

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<p>RYAN W. ZIMMERMAN, Plaintiff, v. AL JAZEERA AMERICA, LLC, et al., Defendants.</p>	<p>Case No. 1:16-cv-13-KBJ-RMM</p>
<p>RYAN J. HOWARD Plaintiff, v. AL JAZEERA AMERICA, LLC, et al., Defendants.</p>	<p>Case No. 1:16-cv-14-KBJ-RMM</p>

**PLAINTIFFS RYAN W. ZIMMERMAN’S AND RYAN J. HOWARD’S REDACTED
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL**

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Plaintiff Ryan W. Zimmerman and Ryan J. Howard (collectively “Plaintiffs”) submit this opening brief in support of their motion pursuant to Rules 26, 33, 34, and 36 of the Federal Rules of Civil Procedure for an order compelling Defendants Al Jazeera America, Al Jazeera Media Network, Al Jazeera International (USA), Inc., and Deborah Davies (collectively, “Al Jazeera”) to (1) expand its unduly restrictive, self-imposed date range for document collection purposes; (2) collect and produce documents from Al Jazeera America; (3) produce documents responsive to numerous requests for production (“RFPs”); (4) produce text messages; and (5) respond fully and completely to numerous interrogatories and requests for admissions (“RFAs”).

PRELIMINARY STATEMENT

This case arises from Al Jazeera’s desperate attempt to salvage the fledgling Al Jazeera America news network from the brink of collapse by broadcasting a flimsy documentary targeting high-profile athletes, including Plaintiffs, with false and unsubstantiated allegations of use of a banned performance-enhancing drug (“PED”) called Delta-2. Those scurrilous allegations were based on uncorroborated accusations by a single source, Charlie Sly, who unequivocally recanted his statements *prior* to the publication of the documentary. Al Jazeera knew full well that its source had recanted his untrue allegations about Plaintiffs but, abdicating all journalistic responsibilities, still chose to publish its defamatory story in an attempt to stir controversy, increase Al Jazeera America’s lagging ratings, and boost its notoriety.

In prosecuting their defamation and false light claims against Al Jazeera, Plaintiffs have been an open book, providing Al Jazeera with virtually limitless discovery on highly sensitive matters, including thousands of pages of medical records and employment records. Unfortunately, the same cannot be said for Al Jazeera, which has arbitrarily limited its document collection to a select few individuals spanning an unduly restrictive time period and has limited

its discovery responses to those topics that it has unilaterally deemed relevant to this litigation. In so doing, Al Jazeera has provided Plaintiffs with *no* discovery from or about Al Jazeera America—a named defendant in this action and the network that aired the documentary five (5) times across millions of households in the United States. Al Jazeera’s refusal to provide Al Jazeera America-related and other discovery is wholly unjustified.

Under well-established D.C. Circuit law, relevance is broadly defined and parties are permitted liberal access to discovery to support their claims and defenses. Notwithstanding this liberal discovery standard, Al Jazeera is desperately trying to prevent Plaintiffs from obtaining evidence relating to some of the most critical issues in the case. In particular, Al Jazeera has flatly refused to provide discovery pertaining to Al Jazeera America’s low ratings and weak financial performance, as well as discovery relating to its financial investment in the documentary, including Al Jazeera’s efforts to promote and sensationalize the film. Such discovery, however, is plainly relevant to Al Jazeera’s bad faith motive in publishing a documentary that it knew contained wholly unsupported allegations about Plaintiffs. Additionally, Al Jazeera has refused to provide discovery relating to other important categories of information, including Plaintiffs’ damages. The law, however, requires Al Jazeera to provide *all* relevant information, not just as to those topics that it deems relevant. Because Al Jazeera’s objections to Plaintiffs’ discovery requests are meritless, the Court should order it to promptly respond in full to the RFPs, interrogatories, and RFAs discussed below.

BACKGROUND

A. Al Jazeera Produces A Documentary Promising To Name “Big Name” Athletes Who Allegedly Use PEDs

In 2013, Al Jazeera Media Network spent \$500 million to buy Current TV and start an American news network—Al Jazeera America. *See* ECF No. 9 ¶ 26; *see also* ECF No. 44 ¶ 29.

That investment quickly proved disastrous with the network earning paltry ratings right from the start. See Maane Khatchatourian, *Al Jazeera America Launch Draws Weak Ratings*, Variety, Aug. 28, 2013, available at <https://goo.gl/XFKZgc>. By spring 2014, the network was still struggling to attract viewers, averaging just 15,000 viewers in prime-time and had to lay off dozens of employees. See Jeanine Poggi, *Al Jazeera America At Six Months: Some New Advertisers, Few Viewers*, AdAge, Mar. 4, 2014, available at <https://goo.gl/ZlrIyd>; see also Erik Hayden, *Dozens Laid Off at Al Jazeera America*, The Hollywood Reporter, Apr. 11, 2014, available at <https://goo.gl/QUR5ez>.

In 2015, following a tumultuous two years, Al Jazeera America suffered “an exodus of top executives” who “brought to the surface a series of grievances that employees sa[id] reflect[ed] a deep dysfunction in management of the newsroom, undermining the network’s mission.” John Koblin, *Al Jazeera America, Its Newsroom in Turmoil, Is Now the News*, N.Y. Times, May 5, 2015, available at <https://goo.gl/aPzvUb>. As a result, Al Jazeera America “nearly imploded,” and its C.E.O., Ehab Al Shihabi, was terminated. Shannon Bond, *Al Anstey Looks To Rewrite Al Jazeera America Headlines*, Fin. Times, Sept. 28, 2015, available at <https://goo.gl/b34TTN>.

It was during this unsettled time period when Al Jazeera decided to produce a documentary entitled *The Dark Side: The Secrets of Sports Dopers* (“Documentary”), the goal of which was to find “**big-name athletes who have cheated in world-class sporting events**” through the use of PEDs. E-mail from P. Charley to J. Young, dated June 15, 2015 at AJ-HZ_0021731 (emphasis added) (Exhibit 1). The hope was that a public flogging of such big-name athletes would “**raise the profile and status of [Al Jazeera America] in particular**” (E-mail from C. Swisher to M. Souag, dated Dec. 4, 2015 (Exhibit 2)) and “**amplify the publicity [Al Jazeera]**

receive[s].” E-mail from J. Young to P. Charley, dated Dec. 12, 2015 at AJ-HZ_0024823 (Exhibit 3) (emphases added); *see also* E-mail from P. Rees to C. Swisher, dated Nov. 2, 2015 (Exhibit 4) (noting that the Documentary “would be angled towards the U.S. and should run on [Al Jazeera America]” and that “[t]he attention that this story could generate is huge”).

B. Al Jazeera Struggles To Find “Big Name” Athletes Who Use PEDs

From the outset, the mandate to Al Jazeera’s investigative team was clear: “break new ground journalistically that nobody had unearthed in the past.” E-mail from J. Young to D. Ulman, dated Jan. 27, 2015 (Exhibit 5). But after four (4) months of work, the investigative team had made little, if any, progress in reaching that goal. Al Jazeera soon realized that without an “insider,” it could not gain entrée into the secretive world of sports doping. Liam Collins Dossier at AJ-HZ_0025665 (emphasis added) (Exhibit 6). Thus, in April 2015, Al Jazeera approached Liam Collins (“Collins”)—a disgraced British track and field athlete—to go undercover by originally “claiming to be an athlete desperate to qualify for the [2016] Rio Olympics” and in search of PEDs. ECF No. 26-4 at 5 (“Documentary Tr.”). Al Jazeera hoped that this cover story would quickly lead Collins to “top level” athletes who take PEDs. *Id.* at 9. It did not.

After a month of working with Collins, Al Jazeera’s management team became concerned about the lack of progress in the investigation. On June 3, 2015, Phil Rees (“Rees”), the Investigations Manager for Al Jazeera, wrote to Peter Charley (“Charley”), another senior executive at Al Jazeera, to explain that he was “concerned that the drug story [was] not focused properly.” E-mail from P. Rees to P. Charley, dated June 3, 2015 (Exhibit 7). Rees explained to Charley that “[f]inding a range of doctors willing to supply drugs to [Collins] isn’t gonna cut it.” *Id.* Charley agreed, telling Rees “we need to aim for the big target(s)[,]” which included legendary ██████████ and ██████████ *Id.* Despite Al

Jazeera's mandate to its reporters to find "big targets," the investigative team, led by Jeremy Young ("Young"), still struggled to achieve this goal.

By mid-June 2015, Al Jazeera's management grew increasingly frustrated. Young's supervisor, Charley, admonished him about the lack of progress, telling Young that "*we need to be zeroing in on specific targets: [REDACTED], and through him, big-name athletes who have cheated in world-class sporting events.*" Ex. 1 at AJ-HZ_0021731 (emphasis added). Two months later, Al Jazeera still had "*no supporting evidence of wrongdoing on the part of leading athletes*" E-mail from P. Charley to J. Young, dated Aug. 28, 2015 at AJ-HZ_0005717 (emphasis added) (Exhibit 8). Charley reiterated his concerns to Young about the lack of progress in the investigation just days later, telling him that the investigative team needed "*a leaked document or secret recordings linking, for the first time, big-name athletes to illegal drug use—something we don't have yet.*" E-mail from P. Charley to J. Young, dated Sept. 7, 2015 at AJ-HZ_0008123 (emphasis added) (Exhibit 9).

With the investigation floundering, Al Jazeera hired Defendant Deborah Davies ("Davies") in August 2015 to provide much-needed assistance. Young, who had been leading the investigation to that point, was displeased by the addition of Davies. According to Young, he did not "see how bringing a correspondent in at this stage [made] much sense." E-mail from J. Young to K. Hirten, dated Aug. 27, 2015 at AJ-HZ_0019477 (Exhibit 10). Nevertheless, Young was aware that he had "fucked this one up a bit" and that the team would need "time to bring together and organize" all of the disjointed material they had gathered to date. *Id.* Time, however, was a luxury that Young and the rest of the team did not have. Al Jazeera considered it a "*network imperative*" to broadcast the Documentary in 2015. E-mail from P. Rees to D. Davies, J. Young, and K. Hirten, dated Sept. 21, 2015 (emphasis added) (Exhibit 11). But by

October 2015, the broadcast date was just weeks away, and Al Jazeera still had not identified any “big-name” athletes it could credibly claim took PEDs (despite ten months of trying).

Al Jazeera soon realized that Collins’ original cover story “*was not going to get [him] into the football or MLB circles.*” Collins Interview Notes at AJ-HZ_0039089 (emphasis added) (Exhibit 12). Al Jazeera, therefore, “had to design another [cover] story to compliment” the original one. *Id.* According to Collins, the new cover story had to be “[s]omething that would get [sports dopers] excited and invested in making serious amounts of money from me.” *Id.* (emphasis added). To that end, Al Jazeera decided that Collins would act as “a middle man for soccer players.” *Id.* Specifically, Collins would claim to be associated with European soccer stars whom Collins wanted to connect with American doping experts in furtherance of the soccer stars’ search for PEDs.¹ Collins promised these so-called doping experts that by integrating the European soccer stars into their American operations it would be hugely lucrative. *See* Exs. 14–16. But before Collins would agree to refer his European soccer contacts to these individuals, Collins would first require them to identify their purported “high profile” clients to ensure that their operations were, in fact, patroned by reputable athletes. *See* Ex. 16 at 11:35–13:22; *see also* E-mail from J. Young to A. Elrashidi and K. Kiang, dated Jan. 3, 2016 at AJ-HZ_0033815 (Exhibit 17).

¹ *See e.g.*, E-mail from C. Sly to B. Rucker, dated Dec. 2, 2015 (Exhibit 13); Recording of Unpublished Undercover Conversation Between C. Sly and L. Collins, dated Oct. 28, 2015 at 4:29–11:25 (Exhibit 14); Recording of Unpublished Interview with L. Collins, dated Oct. 31, 2015 at 8:39–9:10, 10:48–12:30 (Exhibit 15); Recording of Unpublished Undercover Conversation Between C. Sly and L. Collins, dated Oct. 30, 2015 at 11:35–13:22 (Exhibit 16).

C. Charlie Sly Falsely Accuses Plaintiffs Of Taking Delta-2

With this new cover story in place, Al Jazeera’s investigative team, together with Collins, traveled to Austin, Texas to meet Charlie Sly (“Sly”)—a thirty-one (31) year-old purported pharmacist who claimed to supply PEDs to high-profile athletes. *See* Documentary Tr. at 14–18. Collins and Sly first met on October 28, 2015. Within minutes of this interaction, Collins jumped into his new cover story, telling Sly that he was connected to European soccer players who could benefit greatly from Sly’s expertise. *See* Ex. 14 at 4:29–11:25. Just as scripted, Collins then told Sly that there were was “a lot of business to be had, a lot of money to made” if they could integrate Collins’ European soccer players into Sly’s operation. *See id.* at 7:43–7:48. Collins later told Sly that he would soon be speaking with a leading European sports agent who could help funnel soccer players to Sly. *See* Ex. 15 at 8:39–9:10, 10:48–12:30. In order to convince the agent to send his soccer players to Sly, Collins asked Sly to “name drop[]” a few of his high-profile clients to lend legitimacy to Sly’s operation. Ex. 16 at 11:35–13:22. Sufficiently enticed, Sly proceeded to name several high-profile current and former football players. *See id.* Then Collins asked Sly to name Major League Baseball (“MLB”) players with whom he claimed to work. *See id.* In response, Sly identified Plaintiffs. *See id.* at 13:10–22.

Days later, Collins tried to learn more information from Sly about the nature and extent of his claimed relationships with Plaintiffs. It was during these conversations that Sly falsely accused Plaintiffs (among others) of using Delta-2, a PED that was recently banned by MLB. *See* Documentary Tr. at 26–27. Thus, after ten (10) months trying to find top-level athletes who purportedly took PEDs, the investigative team had seemingly met their bosses’ goal when Sly (falsely) claimed that Plaintiffs took Delta-2. The investigative team was so relieved by Sly’s revelations that they described the event as a “Texas miracle.” E-mail from J. Young to D.

Davies, K. Hirten, C. Pennington, dated Nov. 8, 2015 (Exhibit 18); *see also* Ex. 17 at AJ-HZ_0033815.

D. Al Jazeera Ignores Obvious Red Flags Concerning Charlie Sly's Credibility

By the time Sly identified Plaintiffs as being linked to Delta-2, it was early November 2015, and the December 27, 2015 broadcast date was fast approaching. But having only just discovered this new information, the investigative team needed more time to further develop this supposed lead. Young, therefore, wrote to Davies on November 6 begging for more time, explaining that “WE NEED MORE TIME! This is insane. I think we need to ask the bosses for more time. Some of this stuff we got last night is really crazy.” E-mail from J. Young to D. Davies, dated Nov. 6, 2015 (emphasis in original) (Exhibit 19). Ultimately, Young and the investigative team were not given the additional time they needed. As a result, Al Jazeera was forced to “sacrifice the details on the processes [and] protocols” with its investigation. Ex. 12 at AJ-HZ_0039087; *see also* Ex. 11 (noting that due to the December broadcast date “some investigative strands [will] not [be] followed”). Sadly, many of the “details” that Al Jazeera “sacrificed” concerned the numerous red-flags that should have—and indeed *did*—cause Al Jazeera to question Sly’s credibility.

First, from the outset, Al Jazeera knew that Sly was a man of questionable integrity. Al Jazeera even considered reporting Sly to Texas state investigators for his alleged involvement in a “medical billing scam.” E-mail from J. Young to D. Davies, dated Nov. 11, 2015 at AJ-HZ_0024379 (Exhibit 20). But with no other leads and the investigation on the verge of collapse, Al Jazeera blithely continued to pursue Sly as a source.

Second, Al Jazeera ignored its own reporters’ doubts about the reliability of Sly’s statements, even as to Plaintiffs. Specifically, upon learning of Sly’s claims about Plaintiffs’ purported link to Delta-2, Young was so shocked that he “*had his hands on his head in utter*

disbelief and paced around room.” Ex. 12 at AJ-HZ_0039088 (emphasis added). Young also privately told his colleagues that he “*wouldn’t have predicted [Plaintiff Zimmerman] in a million years to be on that list.*” Ex. 15 at 41:24–29 (emphasis added).

Third, Al Jazeera ignored the fact that Sly had an obvious motivation to lie to Collins, who had promised Sly huge financial rewards if Sly revealed his purported “high-profile” clients. *See* Ex. 14 at 4:29–11:25; *see also* Ex. 15 at 8:39–9:10, 10:48–12:30. Beyond these promises of future financial benefits, Al Jazeera also provided Sly with *immediate* financial benefit. Specifically, on November 3, 2015, Al Jazeera provided Collins with a \$200 Whole Foods gift card to give to Sly. *See* E-mail from K. Hirten to J. Stallman, K. Belson, and M. Powell, dated Jan. 4, 2016 at AJ-HZ_0037800 (Exhibit 21).²

Fourth, Al Jazeera ignored numerous lies Sly told to Collins during their interactions—*statements Al Jazeera knew to be untrue prior to publication*. For example, Sly made several false statements to Collins about Delta-2’s detectability. According to Sly, Delta-2 was not detectable in blood or urine; rather, Sly claimed it was excreted through sweat, making the drug undetectable to drug testing authorities. *See* E-mail from D. Davis to M. Thevis, dated Oct. 30, 2015 at AJ-HZ_0025362 (Exhibit 22). But prior to publication, Al Jazeera learned from a leading forensic chemist and expert for the World Anti-Doping Agency (“WADA”) that Sly’s statements about Delta-2 were false. Specifically, the WADA expert told Al Jazeera that Delta-2 *would* show-up in blood or urine samples and that it was *not* accurate for Sly to claim, as he did, that Delta-2 is only excreted through sweat. *See id.* at AJ-HZ_0025360. Nevertheless, Al

² When Davies was subsequently asked by a reporter if, in fact, Collins had given Sly a gift card, she denied it, saying “[w]e don’t pay sources.” Corky Siemaszko, *Al Jazeera Reporter Deborah Davies Defends Sports Doping Expose That Names Peyton Manning*, NBC News, Dec. 28, 2015, available at <https://goo.gl/kjJMfw>.

Jazeera ignored the WADA expert, choosing instead to broadcast Sly's false claims that Delta-2 was undetectable. *See* Documentary Tr. at 17.

Additionally, Sly also told Collins that he had actually stopped giving Delta-2 to baseball players, including Plaintiffs, once MLB added it to the banned substance list. *See* Unpublished Audio Recording of Conversation Between C. Sly and L. Collins at 12:01–38 (Sly stating that “*once MLB put [Delta-2] on that [banned substances] list, I quit messing around with it for baseball players*”) (emphasis added) (Exhibit 23). Sly's claim that he “quit messing around” with Delta-2 once it was added to the MLB banned substances list, however, does not square with other statements in the Documentary that demonstrate that Sly did, apparently, provide Delta-2 to a lesser-known MLB player when it was *already* banned by MLB. *See* Documentary Tr. at 23. Clearly, Sly's statements about when he claims to have supplied athletes with Delta-2 are internally inconsistent, and these inconsistencies should have been a red flag to Al Jazeera that Sly was not a reliable or trustworthy source.

Sly also revealed himself to Al Jazeera as a dishonest man who was willing to lie to his own supposed clients, *including Plaintiffs*,³ about the exact nature of the supplements he claimed to be providing them. *See* Excerpt of Tr. of Audio Recording of Conversation Between C. Sly and L. Collins, dated Nov. 3, 2015 at AJ-HZ_0022917 (Exhibit 24). That conversation, which took place on November 3, 2015, proceeded as follows:

Collins: And he's on the D2. Ryan Howard you say? You've got the agents. [REDACTED] and [REDACTED].

Sly: *[M]ost guys, I don't tell them, everything that's going on. I tell them, this is regenerative medicine stuff. It's different than the team doctor.*

Collins: *Are they aware or do they just turn a blind eye. They must be aware.*

³ For the avoidance of any doubt, Plaintiffs were not clients of Sly.

Sly: *About the D2 Stuff? No.*

Id. (emphasis added). Here again, Sly readily revealed himself to Al Jazeera as a liar who claimed to actively mislead professional athletes into taking banned PEDs.

Finally, Sly also made false statements about his deceased fiancé, Karen Lopez-Bartlett (“Lopez-Bartlett”), who Sly repeatedly referred to in the present tense in numerous disturbing conversations with Collins. Unfortunately, Sly had experienced the loss of his fiancé when she committed suicide on October 20, 2015—just one week before Collins first met Sly in Austin. *See* Ken Belson, *Role of Nurse Is Said to Be of Interest After Report on Doping*, N.Y. Times, April 15, 2016, available at goo.gl/w559zu. Prior to airing the Documentary, Al Jazeera knew that Lopez-Bartlett had committed suicide and, therefore, knew that the numerous statements Sly made about her in the present tense as his *current* fiancé were patently false. *See* E-mail from C. Sly to D. Davies and R. Corn-Revere, dated Dec. 26, 2015 (Exhibit 25). The record is replete with other bizarre and disturbing statements Sly made about Lopez-Bartlett that Al Jazeera knew were false prior to airing the Documentary, but, nevertheless, chose to ignore. *See* E-mail from J. Young to C. Swisher, dated Feb. 29, 2016 at AJ-HZ_0041391(Exhibit 26).

E. Plaintiffs Repeatedly Deny Charlie Sly’s Allegations And Charlie Sly Recants His Statements

On December 9, 2015, Plaintiffs first learned that Al Jazeera planned to run a program accusing them of taking Delta-2. *See* ECF No. 9 ¶ 50; *see also* ECF No. 44 ¶ 53. Shortly thereafter, Plaintiffs promptly and repeatedly denied these allegations prior to publication of the Documentary. *See e.g.*, ECF Nos. 9-15, 9-16, 9-17. Additionally, prior to the airing of the Documentary, Sly—Al Jazeera’s sole source for its statements about Plaintiffs—recanted his statements on three different occasions.

First, on December 24, 2015, Sly sent an e-mail to Al Jazeera stating, in pertinent part: “The statements on those recordings and/or communications are false and incorrect. Under no circumstances should any of those statements, recordings, and/or communications be aired.” E-mail from C. Sly to D. Davies and R. Corn-Revere, dated Dec. 24, 2015 (Exhibit 27). Later that day, Sly sent Al Jazeera a 55-second video in which he reiterated that the statements he made to Collins were false and incorrect. *See* E-mail from C. Sly to R. Corn-Revere and D. Davies, dated Dec. 24, 2015 (Exhibit 28). In the recording, Sly stated, in relevant part, that “[t]he statements on any recordings or communications that Al Jazeera plans to air are absolutely false and incorrect. To be clear, I am recanting any such statements, and there is no truth to any statement of mine that Al Jazeera plans to air. Under no circumstances, should any of those statements, recordings, or communications be aired.” Response, YouTube, dated Dec. 26, 2015, available at <https://goo.gl/i5qC1y>. Then, on December 26, 2015, Sly sent yet another recantation e-mail to Al Jazeera, which stated, in relevant part:

During my conversations with [Collins], I was in no state of mind to be making any coherent statements as I was grieving the death of my fiancé of five months, who committed suicide on October 20. I was the one to find her body in her home on that day and rushed her to the emergency room, where she was pronounced dead. As I was grieving and helping to make arrangements, [Collins] badgered me to meet him. I met him for the first time in person on October 28, just one day after my fiancé’s viewing and three days before her memorial service. I told him about my fiancé’s passing; he clearly was taking advantage of my grief.

I reiterate that the statements that Liam Collins recorded are absolutely false and incorrect, and were taken during a time of extreme pain and despair for me. They should not be aired.

Ex. 25.

F. Al Jazeera Broadcasts The Documentary And Is Widely Criticized For Its Sole-Sourced Reporting

Notwithstanding Plaintiffs' pre-publication denials, Sly's pre-publication recantations, and the numerous red-flags concerning Sly's lack of credibility, Al Jazeera still moved forward with the Documentary and published the defamatory statements about Plaintiffs on December 27, 2015 at 9:00 pm on Al Jazeera America. Al Jazeera published the Documentary even though it expressly realized that it was "*in a risky position*" if it were to rely on Sly and that it needed "[*m]ore documentary evidence.*" Al Jazeera Notes, Undated, at AJ-HZ_0029149 (emphases added) (Exhibit 29).

Much to Al Jazeera's dismay, the Documentary earned terrible ratings. See E-mail from J. Austin to C. Swisher, dated Dec. 30, 2015 (Exhibit 30). Still, the impact of Al Jazeera's false reporting reverberated around the country, causing a "national controversy." E-mail from C. Swisher to various Al Jazeera employees, dated Dec. 29, 2015 (Exhibit 31). The focus of that controversy, however, centered more on Al Jazeera's decision to rely on a single source, who had repeatedly recanted his statements prior to publication than it did on the underlying doping allegations. In fact, representatives from virtually every major news organization reached out to Al Jazeera in the wake of the Documentary for comment as to why it chose to rely on a single source, Sly, who had recanted his statements *prior to* publication. See, e.g., E-mail from B. Vota to Al Jazeera, dated Dec. 28, 2015 (Exhibit 32); E-mail from M. Reeves to R. Corn-Revere and C. Pendleton, dated Dec. 27, 2015 (Exhibit 33); E-mail from M. Kennedy to J. Austin, dated Dec. 28, 2015 (Exhibit 34).

As a result of the widespread criticism and "the questions being raised" about Sly's credibility, Al Jazeera was forced to publicly defend its reporting and its decision to rely on Sly. E-mail from J. Young to K. Hirten, dated Jan. 2, 2016 at AJ-HZ_0033802 (Exhibit 35).

Privately, however, Al Jazeera was singing a different tune. Indeed, several key members of the Al Jazeera investigative team soon began privately to express regret about the Documentary and their reliance on Sly, in particular. For example, Young stated that “[i]n hindsight there are a number of things that I would have done differently” E-mail from J. Young to J. Young, dated Jan. 20, 2016 at AJ-HZ_0035368 (Exhibit 36). As to Sly specifically, Young lamented that the Documentary needed additional material that “[w]ould have added to [Sly’s] credibility.” E-mail from J. Young to P. Rees, dated Jan. 30, 2016 at AJ-HZ_0034396 (Exhibit 37). Rees—the Manager of Investigative Journalism for Al Jazeera—felt similarly. After the Documentary aired, he wondered if there was “ANYTHING else we haven’t used that can raise Sly’s stature?” *Id.* (emphasis in original). Kevin Hirten, another investigator who worked on the Documentary, also expressed regret about the project stating that Al Jazeera made “hundreds” of “regrettable error[s]” in connection with the Documentary, (E-mail from K. Hirten to P. Charley, dated Dec. 30, 2015 at AJ-HZ_0037693 (Exhibit 38)), and that “there are plenty of fair criticisms of the story.” E-mail from K. Hirten to A. Tompkins, dated Jan. 11, 2016 (Exhibit 39).

Weeks after posting disappointing ratings, and one week after Plaintiffs sued for defamation, Al Jazeera announced that Al Jazeera America would cease its operations in April 2016. *See* John Koblin, *Al Jazeera America To Shut Down By April*, N.Y. Times, Jan. 13, 2016, available at <https://goo.gl/oXCPX1>.

ARGUMENT

“Under Rule 26 of the Federal Rules of Civil Procedure, parties to litigation may discover all relevant, non-privileged information.” *Linder v. Dep’t of Def.*, 133 F.3d 17, 24 (D.C. Cir. 1998). As Al Jazeera freely recognizes in an unrelated motion to compel, “relevance is broad at the discovery stage.” ECF No. 84-1 at 8. “The Federal Rules of Civil Procedure encourage the

exchange of information through broad discovery.” *Id.* (quoting *English v. Washington Metro. Area Transit Auth.*, 2017 WL 4620976, at *3 (D.D.C. Oct. 13, 2017) (Meriweather, M.J.)). “Rule 26(b) permits parties to obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *Id.* (quoting Fed. R. Civ. P. 26(b)(1)).

“The Federal Rules of Civil Procedure allow for broad access to relevant information at the discovery stage.” *Id.* (quoting *Sourgoutsis v. United States Capitol Police*, 2017 WL 5633088, at *4 (D.D.C. Nov. 21, 2017) (Meriweather, M.J.)). “Relevance is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on a party’s claim or defense.” *Id.* (quoting *English*, 2017 WL 4620976, at *12). “Moreover, information still need not be admissible in evidence to be discoverable.” *Id.* (quoting *Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016)). Notwithstanding the liberal standard for relevance under Rule 26, Al Jazeera is withholding discovery pertaining to many of the most critical issues in this case. For the reasons discussed more fully below, it should be compelled to provide additional discovery.

I. THE COURT SHOULD ORDER AL JAZEERA TO EXPAND ITS UNDULY RESTRICTIVE DATE RANGE FOR ITS DOCUMENT PRODUCTION

Despite Plaintiffs’ agreement to provide discovery spanning an eight (8) year period (2010 through present), covering deeply personal and invasive topics like their medical histories, Al Jazeera has unreasonably limited its document production to a fifteen (15) month period (December 19, 2014 through February 28, 2016), covering only those topics that it has unilaterally determined make up the universe of relevant topics for discovery. Al Jazeera’s self-selected date range, however, is far too narrow as it excludes large periods of time from which relevant, discoverable information exists and must be produced.

First, Al Jazeera's start date of December 19, 2014 prevents Plaintiffs from obtaining highly relevant information pertaining to key topics such as Al Jazeera America's perennially low ratings and weak financial performance, both of which contributed to Al Jazeera's decision to push its flimsy Documentary. As discussed at length, *infra* Section III, these topics are directly relevant to Plaintiffs' actual malice inquiry insofar as they are probative of Al Jazeera's willingness to publish wholly unsupported allegations. By limiting its document production to December 19, 2014, Al Jazeera has made it impossible for Plaintiffs to obtain discovery about these highly relevant topics that are central to Plaintiffs' claims. Plaintiffs, therefore, request that the Court order Al Jazeera to expand its start date to August 1, 2013, when Al Jazeera America was first launched.

The same is true for the arbitrary end date of February 29, 2016 selected by Al Jazeera. It is simply not the case that all relevant and responsive communications about the Documentary ceased after February 2016. In fact, one of the most critical documents produced by Al Jazeera was sent on February 29, 2016—*the very last day for which Al Jazeera has collected documents*. See Ex. 26 at AJ-HZ_0041391–92 (showing that Al Jazeera doubted Sly's credibility and truthfulness *prior* to publication). To suggest that relevant and responsive communications ceased at this point is untenable. Indeed, for the month of February 2016 alone, Al Jazeera has produced 664 e-mails, suggesting that there are likely thousands of additional responsive documents that exist well beyond that date.

To be clear, Al Jazeera does not dispute that responsive documents do, in fact, exist beyond February 29, 2016. Specifically, Al Jazeera freely admits that in the months and years that followed the Documentary, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Beyond that, there are numerous other documents suggesting that Al Jazeera continued to work on Documentary-related projects well past February 29, 2016. For example, Al Jazeera appears to have assisted the Canadian Centre for Ethics in Sport in its investigation into the Documentary. *See* E-mail from L. Collins to P. Charley and J. Young, dated Jan. 21, 2016 (Exhibit 41). Al Jazeera also appears to have collaborated with reporters from various news outlets, including The New York Times, on follow-up stories relating to the Documentary. *See* E-mail from J. Young to P. Charley and K. Hirten, dated Feb. 26, 2016 (Exhibit 42). Al Jazeera also conducted follow-up research concerning Dr. Dale Guyer and the Guyer Institute, where Sly briefly worked as an intern. *See* E-mail from J. Young to R. Sanders, dated Feb. 24, 2016 (Exhibit 43). Furthermore, Al Jazeera continued to use Collins “to help infiltrate a network of doping forums in the UK” long after the Documentary aired. E-mail from L. Collins to P. Charley, dated Feb. 18, 2016 (Exhibit 44).

All of this information is relevant and discoverable. But because it postdates Al Jazeera’s arbitrary February 29, 2016 cutoff, Plaintiffs have been prevented from obtaining discovery related to these topics, as well as to any other documents that were created, sent, or received after February 29, 2016. There is simply no basis for Al Jazeera’s refusal to provide discovery beyond this date. As such, Plaintiffs respectfully ask the Court to order Al Jazeera to produce documents through the present—which is exactly what Plaintiffs have done.

II. THE COURT SHOULD ORDER AL JAZEERA TO COLLECT DOCUMENTS FROM AL JAZEERA AMERICA

Notwithstanding the fact that Al Jazeera America is a named party in this action and the network that aired the Documentary on five (5) different occasions, Al Jazeera has taken the remarkable position that Al Jazeera America need not provide discovery in this case. Al Jazeera has, therefore, refused to collect a single document from a single employee of Al Jazeera America. By refusing to collect documents from Al Jazeera America, however, Al Jazeera has made it impossible for Plaintiffs to obtain critical discovery from key employees of a named defendant who were actively involved in the production and publication of the Documentary. There is no conceivable basis why Al Jazeera America should not have to participate in discovery.

To be sure, Al Jazeera concedes that numerous Al Jazeera America employees were actively involved in the publication of the Documentary. Specifically, Al Jazeera has identified Amjad Attallah (Regional Director of the Americas), Gordon Robison (Senior Executive Producer), Al Anstey (Chief Executive Officer), Kim Bondy (Senior Vice President), Kate O'Brian (President), and Terry Baker (Senior Vice President) as employees from Al Jazeera America who contributed to the Documentary. *See* Ex. 40, No. 3. Yet, for reasons that are unclear, and after repeated meet and confers, Al Jazeera still refuses to collect documents from these individuals. Its refusal is unjustified. The Court should order Al Jazeera to collect and produce documents and communications from at least the six (6) individuals from Al Jazeera America who have been identified as having worked on the Documentary.

III. THE COURT SHOULD ORDER AL JAZEERA TO PROVIDE DISCOVERY PERTAINING TO MOTIVE

As public figures, Plaintiffs must ultimately prove by clear and convincing evidence that Al Jazeera published its statements about them with “‘actual malice’—*i.e.*, with ‘knowledge that

it was false or with reckless disregard of whether it was false or not.” *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 40 (D.D.C. 2005) (internal citation omitted). Because intent can be hard to prove, “[p]roof of actual malice may take the form of circumstantial evidence.” *Id.* at 50. Courts have identified several “scenarios in which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice.” *Id.* One such scenario occurs where, as here, a defendant publishes statements notwithstanding the fact that there were “obvious reasons to doubt” the veracity of its source. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Plaintiffs contend that there were numerous obvious reasons to doubt the truth of Sly’s statements about them, including the fact that (i) Sly, Al Jazeera’s sole source, repeatedly recanted his statements prior to publication (*see, e.g.*, Exs. 25, 27, 28); (ii) Plaintiffs repeatedly denied Sly’s allegations prior to publication (ECF Nos. 9-15, 9-16, 9-17); (iii) Sly repeatedly lied to Al Jazeera during filming—***lies that were known to Al Jazeera prior to publication*** (*see, e.g.*, Exs. 22–26); (iv) Sly had a financial incentive to mislead Al Jazeera (*see* Ex. 14–17); and (v) Sly’s apparent involvement in a “medical billing scam” for which Al Jazeera considered reporting him prior to publication (*see* Ex. 20). Aside from these obvious reasons to doubt Sly, the evidence also shows that Young did, in fact, immediately doubt the truth of Sly’s statements about Plaintiffs. *See* Ex. 15 at 41:24–29; *see also* Ex. 12 at AJ-HZ_0039088. Yet, despite these obvious reasons to doubt Sly’s statements (as well as its *actual* doubt), Al Jazeera still decided to publish the defamatory statements about Plaintiffs.

Under these circumstances, Plaintiffs are undoubtedly entitled to discovery as to what motivated Al Jazeera to publish its wholly unsupported statements about them. *See Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 590 (D.C. Cir. 2016) (evidence of motive relevant in a

defamation action when it is “probative of a ‘willingness to publish *unsupported allegations*’”) (citing *Tavoulaareas v. Piro*, 817 F.2d 762, 796 (D.C. Cir. 1987) (emphasis in original). Plaintiffs, therefore, propounded numerous discovery requests that pertain to Al Jazeera’s motivation in publishing the Documentary, including information pertaining to (i) Al Jazeera America’s low ratings and weak financial performance; (ii) Al Jazeera’s financial investment in the Documentary; (iii) and Al Jazeera’s efforts to promote and sensationalize the Documentary. Al Jazeera, however, has refused to provide discovery on these topics. As discussed below, each topic is relevant, and the Court should order Al Jazeera to provide discovery as to each category.

A. Al Jazeera Must Provide Discovery Pertaining To Al Jazeera America’s Low Ratings And Poor Financial Performance

First, Plaintiffs have issued the following RFPs pertaining to Al Jazeera America’s financial performance and ratings:

- RFP No. 105: Documents sufficient to show the actual and projected net profits or losses, as well as the actual and projected revenue targets for Al Jazeera America from 2014 to the date of April 30, 2016.
- RFP No. 106: Documents sufficient to show Al Jazeera America’s financial condition, including profit and losses, and assets and liabilities from January 1, 2013, though April 30, 2016.
- RFP No. 107: Al Jazeera America’s annual reports from 2013–2016.
- RFP No. 113: All Documents and Communications that Refer, Relate, or Pertain to Defendants’ announcement on or around January 13, 2016, that Al Jazeera America would be ceasing operations in April 2016.
- RFP No. 121: Documents sufficient to show Al Jazeera America’s television ratings from August 2013 through April 2016.

Al Jazeera, however, has refused to provide documents in response to these RFPs.⁴ There is no basis for its refusal. Plaintiffs have alleged—and the limited record now shows—that Al Jazeera was concerned about the low status and profile of Al Jazeera America such that it pushed a flimsy Documentary promising to name “big-name athletes who have cheated in world-class sporting events” (Ex. 1) in the hopes of driving rating and increasing the network’s notoriety. *See supra* at 2–6. Plaintiffs further contend that this bad faith motive prompted Al Jazeera to abdicate its journalistic responsibilities by ignoring numerous red flags that casted doubt on Sly’s credibility. *See supra* at 7–12. Under these circumstances, Plaintiffs are entitled to discovery as to Al Jazeera America’s financial performance and ratings. *See, e.g., Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1135–36 (9th Cir. 2003) (observing that “financial motive . . . is a relevant factor bearing on the actual malice inquiry”); *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992) (evidence of actual malice where “competition with [plaintiff] and the fact that [defendant] was losing business” motivated defendant to conduct product tests without verifying the source of samples); *Valdez v. Maya Pub. Grp. LLC*, 2011 WL 2413510, at *6 (S.D. Cal. June 15, 2011) (“financial motive” is relevant “circumstantial evidence of malice”).

B. Al Jazeera Must Provide Discovery Relating To Its Financial Investment In The Documentary

Plaintiffs also issued the following interrogatory relating to Al Jazeera’s total financial investment in the Documentary:

- Interrogatory No. 39: Identify the total amount of money You spent developing the Documentary, including, but not limited to, all pre-production, production, and post-

⁴ RFP Nos. 105, 107, and 121 reflect narrowed versions of earlier RFPs that were served on Al Jazeera. Notwithstanding Plaintiffs’ narrowing, Al Jazeera has still refused to produce documents in response to these RFPs.

production expenses such as consultant fees, freelancer payments, research and development allowances, per diems, travel expenses, equipment purchases, employee or contractor reimbursements, and any other payments or expenses billed to Story Code INV 15008.

Al Jazeera has refused to respond to this interrogatory. Its refusal is baseless. This information is also probative of Al Jazeera's motivation to publish wholly unsubstantiated allegations about Plaintiffs. Specifically, it is Plaintiffs' reasonable belief that, after sinking hundreds of thousands of dollars into the production and promotion of the Documentary, Al Jazeera was left with no other economic choice but to air the Documentary and hope it would not get sued. That is precisely the type of financial motive that requires discovery. *See Jankovic*, 822 F.3d at 590; *see also Suzuki Motor Corp.*, 330 F.3d at 1135–36.

C. **Al Jazeera Must Provide Discovery Pertaining To The Steps It Took To Promote And Sensationalize The Documentary**

Finally, Plaintiffs have issued the following RFPs relating to Al Jazeera's efforts to promote and sensationalize the Documentary:

- **RFP No. 92**: All Documents and Communications that Refer, Relate, or Pertain to Defendants' payments to Google or other search engine providers to ensure that *The Dark Side* appears as the top link in an internet searches.
- **RFP No. 93**: All Documents and Communications that Refer, Relate, or Pertain to any contact You had with any publicity agents, public relations firms, or publicists concerning *The Dark Side*, both prior to after it aired.
- **RFP No. 94**: All Documents and Communications that Refer, Relate, or Pertain to Defendants' sale of advertisements associated with *The Dark Side*.

Al Jazeera has refused to produce documents in response to these RFPs. Again, its refusal is unjustified. As demonstrated above, Al Jazeera developed a predetermined storyline in December 2014, the goal of which was to out big-name athletes who allegedly used PEDs. *See supra* at 2–6. Al Jazeera then used these athletes in connection with a coordinated marketing campaign designed to drive interest in the Documentary and increase viewership. *See* E-mail

from K. Hirten to P. Charley, dated Dec. 24, 2015 (showing draft Tweets for possible use in connection with promoting the Documentary) (Exhibit 45); *see also* Promotional Facebook Post, available at <https://www.facebook.com/aljazeera/videos/10153945416388690/>. Under these circumstances, Plaintiffs are entitled to discovery on the precise steps Al Jazeera took to promote and sensationalize the Documentary and, in particular, how Al Jazeera intended to and/or did use Plaintiffs' names (among others) in the course of those promotional efforts. *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1085–87 (9th Cir. 2002) (statement by executive instructing staff to “sex up” the magazine “so that ‘people are going to want to pick up the magazine more’” by publishing a misleading cover was motivated “plainly to promote magazine sales” supported actual malice); *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (actual malice inferable from testimony that defendant had a “pecuniary motive” to sell more papers by using defamatory headline).

IV. THE COURT SHOULD ORDER AL JAZEERA TO PRODUCE DOCUMENTS RELATING TO DAMAGES

Al Jazeera has also refused to produce documents relating to Plaintiffs' punitive damages case. In a defamation action, punitive damages can be awarded to a plaintiff upon a “finding of actual malice or wanton conduct.” *Grossman v. Goemans*, 631 F. Supp. 972, 974 (D.D.C. 1986). As the above Background section demonstrates, Plaintiffs will undoubtedly be able to establish (if they have not already) that Al Jazeera published the statements about them with actual malice. Plaintiffs, therefore, propounded several discovery requests that pertain to punitive damages.

One such category of information relates to the profits and revenues Al Jazeera generated from the Documentary:

- RFP No. 94: All Documents and Communications that Refer, Relate, or Pertain to Defendants' sale of advertisements associated with *The Dark Side*.

- Interrogatory No. 38: Identify the total revenue You generated from the Documentary, including, but not limited to, revenues generated from the sale of commercial advertisements (television and online), or from any licensing, partnership, or syndication agreements reached in connection with the Documentary.

Al Jazeera, however, has refused to respond to these requests. There is no basis for its refusal. It is black letter law that a punitive damages award in a defamation case “may take into account any profit made by the defendant as a result of the libel” *Id.* Plaintiffs are, therefore, entitled to discovery pertaining to the amount of money Al Jazeera earned from the Documentary.

Separately, a punitive damages award may also take into account whether the challenged “conduct involved repeated actions or was an isolated incident.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). As such, Plaintiffs issued the following RFP:

- RFP No. 118: Documents sufficient to show any actual or threatened defamation actions against Al Jazeera America or Al Jazeera Media Network since 2010.⁵

Such information is obviously relevant to Plaintiffs’ damages case insofar as it may establish a pattern or practice of reckless journalism on the part of Al Jazeera. Discovery of this sort is routinely permitted. *See King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 9 & n.12 (D.D.C. 1987) (information relating to other complaints about the same conduct alleged by plaintiffs was “obviously relevant” to claims for punitive damages); *see also Phillips v. Hanover Ins. Co.*, 2015 WL 1781873, at *3 (W.D. Okla. Apr. 20, 2015) (documents relevant for punitive damages insofar as they “establish[ed] a pattern” of conduct).

⁵ RFP No. 118 has been significantly narrowed by Plaintiffs from its original form. Despite this narrowing, Al Jazeera still refuses to produce documents in response.

V. THE COURT SHOULD ORDER AL JAZEERA TO PRODUCE DOCUMENTS RELATING TO OTHER SPECIFIC DOCUMENT REQUESTS

In addition to Al Jazeera's categorical refusals, it has also inexplicably refused to produce documents in response to certain narrow and specific RFPs.

A. Al Jazeera Must Produce [REDACTED]

Plaintiffs have requested the Al Jazeera produce [REDACTED]

[REDACTED]. On October 23, 2017, Al Jazeera indicated to Plaintiffs in its Responses and Objections to Plaintiffs' Second Set of Requests for Production that it would produce these documents and communications so long as Plaintiffs agreed to treat this material as "Confidential" under the Protective Order. Although Plaintiffs were under no obligation to do so, Plaintiffs, nevertheless, agreed on December 29, 2017 that they would treat this information as "Confidential." Now, almost four months later, Al Jazeera still has not produced a single document in response to this request, despite its repeated assurances that such documents were forthcoming. As a result of Al Jazeera's failure to produce these documents, Plaintiffs have no choice but to seek an order from the Court requiring Al Jazeera to produce documents [REDACTED]

B. Al Jazeera Must Produce Organization Charts

Plaintiffs have also asked Al Jazeera to produce "[o]rganization charts for Al Jazeera America, Al Jazeera Media Network, and Al Jazeera International USA from 2015 through 2016." RFP No. 1. Al Jazeera has refused to produce documents in response to this request,

which has been significantly narrowed from its original form. This information, however, is necessary for Plaintiffs to understand the reporting structure within Al Jazeera America (from whom Al Jazeera has not collected or produced a single document), as well as within the Al Jazeera Investigative Unit, which is purportedly maintained by both Al Jazeera Media Network and Al Jazeera International (USA). This information will further assist Plaintiffs in identifying the appropriate individuals to depose in this case. Aside from obfuscation, there is simply no basis for Al Jazeera to refuse to produce these few documents in response to RFP No. 1. *See Educ. Fin. Council v. Oberg*, 2010 WL 3719921, at *5 (D.D.C. Mar. 8, 2010); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 219 F.R.D. 12, 17 (D.D.C. 2003).

C. Al Jazeera Must Produce Documents Pertaining To Its Investigation Of Charlie Sly

Plaintiffs have also requested that Al Jazeera produce “[a]ll documents and communications that refer, relate, or pertain to Sly.” RFP No. 14. Al Jazeera has produced some, but not all such documents and communications. Specifically, Al Jazeera has refused to collect and produce documents from its private investigator, Investigative Group International (“IGINT”), who it retained in late-December 2015 to conduct an investigation of Sly after the Documentary aired. Aside from stray e-mails associated with this investigation, Al Jazeera has refused to collect and produce IGINT’s investigative file pertaining to Sly, claiming that it has satisfied its Rule 26 obligations by producing all responsive documents that hit on the search terms that were negotiated between the parties. Al Jazeera’s obligation to collect and produce responsive documents under Rule 26 extends well beyond simply applying negotiated search terms. Indeed, courts have recognized that while search terms have a place in e-discovery, it is unreasonable for parties to rely entirely on such terms in searching for and producing responsive information, particularly where, as here, a known set of documents exists which a party refuses

to produce.⁶ *See F.D.I.C. v. Baldini*, 2014 WL 1302479, at *2 n.1 (S.D. W. Va. Mar. 28, 2014) (“If, however, a producing party is aware of a relevant document that is not triggered by the application of the search terms, the producing party shall produce that document.”); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 190–91 (S.D.N.Y. 2012) (noting the limitations of key word searches); *cf. Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20 (S.D.N.Y. 1995) (“[T]he federal discovery rules place a duty on a party to turn over not only proper materials of which he is aware, but also those of which he reasonably *ought* to have been aware.”). The Court should, therefore, order Al Jazeera to respond fully to RFP No. 14 by collecting and producing IGINT’s investigative findings, reports, and conclusions about Sly—documents that Al Jazeera does not dispute are within its control and not privileged.⁷

D. Al Jazeera Must Produce Defendant Davies’ Personnel File

Plaintiffs have also requested that Al Jazeera produce “Davies’ personnel file.” RFP No. 99. Davies was the narrator of the Documentary, was one of Al Jazeera’s lead investigative reporters, and is a named party in this action. Her personnel file is plainly relevant to Plaintiffs’ claims and central to her credibility. Al Jazeera, however, has refused to provide this basic, relevant, and easily accessible information. Davies’ personnel file will undoubtedly contain her resume, which will show her purported qualifications and experience to lead a high-stakes

⁶ Unlike Al Jazeera, Plaintiffs have, upon request, applied additional search terms and conducted targeted searches (beyond the application of search terms) for specific categories of documents requested by Al Jazeera. Al Jazeera should be required to do the same.

⁷ Although Al Jazeera claims that Plaintiffs should obtain these documents pursuant to a Rule 45 subpoena, Plaintiffs are not required to do so where, as here, there is no dispute that Al Jazeera retained IGINT and, therefore, controls them for purposes of obtaining Sly-related discovery. *See Annunziato v. Collecto, Inc.*, 304 F.R.D. 360, 362 (E.D.N.Y. 2015) (holding that the fact that plaintiff could obtain documents from third party “does not absolve [defendant] from its discovery obligations”); *see also McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 78 (D.D.C. 1999) (control, for purposes of Rule 34, can be “established by virtue of a principal-agent relationship”).

undercover investigation in the United States. Her personnel file will also likely include performance reviews and evaluations pertaining to her work on the Documentary, information which is obviously relevant to her credibility. The Court should, therefore, order Al Jazeera to produce Davies' personnel file in response to RFP No. 99. *See Henderson v. Turner*, 2012 WL 5354616, at *4 (M.D. La. Oct. 29, 2012) (discovery of personnel files permissible where that information "will affect the credibility of the" witness).

VI. THE COURT SHOULD ORDER AL JAZEERA TO PRODUCE TEXT MESSAGES

In August 2017, Al Jazeera indicated in its Initial Disclosures that it intended to rely upon text messages to support its defenses in this action. But after six (6) months of discovery, Al Jazeera had yet to produce a single text message to Plaintiffs. Thus, on February 22, 2018, Plaintiffs raised their concerns about Al Jazeera's lack of text messages in a correspondence and then again in a March 7, 2018 meet and confer. In response, Al Jazeera indicated that text messages would be produced. Almost two (2) months later, Al Jazeera has yet to make good on its promise. At best, Al Jazeera has produced only a handful of text messages from just two (2) of the nine (9) custodians from whom Al Jazeera has collected documents. This is unacceptable. Plaintiffs are entitled to all relevant and responsive text messages sent or received from *all* of Al Jazeera's document custodians. The Court should, therefore, order Al Jazeera to produce text messages from these individuals.

To the extent Al Jazeera contends that all such text messages have been produced, the Court should order Al Jazeera to describe, in detail, the steps it took to preserve its custodians' text messages. Despite repeated requests from Plaintiffs, Al Jazeera refuses to provide any information on this topic. Al Jazeera's refusal to provide this very basic information is particularly troubling because, unlike Plaintiffs who were under no obligation to preserve

potentially relevant documents and communications prior to late December 2015, Al Jazeera *was* under such an obligation, and indeed, independently assumed this obligation months before the Documentary aired. *See* E-mail from J. Young to L. Collins, dated Sept. 14, 2015 (Exhibit 46). Al Jazeera's failure to produce text messages from seven (7) of its custodians suggests that it has not adhered to its preservation obligations.

VII. THE COURT SHOULD ORDER AL JAZEERA TO ADMIT OR DENY PLAINTIFFS' REQUESTS FOR ADMISSIONS

Al Jazeera has also failed to adequately respond to numerous RFAs. *First*, Al Jazeera has failed to adequately respond to the following fifteen (15) RFAs, all of which are straightforward and not in dispute:

- Request for Admission No. 2: Admit that the Documentary included statements accusing Plaintiffs of using Delta-2.
- Request for Admission No. 3: Admit that the statements accusing Plaintiffs of using Delta-2 were made by Sly.
- Request for Admission No. 4: Admit that You did not name or identify any other source in the Documentary who corroborated Sly's statements about Plaintiffs' alleged use of Delta-2.
- Request for Admission No. 8: Admit that Plaintiffs denied taking Delta-2 to You on December 18, 23, and 26, 2015, prior to the Documentary airing.
- Request for Admission No. 9: Admit that Sly recanted his statements that were included in the Documentary prior to Your publication of it.
- Request for Admission No. 10: Admit that before You published the Documentary, You were aware that Sly had recanted his statements.
- Request for Admission No. 11: Admit that on December 28, 2015, Plaintiffs demanded that You retract all of the statements made about them in the Documentary and that you have not done so.
- Request for Admission No. 13: Admit that on or around August 19, 2017, Major League Baseball announced that its investigation of Plaintiffs "did not find any violations" of Major League Baseball's drug policy.

- Request for Admission No. 14: Admit that for over twenty years, perhaps the most serious issue in professional sports has been the widespread use by athletes of performance-enhancing substances such as steroids and human growth hormone, both to improve performance and to recover more quickly from injury.⁸
- Request for Admission No. 15: Admit that doping, as it is commonly known, threatens the integrity of every professional sport.⁹
- Request for Admission No. 16: Admit that doping has been the subject of concern in Presidential speeches and that Congress has investigated use of performance-enhancing substances in sports, and introduced legislation that would mandate drug testing.¹⁰
- Request for Admission No. 17: Admit that on December 27, 2015, in an interview on Al Jazeera, Davies admitted that the Defendants heard from Sly “48 hours ago” and acknowledged that “Charlie Sly now says that anything he said to us wasn’t true.”
- Request for Admission No. 18: Admit that on December 27, 2015, in an interview on Al Jazeera, Davies (after learning that Sly had recanted his statements) said “[y]ou have to say, well, is he lying now, was he lying during day upon day upon day of undercover filming, because obviously the two don’t square.”
- Request for Admission No. 22: Admit that in the Documentary, Davies referred to Sly as a “chemical mastermind” and “someone who’s taken drugs to a new level.”
- Request for Admission No. 28: Admit that during the development and production of the Documentary, Collins worked under the direction and control of Defendants.

Al Jazeera does not dispute that these very basic and straightforward RFAs seek relevant information that could simplify the issues in the case, which is the purpose of an RFA. *See Miller v. Holzmann*, 240 F.R.D. 1, 4 (D.D.C. 2006) (“the purpose of the rule permitting requests for admission” is the “narrowing of issues in dispute”). Instead, Al Jazeera simply refers Plaintiffs to other documents or materials, without admitting or denying the RFA as written. *See*

⁸ Al Jazeera made this statement in its Memorandum of Law in Support of its Motion to Dismiss. *See* ECF No. 41-1 at 5.

⁹ Al Jazeera also made this statement in its Memorandum of Law in Support of its Motion to Dismiss. *See* ECF No. 41-1 at 5–6.

¹⁰ Al Jazeera also made this statement in its Memorandum of Law in Support of its Motion to Dismiss. *See* ECF No. 41-1 at 6.

Excerpt from Al Jazeera’s Responses and Objections to Plaintiffs’ First Set of Requests for Admissions, dated Nov. 14, 2017 at 4–11, 14 (Exhibit 47). It is well settled, however, that one cannot simply refer a party to the contents of other documents or materials instead of responding to an otherwise non-objectionable RFA.¹¹ Rather, a party must admit or deny an otherwise non-objectionable RFA as written and as consistent with Fed. R. Civ. P. 36. *See, e.g., Miller*, 249 F.R.D. at 4 (“The tautological ‘objection’ that the finder of fact can read the document for itself to see if the quote is accurate is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission, unless a legitimate objection can be made or the responding party explains in detail why it can neither admit or deny the request”); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1992 WL 394425, at *6 n.6 (E.D. Pa. Dec. 28, 1992) (concluding that in responding to a request for admission “[a] party is not free to simply refer to other material, but must admit, deny, deny in part and admit in part, or state that it is unable to admit or deny the statement”). The Court should, therefore, order Al Jazeera to admit RFA Nos. 2–4, 8–11, 13–18, 22, and 28.

Second, Al Jazeera has refused to respond to the following RFA on the basis that it “calls for a hypothetical” Ex. 47 at 11.

- Request for Admission No. 19: Admit that if a Major League Baseball player is accused of doping, it can have a negative impact on that player’s professional reputation.

This objection is meritless. As an initial matter, there is nothing “hypothetical” about RFA No. 19, as it relates directly to the issues and facts that are central to this case, including Plaintiffs’ allegations in the first paragraph of their respective complaints that their reputations were impaired by Al Jazeera’s claims that Plaintiffs used Delta-2. *See* ECF No. 9 ¶ 1; *see also* ECF

¹¹ To be clear, Al Jazeera has not specifically objected to *any* of these RFAs on any basis. *See id.*

No. 44 ¶ 1. In any case, an RFA is not objectionable if it asks for an opinion about a hypothetical situation that relates to the facts of the case. *See* Fed. R. Civ. P. 36, cmt. to subdivision (a) (“a request may be made to admit any matter within the scope of Rule 26(b) that relate to statements or *opinions of fact*”) (emphasis added); *see id.* (observing that “an admission on a matter of opinion may facilitate proof or narrow the issues or both”); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 1, 11 (D.D.C. 2011) (observing that “there is nothing in [Rule 36] that precludes a[n] [RFA] because it is asks a party to make an assumption as the premise of the request”); *cf. Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997) (not requiring party to respond to “improper hypothetical factual scenarios unrelated to the facts” of the case). Al Jazeera’s refusal to respond to RFA No. 19 is, therefore, improper, and the Court should order Al Jazeera to respond to it.

Third, Al Jazeera has denied the following RFAs based on hyper-technical and unproductive readings of the requests and corresponding defined terms.

- Request for Admission No. 21: Admit that [Al Jazeera America] ceased its operations on or around April 30, 2016.
- Request for Admission No. 39: Admit that You considered it a network imperative to broadcast the Documentary in 2015.

“A party may not avoid responding [to an RFA] based on technicalities.” *AmeriPride Servs., Inc. v. Valley Indus. Servs., Inc.*, 2011 WL 1321873, at *5 (E.D. Cal. Apr. 1, 2011) (“For example, a party who is unable to agree with the exact wording of the request for admission should agree to an alternate wording or stipulation.” (citing *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 938 (9th Cir. 1994)). “When the purpose and significance of a request are reasonably clear, courts do not permit denials based on an overly-technical reading of the request.” *Id.* (citing *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 580 (9th Cir. 1992)

(“Epistemological doubts speak highly of (party’s) philosophical sophistication, but poorly of its respect for Rule 36(a).”). Yet, that is precisely what Al Jazeera has done with respect to RFA Nos. 21 and 39.

Specifically, Al Jazeera has denied RFA No. 21, which asks it to admit that Al Jazeera America ceased its operations on or around April 30, 2016. Al Jazeera has denied this RFA because, although Al Jazeera America “went off the air on April 30, 2016 [,] . . . [its] ‘operations’ did not cease on that date.” Ltr. from R. Stevens to Plaintiffs at 10, dated Feb. 16, 2018 (Exhibit 48). Al Jazeera has also refused to admit this RFA because it contends Plaintiffs’ definition of Al Jazeera America is too broad. *See id.* But these are precisely the type of hyper-technical objections that Rule 36 proscribes. *See Tequila Centinela, S.A. de C.V. v. Bacardi & Co.*, 242 F.R.D. 1, 14 (D.D.C. 2007) (“[w]hile it is permissible under the rule to qualify answers which are only partly correct, hair-splitting disingenuous distinctions are inappropriate”).

The same is true for Al Jazeera’s denial of RFA No. 39, which asks Al Jazeera to admit that it “considered it a network imperative to broadcast the Documentary in 2015.” Al Jazeera’s denial, however, is flatly contradicted by documents produced by Al Jazeera that demonstrate that it did, in fact, consider it a “network imperative” to broadcast the Documentary in 2015. *See* Ex. 11. Notwithstanding the evidence to the contrary, Al Jazeera has denied RFA No. 39 on the basis that “Defendants AJMN, AJI USA, and AJAM are corporate entities, not persons, and Defendant Davies never formed an opinion as to” whether it was a “network imperative” that the Documentary be broadcast in 2015. Ltr. from T. Toweill to Plaintiffs at 3, dated Mar. 8, 2018 (Exhibit 49). Again, such hyper-technical readings of RFAs, the underlying gist of which are not in dispute, are not permitted under Rule 36. The Court should therefore deem RFA Nos. 21 and 39 admitted. *See Kendrick v. Sullivan*, 1992 WL 119125, at *6 (D.D.C. May 15, 1992) (ruling

that a “particular request should be deemed admitted because the plaintiffs’ answer is inaccurate” where request accurately represented facts and there was no documentary support for answer provided in response).

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant this motion in full.

Date: April 20, 2018

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Certificate of Service

I hereby certify that a redacted copy of Plaintiffs Ryan W. Zimmerman's and Ryan J. Howard's Memorandum of Law in Support of Plaintiffs' Motion to Compel and accompanying redacted exhibits were served upon the following counsel for Defendants Al Jazeera Media Network, Al Jazeera International (USA) LLC (formerly known as Al Jazeera International (USA), Inc.), Al Jazeera America, LLC, and Deborah Davies on April 20, 2018 via CM/ECF:

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