

Mosley v Conte

2010 NY Slip Op 32424(U)

August 17, 2010

Sup Ct, NY County

Docket Number: 110623/2008

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: YORK

PART 2

LOUIS B. YORK
J.S.C.

MOSLEY, SR., SHANE D.

INDEX NO. 110623/09

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -

VICTOR CONTE

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/17/10

Ley
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
SHANE D. MOSLEY, SR.,

Plaintiff,

-against-

VICTOR CONTE,

Defendants.

-----X

LOUIS B. YORK, J.S.C.:

Index No.: 110623/2008

DECISION/ORDER

FILED
AUG 24 2010
NEW YORK
COUNTY CLERKS OFFICE

Plaintiff Shane D. Mosley, Sr., a professional boxer, was undefeated in his professional career and he has held both lightweight and welterweight titles. Among his many victories, Mosley defeated Oscar De La Hoya for the welterweight title in 2000. He suffered a pair of losses and a "no contest" decision in 2002 and early 2003. Shortly thereafter, Mosley and De La Hoya agreed to a highly publicized rematch. The event was to take place in September of 2003.

According to the Complaint, on July 26, 2003, plaintiff's conditioning coach Derryl Hudson and Mosley met with defendant Victor Conte at the offices of Conte's company Bay Area Laboratory Cooperative (BALCO). BALCO vice president James Valente was also present. BALCO first gained a widespread reputation in the 1980s and 1990s for the legal product ZMA, a zinc and magnesium based powder which also contains vitamin B6. Olympic athletes such as Marion Jones openly used ZMA to build muscle

mass and prevent cramping.¹ Many prominent Olympics and professional athletes were BALCO clients who openly purchased ZMA and nutritional supplements from the company.

During the July meeting, Conte took blood samples from Mosley and, based on the results, recommended a regimen of BALCO products which would help Mosley improve his endurance in the ring. According to the Complaint, Mosley sought and received assurances from both Hudson and Conte that the products were "healthy, legal and permitted for athletes." Compl. ¶ 4. Mosley purchased the products and administered them according to the regimen Conte had suggested. In September, Mosley defeated Oscar De La Hoya by a split decision vote. As a result of this victory, Mosley received the light middleweight titles from the World Boxing Council (WBC), International Boxing Association, and World Boxing Association.

Meanwhile, in 2002 Conte and BALCO had come under federal investigation, as the government suspected the company sold illegal steroids to athletes. As a result of the investigation, local and federal authorities raided BALCO's offices on September 3, 2003, one week before the Mosley-De La Hoya rematch. The subsequent grand jury hearings received an enormous amount of publicity, as high profile athletes including Mosley, Jones and baseball players Barry Bonds and Jason Giambi, among others, testified about their use of the performance enhancing drugs that they purchased from BALCO. Ultimately, in October 2005, Conte pleaded guilty of conspiracy to distribute

¹Jones sued Conte for defamation when, in 2004, he spoke on "20/20" and elsewhere about her steroid use. However, eventually Jones acknowledged that she had used steroids for the two years prior to her Olympics triumph in 2000. She was stripped of her records and Olympics medals as a result.

steroids, receiving a sentence of four months in prison and four months house arrest. Conte has completed this sentence.

As stated, Mosley was among those who testified at the hearings. Plaintiff alleges² that at the hearing he stated that he unknowingly used illegal performance-enhancing steroids such as erythropoietin (EPO) and Tetrahydrogestrinone (THG), a banned substance also called "the clear"; along with "the cream," a 10 % testosterone cream mixed with the masking agent epitestosterone, a concoction designed to mask steroid use. That is, Mosley claims that he used banned substances but fully believed they were legal drugs when he took them. Mosley still maintains that, at the time, he believed the products he purchased from Conte were legal.

In March 2008, Conte made statements to the press indicating that Mosley took steroids before the Mosley-De La Hoya rematch and that he knew the drugs were illegal. Following these comments, in April 2008, Mosley commenced an action in federal court in California ("the California action") against Conte for defamation based on these statements. However in August 2008, after Conte filed SLAPP (Strategic Lawsuit Against Public Participation) charges against Mosley, Mosley discontinued the California action and commenced this one.

Prior to the discontinuance, Derryl Hudson filed a declaration in support of Conte's motion to dismiss the complaint, in which he supported all of Conte's statements. This declaration is annexed to the order to show cause at Exhibit N. The

² Recently Conte posted a video on YouTube, excerpted from Mosley's deposition in this litigation, in which Mosley allegedly states that he knew the products were banned. Mosley's attorney has stated that the video has been edited, misleadingly, in order to make it appear that Mosley made this confession.

Court notes that in 2008 Hudson sued Mosley for defamation based on Mosley's statement that Hudson misled Mosley about the legality of the substances. (Lance Pugmire, *Mosley facing fights in the ring and court*, L.A. TIMES, December 10, 2008, avail at <http://articles.latimes.com/2008/dec/10/sports/sp-boxing10>). That lawsuit ultimately was dismissed.

The Complaint in the action before this Court alleges, in particular, that (1) in a March 2008 interview with the New York Daily News, Conte stated that Mosley "knew precisely what [he was] using," and that Conte had explained what the drugs were "up front" and without deception, resulting in the publication of an article on March 30, Compl't ¶ 15; (2) that, in connection with his book publishing contract with Skyhorse Publishing, Inc. ("Skyhorse"), Conte reiterated these comments to his agent and to representatives of Skyhorse; (3) that, in a telephone interview with a USA Today reporter in March of 2008, Conte again reiterated the above statements; and (4) in September 2007, Conte repeated the above statements in an email to a Sports Illustrated reporter. In addition, in the Daily News interview, Conte allegedly said that Mosley's statements to the contrary were lies.

Moreover, in connection with his book proposal Conte summarized his proposed chapter on Mosley:

"Sugar" Shane Mosley was implicated early in the BALCO scandal and after being one of the hottest boxing properties in the world for many years, fell off the face of the planet. He has recently returned to championship form, almost vindicated, by claiming Victor [Conte] had tricked him into using the drugs and that he believed he was using legal supplements. This is the explosive chapter that exposes the former world champion as a fraud, and that {sic} his earth-shattering victory over "Golden Boy" Oscar De La Hoya was

fabricated and made possible by the very drugs he knew he was injecting into his stomach, provided by Victor. Face-to-face Victor explained the details of the illegal drugs to Mr. Mosley, as well as the ramifications of their use. Mosley understood, agreed, and fully benefited {sic} from his use of EPO as he battered De La Hoya in the final rounds of their bout. Oscar faded, Mosley only got stronger: The definition of EPO use.

Book Proposal for Balco: The Boss Tells All, by Victor Conte with Nathan Jendrick, at p. 8 (annexed as exh. E to plaintiff's order to show cause). Mosley alleges that Conte's comments may have a deleterious impact on Mosley's career. Mosley asserts libel per se as to his first and fourth causes of action, which involve published statements. The USA Today reporter did not publish an article following his interview with Conte. In addition, for various reasons, Skyhorse and Conte ended their relationship and the book was not published. Therefore, Mosley alleges slander per se as to his second and third causes of action. Conte does not challenge that he made the statements in question or that he had intended to publish a tell all memoir with Skyhorse. Instead, he alleges that the statements are true and therefore are not defamatory.

While this was ongoing, the transcripts of the BALCO grand jury testimony remained sealed. Therefore, Mosley's testimony regarding his steroid use remained private. However, in late November 2008, prosecutors requested the release of the transcripts in connection with the investigation of baseball player Barry Bonds and the records were unsealed. After the records were unsealed, prosecutors indicted Bonds for perjury based on his statements that he did not know he'd taken banned steroids.

The unsealing of the records also had an impact on Shane Mosley. The press widely reported his statements regarding his steroid use and his ignorance of their

illegality. Also following the release of the records, the WBC announced that it was opening an investigation into the 2003 Mosley-De La Hoya rematch.

The lawsuit currently before the Court remained dormant between August of 2008 and January of 2009, when Conte moved to dismiss the action. Mosley opposed the motion, which was fully submitted to this Court at the end of April. At oral argument in June, the Court denied defendant's motion for summary judgment as premature and granted plaintiff's cross motion for discovery.

Since then, the parties have proceeded with the discovery process. Throughout, they have communicated any legal or logistical problems to the Court. Among other things, the parties vigorously disputed the permissible scope of electronic discovery, or ESI ("electronically stored information"). Mosley sought broad disclosure of ESI by means of a keyword search by a computer forensics expert. However, Conte did not consent to the search, claiming that he had handed over all the documents he could locate, that third parties such as Skyhorse had handed over all pertinent documents, and that a computer search would be futile because he had replaced his computers on several occasions since 2003. At the Court's suggestion, the parties attempted to mediate a resolution by deriving a mutually agreeable list of search terms. Plaintiff submitted an extensive list of proposed search terms, which defendant rejected. When the parties were unable to resolve this issue and the Court was unable to mediate a resolution, plaintiff brought this motion by order to show cause.

In the order to show cause, Mosley ask that Conte submit "his computers, hard drives, external memory cards, data files, and external hard drives to a computer forensic expert, of Plaintiff's choice, for data extraction and analysis limited to (l)

Plaintiff's Proposed Search Terms . . . and (ii) the time period of January 1, 2003 to the present." (Plaintiff's Order to Show Cause). The proposed search terms, which Mosley annexes as Exhibit A to this application, are:

Plaintiff

- (1) Shane Mosley
- (2) Mosley
- (3) Shane

Mosley's Trainer

- (4) Derryl Hudson
- (5) Darryl Hudson
- (6) Hudson
- (7) Power N Speed

BALCO Employee Present at July 26, 2003 Meeting

- (8) James Valente
- (9) Jim Valente
- (10) Valente

Reporters

- (11) Teri Thompson
- (12) Thompson
- (13) tthompson@nydailynews.com
- (14) Nathaniel Vinton
- (15) Vinton
- (16) nvinton@nydailynews.com
- (17) @nydailynews.com
- (18) A.J. Perez
- (19) Perez
- (20) ajperez@usatoday.com
- (21) @si.com
- (22) Sports Illustrated

Publishers and Literary Agent

- (23) Mollie Glick
- (24) Glick
- (25) mglick@jvnla.com
- (26) mglick@foundrymedia.com
- (27) Tony Lyons
- (28) Lyons

- (29) tlyons@skyhorsepublishing.com
(30) Mark Weinstein
(31) Weinstein
(32) mweinstein@skyhorsepublishing.com
(33) @skyhorse.com

The Court notes that this list is trimmed substantially from the initial list of proposed keywords, which also included such search terms as "Mark," "Tim," "book," and "insurance," among others. A copy of Mosley's counsel's letter dated November 4, 2009 is annexed to the order to show cause at Exhibit K.

Mosley states that the keyword search he sets forth in this order to show cause would likely yield documents that are relevant to the lawsuit at hand. He notes that in response to his earlier document demands, Conte did not produce a single email or letter to any of the individuals above; he annexes to his order to show cause Conte's discovery response dated August 7, 2009, in which Conte frequently replied that he did not have custody or control of the requested materials that plaintiff requested.³ Yet, Mosley claims, it is clear that these documents should exist. For example, he notes that Skyhorse, a nonparty, produced 7,000 pages of documents, including emails to and from Conte and some between Glick and representatives of Skyhorse. He annexes an affidavit which Derryl Hudson filed in the California action, which he executed on May 21, 2008, and which states that at both he and Conte explained to Mosley that Mosley was purchasing EPO, a banned substance, and that the decision to use the steroids was Mosley's. Mosley posits that there must exist communications between Hudson and Conte about Mosley that postdated the July 2003 meeting and

³ Plaintiff does not annex a copy of the document demands and does not annex or identify the documents that Conte provided as exhibits A-I to his discovery response.

preceded the submission of this affidavit.

As for Conte's repeated statements that due to computer crashes he has no documents, Mosley has annexed selected pages from Conte's deposition transcript. Among other things, these refer to 33,000 pages of documents which the government seized during the BALCO investigation and returned to Conte without returning them to their original order and folders. The Court notes that these are paper documents rather than ESI. However, Mosley challenges Conte's credibility with this contention. That is, Conte stated that he did not have responsive documents due to the government investigation, computer crashes, and other issues, yet in his deposition he refers to 33,000 pages of documents. Based on this alleged inconsistency, Mosley posits that Conte has not been forthcoming in his document production, necessitating the keyword search of his computer by an independent forensics expert.

In opposition, Conte raises several arguments. Initially he states that he has turned over all the responsive materials in his possession, so a computer search would be futile. In his affidavit he further asserts that he did not communicate by email with Mosley or Hudson, so a computer search would not retrieve any documents relating to them. According to Conte, he and Valente have been out of touch since 2006, so a computer search would not be productive. He suggests that because Mosley did not depose Hudson or serve nonparty discovery demands on him, he should not be allowed to serve demands relating to Hudson upon Conte; the suggestion is that the documents do not matter significantly to Mosley and/or that his intent is to harass Conte or fish through his files for additional and damaging materials. He also states that Mosley's belief that there are documents on Conte's computer relating to Hudson is nothing more

than the "hunch" of his attorney. Mem. in Opp., at p. 5. He also opposes the request for a search of emails that he sent to representatives of Skyhorse and other individuals; Conte states that he does not save his emails for long after he reads them so a search for them would be futile.

As for his conversations with the press, Conte claims that he did not speak to the press about Mosley's drug use until Mosley publicly stated that Conte misled him by telling him that the BALCO products Mosley used were legal. Therefore, a search for prior communications would be fruitless. Conte claims that his communications with Thompson of the Daily News and Perez of USA Today were by phone rather than computer, and that he kept no written record of them. He states that he did not speak to Vinton or to anyone at Sports Illustrated before May of 2008. More important, he states, he admits he made the statements in question to the reporters Mosley names in the Complaint. He argues that this admission obviates the need for any ESI discovery relating to any existing documents.

Next, Conte states that Skyhorse rather than either he or Glick had possession of any relevant documents about his proposed manuscript. He notes that Skyhorse provided more than 7,000 pages of documents to Mosley. He states that he relied on his lawyer and publisher to keep the critical records. His own record keeping methods were far inferior to those of Skyhorse and they have all the pertinent documents, he says, and therefore a computer search is unnecessary.

Moreover, with respect to all of the above demands, Conte states that his computers crashed and were replaced a number of times over the years in question. He also points out that his computers and records were seized by the government as

part of the 2002-03 BALCO investigation. As a result of these various factors, Conte claims that most of the ESI in question has been lost.

Analysis

There is no dispute that parties generally exchange discovery of all material that is material and necessary to the action, and that courts liberally interpret the phrase "material and necessary" in favor of disclosure. T. A. Ahern Contractors Corp. v. Dormitory Authority, 24 Misc. 3d 416, 420, 875 N.Y.S.2d 862, 866 (Sup. Ct. N.Y. County 2009) ("Ahern"). As plaintiff and defendant also concede, the Court has broad discretion to determine whether disputed discovery is material and necessary. In re Maura, 17 Misc. 3d 237, 244, 842 N.Y.S.2d 851, 857 (Sur. Ct. Nassau County 2007). Concomitantly, courts protect countervailing interests in the discovery process as well. Therefore, courts do not allow parties to pursue palpably improper demands – which, for example, seek irrelevant or confidential information, or which are unduly broad or burdensome. Ahern, 24 Misc. 3d at 420, 875 N.Y.S.2d at 866; see Etzion v. Etzion, 62 A.D.3d 646, 654-55, 880 N.Y.S.2d 79, 87 (2nd Dept. 2009)(remanding to trial court for an order directing electronic discovery but exempting privileged and irrelevant information from the disclosure). The party who seeks the discovery in dispute has the burden of establishing that it is a proper subject for disclosure. Lipco Elec. Corp. v. ASG Consulting Corp., Index No. 8775/01, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct. Nassau County Aug. 18, 2004)(avail at 2004 WL1949062, at *5-6)("Lipco").

Moreover, the principles above apply to computer discovery. See Ahern, 24 Misc. 3d at 420, 875 N.Y.S.2d at 866; see also Lipco, 2004 WL1949062, at *5-6 (directing production of electronic discovery). As parties serve discovery demands for

ESI, they sometimes use keyword searches to focus their demands. However, “[w]hether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.” U.S. v. O’Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (“O’Keefe”). Therefore, “keyword searches work best when the legal inquiry is focused on finding particular documents and when the use of language is relatively predictable.” In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation, Civ. 08-1984-MLCF-SS 2009 WL 2461716, at *2 (E.D.La. Aug. 7, 2009). “Parties should not “design[] keyword searches in the dark, [or] by the seat of the pants.” William A. Gross Constr. Assoc., Inc. v. American Manufacturers Mutual Ins. Co., 256 F.R.D. 134, 135 (S.D.N.Y. 2009)(“Gross”). Instead, they should be able “to explain the rationale for the method chosen to the court” and “demonstrate that it is appropriate for the task.” Id. (citation and internal quotation marks omitted). As no specific State statute addresses ESI, courts have interpreted the CPLR “so as to be virtually parallel to the Federal provision” set forth in Rule 34 of the Federal Rules of Civil Procedure. Delta Financial Corp. v. Morrison, 13 Misc. 3d 604, 608, 819 N.Y.S.2d 908, 912 (Sup. Ct. Nassau County 2006).

Now, the Court applies these general principles to the search words at hand. It initially notes that Conte’s representations as to the existence of ESI or lack thereof are insufficient to constitute a satisfactory response to any legitimate requests for ESI. For one thing, Conte does not state that he has conducted a search for the emails and other ESI that Mosley seeks in this order to show cause. Thus, there may be ESI of which he is aware. Deleted emails and ESI often can be retrieved by a computer

forensics expert. See Playboy Enter. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999)(noting likelihood is that at least some deleted emails can be retrieved by an expert). Therefore, Conte's statements as to what a search would reveal amount to highly educated guesses. Compare to O'Keefe, 537 F. Supp. 2d at 18 (Information Management staff provided evidence as to what was and was not retrievable).

For another, Conte does not indicate whether he saved the computers that crashed or attempted to retrieve or transfer any materials from the old computers onto their replacements. It is possible that backup disks or drives which stored the material may exist, and Conte has not addressed this issue. Again, it may be necessary to have a computer expert "insure complete and accurate discovery of relevant data." Etzion, 7 Misc. 3d at 943, 796 N.Y.S.2d at 846. For a third, unless Conte reviewed the 7,000 pages of Skyhorse documents and examined them against his own ESI, Conte's statement that Skyhorse's production inevitably would have subsumed his own is speculative. In this, his argument is as ill-founded as Mosley's position that because Skyhorse has 7,000 pages, Conte must have more pages that he did not produce.

For all the reasons above, defendant's affidavit is insufficient to establish diligent efforts to retrieve the materials. See Lewis v. City of New York, 17 Misc.3d 559, 567-570, 844 N.Y.S.2d 665, 671 - 673 (Sup. Ct. Bronx County 2007). The affidavit of a computer expert following his or her examination of and search through Conte's computers, email databases, and the like, also might have alleviated these problems. In their absence, the Court does not find the Conte affidavit sufficiently comprehensive or persuasive about the existence of ESI and/or the ability to recover lost or deleted documents of relevance.

A fourth problem is that, to the extent he argues ESI does not exist with respect to certain subjects, Conte's statements are not definitive. For example, he states that "most documents that were not seized by the government [in its July 15, 2005 raid of BALCO's offices] were discarded." Conte Aff. in Opp. at ¶ 11 (emphasis supplied). He further states that he "generally" does not save emails or old drafts of manuscripts, *id.* at ¶ 14, and "generally" replaces early drafts of documents with their revisions. *Id.* at ¶ 15. His admission that he spoke to the reporters Teri Thompson and A.J. Perez by phone is not sufficient, as he does not state that he never communicated by email or letter. *See id.* at ¶¶ 19-20. His statement that he did not speak to any Sports Illustrated reporters prior to May 2008 is inadequate; here, too, Conte does not address the issue of whether he sent them documents or emails which might be discoverable by a forensics expert.

For the reasons above, Conte must allow Mosley to conduct a search to the extent that the Court deems it appropriate. However, keyword searches unearth all documents which contain the words in question, without regard to the context. Therefore, irrelevant and even privileged documents may turn up as the result of a keyword search. *Etzion*, 7 Misc. 3d at 943, 796 N.Y.S.2d at 846; *see, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 -263 (D. Md. 2008)(pertaining to privilege). Following the production of the list of documents the expert has retrieved, counsel for defendant should be afforded the opportunity to create a privilege log.

Having resolved this issue, the Court turns to the search requests and the parties' individual arguments which relate to them. First, plaintiff seeks retrieval of documents that contain his name – that is, "Mosley," "Shane," or "Shane Mosley."

Plaintiff states that the search is relevant because the retrieved documents would relate to plaintiff. Defendant argues against this discovery based on his sworn statement that he did not communicate with plaintiff by email or computer. However, defendant's statement does not obviate the need for a search. Moreover, plaintiff does not simply seek documents in which defendant corresponded with plaintiff. In addition, he seeks documents in which defendant discussed plaintiff. Therefore, defendant's argument is not completely on point and, for this reason, is not persuasive. Moreover, the search is designed to retrieve documents that are material and necessary to the lawsuit, which turns on the interactions between the two parties. Therefore, the Court permits a forensics expert to retrieve a list of the documents containing the words "Mosley," "Shane," or "Shane Mosley."

However, the Court notes that communications may contain information that is confidential relating to athletes or other individuals who are not a part of this lawsuit and did not receive notice of this motion. Among these individuals is Barry Bonds, who is fighting criminal charges. Therefore, an *in camera* inspection as to these documents is appropriate. See In re Maura, 17 Misc. 3d at 244, 842 N.Y.S.2d at 857 (noting that court may on its own initiative limit disclosure to protect the rights of any person).

Second, plaintiff seeks retrieval of documents which mention Mosley's trainer, Derryl Hudson. In particular plaintiff seeks documents which contain references to "Derryl Hudson," "Darryl Hudson," and "Hudson," or which contain the name of Hudson's business "Power N Speed." Plaintiff states that the proposed search will yield necessary information. In support of this position, he notes that, in litigating the summary judgment motion before this Court last June, defendant asserted:

The events leading up to the De La Hoya match, and the participants to those events, are the only relevant persons to this lawsuit, since those persons have actual knowledge of the acts that form the basis of Conte's allegedly defamatory statements. Those persons are Mosley, Derryl Hudson ("Hudson") and James Valente ("Valente").

Mem. in Opp. to Plaintiff's Summary Judgment Motion, at p. 3 (Dec. 10, 2009).

Accordingly, plaintiff asserts that discovery relating to Hudson is relevant.

The Court concludes that references to the manager are relevant. Moreover, defendant has not provided any persuasive reason why such a search would be overly broad or why it would yield irrelevant material. As noted, defendant has conceded that Hudson has actual knowledge of the truth of Conte's allegedly defamatory statements about the July meeting. Neither party states that Mr. Hudson brought additional boxers or other individuals to Conte's headquarters, or that he dealt with Conte other than in connection with Mosley. In addition, as plaintiff notes, Hudson filed an affidavit on Conte's behalf in the California action in 2008. Therefore, Conte and Hudson clearly continued to communicate after the July 2003 meeting. Also, defendant's argument in response – that he has had no computer or email correspondence with Hudson – overlooks the facts that (1) as stated earlier, he must substantiate this contention by doing a search and (2) plaintiff seeks documents that refer to Hudson, his company, and/or the July 2003 meeting regardless of whether the ESI was sent to Hudson.

Finally, although plaintiff did not serve discovery demands on Hudson, this does not preclude him from serving demands upon Conte for Conte's own documents relating to Hudson. The relationship between Mosley and Hudson is also adversarial at this point. As already mentioned, in connection with the Los Angeles litigation between

Mosley and Conte, Hudson filed a sworn statement in which he seconded Conte's claim that Mosley was aware of the illegal nature of the substances he and Mosley purchased in June of 2003. (Lance Pugmire, *Ex-Trainer Says Mosley was Aware of Steroids*, L.A. TIMES, May 31, 2008, available at <http://articles.latimes.com/2008/may/31/sports/sp-mosley31>). As a result of the potential difficulties this might cause, Mosley may have chosen not to seek nonparty discovery from him.

However, the Court does note that some or all of the documents, if they exist, may not be discoverable. In light of Hudson's involvement in the lawsuits described above, some of the communications which refer to him may be protected by attorney-client privilege. Also, Hudson may have an interest in the contents of any ESI, should it exist, due to his desire to protect his reputation and that of his business, Power N Speed. Therefore, an *in camera* inspection as to these documents is also appropriate.

Though defendant has not challenged a keyword search of the word "Hudson" on this basis, the Court concludes that it is an overly broad search term. Cf. Lipco, 2004 WL1949062, at *7 (noting that under CPLR 3103(a) Court can limit disclosure on motion or *sua sponte*). A google search of "Hudson" yielded over 93,000,000 hits, the vast majority of which have nothing to do with Darryl Hudson. Among many others, the Court found references to the city of Hudson, New York; other cities named Hudson throughout the United States; the Hudson River; other athletes including a professional baseball player, Tim Hudson, a starting pitcher for the Atlanta Braves; Kate Hudson, the movie star; a well respected, 63-year-old literary magazine, The Hudson Review; numerous restaurants, antique shops and other businesses which have "Hudson" in the

name; a think tank; and the explorer Henry Hudson from which some of the above take their name. Although defendant may have referred to Hudson by his last name alone on some occasions, to the extent that these communications are relevant to the lawsuit they should contain a reference to Mosley as well; thus, a search of Mosley's name should produce them. At any rate, the overbroad nature of the search term militates in favor of this limitation. Cf. Lipco, 2004 WL1949062, at *4 (vacating item 1 of discovery demand, without pruning it, based on fact that demand was overbroad and "palpably improper").

Third, plaintiff seeks any documents referring to defendant's former employee James Valente. To this end, he seeks to retrieve all documents, including emails, which include the terms "Valente," "James Valente" or "Jim Valente." He claims this will yield material information because of Valente's presence at the July meeting, and he again cites defendant's earlier memorandum, which concedes Valente's relevance to this lawsuit. He points to statements in Conte's deposition indicating that Valente may have met Mosley and Hudson at the door upon their arrival and that he may have accompanied them to lunch. Accordingly, he claims, ESI mentioning Valente, including old emails or other stored documents from 2003,

Defendant argues that as he has not spoken to or communicated with Valente since 2006 the computer search is improper. He also posits the theory that plaintiff is trying to determine whether Valente will appear as a witness if this matter goes to trial – although it is not clear why this information would be kept secret anyway, or how ESI pre-dating December 2006 – and thus pre-dating this lawsuit – would reveal it. Though defendant's arguments lack merit, the Court concludes that the proposed search is

overly broad. For one thing, Valente is a nonparty who worked for defendant for more than the single day in question, and left defendant's employ several years ago. There may be numerous records relating to Valente's association with Conte which are unrelated to plaintiff and inappropriate for discovery. For another, the documents that contain references to Valente and are relevant to this lawsuit also should mention Shane Mosley and/or Darryl Hudson. Though plaintiff states that he seeks documents relating to the July 2003 meeting or to Valente's understanding of what transpired at the meeting, there is no attempt to refine the search so as to limit retrieval to those documents.

Also, the Court notes that plaintiff has not served Valente with this application. Like Conte, Valente was investigated for his involvement with BALCO. After he pled guilty, he was sentenced to three years probation. Also, as suggested above, Valente's personnel records might contain sensitive information irrelevant to this case. For all of these reasons, an *in camera* inspection of these documents is appropriate.

Fourth, plaintiff requests a keyword search and production of all documents which mention any of the reporters to whom defendant spoke about Mosley. Plaintiff argues that any data relating to these interviews or to subsequent interviews with the reporters about Mosley are relevant. Moreover, the disclosure may reveal information relating to Conte's credibility. As to a search for documents relating to the Sports Illustrated reporter, plaintiff notes that defendant denies that he gave an interview to the reporter in question. However, plaintiff points to contradictory testimony by defendant on this issue, and argues that defendant's current statement is not sufficient to obviate the need for a search.

Defendant is incorrect that because he concedes that he made the statements, plaintiff's search has no purpose. As plaintiff notes, any discussion of the interviews or communications relating to them may relate to Conte's credibility. Plaintiff does not elaborate, but the implication is clear. Truth is a defense to a defamation claim. Dillon v. City of New York, 261 A.D.2d 34, 39, 704 N.Y.S.2d 1, 6 (1st Dept. 1999). Therefore, plaintiff seeks to locate ESI which shows that the statements that Conte made were not true. In addition, where, as here, the plaintiff is a public figure, he must establish that the statements were made with actual malice. Shulman v. Hunderfund, 12 N.Y.3d 143, 147, 878 N.Y.S.2d 230, 232 (2009)(regarding the posting of a political flier which opposed plaintiff's candidacy for reelection to the school board); Sprewell v. NYP Holdings, Inc., 43 A.D.3d 16, 21, 841 N.Y.S.2d 7, 10 (1st Dept. 2007). To prosecute his defamation claims, therefore, plaintiff must establish that defendant knowingly made false statements about him. See Greene v. Aberle, 150 Misc.2d 306, 308, 568 N.Y.S.2d 300, 302 (Sup. Ct. Suffolk County 1991)(in connection with libel and malice). Accordingly, communications which may reveal what defendant knew and/or said about plaintiff prior to the publication of the articles, or in contemplation of an unpublished article or book, may be "extremely material and useful to the issues involved herein." Sands v. News America Pub. Inc., 161 A.D.2d 30, 36, 560 N.Y.S.2d 416, 420 (1st Dept., 1990); see Sprewell, 43 A.D.3d at 21, 841 N.Y.S.2d at 10. Therefore, the material is appropriate for discovery.

However, plaintiff's search is not tailored to yield only information that is relevant to his claim. Conte, who is not shy about speaking to the press, also has discussed other athletes with the press – including the reporters in question. The Court is not

comfortable ordering the disclosure of documents that may mention other athletes and their activities. This is especially true where, as here, some of the athletes are under investigation. Therefore, the forensics expert shall produce these documents to the Court for *in camera* inspection. Moreover, the Court concludes that keyword searches using the journalists' last names only are overbroad and are stricken. In addition, keyword searches using @si.com, @dailynews.com are overbroad. Defamation must be pled with particularity, and accordingly plaintiff has alleged that defendant made the statements in question to particular reporters. He cannot fish through Conte's records to determine whether Conte communicated with additional reporters at various publications.

Fifth, for reasons this Court has addressed above, plaintiff's arguments as to the relevance of ESI relating to Skyhorse and/or Mollie Glick are persuasive and defendant does not successfully counter them. If anything, the fact that Skyhorse handed over 7,000 pages of documents without objection by defendant suggests that defendant is unconcerned about personal privacy or other issues with respect to these records. Again, however, plaintiff has not tailored his keyword search in a way to limit disclosure to the matters at hand. The proposed book was to be about Conte's work at BALCO and his interactions with a number of prominent athletes. As indicated above, only one chapter was about Mosley. It appears that any relevant communications with Skyhorse, Glick or the reporters in question would also include some mention of Mosley. Here, too, the communications may contain information that is confidential relating to Conte, to his former employee James Valente or to athletes who are not a part of this lawsuit. Therefore, an *in camera* inspection as to these documents is appropriate.

In conclusion, it is

ORDERED that the order to show cause is granted to the extent that it seeks to conduct a keyword search of defendant's computers using the search terms Mosley, Shane Mosley, Shane, Derryl Hudson, Darryl Hudson, Power N Speed; James Valente, Jim Valente, Teri Thompson, tthompson@nydailynews.com, Nathaniel Vinton, nvinton@nydailynews.com, A.J. Perez, ajperez@usatoday.com, Mollie Glick, mglick@jvnl.com, mglick@foundrymedia.com, Tony Lyons, tlyons@skyhorsepublishing.com, Mark Weinstein and mweinstein@skyhorsepublishing.com; and denied with prejudice to the extent that it seeks a keyword search of the terms Thompson, Valente, Vinton, @dailynews.com, Perez, @si.com, Sports Illustrated, Glick, Lyons, Weinstein and Hudson and it is further

ORDERED that plaintiff shall conduct a search of all available computers through a forensics expert chosen by plaintiff within 45 days of the date of entry of this order and submit all documents retrieved to the Court for *in camera* review; and it is further

ORDERED that, simultaneously, the forensics expert shall provide a second set of the documents to defendant, who has 20 days to provide the Court with a privilege log; and it is further

ORDERED that to the extent defendant does not have access to his old computers and did not preserve any ESI or internet copies of the materials on the computers, defendant shall provide a detailed affidavit describing his search and explaining what if any measures were taken to preserve the computers and/or ESI and shall also provide an affidavit by the forensics expert on this subject; and it is further

ORDERED that, when the documents are produced, each party may submit a

brief of no more than 10 pages on the discoverability of the documents.

ENTER:

Dated: 8/17/10

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Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

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