IN THE CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT

RUBY FREEMAN and WANDREA MOSS,	)	
Plaintiffs,	)	
v.	)	Case No. 2122-CC09815-01
JAMES HOFT, JOSEPH HOFT, and TGP COMMUNICATIONS LLC d/b/a *THE GATEWAY PUNDIT*,	)	
Defendants.	)	

PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERY AND FOR A PROTECTIVE ORDER AND SUGGESTIONS IN SUPPORT

Plaintiffs Ruby Freeman and Wandrea Moss, through their attorneys, move this Court, pursuant to Rule 61.01(a), (b), and (d) and Rule 56.01(c) of the Missouri Supreme Court Rules, to compel Defendants to produce documents responsive to Plaintiffs' Second Requests for Production, and for entry of the attached Protective Order.

Plaintiffs filed this lawsuit exactly one year ago. Although they have diligently sought to move their case forward, Defendants' pattern of delay and obstruction has left Plaintiffs, to date, without a single non-public document responsive to their discovery requests. Defendants have raised a panoply of groundless and unsupportable objections, disputing everything from routine instructions to producing documents concerning the authors of the defamatory statements at issue. The protective order Defendants insisted upon would prevent most of Plaintiffs' *counsel* from viewing documents produced in discovery. Despite the fact that the nearly sixty defamatory stories Defendants published about Ms. Freeman and Ms. Moss destroyed their reputations, livelihoods,

and sense of personal security, Defendants' overall position appears to be that Plaintiffs' claims do not warrant their compliance with basic discovery obligations.

Plaintiffs seek relief to compel Defendants to satisfy those obligations. As provided in the Proposed Order, Plaintiffs respectfully ask the Court to order Defendants to produce all documents responsive to their Second Requests for Production within ten (10) days, enter Plaintiffs' Proposed Protective Order, and to award Plaintiffs the reasonable expenses and attorneys' fees they were forced to incur to compel Defendants to comply with their discovery obligations.

PROCEDURAL BACKGROUND

1. Plaintiffs filed this lawsuit on December 2, 2021, against Defendants James Hoft, Joseph Hoft, and TGP Communications LLC d/b/a The Gateway Pundit ("*TGP*") (collectively, "Defendants").

2. This case was improperly removed by Defendants on December 5, 2021, and remanded by Judge Autrey on June 6, 2022.

3. To date, Defendants have produced zero non-public responsive documents.

4. Plaintiffs served their First Requests for Production of Documents and First Interrogatories (collectively, "First Requests") on Defendants on June 10, 2022, nearly six months ago. On November 11, Plaintiffs filed a Motion to Compel Production of Documents and Answers to Interrogatories concerning Plaintiffs' First Requests for Production of Documents and First Interrogatories. That Motion lays out the procedural history relevant to those disputes.

5. On October 17, Plaintiffs served their Second Requests for Production of Documents on Defendants ("Second RFPs"). Many of the Second RFPs were prompted or

necessitated by the evasive and incomplete responses and improper objections Defendants gave to Plaintiffs' First Requests. Attached as Ex. 1.

6. A number of these requests concerned documents and information related to the "Articles," defined as every article attributed to *The Gateway Pundit* named in the Second Amended Complaint (or Petition) and every republication thereof.

7. On November 16, Defendants served their Objections and Responses to Plaintiffs' Second Requests for the Production of Documents. Attached as Exs. 2, 3, and 4. They refused to produce any documents at all in response to eleven of Plaintiffs' fourteen requests and raised a variety of specious objections discussed in more detail below.

8. Also on November 16, they sent Plaintiffs a proposed protective order. Attached as Ex. 5.

9. On November 23, Plaintiffs sent Defendants a deficiency letter concerning their Objections and Responses to Plaintiffs' Second Requests. Attached as Ex. 6.

10. On November 25, Plaintiffs sent Defendants correspondence concerning Defendants' proposed protective order and a redlined version of the order containing Plaintiffs' proposed revisions. Attached as Ex. 7.

11. On November 28, Plaintiffs and Defendants met and conferred to discuss the deficiencies identified in the November 23 letter as well as the November 25 correspondence concerning the proposed protective order. Though Defendants made minor concessions regarding Plaintiffs' requests, they maintained their objections to much of the Google Analytics and AdSense RFPs and refused many of Plaintiffs' proposed changes to the proposed protective order.

12. On November 30, Plaintiffs sent Defendants an email memorializing the outcomes of the meet and confer, both with respect to Plaintiffs' Second Requests and with respect to the protective order. Attached as Ex. 8. Plaintiffs also provided a second redline version of the protective order a new redline to reflect it. Attached as Ex. 9. Plaintiffs informed Defendants that they intended to quickly move this Court for relief, and as a result asked that Defendants communicate any changes to their positions by the following day (Thursday, December 1).

13. Plaintiffs now seek the intervention of this Court to ensure Defendants' cooperation and compliance with discovery obligations given their delays, failure to produce any non-public responsive information, and utter lack of urgency or thoroughness.

14. Plaintiffs further seek an order that Defendants pay the fees and costs Plaintiffs incurred in filing this motion, caused by Defendants' discovery failures.

LEGAL STANDARD

A motion to compel is authorized when a party fails to respond to requests for production, *see* Mo. Sup. Ct. R. 58.01(e), or interrogatories, *see id.* 57.01(e). As with all discovery matters, trial courts have broad discretion "to choose a remedy to address any non-disclosure of evidence." *Gray v. 3M Co.*, 494 S.W.3d 15, 17 (Mo. Ct. App. 2016). A noncompliant party may be required to pay the costs incurred by the opposing party caused by the failure to timely produce. Mo. Sup. Ct. R. 61.01(d)(4).

Under Missouri Supreme Court Rule 56.01(c), the trial court may issue a protective order and define the terms thereof. The Court "has broad discretion to determine the appropriateness and terms of the protective orders for documents produced during discovery." *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 587 (Mo. 2007). !

ARGUMENT

I. Defendants Repeat Many of the Same Deficiencies in Their Responses to Plaintiffs' Second RFPs.

In their responses to Plaintiffs' Second RFPs, Defendants recycle many of their same deficient objections in response to Plaintiffs' First Requests, including repeating verbatim their objections to the definitions of the terms "Defendants," "You," and "Your" (Definition 3) and "Articles" (Definition 12). These objections are deficient for the reasons identified in Plaintiffs' first Motion to Compel, which Plaintiffs will not rehash. *See Mot. to Compel* 11-15. For the reasons stated there, Defendants must search for and produce responsive documents relating to each of the *TGP* articles listed in the Second Amended Petition. Likewise, the Court should order Defendant TGP Communications LLC to search for and produce all responsive documents and information, including from employees, contractors, and agents, and relating to Articles written by any of its contributors, including but not limited to James and Joseph Hoft, Cristina Laila, Jordan Conradson, Larry Johnson, Patty McMurray, and Alicia Powe. Relatedly, it should order Defendants to search for and produce discovery relating to each of the *TGP* Articles listed in the Second Amended Petition. *See* Proposed Order at (4)-(5).

II. Defendants Wrongly Deny the Relevance of the Requested Google Analytics and AdSense Data.

Plaintiffs have requested certain documents and data concerning Google Analytics and AdSense that are directly relevant to Defendants' liability and Plaintiffs' damages. For most of the requested data, it would take Defendants no more than a few minutes to provide Plaintiffs view-only access to the relevant data. The data at issue will reveal the extent to which Defendants profited from their stories and made editorial decisions based on that profit, shedding light on

whether profits motivated them to fail to investigate their claims and whether they purposefully avoided the truth, purposefully crafted their "reporting" to fit a narrative that garners more clicks, and continued to publish defamatory statements after being put on notice of falsity.

The requested data thus provides important circumstantial evidence that goes to whether Defendants published their stories with actual malice. *US Dominion, Inc. v. Powell*, No. 1:21-CV-00040 (CJN), 2021 WL 3550974, at *11, 13 (D.D.C. Aug. 11, 2021) (financial motive); *Suzuki Motor Corp. v. Consumers Union of U.S.*, 330 F.3d 1110, 1136 (9th Cir. 2003) (financial motive); *Competitive Enter. Inst v. Mann*, 150 A.3d 1213 (D.C. Cir. 2016); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (preconceived narrative), *cert. denied*, 459 U.S. 1226 (1983); *Nunes v. Lizza*, 12 F.4th 890, 900 (8th Cir. 2021) (decision to republish defamatory statement after being put on notice of its falsity); *Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 548 (6th Cir. 2013) (failure to investigate defamatory claims); *Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Pub., Inc.*, 978 F.2d 1065, 1070 (8th Cir. 1992) (purposeful avoidance of truth). As for damages, the evidence will demonstrate the reach of Defendants' stories, as well as provide some indication of the value of Plaintiffs' damaged reputations.

Because it is not the least burdensome to produce this information that is so obviously relevant to liability and damages, other courts have not hesitated to compel defendants to produce this data in defamation cases and other cases. For example, in *Universal Life Church Monastery Storehouse v. King*, No. C19-0301RSL, 2020 WL 13480960, at *3 (W.D. Wash. July 13, 2020), the court granted a motion to compel production of read-only access to Google Analytics data—not just reports generated by the litigant—in a trademark and defamation action. As the court explained, this data was discoverable because it would "enable [the Plaintiff] to analyze the

financials and determine whether [the Defendant] experienced a change in revenues that was attributable to the conduct at issue," and concerns about disclosing information to competitors could be addressed by the protective order. *Id. See also Gilmore v. Jones*, 2021 WL 68684, at *8, 10 (W.D. Va. Jan. 8, 2021) (compelling discovery on revenue generated by the allegedly defamatory videos because defendant's profit motive to publish stories about plaintiff was relevant to actual malice, and likewise compelling discovery about defendant's marketing and research efforts because they were probative of departures from journalistic standards and profit motive); *Palin v. N.Y. Times Co.*, 588 F. Supp. 3d 375, 391 n.11&12 (S.D.N.Y. 2022) (in defamation claim against the *New York Times*, discussing relevance of evidence revealing the total number of page views of the allegedly defamatory editorial); *Digital Shape Techs., Inc. v. Glassdoor, Inc.*, No. 16-MC-80150-JSC, 2016 WL 5930275, at *2, 5 (N.D. Cal. Oct. 12, 2016) (compelling disclosure of Google Analytics statistical information revealing number of viewers of allegedly defamatory information and concluding that protective order could address concerns about sharing information with competitors).

These requests are not a "fishing expedition." To the contrary, the effect of Defendants' election fraud "reporting" in boosting its readership and revenue has been widely reported,[1] and the defamatory articles Defendants published about Plaintiffs over many months repeatedly tout

[1] "Gateway Pundit's popularity had surged last November and again in the spring thanks to misleading stories about the election and the pandemic. It had 50 million visitors from November through January, many times more than it had oridinarily [sic] seen in a year, and a similar amount in mid-2020." Abram Brown, Google Cuts Off Ad Money To 'Gateway Pundit,' A Haven For Vaccine And Election Misinformation, https://www.forbes.com/sites/abrambrown/2021/09/10/google-cuts-off-ad-money-to-gateway-pundit-a-haven-for-vaccine-and-election-misinformation/?sh=2c77efb97d8c (last visited Nov. 30, 2022).

false claims of election fraud. Consequently, the Court should order Defendants to comply with Plaintiffs' narrowed requests.

A. RFP Nos. 1 and 2 concerning Google Analytics data.

Google Analytics is a web analytics service that tracks and reports website traffic. As the Google Analytics website explains, the service aims to help website owners and administrators better "understand [their] customers" by "[u]nlock[ing] customer-centric measurement across [their] sites and apps, so [they] know what's working and what's not."[2] The tool enables websites like *The Gateway Pundit* to "[s]ee how people engage with [their] business and the role different channels play with advanced reporting and analysis."[3]

RFP Nos. 1 and 2 are reasonably calculated to lead to the discovery of relevant and admissible information. In their Second RFPs, Plaintiffs requested "[a]ll documents related to Google Analytics," RFP No. 1, and "[a]ll documents or information generated by Google Analytics," RFP No. 2. In response, Defendants objected that both RFPs are "overbroad and not reasonably calculated to lead to the discovery of admissible information." Exhibits 2, 3, and 4.

Regarding RFP No. 1, this request specifically seeks documents relevant to the facts at issue in this case. Documents reflecting previous Google Analytics reports run by Defendants and documents referencing those reports and their results—paired with the broader Google Analytics data sought by RFP No. 2 and discussed below—will make clear how Defendants interpreted and used Google Analytics, especially as it related to the creation and marketing of their published

[2] *Analytics: Benefits*, Google Marketing Platform https://marketingplatform.google.com/about/analytics/benefits/ (last visited Nov. 23, 2022).
[3] *Id.*

content. This is directly relevant to Plaintiffs' claim that Defendants acted with actual malice when it published the fifty-eight defamatory articles about Plaintiffs.

As for RFP No. 2, Plaintiffs cannot overstate the utility of the documents or information generated by Google Analytics to their case. As explained in Plaintiffs' November 23 letter to Defendants, the documents and information provided by Google Analytics will convey:

- which pages on the website receive the most initial website traffic and how effective those pages are at driving website visitors to view the website in its entirety;
- which website pages are most popular and effective, as well as whether any of the URLs linking the Articles are included;
- how *TGP* visitors arrived on the website—whether by clicking on paid ads or nonpaid media; and
- monthly trends in website traffic.

That information will show how well Defendants' false articles about Plaintiffs performed in bringing visitors to the *TGP* website (relative to Defendants' other published content) and how much Defendants have monetized their defamatory content about the Plaintiffs. It will also shed light on the full readership of Defendants' defamatory statements about Plaintiffs. These insights are directly relevant to Plaintiffs' damages, as well as to whether Defendants acted with actual malice, including whether they possessed a preconceived narrative or had financial incentives to promote false stories about Plaintiffs.

Plaintiffs' requests are not burdensome. Defendants argue that these requests are unduly burdensome because "[i]t is Defendant's understanding that a user must pay at least $150,000 to export the raw Google Analytics database in its entirety and there are otherwise an infinite number

of queries a user can make." Exs. 2, 3, and 4. Firstly, Defendants' objection is not relevant to RFP No. 1, as this request seeks documents "related to" Google Analytics that already exist and are in Defendants' possession.

As for RFP No. 2, Plaintiffs have proposed that Defendants grant them view-only access to all Google Analytics accounts associated with *The Gateway Pundit* website and active from January 1, 2020, through the present. Providing this kind of direct access is both time- and cost-effective, as it is free for Defendants to add an additional user to these accounts and would take mere minutes to make the necessary account adjustments. Though Plaintiffs have offered to provide Defendants with step-by-step instructions on how to do this, Defendants continue to object to granting such access.

Alternatively, Plaintiffs proposed narrowing the scope of RFP No. 2 by requesting five sets of reports for each month from January 1, 2020 through the present:

1. Landing Page Reports. These reports convey which pages on the website receive the most initial website traffic (i.e., what attracts visitors to *The Gateway Pundit* and what content was promoted via external channels) and indicate how effective those pages are at encouraging readers to continue visiting *The Gateway Pundit*. This is clearly relevant to Defendants' content creation and marketing strategy, particularly as it concerns statements concerning Plaintiffs and election fraud content more broadly.
2. All Pages Reports. These reports will help Plaintiffs understand the absolute viewership and subsequent engagement of The Gateway Pundit's content. This is critical for understanding the reach and engagement of individual articles, including those which defame Plaintiffs.

3. Filtered All Pages Reports. These will provide the same information as the standard All Pages Reports, only with respect to the URLs of the Articles listed in Plaintiffs' Second Amended Petition.
4. Traffic Acquisition Reports. This information will allow Plaintiffs to understand both how *The Gateway Pundit* generates viewership for its content and the reach of promotional vehicles to the website—i.e., the report shows where users were before coming to the website, whether on a search engine, from a paid ad, through social media, or direct traffic. Again, this is relevant to the question of how Defendants have monetized the defamatory content about Plaintiffs.
5. Monthly Topline Reports. These reports will allow Plaintiffs to analyze monthly trends across the website, to see if there is an increase in website traffic (such as an increase in page views or website sessions), or an increase in time spent on the website during a specific period. Having several months of data will allow Plaintiffs to develop a baseline understanding of traffic to *The Gateway Pundit*, which is critical for analyzing how the Articles in question performed in relation to that baseline.

Plaintiffs have offered to provide Defendants step-by-step instructions for producing each of these reports, but during the November 28 meet and confer, Defendants agreed to produce only two categories of reports: (2) All Pages Reports and (5) Monthly Topline Reports. As explained above, each of the requested reports is critical to helping Plaintiffs understand the financial and political motivations behind Defendants' publishing choices, which is directly relevant to the actual malice inquiry. Despite Defendants' protestations, this type of information is routinely

subject to discovery. *See, e.g.*, *Universal Life Church*, 2020 WL 13480960; *Gilmore*, 2021 WL 68684, at *8, 10; *Palin*, 588 F. Supp. 3d at 391 n.11&12.

Plaintiffs' requests are not duplicative. While Plaintiffs have previously asked for documents and/or communications showing readership or web traffic for *TGP* and the articles in question, First RFP Nos. 27, 28, and 29, Defendants have not yet produced any documents pursuant to those RFPs. Moreover, in response to those RFPs, Defendants made clear that they would need additional guidance in order to provide useful Google Analytics data, given the numerous reports and queries available. Plaintiffs now offer that guidance.

B. RFPs Nos. 3, 4, and 5 concerning Google AdSense data.

Google AdSense is an advertising program which "provides a way for publishers to earn money from their online content" by matching digital ads to publishers' websites based on their content and visitors.[4] After displaying ads on their website through the AdSense program, publishers are then paid on either a cost-per-click or cost per 1000 impressions basis.[5] As a result,

[4] How AdSense works, Google AdSense Help; https://support.google.com/adsense/answer/6242051?hl=en (last visited Nov. 30, 2022).

[5] Cost-per-click (CPC) is "the amount [a publisher] earn[s] each time a user clicks on [their] ad. The CPC for any ad is determined by the advertiser; some advertisers may be willing to pay more per click than others, depending on what they're advertising." Cost-per-click (CPC), Google AdSense Help, https://support.google.com/adsense/answer/32725?hl=en (last visited Nov. 30, 2022). In contrast, for cost per 1000 impressions (CPM) ads, advertisers "set their desired price per 1000 ads served and pay each time their ad appears." CPM ads, Google AdSense Help, https://support.google.com/adsense/answer/18196?hl=en (last visited Nov. 30, 2022).

publishers like *The Gateway Pundit* are incentivized to increase the size of their audiences and the viewership of their content in order to increase ad revenue.

Plaintiffs' requests seek information reasonably calculated to lead to the discovery of admissible and relevant information. Through RFP Nos. 3, 4, and 5, Plaintiffs requested:

- "All documents related to Google AdSense, including with respect to the termination of The Gateway Pundit's use of Google AdSense, whether such termination was based on allegations of false statements by The Gateway Pundit or for any other reason." RFP No. 3.
- "All communications with or from Google AdSense, including with respect to the termination of The Gateway Pundit's use of Google AdSense, whether such termination was based on allegations of false statements by The Gateway Pundit or for any other reason." RFP No. 4.
- "All documents or information generated by Google AdSense." RFP No. 5.

Defendants object that these three requests are irrelevant and overbroad, and "not reasonably calculated to lead to the discovery of admissible information." Exs. 2, 3, and 4. However, all three RFPs concern the revenue generated through *The Gateway Pundit*'s website and how much of that revenue came through the defamatory articles, which is relevant to, first, Plaintiffs' allegation that Defendants knowingly spread false stories about them based on a preconceived narrative and/or profit motive and, second, Defendants' journalistic practices and ethical standards, which also bears on the actual malice question.

Plaintiffs' requests are not burdensome. Defendants argue that RFP Nos. 3 and 5 are unduly burdensome because "Defendants are aware of no method to export Google AdSense data

and they cannot access it as noncustomers." Exs. 2, 3, and 4. Firstly, Defendants' objection is not relevant to RFP No. 3, which seeks documents that already exist and are in Defendants' possession. As to RFP No. 5, it is Plaintiffs' understanding that Defendants may still log in to their previous Google AdSense accounts, even if they are no longer active users.[6] As such, Plaintiffs proposed that Defendants grant them view-only access to all Google AdSense accounts associated with *The Gateway Pundit* website to facilitate the easy transfer of data responsive to this RFP. As is the case with Google Analytics, providing this kind of direct access to Google AdSense represents the most time- and cost-effective option for Defendants. Again, Plaintiffs have offered to provide Defendants with step-by-step instructions on how to do this, but Defendants refuse.

As an alternative, Plaintiffs proposed narrowing the scope of RFP No. 5 by requesting four sets of reports for each month from January 1, 2020, through the termination of Defendants' Google AdSense account:

1. Page URL Revenue Reports. These reports will allow Plaintiffs to analyze whether certain pages generated more revenue than others and if those revenue streams spiked in certain months versus others. Plaintiffs can then compare this report with the Google Analytics

[6] Access a closed AdSense account, Google AdSense Help, https://support.google.com/adsense/answer/10268925?hl=en (last visited Dec. 1, 2022); Your AdSense account was deactivated for being inactive, Google AdSense Help, https://support.google.com/adsense/answer/7237800?hl=en (last visited Dec. 1, 2022).

All Pages report in order to understand if there is correlation between website viewership and revenue generated.

2. Filtered Page URL Revenue Reports. These will provide the same information as the standard Page URL Revenue Reports, only with respect to the URLs of the Articles listed in Plaintiffs' Second Amended Petition.
3. Ad Network Revenue Reports. These reports assess the relative revenue generated by promotional vehicles to *The Gateway Pundit*'s website, which Plaintiffs can compare to the Google Analytics Traffic Acquisition Reports to gauge which promotions are most lucrative.
4. Filtered Ad Network Revenue Reports. These will provide the same information as the standard Ad Network Revenue Report, only with respect to the URLs of the Articles listed in Plaintiffs' Second Amended Petition.

Plaintiffs have offered to provide Defendants step-by-step instructions for producing each of these reports, but during the November 28 meet and confer, Defendants agreed to produce only two sets of reports: (2) filtered Page URL Revenue Reports, and a Topline Report, which Plaintiffs have not requested. As explained above, each of the reports requested by Plaintiffs is relevant and necessary to helping Plaintiffs understand the financial and political motivations behind Defendants' publishing choices, directly relevant to actual malice.

Plaintiffs' requests are not duplicative. Through their First RFPs, Plaintiffs sought documents and/or communications "showing revenue and sources of revenue for *The Gateway Pundit*, including but not limited to documents and/or communications demonstrating the extent to which any Defendant obtained revenue from the Articles." *See* First RFP No. 30, Ex. 1 to

Plaintiffs' *Mot. to Compel*. Second RFP No. 5 seeks much more detailed information, while Second RFP Nos. 3 and 4 seek a broader set of information, including information about the termination of a particular revenue stream.

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This Court should order Defendants to provide Plaintiffs with view-only access to all Google Analytics and AdSense accounts associated with *The Gateway Pundit*'s website during the relevant time period, as well as produce the supplementary Google Analytics and AdSense documents requested. *See* Proposed Order at (6)-(9). In the alternative to providing Plaintiffs view-only access to the relevant Google Analytics and AdSense accounts, Defendants should be required to produce all requested reports. Generating and exporting the necessary reports will likely require ten to twelve hours of Defendants' time, while granting Plaintiffs view-only access to both sets of accounts can be done in minutes. However, if the Court wishes to order the production of specific reports, Plaintiffs respectfully request that the Court require Defendants to follow Plaintiffs' instructions for producing those reports, to ensure they reflect the specific data Plaintiffs require to substantiate their evidentiary burden.

III. Defendants Assert Improper Objections and Inappropriate Limitations on Discovery.

Objection to instruction concerning previously-held documents. Plaintiffs' requests contain an instruction that, should Defendants have knowledge of responsive documents that were but are no longer in their possession, custody, or control, they "identify each such document and state the circumstances by which Defendants no longer have possession, custody or control of it, and the current location of each such document." Ex. 1 at 2. Defendants rejected this routine

instruction as an "impermissible interrogatory." Their objection has no basis, and they must respond accordingly.

Request concerning TGP's subscription program. Defendants refuse to provide any documents responsive to RFP No. 6, concerning *TGP*'s subscription program. They object that the request is irrelevant and overbroad, but this information is plainly relevant. It bears directly on allegations that Defendants had a financial motive to repeatedly publish known falsehoods about Plaintiffs, which relates to the actual malice inquiry. *See, e.g., US Dominion, Inc.*, No. 1:21-CV-00040, 2021 WL 3550974, at *11, 13 (finding actual malice allegations sufficient in part because Mike Lindell sought to profit from lies about Dominion). Here, documents reflecting *TGP*'s subscriber levels and subscription revenue over the relevant time period, as well as communications amongst the *TGP* staff and contributors discussing these issues, bear on the financial motive question.

Defendants have additionally argued that the request is "designed to harass subscribers." Exs. 2, 3, and 4 at 11. Plaintiffs have made clear to Defendants that they do not seek any personally identifying information, fully ameliorating any good-faith objection on this front.

Request concerning the employment status of TGP contributors who wrote some of the Articles. In RFP No. 7, Plaintiffs seek documents "relating to the ongoing, past, current, or future employment status or engagement" of five individuals whose names appear in the byline of at least one of the defamatory Articles challenged in the Second Amended Petition. Defendants refused to provide any responsive documents, claiming both that the information was irrelevant and that the request was "designed to invade the privacy of the named individuals, who are non-parties to this matter." Exs. 2, 3, and 4 at 12. These objections are both specious and wrong as a matter of law.

TGP acknowledges these individuals as the authors of some of its defamatory statements. These individuals' relationships to *TGP*, along with the terms and conditions of those relationships, are therefore plainly relevant to *TGP*s claims that it does not have possession of these individuals' documents relevant to this matter. Plaintiffs are entitled to confirm the employment or engagement status of the cited contributors. *See McClure v. McIntosh*, 770 S.W.2d 406, 409-10 (Mo. App. 1989) (noting that a discovery request seeking information about agents or employees of defendants was proper, as is discovery about individuals acting on behalf of a party; narrowly construing agents of a party is impermissible gamesmanship).

This Court should enter an order requiring Defendants to retract their objections that the Requests are overbroad, unduly burdensome, or irrelevant and update their discovery responses accordingly. *See* Proposed Order at (10)-(12).

IV. Good Cause Exists for the Entry of the Enclosed, Appropriately Tailored Protective Order.

Having been unsuccessful in seeking to negotiate an appropriately limited stipulated protective order, Plaintiffs respectfully move the Court to enter the enclosed Protective Order that appropriately protects the parties' confidential and sensitive information while ensuring that discovery can continue without undue burden. Good cause exists for the entry of this order, as discovery will likely require the production of material whose public disclosure or unauthorized use could cause substantial privacy harms to Plaintiffs. Mo. Sup. Ct. R. 56.01(c).

Defendants sent Plaintiffs a proposed stipulated protective order on November 16, 2022, more than five months after Plaintiffs served their first discovery request, at which point they knew or should have known that discovery would likely require the disclosure of information and

documents Defendants deem sensitive or confidential. Defendants' proposed order was overly broad, unnecessarily complicated, and objectionable in numerous respects. Plaintiffs sought to negotiate a reasonable protective order, but without success. *See* Ex. 7 (redline reflecting Plaintiffs' requested modifications to Defendants' proposed protective order). While Plaintiffs proposed a number of minor revisions, the material disputes between the parties concerned three issues.

First, Defendants' proposed definition of "CONFIDENTIAL Material" would encompass any and all of Defendants' non-public "business" information, regardless of whether the disclosure of such information would be likely to cause Defendants any harm. This would authorize carte blanche designation of everything as "confidential" and unnecessarily burden its use in this litigation. Plaintiffs propose that material containing non-public business or commercial information be designated confidential only if the disclosure of such information would likely cause the designating party an identifiable injury. This proposal is in harmony with Missouri law, which requires litigants restrict from public view "information that is confidential pursuant to statute, court rule or order, or other law," including, for example, social security numbers, financial institution account numbers, and crime victims and witnesses identifying information—information whose disclosure would cause or be likely to cause serious, tangible harm. Mo. R. Civ. P. 84.015. Business information whose disclosure would cause no "specific potential harm" is not a trade secret. *State ex rel. Blue Cross & Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 170 (Mo. Ct. App. 1995); *see also State ex rel. Coffman Grp., L.L.C. v. Sweeney*, 219 S.W.3d 763, 768–69 (Mo. Ct. App. 2005) (trade secret is a "compilation of information…used in one's business, and which gives" its holder "an advantage over competitors who do not know or use it") (internal quotations and citation omitted). The definition Plaintiffs propose would protect the parties'

sensitive information while preventing excessive and unnecessary confidentiality designations from bogging down the proceedings and burdening the parties and the Court.

Second, and equally problematic, is Defendants' proposal to restrict access to confidential-designated material only to Counsel of Record who work at for-profit law firms. Defendants propose that Plaintiffs' counsel of record at Protect Democracy and the Media Freedom and Information Access Clinic be permitted to view designated material only by coming to the Missouri offices of their co-counsel Dowd Bennett LLP and reviewing it at Dowd Bennett's office. Defendants offer no legitimate reason or legal basis for such an extraordinary impediment to representation of a party by their chosen counsel. Defendants' demand would hamstring the ability of Plaintiffs' counsel to efficiently litigate this case by blocking most counsel of record[7] from routine access to the discovery materials and evidence needed to prepare the case. Defendants' sole justification for this restriction is their unfounded conjecture that Protect Democracy and the Yale clinic do not abide by the same ethical and professional safeguards as for-profit law firms. Both entities (Protect Democracy and the Media Freedom and Information Access Clinic) abide by the same ethical and professional safeguards required for attorneys employed at for-profit firms. Further, the proposed protective order will equally bind all counsel of record and their respective organizations, and restrict improper sharing and use of confidential-designated material. Plaintiffs' proposed protective order removes Defendants' unwarranted definition of eligible "Outside Counsel" and places all counsel of record on equal footing. Ex. 9.

[7] None of the counsel employed by Protect Democracy and the Media Freedom and Information Access Clinic are based in Missouri.

Finally, Plaintiffs propose certain revisions to the order's sealing provision to make clear that whether a party may designate material as confidential is a distinct question from whether a court filing containing designated material can be filed under seal. Defendants' draft provided that "that designated material will be filed under seal, in accordance with Missouri Court Operating Rules 4.24-4.27." But Missouri court records are presumptively open, as recognized by Supreme Court Operating Rule 2. And the Supreme Court Rules do not authorize indiscriminate sealing of party-designated material. Instead, only narrow categories of records, such as grand jury materials, psychiatric records, juvenile and adoption records, and other pre-trial criminal records, are confidential and should be sealed. Mo. R. S.Ct. Op. 4.24. Records that do not fall within these categories can be sealed only in accordance with statute, Supreme Court Rule, or by order of the court, for good cause shown. *Id.* "[T]he presumption of openness cannot be overcome absent a compelling justification that the records should be closed." *Brewer v. Cosgrove*, 498 S.W.3d 837, 842 (Mo. Ct. App. 2016). Thus, "a court must identify specific and tangible threats to important values in order to override the importance of the public right of access." *Id.* The order Plaintiffs propose incorporates this standard and places the burden of proving good cause to seal a court record on the party seeking that relief.

Plaintiffs respectfully request the Court enter the enclosed protective order. *See* Ex. 9. Defendants should not be allowed to further delay discovery by requiring a protective order with provisions that (1) define confidential too broadly, (2) restrict counsel of record's access to all confidential documents, and (3) fail to adhere to the applicable sealing procedures.

V. Defendants Should Pay Plaintiffs' Reasonable Expenses for Having to Make This Motion to Obtain Proper Discovery Responses and an Appropriately Tailored Protective Order.

As with Plaintiffs' prior motion to compel, Plaintiffs seek compensation for their expenses and attorneys' fees incurred because of Defendants' failures to meet their discovery obligations. *See, e.g.*, Mo. Sup. Ct. R. 61.01(d). As detailed above, Defendants repeatedly have provided woefully evasive and incomplete responses to Plaintiffs' Requests, which amount to a failure to answer. Mo. Sup. Ct. R. 61.01(a)*; see also Luster v. Gastineau*, 916 S.W.2d 842, 843, 845 (Mo. Ct. App. 1996) (upholding sanctions where "seven of the thirteen interrogatories…were answered evasively"). Despite Plaintiffs' best efforts to resolve these disputes—including by sending a fourth deficiency letter with a redline of the protective order, meeting and conferring with Defendants, subsequently proffering a new redline of the protective order, and emailing Defendants a summary of the parties' positions—Defendants insist on delaying and declining to provide meaningful answers or to produce the documents requested. Thus, Defendants should be required to pay Plaintiffs' expenses and fees in filing this motion. *See* Proposed Order at (18).

CONCLUSION

WHEREFORE, Plaintiffs respectfully request this Court grant their Second Motion to Compel Discovery and for a Protective Order and enter any further relief the Court deems just and proper.

Dated: December 2, 2022

Respectfully submitted,

By: /s/ Matt D. Ampleman

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**Pro hac vice* pending
***Pro hac vice* forthcoming

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via the Court's electronic filing system this 2nd day of December, 2022.

/s/ Matt D. Ampleman