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Counsel for Ryan Goldberg and Gizmodo Media Group, LLC

Hearing Date:
March 21, 2018 at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
Gawker Media LLC, *et al.*,[1]	:	Case No. 16-11700 (SMB)
Debtors.	:	(Jointly Administered)

MEMORANDUM OF LAW IN OPPOSITION TO MOTION *IN LIMINE* TO EXCLUDE EXPERT

Ryan Goldberg, by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to the Motion *in Limine* of Pregame LLC, d/b/a Pregame.com and Randall James Busack (collectively, "Pregame") to Exclude Expert (the "Motion") [ECF No. 1073], filed on January 31, 2018.

[1] The last four digits of the taxpayer identification number of the debtors are: Gawker Media LLC (0492); Gawker Media Group, Inc. (3231); and Gawker Hungary Kft. (f/k/a Kinja Kft.) (5056). Gawker Media LLC and Gawker Media Group, Inc.'s mailing addresses are c/o Opportune LLP, Attn: William D. Holden, Chief Restructuring Officer, 10 East 53rd Street, 33rd Floor, New York, NY 10020. Gawker Hungary Kft's mailing address is c/o Opportune LLP, Attn: William D. Holden, 10 East 53rd Street, 33rd Floor, New York, NY 10020.

I. BACKGROUND

As directed by this Court, a trial will be held on Goldberg's motion to enforce this Court's December 22, 2016 Order confirming the amended joint Chapter 11 plan of liquidation ("the Plan"). Specifically, the trial will concern two passages in Section 9.05 of the Plan that the Court ruled were sufficiently ambiguous to require evidence about their meaning and effect. At the trial, Goldberg intends to present the testimony of Mr. Chad E. Milton, an expert in the specialty insurance field of media liability. Milton's expert testimony is relevant to the parties' dispute over the meaning and effect of the carve-out in Section 9.05's third-party release for work performed or content provided by Goldberg and other writers that is "the result of gross negligence or willful misconduct." In particular, the testimony is relevant to Goldberg's argument that he and the other writers received the third-party release in exchange for giving up their indemnification rights for claims arising from work they performed for the Debtors, and that within the media industry, such indemnification rights cover the types of defamation and related claims asserted by Pregame.

Milton has disclosed the following summary of his opinion: "In the specialty insurance field of media liability, insurers provide coverage for defamation and related claims to media insureds *without* exclusion for gross negligence or willful misconduct. The same is true for employees and non-employee content providers. Those insurers, having committed to insuring defamation and related claims, understand that it would be unfair and illusory to deny coverage for conduct that satisfies the elements of the torts." Exhibit A to the Motion ("Milton Declaration") at ¶ 1 (emphasis added). Pregame's Motion argues that Milton's testimony should be excluded as irrelevant.

II. ARGUMENT

The Court should deny this Motion for two reasons. First, Milton's testimony is relevant to the meaning and effect of Section 9.05's "gross negligence or willful misconduct" carve-out. Second, because the testimony will be presented at a bench trial instead of a jury trial, a motion *in limine* like this is unnecessary—the Court is well able to evaluate the relevance of the testimony at trial within the appropriate factual context.

A. Milton's Testimony Is Relevant to Determining the Meaning of the "Gross Negligence or Willful Misconduct" Language in the Third-Party Release.

In determining whether expert testimony is admissible under Rule 702, courts perform their gatekeeping role by ensuring that: "(1) the evidence is relevant, (2) the expert is qualified, and (3) the expert's testimony rests on a reliable foundation." *In re Med Diversified, Inc.*, 334 B.R. 89, 95 (Bankr. E.D.N.Y. 2005) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (internal footnote omitted)). Pregame does not challenge Milton's qualifications or the reliability of his testimony. Nor could it, given his decades of work in media liability insurance, including as an adviser to major insurance companies and media companies, including the New York Times, Washington Post, Dow Jones, and Gannett. *See* Milton Decl. at ¶¶ 2–11. Instead, Pregame limits its challenge to the narrow argument that Milton's testimony is not relevant.

Evidence is relevant, and therefore admissible, however, merely if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The bar for relevancy under Rule 401 is "very low . . . and evidence should not be excluded on a motion *in limine* unless such evidence is clearly inadmissible on all potential grounds." *Sec. Inv'r Prot. Corp. v.*

Bernard L. Madoff Inv. Sec. LLC, 2017 WL 2602332, at *4 (Bankr. S.D.N.Y. 2017) (internal citations and alterations omitted); *see also Hart v. RCI Hospitality Holdings, Inc.*, 90 F. Supp. 3d 250, 257 (S.D.N.Y. 2015). Further, in a bench trial, whether evidence is relevant "can best be determined at trial, so that the motion is placed in the appropriate factual context." *In re GII Indus., Inc.*, 495 B.R. 209, 212 (Bankr. E.D.N.Y. 2010) (denying a motion *in limine* prior to a bench trial) (internal citations and quotation marks omitted).

At the September 28, 2017 hearing, the Court made the point that during the Plan confirmation process: "the releases were the *quid pro quo* for the loss of the indemnification rights." Exhibit 1 ("Hearing Transcript") at 66:13–15. The Court directed the parties to conduct discovery regarding the intended meaning of the Section 9.05 terms "gross negligence or willful misconduct" within the context of the indemnification negotiations between the writers and the Debtors during the Plan confirmation process. In particular, the Court requested "evidence regarding the negotiations of these phrases . . . relevant evidence in order to interpret them and interpret the scope of these exceptions to the releases." *Id.* at 66:20–23 (alteration added).

Milton's testimony directly addresses the requests posed by the Court. Milton will testify about the broader context of indemnification agreements between writers and media companies within the media industry. This testimony is relevant to determining how the "gross negligence or willful misconduct" language was understood by the parties at the time of the Order, and what effect the carve-out was intended to have. A primary way by which media companies carry out their indemnification obligations is by providing media liability insurance coverage to their writers. As an expert in the specialty insurance field of media liability, Milton will provide relevant testimony including about media insurance companies' coverage for employees and freelancers of media companies. He will testify that he has never seen a carve-out for "gross

negligence or willful misconduct" in such insurance policies; and that if an insurer were to come across the "gross negligence or willful misconduct" language in an insurance contract, that insurer "would likely say that this language is inoperative as respects defamation claims . . . ." Exhibit B to the Motion ("Milton Deposition") at 45:7–12 (alteration added).

Milton's testimony is thus relevant because, in the language of Rule 401, it is "of consequence" in aiding the Court to determine the intended meaning of the "gross negligence or willful misconduct" language; and it has a "tendency" to support the finding that such language was not intended to exclude writers, like Goldberg, who are named in defamation actions, from the protection of the third-party releases. Fed. R. Evid. 401. Accordingly, the Court should deny Pregame's Motion to exclude Milton's testimony.[2]

B. The Court Should Deny Pregame's Motion *in Limine* and Consider Milton's Evidence at Trial, Within the Appropriate Factual Context.

In any event, because the Court will be conducting a bench trial rather than a jury trial, the best course is to allow Milton to testify at trial, so that the Court can evaluate his testimony within the appropriate factual context. Where, as here, "a bench trial is in prospect, resolving *Daubert* questions at a pretrial stage is generally less efficient than simply hearing the evidence;

[2] Pregame mischaracterizes Milton's proffered testimony in two ways. First, Milton's testimony is not "interpretative testimony that contradicts the terms of an instrument." Mot. at ¶ 9 (internal quotation marks omitted). Because the Court has found the "gross negligence or willful misconduct" language to be sufficiently ambiguous to warrant a trial, Goldberg may submit expert evidence to supplement the language's construction. *See In re Sept. 11th Liab. Ins. Coverage Cases*, 2005 WL 425267, at *3 (S.D.N.Y. 2005). Second, Milton's testimony is *not* that media insurance policies merely "typically" do not contain a carve-out for gross negligence and willful misconduct. Mot. at ¶¶ 5, 11. Instead, Milton has testified and will testify that he has *never* seen such a carve-out, *see* Milton Dep. at 21:12–22:25, and such a carve-out would make no sense because it would render insurance for defamation and related claims illusory, *see* Milton Decl. at ¶ 1; *see also* Milton Dep. at 45:7–12.

if [objections to the evidence] are well-taken, the testimony will be disregarded in any event." *Victoria's Secret Stores Brand Mgmt., Inc. v. Sexy Hair Concepts, LLC*, 2009 WL 959775, at *6 n.3 (S.D.N.Y. 2009) (alteration added); *see also Sec. Inv'r Prot. Corp.*, 2017 WL 2602332, at *4 ("The usefulness of *in limine* motions is largely negated in bench trials"); *In re Signature Apparel Grp. LLC*, 2015 WL 1009452, at *15 (Bankr. S.D.N.Y. 2015) ("In the context of a bench trial where there is not a concern for juror confusion or potential prejudice, the court has considerable discretion in admitting the proffered testimony at the trial and then deciding after the evidence is presented whether it deserves to be credited by meeting the requirements of *Daubert* and its progeny" (internal citation omitted)). Further, courts have stated that it "is inappropriate to use a motion *in limine* to pre-determine theories of the case or to preclude parties from presenting evidence on underdeveloped issues in advance of the trial." *In re Oak Rock Fin., LLC*, 560 B.R. 635, 638 (Bankr. E.D.N.Y. 2016).

Here, the Court will be proceeding by bench trial. Accordingly, the Court has the opportunity to evaluate the relevance of Milton's testimony when hearing it within the appropriate factual context of the other evidence presented at trial. Because there is no risk of juror confusion or potential prejudice, there is no harm in allowing Milton to testify and then determining what weight to grant his testimony.

III. CONCLUSION

For the foregoing reasons, Pregame's Motion should be denied, and Milton's testimony should be permitted.

Dated: Washington, D.C.
February 7, 2018

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By: /s/ Chelsea T. Kelly

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 16-11700-smb

- x

In the Matter of:

GAWKER MEDIA, LLC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

September 28, 2017

10:20 AM

B E F O R E :

HON. STUART M. BERNSETIN

U.S. BANKRUPTCY JUDGE

ECRO: JONATHAN

HEARING re Motion of Proposed Amici Curiae Society of Professional Journalists, Reporters Coalition for Freedom of the Press, and 19 Other Media Organizations for Leave to File Memorandum of Law as Amici Curiae

HEARING re Motion of Ryan Goldberg to Enforce Order Confirming Amended Joint Chapter 11 Plan of Liquidation

HEARING re Motion of Gizmodo Media Group, LLC to Enforce the Sale Order and to Bar Certain Plaintiffs from Prosecuting Their State Court Actions

Transcribed by: Sonya Ledanski Hyde

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PROCEEDINGS

MR. GALARDI: Good morning, Your Honor. For the record, Gregg Galardi of Ropes and Gray on behalf the plan administrator. We submitted an agenda to Your Honor and would like to proceed first with the amicus. I think there is a proposed amicus brief and whether they can, in fact, appear on this matter. There is an opposition to that.

THE COURT: Right.

MR. GALARDI: And then the second and third matters, I'd like to ask Your Honor to reverse the order, have the motion to enforce prior to the actual motion of Ryan Goldberg to enforce the order confirming the amended joint plan.

THE COURT: All right. Let me deal with the amicus motion first.

MR. BALIEN: Good morning, Your Honor. My name is Mark Balien of Baker Hostetler. I'm counsel to the amici curiae, the Society of Professional Journalists, the Reporters Committee for Freedom of the Press and 19 other media organizations. I also serve as the outside general counsel to the Society of Professional Journalists, an organization with over 7,000 members nationwide whose mission is dedicated to the perpetuation of a free press as a cornerstone of our nation -- liberty. We seek leave, Your Honor, to file our amicus brief in furtherance of this

mission to protect the free press which, in reality, is made up of journalists who individually and collectively research, investigate, report -- and report the news into the public to ensure a well-informed citizenry, a critical component of our self-government. Our proposed brief is short. It's only four and a half pages, and serves to augment the arguments of the movants Ryan Goldberg and Gizmodo Media Group, and to emphasize the critical importance to journalists everywhere of indemnification agreements which in this case are in the form of a release and injunction provisions that effectively replace the journalists' indemnification guarantees.

THE COURT: But what does your brief add that hasn't been raised by Mr. Goldberg?

MR. BALIEN: Well, essentially I believe we augment the arguments. We emphasize the point that there's -- there are First Amendment interests here. And we --

THE COURT: But this is just an issue of whether the plan release provisions preclude the suit in State Court. It's not a First Amendment case. I remember we had this discussion, maybe not with you, but at the confirmation hearing and I approved the release of the writers at that point, but it wasn't a complete release. It carved out willful conduct. It didn't apply to people who were not deemed, whatever that means, to accept the plan, so it's not

a complete release and that's the basis of the decision in the case.

MR. BALIEN: Right, and frankly I believe it -- our brief does address this with respect to those -- they carve out what you just described. The plaintiffs, you know, argue that the carve out applies here but this is based, I believe, on a fundamental misunderstanding of the release provision. In our view, this language is a carryover of the typical language that's incorporated into indemnification agreements, especially ones involving journalists and the media and which would relieve an employer when an employee acts with willful misconduct or in some other egregious manner. It has no bearing on the situation here where the company, in this case Gawker, fully backed this reporter and this reporter's journalism was supported by the company in that instance, and the indemnification provision then would've been fully enforced. He would've been provided indemnification.

The issue that they're trying to -- I believe that the plaintiffs in this case are trying to do, they're trying to twist this into some type of actual malice related or other scienter requirement that's required under the libel law, and in our view this is a completely separate issue altogether.

THE COURT: Well, he is being accused of an

intention tort in State Court, tortious interference with contract, defamation; those are all intentional torts.

MR. BALIEN: Right. No, I understand that. But again, when it comes to willful misconduct in that language in the release, it was meant to essentially incorporate the provisions of the indemnification agreements which would provide an employer an out. For an example, about 20 years ago, Chiquita Banana, a company sued -- threatened a suit against Gannet's newspaper in Cincinnati, and they within, I think ten days, literally just days after the publication they were threatened with suit.

Gannet settled the case for $10 million before the suit was even filed, and it turned out that the reporter there was accused of breaking into the phone system of Chiquita Banana's executives and stealing the phone records, the voicemails. In that case, he sought indemnification when he was being pursued and that issue of indemnification came up and there was arguments by the company that that was willful misconduct, and that's where this issue comes into play, it's whether or not this employee has acted outside the bounds.

Here, there's no allegations in the complaint, in the State Court action, that the employee has done any of that. There are these conclusory allegations that he engaged in willful misconduct, but there's no factual basis

for there to be any finding that there's this type of willful misconduct that the indemnification provisions would address and would ultimately be nullified because of that.

THE COURT: Okay. Thank you. Mr. Flaxer?

MR. FLAXER: Good morning, Your Honor. Jonathan Flaxer of Golenbock, Eiseman, Assor, Bell, and Peskoe on behalf of plaintiffs. We filed a very, you know, brief opposition. We don't see any relevance here because everything that able counsel just described is all -- all these arguments were made during the plan, you know, a process.

Whatever points they made are already baked into the plan and now we're having a debate about parsing the words of the plan, and I don't think any of these other considerations come in at this stage, number one, and number two, I just think this -- these motions were made on August 21st to file these papers on late afternoon on Friday, was I think, not the best way it could've been handled, so I think for those reasons the motion should not be granted.

THE COURT: Okay, thank you. Look, I'll grant the motion. I'll take the papers for, (indiscernible) the order. Next? You can submit an order.

MR. GILHULY: Your Honor, if it pleases the Court, we would like to have the motion of Gizmodo Media Group taken first, to enforce the order, and then --

THE COURT: Anyone have a problem with that? All right, go ahead.

MR. GILHULY: Thank you, Your Honor. Good morning, Your Honor, Peter Gilhuly of Lathan and Watkins, LLP, on behalf of Gizmodo Media Group, which I will refer to as GMG. With me in the Court today is Thomas Hentoff, a partner at Williams and Connolly, defamation counsel to GMG, who is available to address any detailed single publication rule the Court may have.

Your Honor, also in the Court with me is Lynn Oberlander, executive vice president and general counsel of GMG, directly behind me, and (indiscernible), senior vice president and associate general counsel, head of litigation of GMG. Remarkably, Your Honor, the facts in this matter are, I think, entirely undisputed. I think you know the timeframe and I will recite them briefly. I think it might be helpful as background here. As you know, Your Honor, the debtor filed bankruptcy on June 13th, 2016. Ten days later, the article in question was published on June 23rd, was published on the website Deadspin and has remained there without alteration since. On June 27, counsel for the plaintiff sent a letter to Gawker demanding retraction of that story. On July 8th, the Court approved the sales procedure order in this case. On August 16th, the bankruptcy sale auction was held. On August 17th, notice of

the bar date and customized proof of claim was sent to plaintiffs. On August 18th, the Bankruptcy Court held the sale hearing in this case, and on August 22nd the -- after GMG was declared the winning bidder, plaintiff's counsel sent a letter to GMG's counsel demanding retraction of the same story. On August 28th, the bankruptcy sale order was entered, and on June 22, 2017, one day short of a year after the article had originally been published, the plaintiff's filed their State Court lawsuit without mentioning bankruptcy sale at all, nothing about the prior history, and on August 21st, GMG filed its motion to enforce the Court order.

Your Honor, I don't think that any of those facts are contested, and the plaintiffs don't contest they had actual notice of the sale and that they did not object to the sale.

THE COURT: I guess the only question, really, was whether -- I take it that this article is still available?

MR. GILHULY: Right.

THE COURT: And the only question is whether, like a continuing trespass -- every day it's up there, that's a new tort, and all the parties have cited New York law, so I'd assume everybody was thinking that New York law controls this question.

MR. GILHULY: Correct.

THE COURT: And I understand the single publication rule which is a rule of statute of limitations. But is there also a rule that the tort occurs with the first publication -- you know, I assume it came up at a time when there was a single publication, the newspaper, but in this day and age, is it still the rule that even if the offending article appears every day for a year on a website that it is still only a single tort that occurs when it first goes up?

MR. GILHULY: Absolutely. That is the force of the rule, Your Honor.

THE COURT: Well, as I said, has it been applied in a situation that I just described?

MR. GILHULY: Philadelphia Newspapers is the very case. It's right on all fours here, Your Honor. It involved a bankruptcy sale, it involved a single publication, it involved a lawsuit in State Court seeking exactly what the plaintiffs are, and it was barred. In fact, Your Honor, I'll read from Philadelphia Newspaper on this very point.

"While the articles may remain extant and available online, neither was republished after PMN," who's the purchaser, "became the owner of the papers. Neither did PMN assume liability for defamation claims such as these in the purchase agreement. For that reason, the plaintiffs may not look to the purchaser for any recovery."

And this is the law. I mean, that is not surprising at all. That is the force of the law. The New York controlling law, the Firth case, Your Honor, makes that very clear.

All right, Your Honor, I'm just going to go in order of the arguments. Your Honor, I think it's very important to note at the onset of this issue, that this is not some secondary or tertiary issue. This issues was core, front and center, in this matter from the beginning, as you will recall from the bankruptcy case, and it was a primary concern of the debtors, you know, to get a free and clear order over these very issues that it's addressed.

THE COURT: I don't understand them to be arguing that the free and clear order didn't cut off whatever claims might have arisen immediately prior to the sale order.

MR. GILHULY: You're right. I think you're right.

THE COURT: I don't understand -- my, as I said, I understand them to be arguing that each day that this information is available is a new tort.

MR. GILHULY: Your Honor, here's what I'd like to do. I'd like to go to the issues. I may have Mr. Hentoff, who's an expert on these issues, come and address you on that issue.

Your Honor, I think the first thing is jurisdiction. I think it is really beyond argument that the

Court's ability to interpret and enforce its argument is a Court proceeding and the Travelers and GM cases make this --

THE COURT: You can move on to your next point.

MR. GILHULY: Okay. Thank you. I think it's also not disputed, Your Honor, and I'll go through it if you would like, but I do not -- I don't think the plaintiffs are arguing that these are not adverse interests that are otherwise, other than the issue you mentioned, they are not arguing that the sale order doesn't bar pre-sale conduct. So, I could go through that language; it's in our brief. I assume that --

THE COURT: I don't understand them, and I'll hear them, but I don't understand them to be arguing (indiscernible) as you just said that the sale order does not cut off -- the free and clear language doesn't cut off, or the successful liability language doesn't cut off that liability, if anything.

MR. GILHULY: Your Honor, the other two arguments, before I let Mr. Hentoff address you, are mandatory abstention which I think if you conclude that there's core jurisdiction here, that's the beginning and the end of the argument. There's -- (indiscernible) made that quite clear, and I think there -- at least the other factor in mandatory extension that's not present here is the motion enforce is not solely based on state law. There's just no way to

conclude that. This -- you have to interpret the text of the order, the APA, and apply it to this situation, so it just seems to me that mandatory extension is not an issue here. I'm happy to argue further, but it seems to me that that goes nowhere.

Your Honor, as to permissive abstention, the Revco and Ionosphere cases that we cite in our brief make it very clear and reflect the wisdom that when jurisdiction plainly exists and there's not mandatory extension does not apply, a Bankruptcy Court should exercise permissive abstention in really rare and unusual circumstances. I -- we don't have that here. In particular, as other Courts have including the WorldCom case, when the 12 factors that you look at for permissive abstention are really weighed heavily in taking this case.

First, Your Honor, as I say, this is a core proceeding, the bankruptcy, that is one of the factors, and we are seeking interpretation and enforcement of specific language in a specific word that this Court has entered. The proceeding -- and the proceeding here is the motion to enforce, not the State Court action, Your Honor. The proceeding is plainly related to the bankruptcy case. I would say it's at the core. The solution of this case was a sale to my client. It couldn't be more central to the case, and the Winstar case, you know, found that when a sale is

subject of the proceeding, was a central aspect and basic function of the bankruptcy proceedings, you know, this is when you do not abstain.

And related, Your Honor, the factors -- non-bankruptcy law does not predominate over bankruptcy issues and the relevant non-bankruptcy law is well settled. I mean, just take the second one first. Mr. Hentoff is going to tell you that the single publication rule is very well settled. There are not -- I mean there is -- the Philadelphia Newspaper case cites the Firth case for things like the fact that the first single publication rule applies to the internet, posting on the websites.

It also cites, Philadelphia Newspaper sells the seminal New York Firth case on the fact that links directing to -- people to know where the article is published is also not a valid argument for undoing the single publication rule. So, I will submit, and Mr. Hentoff will talk to you -- address you on this, that the single publication rule is well-settled law in New York. It's not a complicated analysis.

With respect to non-bankruptcy law not predominating, Your Honor, to resolve our motion you need to basically analyze Section 363, the text of the court order which refers to the APA, and the single publication rule. They all come together, but there is -- it's fundamentally a

bankruptcy issue. Given this Court's familiarity with its own sale order, the bankruptcy code, and the factual underpinnings of the bankruptcy case, the Court is best positioned to adjudicate this motion. A State Court judge would not understand, you know, the complexities of bankruptcy law here and what the intent behind the order is.

THE COURT: I'm not sure I do but that's (indiscernible).

MR. GILHULY: Your Honor, the idea what GMG forum shopped is completely ridiculous. Where else were we going to go to enforce this Court's order, but this Court? And there's obviously no right to jury trial implicated in the motion to enforce a court order. I really don't think, Your Honor, it's feasible to sever the claims, and this motion doesn't burden this Court. This Court is the right place for this to get resolved, and I would submit to Your Honor that the efficient administration of the estate would be well served by, instead of going to other Courts, for you to resolve this today.

Your Honor, and the fact that the plaintiffs and GMG are non-debtor parties, that's true in every sale context when you're trying to enforce a sale order. You don't have to enforce it against the debtor usually, you have to enforce it against third parties. So, I would say the overwhelming majority of factors weigh in favor of you

not abstaining here, Your Honor, and, look, this case involves, you know, a garden variety motion to enforce a sale order. The Court clearly has jurisdiction to enforce its own order. The sale order clearly bars pre-sale claims against GMG, that's not disputed.

The single publication rule, as you will hear, dictates that the article in question has been published once by Gawker and has not been republished. Mandatory abstention is completely inapplicable here and permissive abstention is imprudent. As Judge Gerber said in the motors liquidation case, the construction and enforcement of Bankruptcy Court orders is important to the bankruptcy system. This is simply not the right case to erode confidence in the basic bargains struck often in 363 sales.

Your Honor, with that I'm going to defer to Mr. Hentoff to address the single publication issue.

THE COURT: Thank you.

MR. HENTOFF: Good morning, Your Honor. May it please the Court, Thomas Hentoff.

The -- I have four points to make, Your Honor. I think the first point, the question the Court made is, is this a continuing tort. And the answer is, that's the question that the New York Court of Appeals decided in the Firth case in 2002, that in a defamation the fact that an article, or the case of Firth is was a report, remains

online so that people can see it and visit it day after day after day, the New York Court of Appeals said that's not a continuing tort.

We're going to apply the standard single publication rule that applies in defamation cases generally, and we're going to apply it online and then courts all over the country followed Firth and applied the same rule. In fact, I would say the best way to understand the single publication rule is, it is the opposite of a continuing tort, and I think a good example of that would be imagine an article that's on a website that a plaintiff claims is defamatory and at the same time there's a photograph that's embedded in that article that the photographer said, "You didn't pay me for it, this is a copyright infringement." Well, copyright infringement, not going to make an (indiscernible) addition for some other case in the future, but copyright infringement is understood to be a continuing tort and so that photograph every day that it continues to be distributed to people, that can be a new cause of action. But under the standard single publication rule, as applied on the internet by Firth and all the cases, it's the opposite of a continuing tort and it's a single unitary publication.

Now, my second point, Your Honor, is this is not simply a rule that's applied in the statute of limitations

context. It is often applied in the statute of limitations context, but in defamation law. it's also very important and comes up a lot on state of mind because under the actual malice test that's a default standard for public figures and in New York State under the gross irresponsibility test which is the standard for matters of public concern where you don't have a public figure, there's a big question. what did the defendant know? What was in their mind at the time of publication? And if not for the single publication rule, every day that an article is on a website or continues to be distributed, the defendant arguably is getting more and more information and their state of mind always changes. But the courts have been very clear.

We don't look at the defendant's state of mind after the first time the article goes on the website, so it's not just a statute of limitations rule, it's a unitary publication rule that applies in a number of contexts. So in our motion, we cited the Bureau of Conde Nast case for a different proposition, but that's a case in which the Court held for actual malice purposes you can't look beyond the first posting of the article on the website.

And then finally, as Mr. Gilhuly said, in Philadelphia Newspapers which just applied the general law, at least one of the plaintiffs in that case had filed lawsuit within a year of the original article being

published. So, Philadelphia Newspapers is not a statute of limitations case, it's a unitary publication case.

And then just my final point, is the law is clear on this. There are no exceptions that could be applied here. The plaintiffs are asking for an exception when there's a change in ownership of the company that owns the website. As we say in our papers, Philadelphia Newspapers applied regular law and rejected that argument.

And then finally as we note in our reply brief, it would be a really bad exception to make to the single publication rule because you could have, as we note, like the Daily News was recently sold to the Tribune Company which permits New York institution to continue, all the people who are employed by it to keep their jobs, but if that had been a republication, then I don't know, 50, 60, 70 years of archives from the Daily News would be subject to new statute of limitations and people wouldn't be in a position to engage in transactions for media companies because they'd be afraid that any new transaction, you've got liability for things that have been up for 10, 20, 30 years. So, it's -- there is no exception to the law and it would be a bad idea to make one. Thank you.

THE COURT: Thank you, (indiscernible).

THE COURT: Oh, sure. Go right ahead.

MR. GALARDI: Your Honor, again, we have the

Gawker and the plan administrator. We joined this motion. I do want to, as the historian of the case, remind Your Honor of this actual sale proceeding.

As you may remember, we filed a reply in support of the single publication rule. There were a number of people represented by the exact same counsel in that. Mr. Harder, who had said reservation of rights. We had come in and argued that single publication rule would protect the successive buyer because that was part of the significant value and we'd had a number of the negotiations regarding that.

The plan administrators here are prepared to testify, but I think the facts are uncontroversial that when we sold, we took the view that this was a single publication, that their acquisition would not be considered a new publication, but all that Ms. (indiscernible) and Mr. -- Dr. (indiscernible) did was file a reservation of rights. Your Honor and I had this dialog about, can I overrule -- can you overrule a reservation of rights. You said no, but that was an issue that Your Honor was going to interpret on the successor at some date, but it was the exact issue that we'd raised here. The counsel was the exact same counsel. They did not raise that issue and did not fight that issue, they just simply did -- laid in wait, so I just wanted to remind Your Honor about that. We did take the position with

both buyers at that time that this would be covered by the single publication rule for the reasons the gentleman from Williams and Connolly argues, as this is not continuing tort. Thank you.

THE COURT: Mr. Flaxer?

MR. FLAXER: Like Mr. Gilhuly, I am not an expert on the single publication rule either or, you know, New York's law about defamation. My partner, Mr. Ricardo was here and if Your Honor wishes to hear more about that, he's here to speak to those issues. I may allude to them a little bit, but I'm certainly not the expert.

I find myself in agreement with much of what Mr. Gilhuly said, but when you get to nub of the issue we're -- we have opposite views.

THE COURT: What's the nub?

MR. FLAXER: The nub is that the basic question that's raised here is whether the New York State Court where the action is pending or this Court will decide a complex, multilayered disputed issue of New York law.

THE COURT: But how do I avoid doing that in order to interpret the sale order?

MR. FLAXER: Because, well, I think that's the nub. You can't interpret, in quote, because the reality is you're not being asked to interpret the sale order. The sale order was clear. What they've done is instead of going

to State Court and either raising this issue there --

THE COURT: Well, they're saying I don't have to do anything.

MR. FLAXER: They could've gone to a State Court but they didn't. They decided to come here on what we think is a fundamental misdirection.

THE COURT: So, what's the issue that the State Court should decide?

MR. FLAXER: The State Court is going to have a trial with discovery and witnesses on this defamation claim and on the intentional tort claims.

THE COURT: But isn't one of the purposes of the provisions of the sale order to cut off that claim before you get to discovery and all that other stuff?

MR. FLAXER: If it is, it's not in the sale order. We didn't participate at all. We are listed as a -- having a disputed claim.

THE COURT: Are you saying you're not bound by the sale order?

MR. FLAXER: No, I'm not saying that, but what I'm saying is that when you analyze the jurisdictional and abstention questions in the extent of your power, the fact that we did not file a claim, that was submitted to the jurisdiction of the Court, and never participated in any way in the proceedings before this Court affects how you view

the extent of your power here and the appropriate exercising of your power.

THE COURT: Do you contend that the sale order doesn't cut off pre-sale claims?

MR. FLAXER: Absolutely not. The sale order --

THE COURT: Okay, so isn't the only issue whether you're complaint alleges post-sale claims?

MR. FLAXER: No. The issue is -- our complaints on its face clearly only seeks redress for post-sale conduct.

THE COURT: I disagree. Your complaint, the material facts, are alleged starting in Paragraph 16 but mostly 17 to 20, which talk about the June 23rd, 2016, article written by Mr. Goldberg which is the article at issue.

Then when I get to the defamation claim, which is -- starts at Paragraph 42, says that defendants published or caused to be published on or -- and/or maintained defamatory statements in a story against them as described in Paragraphs 17 through 20.

So, if I'm a State Court judge looking at this and I know nothing about the bankruptcy, case it looks to me like your arguing that whatever wrong occurred, occurred on June 23rd and you just told me that that would be barred by this free and clear and successor liability provisions of

the sale order.

MR. FLAXER: You know, I think the answer is that you can't frame the complaint without explaining the background facts and the circumstances.

THE COURT: So, where does it talk about the bankruptcy and the sale order and that you're only suing for claims that arose after the sale order, which would be clearer to the judge who had to handle this in State Court? Then they could make a motion to dismiss saying there were no such claims.

MR. FLAXER: You know, I --

THE COURT: Mr. Flaxer, I've read it and it's not in there.

MR. FLAXER: Okay. No, I'm sure there's nothing in here about --

THE COURT: All right.

MR. FLAXER: -- the bankruptcy or the sale order or any of that. I'm looking at the prayer for relief which is on Page 19, and in 3 it seeks an order enjoining defendant from publishing, continuing to publish, or republish, and the defendants are the only defendants in the case.

THE COURT: I always thought the wherefore clause wasn't part of the plea.

MR. FLAXER: I know, but we're trying to

understand what is being sought here. Here's -- the only defendants are the buyer.

THE COURT: I know what you're -- I know what's being sought, but the question is, at least the way the complaint frames it, is that it's being sought for a wrong that occurred on June 23rd prior to the sale. That's the problem I have with the complaint.

MR. FLAXER: I --

THE COURT: And you can argue this 'til you're blue in the face to a State Court judge and he or she would probably tell you to come back here to do it.

MR. FLAXER: You know, I severely doubt that, but you know, at that point, it could be explained to the State Court which is where this belongs, that no, to the extent that you want us to amend the complaint to make that clear we're happy to do that. The only relief sought is against these defendants for post-sale conduct.

THE COURT: But you said these defendants published something, and they didn't publish anything. It was Gawker that published it, their successors.

MR. FLAXER: There is this concept embedded in the New York law, that I'm not the expert on, about --

THE COURT: But you're going to tell me about it anyway, right?

MR. FLAXER: -- about the concept of a

republication and as Mr. Ricardo will explain to you, that is not a simple issue. New York State, unlike Pennsylvania, has not adopted the uniform single publication act. New York has decided to go its own way and develop its own common law about single publication, republication, and all the very complicated issues that surround this. I don't think you want to be the judge to have to guess how a New York State Court would decide to develop this law that's also always changing and subject to reevaluation.

THE COURT: But I'm being told there's a New York State Court of Appeals (indiscernible) case that's essentially on point.

MR. FLAXER: Okay, well my partner -- I mean, if you want him to speak to that now, I'll bring him up here.

THE COURT: It's your show.

MR. FLAXER: All right, well, why don't I keep going through my argument and then --

THE COURT: Okay, go ahead.

MR. FLAXER: -- then we'll get to that. So, I think the notion of casting this as a motion to enforce or interpret your order is superficial. There's nothing in the order that is alleged to be ambiguous, and --

THE COURT: But, won't that make it easier to enforce?

MR. FLAXER: No, because the -- I -- we don't

believe there's anything for you to enforce except if you would like to read the relevant provisions of the order into the record and then send us back to State Court. Because the order, like -- (indiscernible) like most sale orders I've seen, they all say this applies up to the date of the sale and applies to all pre-sale conduct but doesn't bar post-sale conduct, and we --

THE COURT: I don't think anybody's in disagreement (indiscernible) that.

MR. FLAXER: And so the only way you would ever get to an issue about how -- about whether you should enforce your order, is for you to substitute yourself for the New York State Court System on the issue of single publication and republication, and now we'll quit that, leave it at the side for the moment. But I will say that in addition to the lack of dispute about what the order says on this issue, there's no issue of bankruptcy law that you're being asked to decide or think about. This doesn't implicate 363 or any of that. There's nothing in the bankruptcy code that this dispute would call upon you to have to --

THE COURT: But in light of that, can't I just read the complaint for the reasons I said and say this is complaint asserts a pre-sale claim. Because that's the way it's pleaded.

MR. FLAXER: I think you could do that, but I think you'd be elevating form over substance. I think the only defendants are the ones who are named in the complaint and I will represent to the Court right now that we seek nothing from the estate, from the debtor, or for any pre-sale conduct. It's just that you need to recite the background to get to where you need to go, and I -- and we understand. One argument that I'm guessing they would make in State Court is, okay, because of the way you set this up, you can't seek any damages for anything that happened prior to the sale date, and you know what? That's right. That is --

THE COURT: I think they're going to say you can't seek any damages because whatever was done was done before the sale.

MR. FLAXER: Well, they're going to say that as well. But on the first -- but that one, we think they're going to lose. But we understand we have a problem, an issue. I don't want to say the word problem, it's an issue, on the second.

We think the case law is clear that by simply characterizing something as a motion to interpret or enforce an order, doesn't mean that all considerations of jurisdiction and the power of the Court suddenly go out the window, the Court has to look at the substance of what is

really -- what the Court's really being asked to decide.

THE COURT: You're saying that if someone were to claim post-confirmation let's say, maybe this is the other case, it's clearly barred by the terms of the release, discharge, or whatever that this Court would have no jurisdiction and if somebody aggrieved by that lawsuit came in and wanted to stop it because it violated the confirmation (indiscernible), they'd have to go to State Court and show them what the confirmation order says and tell the State Court judge to figure it out?

MR. FLAXER: You know, I think that's too generic.

THE COURT: Well isn't it what's happening here?

MR. FLAXER: No. This is total -- I don't agree. It's totally fact intensive. If you accept my, you know, credits.

THE COURT: What are the disputed facts, though.

MR. FLAXER: In -- on.

THE COURT: In other words, the article is still published, the sale occurred. Isn't just purely a legal question whether this there's a separate claim?

MR. FLAXER: No, and again as the non-expert, I will --

THE COURT: Well, maybe I ought to hear from -- let me hear from the expert.

MR. FLAXER: All right. But there are several

layers of issues that are going to require discovery. So, we view this as not being -- as this Court not having jurisdiction --

THE COURT: I just don't -- I'm sorry, I just don't understand that. You may think that the State Court is a better place to answer the question, but I don't know how you can say I don't have jurisdiction to enforce the sale order.

MR. FLAXER: If someone was seeking to enforce the sale order in real substance as opposed to using the notion of enforcing a sale order to move a state law dispute between non, you know, debtors that has no effect on the bankruptcy estate, to this Court, you know, you got to look to the substance. I view their position as elevating form over substance. There's no dispute any provision of the sale order. It otherwise has no effect on the bankruptcy estate. It doesn't arise under the code. We don't think, again --

THE COURT: -- you disputing that the sale order cuts off the claim that you say you're asserting?

MR. FLAXER: Am I asserting that --

THE COURT: You're saying that the sale order doesn't cut it off, right? And they're saying it does. That sounds like a dispute over the sale order.

MR. FLAXER: No, it's -- well, that's where I

think you're elevating form over substance. It's a dispute over an issue of purely state law. If they win in State Court, then they will have established that the sale order should cut the claim off, but at that point it's moot. It never comes back here because if we lose on that issue, we lose anyway.

THE COURT: Okay. I got it. Thank you.

MR. FLAXER: So, on mandatory abstention, assuming you concede that it is related to the bankruptcy case, which we dispute, but if it is, there's no dispute that an action has been commenced. You know, notwithstanding their argument that this is about -- it's about their motion to enforce the order. The action is clearly the State Court action. We're the ones who are raising mandatory abstention (indiscernible) then you should abstain from getting --

THE COURT: How would you demonstrate

MR. FLAXER: -- State Court --

THE COURT: How would you demonstrate it if the case can be timely adjudicated in State Court? I don't have any statistical information.

MR. FLAXER: Well --

THE COURT: That's how you prove it.

MR. FLAXER: I'll say two things on that. I mean, we've raised it. They haven't said it can't be. We could have a hearing on that. This isn't an evidentiary hearing.

There are no, you know,

THE COURT: I know you didn't have an evidentiary hearing. State Courts and the Federal Courts publish statistics in terms of clear -- I just had a case like this, clearance rates and caseloads and things like that. It's all published statistics.

MR. FLAXER: I mean, my view is we raised it, they didn't

THE COURT: But you have to --

MR. FLAXER: -- oppose it.

THE COURT: -- sustain your burden of proof. All right. All right. I got it.

MR. FLAXER: So, their only pushback on mandatory abstention goes back to that they think this is about your somehow interpreting the sale order, and we, for reasons I've stated and won't state again, don't agree.

THE COURT: (indiscernible)

MR. FLAXER: Rather than pick through all of the standards of permissive abstention which Your Honor is very (indiscernible) with as is my adversary, we think the non-bankruptcy issues predominate over the bankruptcy issues. We don't think there are any bankruptcy issues whatsoever. As my partner will explain, we think the single publication rule issues are very complex, unsettled, will require discovery, and are items that belong in the New York State

Court for reasons I've already stated so I won't state them again.

We also think it would be inefficient for Your Honor to take this on. That jumps ahead a little bit to the extent that the power of the Court and whether you can finally decide this or could only issue findings and conclusions, but that again gets into the judicial efficiency prong. From my clients' perspective, they're being damaged every day that this article stays up, and we see the possibility of very protracted litigation in this Court. If I convince Your Honor that it's necessary to take discovery on the state law issue and you decide to do it anyway, if you agree with us, then we're going to start from scratch in State Court all over again and we're going to lose a lot of time. If it goes to the State Court, it only gets resolved once and it's finished.

It was a very good quote in the Casual Male case which we cited about how the New York State Courts have a significant interest with the laws of different -- the laws of the various states are different. We think that's implicated here. You know, I think what they seek is difficult to square with the Second Circuit's decision in Orion. I guess what they're suggesting is that you can, I guess make some limited finding, a non-binding finding on the single publication rule.

THE COURT: But that was a summary procedure whether or not the debtor could, if (indiscernible) reject the agreement with Showtime. This isn't a summary procedure. I'll decide this, and it's not -- you know, if I decide that it violates the sale order, for example, I'll enter an injunction. Not going to be a summary procedure.

MR. FLAXER: I guess what's bothering me is the issue of in a proceeding that is unique to this case, whether you can finally decide a state law dispute between non-debtors wherein -- this is where the fact that we never filed the claim, I think, does have an effect. Where once of the parties is basically a stranger to the bankruptcy case in terms of its own --

THE COURT: But --

MR. FLAXER: -- conduct whether you're in the position or whether it was appropriate for you to finally decide that issue particularly where --

THE COURT: You just told me you were bound by the sale order, though. I don't understand that argument. Sale order was an in rem order which has obviously an effect on everyone's in personam rights. If you're bound by the sale order, you're bound by the sale order the same as the debtor is bound by the sale order, and the purchaser.

MR. FLAXER: Except that your -- the way you frame it, assumes the conclusion or assumes the resolution of the

fundamental issue of New York State law --

THE COURT: No.

MR. FLAXER: -- that you shouldn't be getting into in the first place.

THE COURT: You may be right, but I -- that's a different issue from whether you're bound by the sale order.

MR. FLAXER: So, I think they're not inconsistent. I can concede --

THE COURT: Do I really have to decide all this, though? I look at the complaint. You're alleging a tort that occurred on June 28th.

MR. FLAXER: Again, if you wanted to go that way, I think it would be a mistake because I think you'd be elevating form over substance. We need to recite the background, but I'm telling you here today that this complaint is only against these defendants and it only seeks relief for post-sale conduct.

THE COURT: So, in reciting the background, why didn't you recite the sale and make that clear?

MR. FLAXER: You know, if you ordered us to amend the complaint to do that, we would do it.

THE COURT: I'm just going to read the complaint. That's all I have before me.

MR. FLAXER: I -- you know --

THE COURT: You want to amend your complaint?

MR. FLAXER: If it would get me out of this Court, I would.

THE COURT: Time is going to get you out of this Court, because I have a very crowded Courtroom, so why don't you wrap it.

MR. FLAXER: Okay. You know, I'm hoping you're not listening too much to a lot of the background noise about how we laid in wait and we should've done something in the Bankruptcy Court --

THE COURT: No, no, it's a straight question.

MR. FLAXER: All right.

THE COURT: Whether the claim is cut off by the sale order; that's it.

MR. FLAXER: I can go into --

THE COURT: And as I said, you're as bound as the debtor and the buyers are to that sale order, which you apparently admit most of the time.

MR. FLAXER: For purposes of this hearing, I'm not debating the enforceability of the sale order. What I'm saying is that the sale order is abundantly clear that it does not bar claims for post-sale conduct.

THE COURT: No question about that. I don't think anybody's arguing that it does.

MR. FLAXER: Right. We agree on that, and we're only --

THE COURT: But you're alleging a pre-sale tort.

MR. FLAXER: I -- as the representatives of these parties here today, I'm here to tell you that that is not true. We are -- what we're really after for the most part, I'm not waiving anything. This is about getting that article taken down.

THE COURT: I understand. No, I understand the practical difficulties.

MR. FLAXER: It's like killing my guy -- we got to get that thing down.

THE COURT: Right. Now, look, I understand --

MR. FLAXER: I'm going give you a policy point since, you know, Mr. Gilhuly had the (indiscernible). If you take their argument, a party could publish a horrendously defamatory article on a site owned by an assetless company, leave it there for a week, and then move it to the real site can claim, oh, you know, it's forever, you know, insulated from any attack. Doesn't seem right that that can be the law.

THE COURT: (Indiscernible) you put a timely claim against the original publisher (indiscernible) and not only seek damages but seek an injunction.

MR. FLAXER: I'm not sure that's -- they seem to have a very different view.

THE COURT: Well, I think you could do that if you

put --

MR. FLAXER: (Indiscernible)

THE COURT: That's not what happened here. You have the intervention of the sale order. It's the equivalent of bringing the action beyond the one year statute of limitations. That's essential what it is here.

MR. FLAXER: So --

THE COURT: And unless you have a new action today (indiscernible) post-sale, you're late.

MR. FLAXER: I'm --

THE COURT: Let me -- you know, why don't you wrap it up, it's --

MR. FLAXER: I only want to allude to the fact that there has been requests for attorneys' fees and things that kind of sound like sanctions. I hope the Court's not taking any of that seriously. If you are --

THE COURT: I take everything seriously.

MR. FLAXER: All right. Then we -- if you decided to reserve decision and it were not mentioned, I just want to mention the fact that there's been no evidence on any of that. We would like the opportunity, if it is being considered to have evidence on that and a full, you know, briefing, and Mr. (indiscernible). And I'll (indiscernible) Mr. Ricardo.

THE COURT: You're up.

MR. RICARDO: Your Honor, Preston Ricardo for the plaintiffs. The defamation issue in this case is much more interesting that what people have thus far made --

THE COURT: Sounds pretty interesting so far, okay?

MR. RICARDO: Well, it's much more complex and it's actually a novel question that's presented under New York law, and I'll tell you why.

THE COURT: All right.

MR. RICARDO: You've only heard half the story. You've heard what I would agree is an accurate recitation of the single publication rule and if the story ended there, it may very well be that this claim would be barred. But the whole crux of the issue and the argument is that the post-sale conduct falls under and constitutes what is an exception to the single publication rule and that's republication, and republication has happened here post-sale by Gizmodo and this case is not on -- and I'll tell you why -- this case is not at all like the Philadelphia case does apply Pennsylvania law and New York law because in that case there was an acquisition and nothing new -- the Court didn't address anything new that happened or that the buyer did after that, which I'll get into. And those are the very things, those actions are at issue here and they're -- that part of the exception is acknowledged in every one of the

New York cases that the movement has referred to as binding and I agree that we have relevant New York decisions. They haven't addressed this issue but they actually favor the plaintiffs, and here's why.

Firth is a Court of Appeals decision that you've heard a lot about. That's not like this case because all you had with the website (indiscernible) at issue there, the website alleged defamatory article was completely unrelated modification to the website, some tweak, and the Court of Appeals used the example of, you know, if it were to buy into some tweak to the website constituting a republication, then the Court of Appeals' own website if it could potentially be exposed to a republication exception claim merely by virtue of the fact that the Court of Appeals adds things to its website like (indiscernible) opinions.

THE COURT: What was the republication, though? If the debtor continued to own --

MR. RICARDO: Yes.

THE COURT: -- the website, would a republication have occurred in this case? And if so, when?

MR. RICARDO: Well, here's what -- when the republication happens, and here's the fact issue and it's been recognized as a fact issue by the most recent decision that's been cited to this Court in these papers, and that's a 2014 Etheridge-Brown decision by Judge Oetken from -- in

the Southern District applying New York law, he relies on Firth, and you know he concludes -- he denies summary judgment to American Media which had printed an alleged defamatory article in the -- in hard copy of the National Enquirer and then later published that article on a website, and so the issue there was, was that republication.

THE COURT: Well, that was a separate medium, right?

MR. RICARDO: It's a separate medium.

THE COURT: Here --

MR. RICARDO: And that's going to dovetail here with what we have. I've been setting the background for this.

THE COURT: But the argument, as I recall, the allegation in the complaint is that they didn't take it down after a demand.

MR. RICARDO: Right. And what they did instead, they made it worse.

THE COURT: Well, but that's -- where is that alleged in the complaint?

MR. RICARDO: The allegation in the complaint about --

THE COURT: That they made it worse, that they did something different that made it worse.

MR. RICARDO: Right, I'm loading (indiscernible).

THE COURT: Or what's the republication?

MR. RICARDO: The republication is -- let me just read --

THE COURT: Are you saying it's a change --

MR. RICARDO: (indiscernible).

THE COURT: -- it's the change of ownership?

MR. RICARDO: It's when, and this is where it's not discussed in the Philadelphia case which is critical and it's discussed in every one of the New York cases as a republication happens, one of the key fact issues and factors is the extent to which the alleged republisher took, made a conscious decision and efforts -- and these -- this is quoted language essentially, I'm -- to reach a new audience. So, the last -- essentially the -- almost the last sentence of Judge Oetken's decision denied summary judgment to American Media it is. It is plausible to infer that the posting on the website of the original hard copy National Enquirer article that was alleged to be defamatory was done as part of a conscious effort to reach a new audience. Similarly here --

THE COURT: Where do you allege that in the complaint?

MAN: We're looking.

THE COURT: The only thing I saw in the complaint is you'd asked them to take it down and they didn't take it

down.

MR. RICARDO: While they look, Your Honor, may I just --

THE COURT: Yes.

MR. RICARDO: -- continue to say, similar here, the Gizmodo made a conscious decision to try and reach a new audience using, with this article being published, by cross-promoting the Deadspin website containing the alleged -- what we allege is a defamatory article, to its entire new -- its whole customer base.

THE COURT: But the complaint doesn't allege that. All I have to look at is the complaint here, and you're arguing --

MR. RICARDO: We can amend that --

THE COURT: --that the complaint --

MR. RICARDO: We can amend the complaint, Your Honor, to allege that the republication --

THE COURT: If you want -- look, if you --

MR. RICARDO: -- is reaching the new audience, and the cross promotion which --

THE COURT: If you want to consent to the injunction on this complaint without prejudice to file a new complaint, that's fine. (Indiscernible) the relief, and you'll have an opportunity to make allegations which maybe are appropriate -- more appropriate for State Court because

it's clear that it's purely at State Court issue. But as I said, you don't anything -- you don't allege what you say constitutes the republication, and as I read the complaint, although you say the background is important, you don't give the background of the bankruptcy or the (indiscernible) order or in case of Mr. Goldberg, the release, I guess. But I'll hear that. But if, you know, short of that because they've made the motion, short of some agreement, you know, I don't -- I'll just decide the motion based on the complaint.

MR. FLAXER: I mean, it seems to me we could agree on the record to take to stay the State Court action, take no further steps, give us a certain number of days to file an amended complaint, and then Your Honor can decide whether or not you want to have a new -- you know, a further hearing, I mean that sounds like something that we could out.

THE COURT: Mr. Gilhuly?

MR. GILHULY: Your Honor, you know, we've been being very nice about this, but they completely wasted our time and our money, a lot of money. This is ridiculous. They did not allege anything that could be a republication in that complaint, zero. And now they're trying to make it up. They're grasping for facts. It -- I will tell you. We have an order that you entered that said it bars all pre-

sale conduct.

THE COURT: Let me ask you a question. Now, let's --

MR. GILHULY: We are telling you --

THE COURT: Let me just --

MR. GILHULY: Yes.

THE COURT: Assuming you're right, I agree with you. All you're going to get is an injunction without prejudice to file the claim that doesn't -- that's not barred by the sale order.

MR. GILHULY: I understand they could file a new complaint that would have to focus on real republication.

THE COURT: So, that's what they're -- that's what they're proposing to do.

MR. GILHULY: Well, do we get attorney's fees for having spent all of this money on a -- what is a frivolous --

THE COURT: What's the basis of the attorney's fees? What's the statute or ruling that grants you attorney's fees? Did you ever send them a safe harbor?

MR. GILHULY: No.

THE COURT: Okay. 9011 is out.

MR. GILHULY: I'm sorry?

THE COURT: 9011 is out.

MR. GILHULY: Yes. Your Honor, this was a hundred

(indiscernible) case. They weren't able to bring all of these arguments and ask for the injunction and resolve this. Instead they wait one year shy, eight months after the order, and file a complaint that doesn't allege anything that could constitute republication. They have wasted our time and I just don't think this is a close issue at all. I'm going to have Mr. Hentoff tell you why

THE COURT: Very briefly.

MR. GILHULY: Okay.

THE COURT: I have a very crowded courtroom and we've been at this for a while now.

MR. HENTOFF: Thank you, Your Honor. Just very briefly, Mr. Ricardo's argument was made in the plaintiff's objections to our motion and we responded to it fully in our reply brief, and we explained why adding a link to a general website for a totally different reason is not a republication. We cite the Hefnerand I'm happy to rest on the argument that we made.

THE COURT: Thank you. All right. I'll reserve decision (indiscernible).

MS. LEVINE: Good morning, Your Honor. Sharon Levine and Dipish Patel, Saul, Ewing, Arnstein, Lehr for Ryan Goldberg, and if I could introduce Mr. Goldberg is in court with us today. Thank you.

Your Honor, it's been a lengthy hearing and I

heard during that course that Your Honor's primary concerns seem to revolve around two issues.

THE COURT: Well, Mr. Goldberg's issue is a little different. We're not relying on the sale order, we're relying on the confirmation order and specifically on the release provisions in it.

MS. LEVINE: Correct, and I heard Your Honor question willful misconduct and the terms deemed released --

THE COURT: Deemed. Yes.

MS. LEVINE: -- deemed to have received, and if we could focus on those for a minute. Your Honor, as you might imagine, in connection with the context of negotiating the plan and the disclosure statement and the release language, there was some substantial back and forth. We dealt primarily through the debtors who we had understood were negotiating with parties that didn't want us to get releases on the other side, and were working through that language, so obviously this wasn't the first language we proposed. We understand why Your Honor is raising these issues, but we would respectfully submit that in this context this language is sufficient to protect Mr. Goldberg.

First, with regard to intentional misconduct, Mr. Goldberg didn't borrow the company car, go out on bender and hit a pedestrian.

THE COURT: But --

MS. LEVINE: He provided services in the ordinary course of his business to his editors which content was reviewed and then published prior to the sale. At the time of the confirmation -- I think Your Honor might've been asking a question, I was --

THE COURT: No, go ahead.

MS. LEVINE: At the time of the confirmation, we negotiated for release language that would provide that even though when they sent the responsive letter it was clear that Gawker Media was going to stand behind Mr. Goldberg and protect him the way they had protected, historically, all of their writers with regard to content that was provided through the ordinary course, that they wanted the release of the indemnification claim so they could do a finite claim reconciliation and pay hundred-cent dollars to everybody who actually asserted claims. We understood that there seemed to have been a pattern of behavior here where we were afraid that separate and apart from just wanting money from the Gawker settlement there were other agendas going on. So the deemed, or the ability to have gotten a release, a distribution, is exactly what we were looking to protect here where they lie in wait, don't go after the deep pocket which is Gawker, don't let the issue get resolved through the Bankruptcy Court through the process, and then come later after Goldberg for reasons that are not exactly clear

to us.

THE COURT: Ms. Levine, you've told me a lot of things that would have to be part of an evidentiary hearing. Are you implicitly conceding that deemed to receive distributions is an ambiguous phrase?

MS. LEVINE: Your Honor, we --

THE COURT: I can't understand it without that background.

MS. LEVINE: Well, two responses, Your Honor. First of all, we think that Your Honor can consider the entire record of the case as part of what Your Honor considers in connection with this hearing.

THE COURT: I don't know what that means.

MS. LEVINE: The confirmation hearing and the discussions that took place at the confirmation hearing with regard to the release language. Secondly, Your Honor, we think that deemed to have received needs to have meaning for the --

THE COURT: So, what do you think it means?

MS. LEVINE: We think it means that if somebody was a creditor or an administrative expense claimant at the time that the release language was approved and chose for whatever reason that we don't fully understand here not to exercise that right to get paid a hundred cents on whatever their claim would've been if they'd come to Court and ask

for the money, that they should be deemed to have received that money and they should've be permitted, when Gawker the deep pocket and the protector of the writer in this circumstance, goes away to come after Ryan. And we would respectfully submit that that was the contents -- context in which the Court considered the applicability of third party releases in this case.

THE COURT: And what you think the willfulness -- willful misconduct, I think is the phrase. What do you think that means?

MS. LEVINE: Your Honor, we think you have to look at it under the facts and circumstances of the case and in the context of the industry.

THE COURT: That sounds like a factual issue, though.

MS. LEVINE: No, no --

THE COURT: In other words, are you saying that I can read it and know what it means without taking evidence?

MS. LEVINE: I think that you can, Your Honor, because if we read it the way the creditor here is looking to have Your Honor read it, it writes the release out of the plan, okay? So, you know, willful misconduct is not something that you have to first prove and defeat and win and have Ryan be the victor in an underlying defamation suit in order to have the release apply. Here, this is exactly

the type of claim that had been brought against the writers prior to the time of the confirmation order and that we discussed at the confirmation hearing as being exactly the type of third party release and protection that the debtor's counsel made as part of that hearing with regard to Your Honor's consideration.

THE COURT: So, what is the willful -- and I understand your argument that it's -- creates an exception that swallows up the entire rule of the release, but what was it supposed to mean?

MS. LEVINE: We would respectfully submit that it -- what it means is the same way you look at willful misconduct in any other context. It means when somebody is truly acting outside the scope of their employment, like the hypothetical I gave earlier where they, you know, they took the company car and went on a bender or they -- you know, it's the type of thing that would've caused Gawker, had it survived, not to be indemnifying Ryan.

THE COURT: So, you think it's linked to the indemnification obligation?

MS. LEVINE: Yes, Your Honor.

THE COURT: That's what was intended by the parties?

MS. LEVINE: Yes, and that's why when Ryan and the other covered writers and content provided gave up their

indemnification claims without also simultaneously having a pot of money set aside to defend them from these types of causes of action that especially in the case of Gawker, I've been on everybody's radar screen. This release was included in the plan.

THE COURT: Okay. Thank you.

MS. LEVINE: Your Honor --

THE COURT: Wait, before you go.

MR. GALARDI: Sorry.

THE COURT: Who wants to give me the context? I didn't mean to cut you off, Ms. Levine. Are you done?

MS. LEVINE: Your Honor, there -- obviously there are other arguments in the brief but --

THE COURT: I read it.

MS. LEVINE: -- we'll just rely on those.

THE COURT: Okay.

MR. GALARDI: Your Honor, again I'm stepping up as the historian part of the negotiations. Your Honor, I want to confirm Ms. Levine's understanding. Whenever we did this --

THE COURT: Are you testifying now?

MR. GALARDI: -- I can have Mr. --

THE COURT: I'm not going to have an evidentiary hearing now.

MR. GALARDI: Your Honor --

THE COURT: The question is whether one is necessary.

MR. GALARDI: Your Honor, Your Honor asked me at the hearing and I believe we said that this all came up in the context of indemnification agreements and what the company had done with their indemnification agreements.

THE COURT: I remember.

MR. GALARDI: Companies cannot indemnify people for gross negligence and willful misconduct, so what we did was -- and to match up with the U.S. trustee, as I think we've said, is we reviewed the conduct, the letters, and other than the one claim that we did bring which was against (indiscernible), as you may recall, we did say because there was a finding of punitives, we were very sensitive to this issue and then with respect to the writers we did not believe, we thought it was all within the course of their conduct. So, in negotiating the releases, we made, as Mr. Holden would testify at the confirmation (indiscernible) on his behalf, made a determination that the releases were appropriate to the writers because we believe they did not act outside their authority with respect to any known claims or any known letters including the letters that we had received that Your Honor has gone through. That was the context in which this provision was drafted. Thank you.

MR. FLAXER: I think where the plan is clear, the

other arguments that are being made on the language with respect to the background and who said what to whom, I don't think get implicated and we believe on the deemed to have received a distribution, we think that is clear so it's not necessary for the Court --

THE COURT: You think -- what do you think deemed to have received a distribution means?

MR. FLAXER: I think that the Court's bar date order clarifies it.

THE COURT: But that came before the claim.

MR. FLAXER: Right, but the plan specifically says that it is the release ---

THE COURT: Who is someone who's deemed -- and I'm not asking this as a rhetorical question. In your view, who is someone who is deemed to have received a distribution but doesn't actually receive a distribution?

MR. FLAXER: So, for example, someone who has a claim could have the claim somehow reinstated and get a different type of treatment that's not a, you know, distribution but they could be deemed to have received a distribution.

THE COURT: You mean a class that doesn't receive anything is deemed to have received a distribution?

MR. FLAXER: Or a creditor who has their claim, you know, reinstated, for example.

THE COURT: I've never heard it in that context.

MR. FLAXER: I mean --

THE COURT: I've never heard the -- I don't recall ever hearing the phrase. I mean, it could've been in other releases.

MR. FLAXER: I think there could be, you know, we could think through lots of examples, but the fact is that the bar date order, and I think it's the injunction provision specifically says that subject to any other orders of the Court -- here. "Upon the entry of the confirmation order except as expressly provided in the plan, confirmation order, or a separate order at the Bankruptcy Court." So, when this comes out already in place, is the bar date order that provides --

THE COURT: You don't file a timely claim, you don't receive a distribution?

MR. FLAXER: And --

THE COURT: It's the same as the rule.

MR. FLAXER: And it says shall not -- sorry, my finding is --

THE COURT: I know what it says.

MR. FLAXER: It's very clear that you're not deemed to be -- you're not deemed to have received a distribution. (Indiscernible.)

THE COURT: It doesn't say that. It just says you

don't receive a distribution on both, which is what it normally says.

MR. FLAXER: I have it right here. I think it's important. I think it's important I just read it in --

THE COURT: Okay.

MR. FLAXER: -- for the record. I thought I had it right here. I apologize for the delay. I know everybody's waiting.

So, I think it's clear that Your Honor in your comments on the record made clear that the injunction in the release provision should be made to be co-extensive. I --

THE COURT: Right.

MR. FLAXER: And it was not like that originally, but, Your Honor insisted on that change and that change was made and the injunction is abundantly clear that it only applies to parties who are subject to the release and the sale order -- I'm sorry, the bar date order provides that all holders of claims that fail to comply with this order by timely filing the proof of claim in appropriate form shall not be treated as a creditor with respect to such claim (indiscernible) voting and distribution. I can't imagine it being more clear that we're just not subject to that release and injunction.

THE COURT: But it's still -- you don't receive a distribution, but it doesn't really answer the question what

it means to be deemed to receive a distribution, which is what I am having trouble with.

MR. FLAXER: I mean, I think the bar date order resolves that issue conclusively because it specifically says if you don't file it, if you don't comply with the order by filing a timely claim, you're not treated as a creditor with respect to such claims for, dot-dot-dot, distribution. How can we be deemed to have received a distribution in light of this language? I don't --

THE COURT: Well, to be --

MR. FLAXER: I'm having -- I'm not seeing it.

THE COURT: Could mean you're a creditor who was entitled to receive a distribution had you filed a timely proof of claim.

MR. FLAXER: I mean --

THE COURT: Because there was no discharge in this particular case because it was a liquidated case.

MR. FLAXER: You know, I think we can, you know, fashion words to try to get around it, but I think it's very clear. I just don't think it could be more clear and they, you know, they haven't pointed to any -- anybody else than use who could possibly be in this category. I mean this notion of opening the floodgates doesn't seem to be backed up by any facts. But again, I'm basing my argument on, you know, a lot of smart lawyers spent a lot of time with the

plan. They drafted it, they knew about the earlier orders of the Court. I think the words are clear and I'm -- and I would submit to Your Honor that that should end the inquiry. I think on the, you know, the willful misconduct is modified by, is established by a final order. Doesn't say a final order of any particular Court, but it says by a final order. I mean, I would submit that the volitional act of publishing an article seems to me like intentional conduct. They didn't, you know, publish it by accident. You know, we allege that this is really --

THE COURT: I guess an author doesn't publish it because he writes it.

MR. FLAXER: I used the wrong word, but --

THE COURT: Yeah.

MR. FLAXER: To produce it and make it available for publication is a volitional act. You know, we think it's a dastardly defamation. They don't agree. You've heard a lot on both sides, but you know, we believe that we have a lot of equities on our side on this. I just want to take one moment to -- because we've heard so much about how we're wasting our time and the timing and we lay in wait -- or I should say lied in wait. You know, the decision to pursue a defamation claim, by the way, I'm not the expert on this, either. I had somebody else --

THE COURT: What are you an expert on?

MR. FLAXER: I'm beginning to wonder. Is not one that you take lightly because when the article gets published you kind of hope it's not going to get a lot of attraction and by filing claims or bringing lawsuits you can bring more attention to it than it's worth so you'll like -- often the decision is made to wait. Then the sale, you know, process gets started. We had hoped they would see the light and bring it down. They didn't. It's not uncommon for an action to be brought close to the expiration of the statute. We were hoping it would go away; it didn't, and we thought we had to act. So, there is another side to that. I'm not getting into right or wrong, it's just it's not as simple as they cast it.

Two last quick things on -- that I'd like to point out. My associated did me the favor of pointing out a case in our brief on the mandatory abstention that says, absent contrary to the evidence, a Federal Court may presume that a State Court will operate efficiently and effectively in adjudicating the matter (indiscernible) that's on Page 19.

And lastly, it is a request for a jury here, and I think that raises even more layers and issues for Your Honor to -- and that essentially, finally decide the State Court issue in this context.

THE COURT: Thank you. Briefly.

MS. LEVINE: Your Honor, two quick responses. If

you -- I would invite the Court's attention to, in Paragraph 32 and then again in Paragraph 40 of the motion -- of our motion itself, we quote the transcript from our confirmation in the discussion about the releases and what -- and it -- so it sort of talks to why we need more than just actually received a distribution and if you look at the language we quoted in Paragraph 40, it actually references the fact that this letter in this particular case was sent during the course of the bankruptcy case and that there was no proof of claim filed, and therefore we needed to deal with releasing claims for those folks who were, for whatever reason, lying in wait. In addition to that --

THE COURT: Where are you reading this?

MS. LEVINE: On Page 15 of the actual -- actually, Your Honor, let me invite you to (indiscernible) on Page 11 at Paragraph 32 --

THE COURT: All right.

MS. LEVINE: -- quoting Mr. Galardi. "We believe that anybody who would be bringing such action should have brought an action or claim in the bankruptcy knowing that Gawker was in bankruptcy and therefor Gawker could've dealt with those claims in bankruptcy." And then it goes on, you know, and it continues from there with the concept that we understand that people may be choosing not to do that, and that's a problem. In 40, we go on and Mr. Galardi actually

talked about this particular issue. "Your Honor, let me ask you a question. Are there any creditors who have not filed a claim, did not vote, and have not settled?" And Mr. Galardi, "Yes, in the following way, and I want to be clear as I mentioned, Mr. Harder mentioned maybe I'm not getting it right, but -- and I hate to use the president's name but we have received from one -- from one law firm that we wrote an article about the president elect that never got filed in this case." So, there are -- there were specific references to actual claims where everybody knew about the bankruptcy and everybody knew about the claims and there was an affirmative decision not to bring them or deal with them in the bankruptcy case and we would respectfully submit that those are the claims that should be deemed to have received a distribution.

Also, there was a reference made to the fact that we don't think that this should be considered something that's going to be sort of a repetitive, ongoing problem, but if you take a look at the Jezebel case which we cite in a footnote which is not before this Court, not only does it eliminate Gawker who would've protected the writer in that particular case, it was actually filed after the statute of limitations, so there is a fear by the writers and that in fact this is a reoccurring problem and they just really need the release here to protect them, not only where people got

paid their hundred cents in the bankruptcy but where they could've and should've come forward and should be deemed to have received that distribution in the bankruptcy. Thank you, Your Honor.

THE COURT: Thank you. Yes, sir?

MAN 1: Your Honor, Samuel (indiscernible) on behalf of the (indiscernible) law firm. Because Your Honor takes whatever the motion's wrote seriously, Your Honor was correct, Rule 11 dead. Mr. Goldberg mentioned 1927, and I just want to say one thing, that like Mr. Flaxer said we'd like the opportunity because this raises big questions. First of all, whether 1927 applies to a single complaint filed in State Court. It was their decision to come to Court. They could have filed a motion to dismiss. State Court judges interpret Bankruptcy Court orders all the time. That's number one, and they could've asked for sanctions there under the (indiscernible), but they didn't.

Second of all, Your Honor, there's no basis as Your Honor -- you know, it's not really appropriate to quote Your Honor's opinions, but you quote a lot of Second Circuit cases in (indiscernible) and the fact that we're sitting here and discussing this for two hours and you didn't throw us out in the first minute, clearly --

THE COURT: That would be impolite, I wouldn't do that.

MAN 1: But --

THE COURT: Although I was sorely tempted.

MAN 1: But the bottom line is if there's any consideration which you think you should never have, you should give us an opportunity to brief it properly.

THE COURT: On this one, there are two exceptions to the release that (indiscernible) is deemed to receive a distribution. I'm not sure what it means. It could mean that you're a creditor that didn't file a claim. It could mean -- I'm not really sure what it means. The other, which is more difficult, is this willful misconduct notion, and I understand the -- and I think it's an ambiguous phrase. I do remember the background to this. I do remember that the releases were the quid pro quo for the loss of the indemnification rights and maybe it is appropriate to interpret that exception as the types of things that the company wouldn't (indiscernible) earlier, would not be statutorily required or by agreement required to indemnify, but the bottom line is these are ambiguous phrases. They're in the plan and I would like to hear evidence regarding the negotiations of these phrases (indiscernible) relevant evidence in order to interpret them and interpret the scope of these exceptions to the releases. So, parties want to take discovery on that issue?

MR. FLAXER: I mean, from our perspective, I think

the answer is yes. I think we would also want to brief the issue that it's -- that evidence shouldn't be taken.

THE COURT: I've just concluded it should, to save the ink.

MR. FLAXER: And so I -- the answer is yes, but I'd like a day or two to just confer and think about that a little more because I don't want to put everybody to a lot of work if there's a way around it, but as I stand here now, I would think the answer is yes.

THE COURT: All right. All right. Why don't I give you 60 days to complete discovery. All right, why don't you submit a new order providing for 60 days to complete discovery on the two issues I mentioned. Let's say the end of November because of Thanksgiving, the last day in November. Give you a pre-trial conference date and then I'll fix a trial or hearing date at that point.

MR. FLAXER: Thank you.

THE COURT: Let me just give you the date, submit an order. Don't come on that date and tell me you've been having problems with discovery. If you're having problems with discovery, well me before.

December 12th, okay? For pretrial conference, 10:00. At 10:00. Okay. Thank you.

MR. FLAXER: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 11:47 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: October 2, 2017