information. Original Media agrees any foreign publications are irrelevant but it produced all information regarding foreign publications in its possession. Resolution of this issue requires a brief analysis of the law regarding publication of allegedly defamatory statements.

Under Arizona law, "a cause of action for defamation arises at the time the

statement is first published; later circulation of the original publication does not start the statute of limitations anew, nor does it give rise to a new cause of action." *Larue v. Brown*, 333 P.3d 767, 771 (Ariz. Ct. App. 2014). This "single publication" rule includes publication on the Internet. *Id.* Under this rule, defamation defendants can be liable for all damages a plaintiff incurs as a result of the applicable single publication, even if the publication "crossed state lines and [was] read, heard or seen in every state and in foreign countries." Restatement (Second) of Torts § 577A (1977) ("The purpose of the rule is to include in the single suit all damages resulting anywhere from the single aggregate publication."); *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 963 (9th Cir. 2013) (single publication rule allows for recovery of "*all damages*" stemming from the relevant publication). Publication of the episode outside the United States might be relevant, provided the foreign publication was the same publication as what is at issue in this case. It is unclear, however, whether Lundin's discovery request is aimed at the relevant publication or entirely separate publications.

Lundin seeks the "dates and sources of all publications" of the episode, including publications outside the United States. Discovery apparently does not object to providing information regarding publications within the United States. To the extent those publications are distinct from the publications underlying the presently pending claims, it is unclear whether Lundin will be able to seek damages for those publications. But the Court need not address that issue because, at present, the only dispute is whether Discovery must produce information regarding publications in "foreign countries."

If the alleged "foreign publications" qualify as the same publication underlying the claims in this suit, Discovery must provide that information. But to the extent the "foreign publications" qualify as separate publications, they are irrelevant to the currently pending claims. As noted by the Arizona Court of Appeals, "[a] plaintiff has a new cause of action when the defendant edits and retransmits the defamatory material, or distributes the defamatory material for a second time with the goal of reaching a new audience." *Larue v. Brown*, 333 P.3d 767, 772 (Ariz. Ct. App. 2014). New claims based on foreign

publications would differ significantly from the currently pending claims because the elements and scope of damages likely would have to be analyzed under foreign law. At present, Lundin has not established he is entitled to conduct discovery to uncover the factual basis for other, not currently pending, claims. Accordingly, Discovery must produce the foreign publication dates if they qualify as the same publication as what is serving as the basis for the currently pending claims. Discovery need not produce information regarding foreign publications if those publications qualify as separate publications.

G. Lundin's Request for Co-Host Safety Concerns

Lundin seeks production of evidence concerning "safety complaints and reports" regarding his former co-host. Discovery and Original Media claim this information is irrelevant. Original Media, however, produced some information responsive to Lundin's request. Given Lundin's claims, the information is irrelevant. Discovery need not produce any information and Original Media need not produce any additional information.

H. Lundin's Request for Other Contracts

Lundin seeks production of other "Talent Agreements." Lundin believes those other agreements would establish the particular agreement he signed was not meant to waive his defamation and false light claims. As set forth above, Lundin's agreement cannot be enforced to bar his claims. Other possible agreements, therefore, are irrelevant and Discovery need not produce them.

I. Lundin's Complaints of "Incomplete Document Production"

Lundin makes a general complaint that Discovery has produced documents "in a 'rolling,' unorganized series of 'document dumps.'" (Doc. 90 at 12). According to Lundin, the productions have not identified which documents are responsive to which of his requests. Both Discovery and Original Media respond that they have produced "documents as those documents are maintained . . . in the usual course of business." (Doc. 90 at 12).

Lundin has not explained in a coherent manner the relief he seeks. It appears Lundin wishes to complain about Discovery and Original Media without any concrete disputes for the Court to resolve. Lundin's request for unspecified assistance is denied.

J. Discovery's RFP No. 27

Discovery seeks documents regarding the "income, profits, losses, assets, liabilities and federal income tax returns" of Barefoot Productions, LLC. That LLC is controlled by Lundin. Records from another LLC controlled by Lundin indicate Barefoot Productions was paid $23,288 for advertising Lundin's services. Lundin claims he suffered reduced income as a result of Defendants' actions but Defendants contend his reduced income may be attributable to other matters, such as a reduction in advertising. Lundin claims the documents related to Barefoot Productions are irrelevant and the reference to advertising "appears to be an accounting error" that his counsel "are looking into." (Doc. 93 at 2).

At present, Lundin has not established the entry is an error, meaning Barefoot Productions was involved in advertising Lundin's services. Changes in advertising may have impacted Lundin's income. Therefore, Lundin must produce Barefoot Productions' records.

K. Discovery's RFP No. 30

Discovery seeks production of records regarding the private survival courses Lundin has given as well as Lundin's speaking engagements since 2011. Lundin produced the information but he redacted the locations where the courses took place as well as the names of the individuals who took the courses. Lundin claims his clients have important "privacy interests" such that he need not produce their information. Discovery claims it is entitled to this information.

The places and names Lundin redacted are not privileged but Discovery has not identified any plausible basis for needing this information. The records regarding courses are relevant only to the extent they impact Lundin's finances. Where a course took place or who took the course are not relevant. Moreover, the third-parties who took the courses

should not be dragged into this litigation unnecessarily. Therefore, Lundin need not produce this information.

L. Discovery's RFP No. 31 & 32

Discovery sought Lundin's tax returns and the tax returns of an LLC for the years 2008 through 2010. Lundin has agreed to produce those returns, meaning there is no dispute.

M. Discovery's ROG No. 3 & 4

Discovery requested Lundin "identify 'all homes and/or residences' that he owns." This request was based on an allegation in the complaint that Lundin lives in a "passive earth solar home in the high desert wilderness of Arizona." (Doc. 93 at 5). Discovery believes that may be false and claims it is "entitled to test the accuracy of Plaintiff's allegations." Lundin responds that his "personal address" might "allow someone to breach his privacy and security." (Doc. 93 at 6). More importantly, Lundin claims his addresses are not relevant to any claim. The fact that Lundin may own or occupy multiple homes is relevant, at the very least, for impeachment. Therefore, Lundin must provide that information.

Discovery also requested the identification and address of Lundin's girlfriend, believing she "may have relevant information concerning Plaintiff's damages." (Doc. 93 at 6). Lundin claims his girlfriend's "home address is not even plausibly relevant to any claim or defense in this case." Lundin's girlfriend may have discoverable information regarding Lundin's claim for emotional damages. Lundin must provide her name and address.

The Court is ordering these disclosures under the assumption that defense counsel and those working with them will handle the information responsibly and will not file Lundin's addresses on the publically available docket absent some justification nor will they unnecessarily invade the privacy of Lundin's girlfriend.

N. Discovery's ROG No. 7

Discovery requested Lundin "articulate all 'facts' that he *misrepresented* to

Defendants." Lundin argues this request "is very plainly overbroad, overreaching and unduly burdensome." (Doc. 93 at 7). Lundin must respond to this interrogatory by identifying all "facts" he can recall misrepresenting to Discovery.

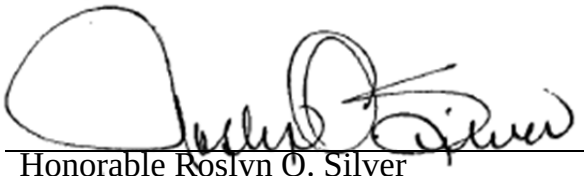
Accordingly,

IT IS ORDERED the Motion for Jury Trial (Doc. 31) is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff is entitled to a jury trial only on the issue of punitive damages.

IT IS FURTHER ORDERED the Motion for Summary Judgment (Doc. 59) is **DENIED**.

IT IS FURTHER ORDERED the Motions to Seal (Doc. 66, 69) and Motion to Strike (Doc. 75) are **DENIED**. Plaintiff shall file an unredacted version of his statement of facts and supporting documents within five days of this Order.

Dated this 8th day of March, 2018.



Honorable Roslyn O. Silver
Senior United States District Judge