

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ARTHUR ALAN WOLK, ESQUIRE

Plaintiff,

v.

WALTER K. OLSON,  
THEODORE H. FRANK, ESQUIRE,  
DAVID M. NIEPORENT, ESQUIRE,  
THE OVERLAWYERED GROUP And  
OVERLAWYERED.COM

Defendants.

:  
:  
:  
:  
: NO  
:  
: CIVIL ACTION  
:  
: JURY TRIAL DEMANDED  
:  
:  
:  
:  
:

**NOTICE OF REMOVAL**

**TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA:**

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively, the “Removing Defendants”) hereby remove the above-captioned action to the United States District Court for the Eastern District of Pennsylvania from the Court of Common Pleas of Philadelphia County, Pennsylvania, pursuant to 28 U.S.C. §§ 1331, 1441 and 1446.

**I. INTRODUCTION**

1. This matter is a civil action, which was commenced in the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, by Writ of Summons, docketed at May term 2009, No. 01489. A copy of the Writ of Summons is attached hereto as Exhibit “1”

2. The Complaint in this matter was filed on August 17, 2009. A copy of the Complaint is attached hereto as Exhibit "2."

3. The Removing Defendants received notice of the Complaint on August 18, 2009.

4. This Notice of Removal is therefore timely filed because it is within thirty (30) days of such receipt as required by 28 U.S.C. § 1446(b).

5. Defendants wish to exercise their rights under the provisions of 28 U.S.C. §§ 1331, 1332, 1441 and 1446, *et seq*, to remove this action from the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, where the case is currently pending.

6. Venue is proper in this district under 28 U.S.C. § 1446(a) because this is the district and division embracing the Court of Common Pleas of Philadelphia County, Pennsylvania.

7. All pleadings, process, orders and other filings in the state court action are attached to this Notice of Removal as required by 28 U.S.C. § 1446(a). (See Exhibits 3-13).

8. Removing Defendants will promptly file a copy of this Notice of Removal with the Prothonotary of the Court of Common Pleas of Philadelphia County Pennsylvania, and shall give written notice thereof to all Plaintiffs and parties of record as required by 28 U.S.C. § 1446(d).

## **II. BASES FOR REMOVAL**

### **DIVERSITY JURISDICTION**

1. Plaintiff Arthur Alan Wolk, Esquire is a citizen of the Commonwealth of Pennsylvania.

2. Defendant Walter K. Olson is an individual, citizen and resident of the State of New York.

3. Defendant Theodore H. Frank is an individual, citizen and resident of the State of Virginia.

4. Defendant David M. Nieporent is an individual, citizen and resident of the State of New Jersey.

5. Defendant The Overlawyered Group is a New York entity with its principal place of business in the State of New York.

6. Defendant Overlawyered.com is a New York entity with its principal place of business in the State of New York.

7. In the Complaint, Plaintiff seeks compensatory and punitive damages arising from an alleged claim of Defamation, False Light and Intentional Interference with Prospective Contractual Relations, in an amount in excess of the statutory minimum for arbitration.

8. Removal of this action is therefore proper under 28 U.S.C. §§ 1332 and 1441 because none of the parties in interest properly joined and served as defendants are citizens of the Commonwealth of Pennsylvania and the matter in controversy exceeds the sum or value of \$75,000.00 exclusive of interest and costs.

### **FEDERAL QUESTION JURISDICTION**

9. Pursuant to 28 U.S.C. §§ 1331 and 1441, a defendant may remove a case if the plaintiff could have originally brought the action in a federal court as one “arising under the Constitution, laws or treaties of the United States.”

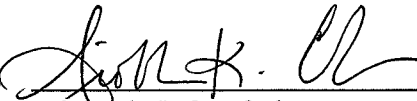
10. For purposes of federal-question jurisdiction, it is now settled that a state-law claim can nonetheless “arise under” federal law. See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 125 S.Ct. 2363, 2367 (2005). In Grable, the United States Supreme Court clarified that “federal question jurisdiction will lie over state-law claims that implicate significant federal issues.” Id. (citing Hopkins v. Walker, 244 U.S. 486, 490-491 (1917)). A “significant federal issue” is one “actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” Id. at 2368.

11. Disposition of Plaintiff’s claims necessarily implicates a significant federal interest because the First Amendment to the United States Constitution establishes whether the statement at issue is defamatory.

12. Furthermore, Plaintiff’s claim is one “which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” See Grable, 125 S. Ct. at 2368. There is no Congressionally-approved balance of federal and state judicial responsibility that would be upset by a federal forum entertaining Plaintiff’s claim.

**WHEREFORE**, the Removing Defendants remove this action from the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, pursuant to 28 U.S.C. §§ 1331, 1332, 1441 and 1446.

WHITE AND WILLIAMS LLP

BY: 

Michael N. Onufrak  
Siobhan K. Cole  
Attorneys for Defendants  
Walter K. Olson,  
Theodore H. Frank, Esquire, David M.  
Nieporent, Esquire, The Overlawyered  
Group, and Overlawyered.com

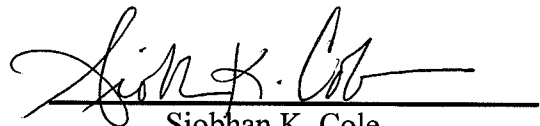
Dated: September 1, 2009

**CERTIFICATE OF SERVICE**

I, Siobhan K. Cole, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Notice of Removal on counsel listed below on September 1, 2009:

Paul R. Rosen, Esquire  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

Andrew J. DeFalco  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

  
Siobhan K. Cole

# **EXHIBIT 1**

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire

Attorney I.D. No. 13396

prosen@lawsgr.com

By: Andrew J. DeFalco, Esquire

Attorney I.D. No. 84360

adefalco@lawsgr.com

Seven Penn Center Plaza

1635 Market Street, 7th Floor

Philadelphia, PA 19103

(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

1710-12 Locust Street

Philadelphia, PA 19103

**THIS IS NOT AN ARBITRATION****: CASE****Plaintiffs****vs.****: AN ASSESSMENT OF DAMAGES IS  
NOT REQUIRED****:****WALTER K. OLSON, ESQUIRE**

875 King Street

Chappaqua, NY 10514-3430

**: CIVIL ACTION – LAW****: NO.:****And****:****THEODORE H. FRANK, ESQUIRE**

901 North Monroe Street, Apt. 1007

Arlington, VA 22201-2353

**JURY TRIAL DEMANDED****: Civil****:****And****:****DAVID M. NIEPORENT, ESQUIRE**

155 Tillotson Road

Fanwood, NJ 07023

**:****:****And****:****THE OVERLAWYERED GROUP**

875 King Street

Chappaqua, NY 10514-3430

**:****:****And****:****OVERLAWYERED.COM**

318 State Street

Santa Barbara, CA 93101-2361

**:****:****And**



JOHN DOE

And

JANE DOE

Defendants

**PRAECIPE TO ISSUE WRIT OF SUMMONS**  
**2L – Libel and Slander**

TO THE PROTHONOTARY:

Kindly issue a Writ of Summons -- Civil Action, to (1) Walter K. Olson, Esquire, (2) Theodore H. Frank, Esquire, (3) David M. Nieporent, Esquire, (4) The Overlawyered Group, and (5) Overlawyered.com, in the above-captioned matter.

Respectfully submitted,



Paul R. Rosen, Esquire  
Andrew J. DeFalco, Esquire  
**SPECTOR GADON & ROSEN, P.C.**  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19103  
(215) 241-8888 (Main)  
(215) 241-8844 (Fax)

**Counsel for Plaintiffs**

Date:

5/12/09



**Commonwealth of Pennsylvania**  
CITY AND COUNTY OF PHILADELPHIA

SUMMONS  
CITACION  
COURT OF COMMON PLEAS

ARTHUR ALAN WOLK, ESQUIRE  
1710-12 Locust Street, Philadelphia, PA 19103

vs.

WALTER K. OLSON, ESQUIRE  
875 King Street, Chappaqua, NY 10514-3430

Term, Yr.

No. \_\_\_\_\_

THEODORE H. FRANK, ESQUIRE  
901 North Monroe Street, Apt. 1007, Arlington, VA 22201-2353

DAVID M. NIEPORENT, ESQUIRE  
155 Tillotson Road, Fanwood, NJ 07023

THE OVERLAWYERED GROUP  
875 King Street, Chappaqua, NY 10514-3430

OVERLAWYERED.COM  
318 State Street, Santa Barbara, CA 93101-2361

To: <sup>(1)</sup> WALTER K. OLSON, ESQUIRE  
875 King Street, Chappaqua, NY 10514-3430

THEODORE H. FRANK, ESQUIRE  
901 North Monroe Street, Apt. 1007, Arlington, VA 22201-2353

DAVID M. NIEPORENT, ESQUIRE  
155 Tillotson Road, Fanwood, NJ 07023

THE OVERLAWYERED GROUP  
875 King Street, Chappaqua, NY 10514-3430

OVERLAWYERED.COM  
318 State Street, Santa Barbara, CA 93101-2361

You are notified that the Plaintiff<sup>(2)</sup>  
Arthur Alan Wolk, Esquire  
*Usted esta avisado que el demandante<sup>(2)</sup>*  
Has (have) commenced an action against you.  
*Ha (han) iniciado una accion en contra suya.*

JOSEPH H. EVERS  
*Prothonotary*

BY \_\_\_\_\_

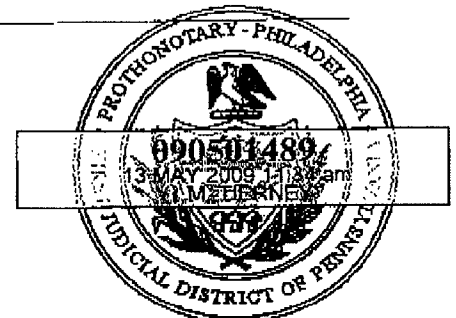
Date \_\_\_\_\_

<sup>(1)</sup>Name(s) of Defendant(s)

<sup>(2)</sup>Name(s) of Plaintiff(s)

463844v1

554199-1



Case ID: 090501489

**COMPLETE LIST OF DEFENDANTS:**

1. OVERLAWYERED.COM  
318 STATE STREET  
SANTA BARBARA CA 93101
2. DAVID M. NIEPORENT  
155 TILLOTSON ROAD  
FANESWOOD NJ 07023
3. WALTER K. OLSON  
875 KING STREET  
CHAPPAQUA NY 10541
4. THEODORE H. FRANK  
901 NORTH MONROE ST. APT 1007  
ARLINGTON VA 22201
5. THE OVERLAWYERED GROUP  
875 KING STREET  
CHAPPAQUA NY 10514

COURT OF COMMON PLEAS

\_\_\_\_\_, 20 \_\_\_\_ No. \_\_\_\_

ARTHUR ALAN WOELK, ESQUIRE  
1710-12 Locust Street, Philadelphia, PA 19103

vs.

WALTER K. OLSON, ESQUIRE  
875 King Street, Chappaqua, NY 10514-3430

THEODORE H. FRANK, ESQUIRE  
901 North Monroe Street, Apt. 1007, Arlington, VA 22201-1353

DAVID M. NIEPorent, ESQUIRE  
155 Tillotson Road, Fanwood, NJ 07023

THE OVERLAWYERED GROUP  
875 King Street, Chappaqua, NY 10514-3430

OVERLAWYERED.COM  
318 State Street, Santa Barbara, CA 93101-2361

SUMMONS

Attorney for Plaintiff:  
Paul R. Rosen, Esquire  
Andrew J. DeFalco, Esquire  
Spector Gadon & Rosen P.C.  
1635 Market Street  
Philadelphia, PA 19103

554199-1

COMPLETE LIST OF DEFENDANTS:

1. OVERLAWYERED.COM  
318 STATE STREET  
SANTA BARBARA CA 93101
2. DAVID M. NIEPORENT  
155 TILLOTSON ROAD  
FANSWOOD NJ 07023
3. WALTER K. OLSON  
875 KING STREET  
CHIAOGAQUA NY 10541
4. THEODORE H. FRANK  
901 NORTH MONROE ST. APT 1007  
ARLINGTON VA 22201
5. THE OVERLAWYERED GROUP  
875 KING STREET  
CHAPPAQUA NY 10514

## **EXHIBIT 2**

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire  
Attorney I.D. No. 13396  
prosen@lawsgr.com  
By: Andrew J. DeFalco, Esquire  
Attorney I.D. No. 84360  
adefalco@lawsgr.com  
Seven Penn Center Plaza  
1635 Market Street, 7th Floor  
Philadelphia, PA 19103  
(215) 241-8888

Attorneys for Plaintiff



**ARTHUR ALAN WOLK, ESQUIRE :**

**Plaintiff :**

**vs. :**

**WALTER K. OLSON, ESQUIRE  
THEODORE H. FRANK, ESQUIRE  
DAVID M. NIEPORENT, ESQUIRE  
THE OVERLAWYERED GROUP  
And OVERLAWYERED.COM**

**Defendants**

**CIVIL ACTION – LAW**

**MAY TERM, 2009**

**NO.: 1489**

**JURY TRIAL DEMANDED**

**COMPLAINT – CIVIL ACTION**  
**DEFAMATION, LIBEL AND SLANDER – 2L**

Plaintiff Arthur Alan Wolk, Esquire (“Wolk” or “Plaintiff”), by and through his attorneys, Paul R. Rosen, Esquire, Andrew J. DeFalco, Esquire and Spector Gadon & Rosen, P.C., hereby files this Complaint, and in support thereof, avers the following:

**PRELIMINARY STATEMENT**

1. The Constitution of the Commonwealth of Pennsylvania places reputational interests on the “highest plane,” the same level as those interests pertaining to life, liberty and property. In Pennsylvania, the right of any person to the protection of his own reputation from unjustified invasion and wrongful hurt reflects Pennsylvania’s basic concept of the essential dignity and worth of every human being.

2. In violation of these fundamental principles, the individual Defendants, Walter K. Olson, Esquire (“Olson”), Theodore H. Frank, Esquire (“Frank”), and David Nieporent, Esquire (“Nieporent”), who are themselves lawyers, and their entity, “Overlawyered.com,” which is funded by trade organizations representing the aircraft industry and dedicated to permitting aircraft manufacturers to avoid liability for defective and unsafe products, intentionally and maliciously posted a defamatory article on their popular and widely read website, Overlawyered.com, which falsely accused the Plaintiff, a world-renowned attorney, of selling-out his client in obtaining a settlement, for his own personal benefit, at the expense and to the detriment of his client. In addition to being outrageously false, an accusation of selling out a client in such a manner, on a website that is read daily by tens of thousands of lawyers and potential clients, is just about the worst thing that can be said about an attorney, and was intended to, and did, have the effect of damaging Wolk’s reputation in the legal community in Philadelphia and beyond.

3. Accordingly, Wolk seeks damages from the Defendants under theories of defamation and false-light invasion of privacy.

#### **THE PARTIES**

4. The Plaintiff, Wolk, is an individual, citizen and resident of the Commonwealth of Pennsylvania, and an attorney licensed to practice law in the Commonwealth of Pennsylvania. Wolk has a business address located at 1710-12 Locust Street, Philadelphia, Pennsylvania.

5. Defendant Walter K. Olson, Esquire is an individual, citizen and resident of the State of New York, with an address located at 875 King Street, Chappaqua, New York 10514-3430.



6. Defendant Theodore H. Frank, Esquire is an individual, citizen and resident of the State of Virginia, with an address located at 901 North Monroe Street, Apartment 1007, Arlington, Virginia 22201-2353.

7. Defendant David M. Nieporent, Esquire, is an individual, citizen and resident of the State of New Jersey, with an address located at 155 Tillotson Road, Fanwood, New Jersey 07023.

8. Defendant The Overlawyered Group is a New York business entity with its home office and principal place of business located at 875 King Street, Chappaqua, New York 10514-3430.

9. Defendant Overlawyered.com is a California business entity with its home office and principal place of business located at 318 State Street, Santa Barbara, California 93101-2361.

#### **JURISDICTION AND VENUE**

10. Subject matter jurisdiction over the Defendants with respect to these claims and causes of action is conferred upon this Court pursuant to 42 Pa.C.S. § 931 and 42 Pa.C.S.A. § 8341 *et seq.*

11. This Court has personal jurisdiction over the Defendants under 42 Pa.C.S. § 5322 (a) - (b), because the Defendants, jointly and severally, do business in this Commonwealth, committed intentional torts against the Defendant, a Philadelphia resident, where the brunt of the harm was felt by the Plaintiff in Philadelphia, and the Defendants expressly aimed their tortious conduct at Pennsylvania such that Pennsylvania is the focal point of the tortious activity.

12. Venue is proper in this Court pursuant to Pennsylvania Rule of Civil Procedure 1006 (a), because Plaintiff's offices are headquartered in Philadelphia County, and the conduct at issue resulted in damages here in Philadelphia County.

### **FACTS**

#### **A. The Plaintiff**

13. Wolk is perhaps the most prominent aviation attorney in the United States of America. Wolk has practiced aviation law for over 35 years. During the last decade alone, Wolk has generated almost \$1 billion in verdicts and settlements for injured victims of aircraft-related occurrences.

14. For over 30 years, Wolk has been an aircraft pilot, and holds the Federal Aviation Administration's highest pilot's certificate – Airline Transport Pilot (ATP) – for multi-engine land engine and sea aircraft, and single-engine land and sea airplanes.

15. Wolk is also the past editor of Lawyer Pilots Bar Association Journal and the past legal editor for Business and Commercial Aviation Magazine. Wolk is regularly quoted and consulted by aviation writers, is a frequent contributor to The Aviation Consumer, Aviation Safety, and other aviation publications, and has appeared as an on-air aviation expert for ABC's "Nightline", the CBS Evening News, NBC, CNN, the BBC and numerous other television and radio stations around the world.

16. Wolk is nationally known to be a zealous advocate for his clients, one who will go to the ends of the earth to secure for them a just result in litigation. While accusations come and go in the legal profession, Wolk has never been accused of failing to zealously represent any client, or selling out his client to benefit himself financially. Such an accusation, to a lawyer practicing in Wolk's area of specialty, would have an

enormous negative impact, as trust between an attorney and client, and a belief that an attorney will zealously represent the client, is particularly essential to Wolk's practice.

**B. Overlawyered.com**

17. In 1999, the "Overlawyered.com" website was created. The Overlawyered.com website describes itself as "the oldest law blog."

18. Olson, a licensed attorney, founded Overlawyered.com, and is its predominant contributor and editor. Olson has been, and remains, a Senior Fellow at the Manhattan Institute, and is the author of several books critical of the United States litigation system.

19. Frank is also a licensed attorney, and was formerly a practicing attorney associated with O'Melveny and Myers, one of the largest and most prominent law firms in the United States. Frank has regularly contributed to Overlawyered.com since 2003. At all times material, Frank has been a resident fellow at the American Enterprise Institute, and the director of the American Enterprise Institute Legal Center.

20. Neiporent is a practicing attorney in the State of New Jersey, and has been a regular contributor to Overlawyered.com during the relevant time period.

21. On the website, Overlawyered.com describes itself as follows:

Overlawyered.com explores an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public's expense, and resists even modest efforts at reform and accountability.

22. Since its inception, Overlawyered.com has attracted a huge following that not only includes tens of thousands of lawyers from every state in this Country, but also includes persons from other professions, such as doctors, and a large overseas following.

At one point, Olson boasted about his readership: “My readership has a large following among lawyers, but I’ve been surprised to find that a lot of doctors are reading it, as are a lot of people from other countries.”

23. In fact, in an article written by Law.com, Olson advised that Overlawyered.com is one of the most popular “blog” websites in the country, “regularly surpassing 9,000 unique daily visitors.”

24. Olson has also boasted that Overlawyered.com is #298 on the list of most popular blog websites, and #4 on the list of most popular legal blogs. Further, Olson boasts that even these figures vastly understate the actual readership of Overlawyered.com because it has many RSS readers, and “several thousand people who receive Overlawyered through mailing lists.”

25. Wolk has been a favorite target of criticism and ridicule from Overlawyered.com. For example, after Wolk secured a a \$480 million verdict against Cessna arising from an aircraft accident, a different website, AV Web, issued an article critical of Wolk, for which AV Web eventually issued a retraction and apologized. Notwithstanding, and despite AV Web’s admission that its article was false, Overlawyered.com and Olson posted a gratuitous article ridiculing Wolk and criticizing AV Web’s retraction:

by Walter Olson on September 20, 2002

**September 16-17 – Free speech & web litigation:**  
**AVweb capitulates to defamation suit.** Which reminds us of an update we should have posted earlier: readers will recall the defamation lawsuits filed last year by aviation plaintiff’s attorney Arthur Alan Wolk against two editors and four subscribers of the aviation-news website AVweb, all of whom had sharply criticized him after he won a \$480 million verdict against Cessna (Sept. 7 and Oct. 12-14,

2001). On July 19 the website rendered to Wolk a thoroughly abject capitulation and apology in connection with his agreement to drop his suit against it. Its statement to readers (link now dead) includes a number of passages which deserve to be read with great care by those to whom the Internet still represents some sort of idealized sanctuary for untrammelled discussion [*italicized comments ours*]: “One of Mr. Wolk’s complaints was that we did not supervise our chat room to prevent libelous comments about him being published by our subscribers. We have corrected that. Another of Mr. Wolk’s complaints was that our characterizations instigated some of our subscribers to libel him. We will no longer characterize matters in such a way as to bring apparent discredit upon anyone.” [*The consequences of such a formula for the future of hard-hitting journalism can be imagined. And the mind reels at what is involved in the task of avoiding all characterizations which, whether or not libelous themselves, might instigate others to commit that offense. -- ed.*]

“While the defense of Mr. Wolk’s lawsuit has been expensive, he nonetheless has been gracious enough to settle with us for a payment to charity. In fact, even in settlement negotiations, when there was a demand for money, it was always to be contributed to charity, none for Mr. Wolk himself. He steadfastly insisted that his lawsuit was not about money and we have come to believe him.” [*Why would it be thought surprising that the aim of such a lawsuit might be more to silence certain critics than to obtain cash from them? -- ed.*]

As we say, read the whole thing, which lays out at considerable length Mr. Wolk’s reasons for considering himself libeled. AVweb then goes on to publish a sort of protracted advertisement for Mr. Wolk’s services, in the form of tributes and testimonials from grateful clients he has represented in litigation, as well as others. Also included is the painfully self-abasing apology of one of the reader-posters who found himself individually sued by the powerful lawyer — outgunned in every way, and facing who knows what sort of prolonged personal exposure to the cost of litigation. Among the lessons many observers will draw, we think, will be the old one: watch what you say about lawyers. **(DURABLE LINK)**

26. Thus, despite AV Web's admission that the facts it printed were inaccurate, Overlawyered.com took it upon itself to criticize AV Web's retraction and Wolk. This only demonstrates the animosity and malice directed towards Wolk by Olson, Frank, Nieporent and Overlawyered.com.

27. At all times material, the Defendants in this case held themselves out, and continue to hold themselves out, as being persons with superior knowledge and access to information respecting problems with the practice of law in this Country, and unethical practitioners of law in this Country. Therefore, any decision by the Defendants to brand a legal practitioner as unethical or willing to sell-out his client is treated as true, even if made out of personal animosity, ill-will, jealousy, bias or prejudice, and taken by the recipient to imply the existence of undisclosed facts resulting in a purportedly informed assessment by the Defendants.

28. Moreover, while the Defendants hold themselves out as being unbiased "scholars" of the legal profession, in fact, the Defendants are employed by, and funded by, organizations dedicated to reducing liability to victims for personal injuries, including, but not limited to, the aircraft industry. Therefore, without actually disclosing this to the public, in drafting and disseminating articles critical of attorneys who represent victims, the Defendants' columns are merely shilling for aircraft companies and other sources of funding under the guise of scholarly writing, and attempting to turn public opinion against victims.

**C. The Taylor Case**

29. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a case venued in the United States District Court for the Northern District of

Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the “Taylor Case”).

30. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk’s conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct.

31. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order.

32. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional, unethical or wrongful conduct in the Taylor Case. Wolk did not, in fact, commit any unprofessional, unethical or wrongful conduct in the Taylor case, but instead represented his client zealously with an extraordinarily high degree of professionalism and dedication worthy of his reputation.

33. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the “Wolk Case”).

34. The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

**D. The Defamatory Frank Article**

35. As discussed above, although they do not disclose the sources of their funding or affiliations on the website, the Defendants, and their employers such as the American Enterprise Institute, are funded by aircraft engine manufacturers and other organizations, and seek to turn public opinion against victims and those who represent victims to save money for their patrons.

36. Wolk is perhaps the most prominent and important attorney who represents victims of aircraft accidents, and is therefore a major target of the aircraft industry. It benefits the aircraft manufacturers to attempt to besmirch Wolk's name, to coerce clients not to seek Wolk's representation, because Wolk has been so successful in obtaining compensation to injured victims.

37. In conjunction with this mission, on or about April 8, 2007, Defendant Frank, writing for "Overlawyered.com," wrote an article relating to the Wolk Case and the Taylor Case (the "Frank Article"). Upon information and belief, Defendants Olson and Nieporent edited and approved of this article.

38. After a brief reference to the Wolk Case, the Frank Article accused Wolk of "selling out" his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties. The text of the Frank Article is as follows:

Arthur Alan Wolk v. Teledyne Industries, Inc.

by Ted Frank on April 8, 2007



Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other attorney for defamation. No dice, but even this ludicrous suit does not result in sanctions. [Beck/Herrmann]

Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, *Taylor v. Teledyne*, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), *aff'd* in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).

We've earlier reported on Mr. Wolk for his lawsuits against commenters at an aviation website that criticized him: Sep. 16-17, 2002. As the Taylor opinion notes, Wolk also threatened to sue the federal judge in that case. He also filed what the Eleventh Circuit called a frivolous mandamus petition.

(See Frank Article, attached as Exhibit "A").

39. The Frank Article was received by the tens of thousands of readers of Overlawyered.com, including the thousands of people who read Overlawyered.com on the internet, and the thousands more who receive the Overlawyered.com newsletters, the majority of whom are practicing attorneys in Pennsylvania and in the United States.

40. Considering the Frank Article in context, and in particular, the assertion that Wolk "sold out" his client for his own personal benefit, with an eye toward the effect

the Frank Article was fairly calculated to produce, and the impression it would naturally engender in the minds of the average persons among whom it was intended to circulate, it is clear that the Frank Article is defamatory.

41. In fact, the Frank Article is defamatory *per se* because it was intended to, and did, blacken Wolk's reputation and expose him to public hatred, contempt and ridicule, and injure him in his business and profession, by ascribing to Wolk conduct and characteristics that would adversely affect his fitness for the proper conduct of his lawful business as an attorney at law.

42. Further, the Frank Article is not merely "opinion," but it purports to be an analysis of a case and an attorney's conduct by several persons, Frank, Olson and Nieporent, who hold themselves out as having superior knowledge of the legal field and of attorney misconduct, such that the Frank Article implies undisclosed, false and defamatory facts – namely, that Frank, Olson, Nieporent and Overlawyered.com, as a result of their investigation and analysis, had determined that Wolk acted improperly and unethically, and "sold out" his client for his own personal and professional gain.

43. In fact, the implication that Wolk had sold out his client for his own personal and professional gain was false.

44. When the Frank Article was disseminated, Frank, Olson, Nieporent and Overlawyered.com knew that it was false, knew that they had no basis to assert that Wolk "sold out" his client for his own personal and professional gain, and knew that the settlement that was achieved in the Taylor case was a remarkably good settlement which exceeded the value of the case placed upon it by a mediator. Notwithstanding, due to their personal animosity and ill-will towards Wolk, with actual malice, and with actual

knowledge that their statements in the Frank Article were false, the Defendants disseminated the Frank Article.

45. As a direct and proximate result of the false and malicious Frank Article, Wolk has sustained damages that include, but are not limited to, pecunairy loss, impairment of reputation and standing in the legal community, personal humiliation, and mental anguish and suffering.

**E. Wolk Learns Of The Defamatory Frank Article In April 2009**

46. In April 2009, Wolk attended a seminar dealing with, *inter alia*, client relationships. During this seminar, the speaker advised the listeners that clients were becoming increasingly media and internet savvy, such that, prior to engaging an attorney to represent him in a lawsuit, many clients will perform a “Google” search on the attorney as part of due dilligence. Therefore, the speaker advised Wolk and others that it was important to ascertain what a “Google” search would reveal, and warned that there could be inaccurate, unfair, or false information on the internet that would be revealed through a “Google” search. For this reason, the speaker recommended that all listeners perform a “Google” search on themselves.

47. That night, Wolk returned to his home and, for the first time, performed a “Google” search on himself, and saw the defamatory Frank Artcile for the first time. Wolk was outraged and dismayed.

48. Thus, Wolk immediately sent a April 9, 2009 email to Frank. This email stated that Wolk never sold out his clients, pointed out that Frank had miscast important facts of the case, and then stated:

I demand that you immediately remove this and every other article about me from your website. What you wrote is

false, shows a complete disregard for the facts and malice, an intent to harm me when you couldn't beat me in court and an effort to destroy the perception of potential clients who would read this and fail to hire me. You have accused me of unethical conduct, fraud and the commission of a crime, none of which is true. This is clearly the reason I have found it extremely difficult to gain new business. You will soon find the same.

(See April 9, 2009 email, attached as Exhibit "B").

49. The Defendants refused to retract the defamatory Frank Article, which still remains accessible on the Overlawyered.com website.

50. In fact, Wolk has information that potential clients had, in fact, viewed the Overlawyered.com website and the defamatory Frank Article, and viewed the accusations that Wolk is unethical, that he cheats and sells-out his clients, and the other false accusations, and decided not to engage Wolk as an attorney, despite his track record and prominence, solely on the basis of the Frank Article and the false statements made therein.

51. Thus, the false Frank Article has had an enormous negative impact on Wolk as a legal practitioner based primarily in Philadelphia, Pennsylvania.

**COUNT I**  
**DEFAMATION**  
**PLAINTIFF VS. DEFENDANTS**

52. The Plaintiff incorporates by reference the preceding Paragraphs of this Complaint.

53. The Defendants published the Frank Article, and the Frank Article was disseminated to the thousands of readers who read Overlawyered.com, as well as those who receive written copies of Overlawyered.com through the mail including attorneys

and other persons in Pennsylvania. The Frank Article presently remains accessible on the Overlawyered.com website.

54. The Frank Article defamed the Plaintiff because, *inter alia*, it ascribed conduct and character to the Plaintiff that would adversely affect his fitness for the proper conduct of his lawful profession, blackened his reputation, exposed him to public contempt and ridicule, injured him in his business or profession, lowered him in the estimation of the community, and deterred third persons from associating and/or dealing with him.

55. The Frank Article expressly applied to the Plaintiff.

56. The Frank Article's defamatory meaning, and its application to the Plaintiff, was understood by the thousands of ordinary and reasonable readers of Overlawyered.com.

57. As a result of the Frank Article, the Plaintiff suffered special harm in the form of severe monetary loss, economic and consequential damages discussed above, as well as severe and irreparable impairment of his reputation and credibility in the community generally, and personal humiliation, mental anguish and mental suffering.

58. The Frank Article was false. The false and defamatory Frank Article was made with actual malice by Frank, Olson, Nieporent, and Overlawyered.com, because Frank, Olson, Nieporent, and Overlawyered.com had actual knowledge of the falsity of the Frank Article when it was made, and/or a reckless disregard for the falsity of the Frank Article when it was made. Indeed, Frank, Olson, Nieporent, and Overlawyered.com entertained serious doubts as to the truth of the Frank Article at the time it was disseminated. Further, when making the false and defamatory Frank Article ,

Frank, Olson, Nieporent, and Overlawyered.com were motivated by personal animosity and ill-will towards the Plaintiff, and published the Frank Article with the intent to harm the Plaintiff and destroy his career.

59. The Frank Article was not subject to any recognized privilege, and/or to the extent that any privilege existed or could exist, Frank, Olson, Nieporent, and Overlawyered.com abused any such privilege.

60. Due to the willful, wanton, intentional and malicious nature of the Defendants' conduct, Plaintiff also demands an award of punitive damages in an amount to be determined at trial.

WHEREFORE, Plaintiff Arthur Alan Wolk respectfully requests that the Court enter judgment in his favor and against the Defendants, award the Plaintiff Arthur Alan Wolk compensatory and punitive damages in an amount in excess of the statutory minimum for arbitration, and grant such other and further relief as this Court deems just and appropriate.

**COUNT II**  
**FALSE LIGHT**  
**PLAINTIFF VS. DEFENDANTS**

61. The Plaintiff incorporates by reference the preceding Paragraphs of this Complaint.

62. By disseminating the Frank Article, the Defendants gave publicity to a matter concerning the Plaintiff that placed the Plaintiff before the public in a false light.

63. The Frank Article was disseminated by the Defendants and communicated to the public at large, and it was received by so many persons that the matter must be regarded as public knowledge.

64. The Frank Article included major misrepresentations of the Plaintiff's character, conduct and activities.

65. The Frank Article is highly offensive to the Plaintiff, as it would be to any reasonable person.

66. The misrepresentations contained in the Frank Article, concerning the (alleged and false) assertion that the Plaintiff sold out his client, and accepted a lesser settlement for personal reasons to the detriment of his client, are not of any legitimate public concern.

67. The false Frank Article was disseminated by the Defendants with the knowledge and/or reckless disregard for the false light in which the Plaintiff would be portrayed.

68. Further, the false Frank Article was made by the Defendants with actual malice, because the Defendants had actual knowledge of the falsity of the Frank Article when it was made, and/or a reckless disregard for the falsity of the Frank Article when it was made. Indeed, the Defendants entertained serious doubts as to the truth of the Frank Article at the time it was disseminated. Further, when disseminating the false Frank Article, the Defendants were motivated by ill-will and personal animus towards the Plaintiff, and published the Frank Article with the intent to harm the Plaintiff and destroy his reputation.

69. The Frank Article was disseminated to the public at large through the internet and mailings, and is continuously available to the general public on the Overlawyered.com website, and elsewhere on the worldwide web.

70. As a result of the Frank Article, the Plaintiff suffered severe harm to his interest in privacy, as well as significant damages in the form of monetary loss, economic and consequential damages discussed above, severe and irreparable impairment of his reputation and credibility in the community generally, and personal humiliation, mental anguish and mental suffering.

WHEREFORE, Plaintiff Arthur Alan Wolk respectfully requests that the Court enter judgment in his favor and against the Defendants, award the Plaintiff Arthur Alan Wolk compensatory and punitive damages in an amount in excess of the statutory minimum for arbitration, and grant such other and further relief as this Court deems just and appropriate.

**COUNT III**  
**INTENTIONAL INTERFERENCE WITH**  
**PROSPECTIVE CONTRACTUAL RELATIONS**  
**PLAINTIFF VS. DEFENDANTS**

71. The Plaintiff incorporates by reference the preceding Paragraphs of this Complaint.

72. As set forth above, Wolk is one of the world's most prominent aviation attorneys, and one of the most successful attorneys ever in this country representing victims of aircraft accidents. Wolk is also widely known through his appearances in the media, as a commentator on aircraft safety and accidents.

73. Since the dissemination of the false Frank Article, and following his becoming aware of the false Frank Article, Wolk has become aware of several potential victims who intended to engage Wolk as their counsel to represent them, and would have in fact represented him but for their due diligence on him, which included reference to



the defamatory and false Frank Article. As to these persons, Wolk can establish a prospective contractual relationship.

74. As agents of the aircraft industry, the Defendants in this case acted with the purpose and intent to harm Wolk in Pennsylvania, where his home office exists, by spreading false and defamatory statements about him, and accusing him of selling out his client, in order to prevent Wolk from representing clients who are victims of aircraft accidents.

75. The Defendants in this case acted without privilege or justification.

76. As a result of the Defendants' conduct, Wolk has sustained actual legal damage.

WHEREFORE, Plaintiff Arthur Alan Wolk respectfully requests that the Court enter judgment in his favor and against the Defendants, award the Plaintiff Arthur Alan Wolk compensatory and punitive damages in an amount in excess of the statutory minimum for arbitration, and grant such other and further relief as this Court deems just and appropriate.

Respectfully submitted,



---

Paul R. Rosen, Esquire  
Andrew J. DeFalco, Esquire  
**SPECTOR GADON & ROSEN, P.C.**  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19103  
(215) 241-8888 (Main)  
(215) 241-8844 (Fax)

Counsel for Plaintiff

Dated: August 17, 2009

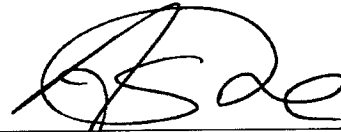
**VERIFICATION**

I, Andrew J. DeFalco, Esquire, hereby verify that I am counsel for Plaintiff in the within action and, as such, I am authorized to make this Verification on his behalf.

The statements made in the foregoing Complaint are true to the best of my personal knowledge, information and belief, based on my knowledge of this litigation.

I understand that the statements made therein are subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

Date: August 17, 2008

A handwritten signature in black ink, appearing to read 'A. DeFalco', is written over a horizontal line.

Andrew J. DeFalco

## EXHIBIT A

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## [Overlawyered](#)

Chronicling the high cost of our legal system

# Arthur Alan Wolk v. Teledyne Industries, Inc.

by [Ted Frank](#) on April 8, 2007

Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other attorney for defamation. No dice, but even this ludicrous suit does not result in sanctions. [[Beck/Herrmann](#)]

Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, *Taylor v. Teledyne*, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), *aff'd* in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).

We've earlier reported on Mr. Wolk for his lawsuits against commenters at an aviation website that criticized him: [Sep. 16-17, 2002](#). As the *Taylor* opinion notes, Wolk also threatened to sue the federal judge in that case. He also filed what the Eleventh Circuit called a [frivolous mandamus petition](#).

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Tagged as: [libel](#) [slander](#) and [defamation](#)

**EXHIBIT B**

**Arthur Alan Wolk**

---

**From:** Arthur Alan Wolk  
**Sent:** Thursday, April 09, 2009 9:29 PM  
**To:** tedfrank@gmail.com  
**Cc:** Paul Rosen; Walter DeForest; Cheryl DeLisle; Bradley J. Stoll  
**Subject:** Your false and disparaging statements on the website Overlawyered.com

Mr. Frank:

I have just seen the false and disparaging statements made about on your web site or better said the web said managed, supervised and promoted by those who would deny consumers all rights to sue companies that manufacture defective products, the American Enterprise Institute, a web site run by and for defense lawyers and manufacturers and which by your lead at least made absolutely no effort to investigate the facts.

You don't mention the fact that for example you worked for at least two defense firms against which I have been extremely successful thus your pique over me appears to be related more to my beating your clients backsides than any umbrage over some undefined legal transgression. Absent from your bio is any description of any success anywhere on any subject and with any law firm of substance so it therefore must be easy for you to tear down someone who has a had a forty year success record against the likes of you. Absent from your tirade is my forty years of success and my hundreds and hundreds of cases with not a critical word by a lawyer or a judge.

But more important to me is your false commentary on the Taylor case and your outright libelous statements that make me look like I sold out my clients in that case for a retraction of a false discovery order. Had you investigated the facts you would have seen that it was my firm that made complete discovery and the defense none. In fact it was because the court looked so foolish with nothing to back up her vitriol that she vacated that order and for no other reason.

I have never sold out my clients ever and never will but I will fight to protect my name against people like you who hide behind some phony title like "scholar" bestowed upon yourself. What did the Taylor case settle for? Who were the heirs and what were their damages? What was the liability defense and what were the facts against Teledyne. How many plaintiffs' death verdicts had ever been allowed out of that judge's courtroom? What were the damages recoverable under Georgia law? What considerations as to liability and damages did I make before recommending settlement. What potential for proofs of contributory conduct or even sole causation by immune persons such as the pilots' employer were there as in bad maintenance? What steps did I take to ensure that the settlement was fair and reasonable and like other settlements or even better for similar circumstances in Georgia? Did I contact other Georgia lawyers for their views?

The 11<sup>th</sup> circuit affirmed the trial court's decision not to hold be in contempt, not to award counsel fees, and not to reinstate the false discovery order. That affirmance had nothing to do with the underlying Taylor case at all so you even got that wrong.

Kindly provide full and complete answers to these questions in writing within twenty-four hours and yes I will sue you for defamation. I know you never contacted me to get answers to these questions so let's learn whom you spoke to.

I will check to see if your late firms represented Teledyne in anything. I know Kirtland and Ellis represented Pratt and Whitney unsuccessfully against me at least once and maybe more. I am attempting to see if you were involved in that debacle.

You see Mr. Frank, if you are going to libel someone you need to understand the facts first and the law and also understand the person you are libeling. This was a big mistake.

By copy of this e-mail I am requesting my counsel, Paul Rosen to immediately institute a lawsuit against you and your organization. When we learn who your contributors are we will sue each and every one of them against whom I have had cases or who motivated you to continue the defense generated effort to damage my reputation.

Also by copy of this e-mail I am requesting counsel for Teledyne to set you straight because if I find they had anything to do with these lies I'll sue them too.

I demand that you immediately remove this and every other article about me from your website. What you wrote is false, shows a complete disregard for the facts and malice, an intent to harm me when you couldn't beat me in court and an effort to destroy the perception of potential clients who would read this and fail to hire me. You have accused me of unethical conduct, fraud and the commission of a crime none of which is true. This is clearly the reason I have found it extremely difficult to gain new business. You will soon find the same.

Arthur Alan Wolk

## **EXHIBIT 3**



**WHITE AND WILLIAMS LLP**

BY: Michael N. Onufrak

Identification No(s). 43064

1650 Market Street

One Liberty Place, Suite 1800

Philadelphia, PA 19103-7395

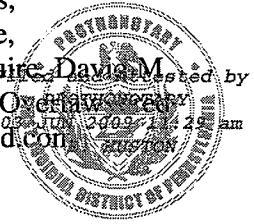
215.864.7174

onufrakm@whiteandwilliams.com

Attorneys for Defendants,

Walter K. Olson, Esquire,

Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com



ARTHUR ALAN WOLK, ESQUIRE

Plaintiff,

v.

WALTER K. OLSON, ESQUIRE,  
THEODORE H. FRANK, ESQUIRE,  
DAVID M. NIEPORENT, ESQUIRE,  
THE OVERLAWYERED GROUP,  
OVERLAWYERED.COM,  
JOHN DOE and JANE DOE

Defendants.

: PHILADELPHIA COUNTY  
: COURT OF COMMON PLEAS

: MAY TERM 2009

: NO. 1489

: CIVIL ACTION – LAW

: JURY TRIAL DEMANDED

**ENTRY OF APPEARANCE**

Kindly enter my appearance on behalf of Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com in the above matter.

WHITE AND WILLIAMS LLP

BY: s/Michael N. Onufrak

Michael N. Onufrak

Attorneys for Defendants,

Walter K. Olson, Esquire,

Theodore H. Frank, Esquire, David M.

Nieporent, Esquire, The Overlawyered

Group, and Overlawyered.com

Dated: June 3, 2009

**CERTIFICATE OF SERVICE**

I, Michael N. Onufrak, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Entry of Appearance on counsel listed below on June 3, 2009:

Paul R. Rosen, Esquire  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

s/Michael N. Onufrak

## **EXHIBIT 4**

**WHITE AND WILLIAMS LLP**

BY: Michael N. Onufrak

Identification No(s). 43064

1650 Market Street

One Liberty Place, Suite 1800

Philadelphia, PA 19103-7395

215.864.7174

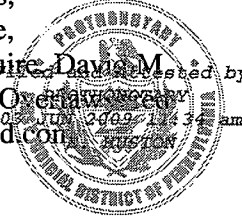
onufrakm@whiteandwilliams.com

Attorneys for Defendants,

Walter K. Olson, Esquire,

Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com

02 JUL 2009 1:43 am



ARTHUR ALAN WOLK, ESQUIRE

Plaintiff,

v.

WALTER K. OLSON, ESQUIRE,  
THEODORE H. FRANK, ESQUIRE,  
DAVID M. NIEPORENT, ESQUIRE,  
THE OVERLAWYERED GROUP,  
OVERLAWYERED.COM,  
JOHN DOE and JANE DOE

Defendants.

: PHILADELPHIA COUNTY  
: COURT OF COMMON PLEAS

: MAY TERM 2009

: NO. 1489

: CIVIL ACTION – LAW

: JURY TRIAL DEMANDED

**PRAECIPE FOR RULE TO FILE COMPLAINT**

TO THE PROTHONOTARY:

Kindly enter a Rule upon plaintiff to file a Complaint within 20 days hereof or suffer the entry of a Judgment Non Pros.

WHITE AND WILLIAMS LLP

BY: s/Michael N. Onufrak

Michael N. Onufrak

Attorneys for Defendants,

Walter K. Olson, Esquire,

Theodore H. Frank, Esquire, David M.

Nieporent, Esquire, The Overlawyered

Group, and Overlawyered.com

**RULE TO FILE COMPLAINT**

AND NOW, this 3<sup>rd</sup> day of June 2009, a Rule is hereby granted upon plaintiff to file a Complaint herein within 20 days after service hereof or suffer the entry of Judgment of Non Pros.

\_\_\_\_\_  
Prothonotary

### **CERTIFICATE OF SERVICE**

I, Michael N. Onufrak, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Praecipe for Rule to File Complaint on counsel listed below this 3<sup>rd</sup> day of June 2009.

Paul R. Rosen, Esquire  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

s/Michael N. Onufrak

## **EXHIBIT 5**

ARTHUR ALAN WOLK, ESQUIRE	:	CIVIL ACTION – LAW
Plaintiff	:	
vs.	:	MAY TERM, 2009
	:	
WALTER K. OLSON, ESQUIRE	:	NO.: 1489
THEODORE H. FRANK, ESQUIRE	:	
DAVID M. NIEPORENT, ESQUIRE	:	JURY TRIAL DEMANDED
THE OVERLAWYERED GROUP	:	
And OVERLAWYERED.COM	:	
Defendants	:	

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2009, it is hereby **ORDERED** and **DECREED** Plaintiff's Emergency Motion to Compel Pre-Complaint Discovery and to Strike Rule to File Complaint is **GRANTED**. We direct that the following Order be entered:

1. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, are **ORDERED** to fully and completely respond to the Plaintiff's Pre-Complaint Requests for Production of Documents, pursuant to the Plaintiff's May 13, 2009 Notice, without further objection or obstruction except for claims of privilege, within ten (10) days of the date of this Order.

2. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire are **ORDERED** to submit a privilege log with their production of documents, identifying all documents withheld or redacted due to a claim of privilege, and the basis for the claim of privilege.

3. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire are **ORDERED** to appear for depositions, pursuant to the



Plaintiff's May 13, 2009 Notice, within ten (10) days of the date of the Defendant's production of documents.

4. Should Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire fail to comply with this Order, Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire will suffer sanctions upon further application to this Court.

5. The Rule to File Complaint issued by the Prothonotary on June 3, 2009 is hereby **STRICKEN WITHOUT PREJUDICE**, pending the completion of the Pre-Complaint Discovery as described above. Upon the completion of the Pre-Complaint Discovery that is the subject of this Order, and if no Complaint is filed by the Plaintiff within twenty (20) days following the completion of the Pre-Complaint Discovery that is the subject of this Order, the Defendant may file another Praecipe for Rule to File a Complaint.

**BY THE COURT:**

---

J.

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire

Attorney I.D. No. 13396

prosen@lawsgr.com

By: Andrew J. DeFalco, Esquire

Attorney I.D. No. 84360

adefalco@lawsgr.com

Seven Penn Center Plaza

1635 Market Street, 7th Floor

Philadelphia, PA 19103

(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

**CIVIL ACTION – LAW**

**Plaintiff :**

**vs.**

**MAY TERM, 2009**

**:**

**WALTER K. OLSON, ESQUIRE**

**NO.: 1489**

**THEODORE H. FRANK, ESQUIRE :**

**DAVID M. NIEPORENT, ESQUIRE :**

**JURY TRIAL DEMANDED**

**THE OVERLAWYERED GROUP :**

**And OVERLAWYERED.COM :**

**Defendants**

**PLAINTIFF'S EMERGENCY MOTION TO COMPEL PRE-COMPLAINT  
PRODUCTION OF DOCUMENTS AND DEPOSITIONS AND MOTION TO  
STRIKE RULE TO FILE COMPLAINT**

Plaintiff Arthur Alan Wolk, Esquire ("Plaintiff"), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby submits the following Memorandum of Law in support of his Emergency Motion for an Order compelling Defendants to respond fully to Plaintiff's Pre-Complaint Requests for Production of Documents within ten (10) days, and thereafter, to produce for Pre-Complaint Depositions Walter K. Olson, Esquire ("Olson"), Theodore H. Frank, Esquire ("Frank"), and David M. Nieparent, Esquire ("Nieparent") (collectively "Defendants"), within ten (10) days following the document production. Plaintiff also respectfully moves this Court for an Order striking without prejudice the June 3, 2009 Rule to File Complaint

pending the completion of the Pre-Complaint Depositions and Document Production described above.

The Plaintiff seeks **emergency relief**. The nature of the emergency, requiring immediate relief from the Court, is as follows: This matter must be heard on an “emergency” basis because in the absence of expedited relief, the Plaintiff will not be able to obtain the required relief, and obtain pre-complaint discovery, prior to the deadline to file a complaint imposed by the June 3, 2009 Rule to File a Complaint. Therefore, the Defendants will be able to effectively defeat the Plaintiff’s right to pre-complaint discovery to which the Plaintiff is entitled as a matter of law pursuant to Pennsylvania Rule of Civil Procedure 4003.8. For these reasons, the Plaintiff respectfully requests that the Court hear this Motion on an expedited basis. In support of the Plaintiff’s Motion, Plaintiff avers as follows:

## **I. INTRODUCTION**

1. Pennsylvania Rule of Civil Procedure 4003.8 expressly permits a party to initiate an action by Writ of Summons, and to take pre-complaint discovery prior to filing a complaint. While the natural impulse of the recipient of a summons and request for pre-complaint discovery may be to file a rule to file a complaint, in order to prevent the requested pre-complaint discovery, and to seek to challenge the sufficiency of a complaint before engaging in discovery, the Pennsylvania Rules of Civil Procedure do not permit a Defendant to utilize a Rule to File Complaint to defeat a Plaintiff’s right to pre-complaint discovery. If a Defendant could defeat the Plaintiff’s right to pre-complaint discovery through the procedural vehicle of a Rule to File a Complaint, Rule 4003.8 would be meaningless, as a defendant in any action commenced by writ of

summons could always defeat a plaintiff's right to pre-complaint discovery through the filing of a Rule to File Complaint. That is not what the Pennsylvania Courts envisioned in enacting Rule 4003.8. Accordingly, to effectuate the purposes of the Pennsylvania Rules of Civil Procedure, this Court should rule that the Plaintiff in this case is entitled to pre-complaint discovery, and that the Defendant in this case may not defeat the Plaintiff's right to pre-complaint discovery through a Rule to File a Complaint.

## **II. FACTS**

2. Wolk is a nationally-known aviation attorney.

3. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the "Taylor Case").

4. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk's conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order.

5. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

6. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of

Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the “Wolk Case”). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

7. On or about April 8, 2007, Defendant Frank, writing for the legal blog “Overlawyered.com,” which is operated and edited by Defendant Olson and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case (the “Frank Article”).

8. However, after a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties.

9. Wolk was unaware of the Frank Article until he discovered it in April 2009. The statements in the Frank Article are false and defamatory as a matter of law.

10. The Plaintiff filed a Praecipe to Issue Writ of Summons, and Summonses were issued in this matter on May 13, 2009.

11. On the same date, the Plaintiff served upon the Defendants a Notice of Pre-Complaint Discovery Pursuant to Rule 4003.8 and Rule 4007.1 (c), and Notice of Pre-Complaint Request for Production of Documents pursuant to Rule 4007 (d) (1) (the “Notice”). (See the Notice, attached as Exhibit “A”).

12. As required by Rule 4007.1, the Notice provides a “Brief Statement of the Nature of the Action and the Matters to Be Inquired Into,” which is largely as discussed above. (Id.)

13. The Notice then seeks the pre-complaint depositions of Nieporent, Frank and Olson. (Id.) The Notice then requests the following documents:

All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

(Id.)

14. The Plaintiff incorporates by reference, as though fully set forth herein, the “Facts” section of his supporting Brief.

### **III. PLAINTIFF IS ENTITLED TO PRE-COMPLAINT DISCOVERY AND DOCUMENT PRODUCTION**

15. Pennsylvania Rule of Civil Procedure 4003.8 (a), which was adopted September 20, 2007, and effective November 1, 2008, provides that a Plaintiff may obtain pre-complaint discovery as follows:

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

Pa.R.Civ.P. 4003.8 (a).

16. Pennsylvania Rule of Civil Procedure 4007.1 (a) – (d) (1) provides that a party may obtain pre-complaint depositions and document production, as follows:

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ... A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this Rule ...

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into.

(d)(1) If the person to be examined is a party, the notice may include a request made in compliance with Rule 4009.1 et seq., for the production of documents and tangible things at the taking of the deposition.

Pa.R.Civ.P. 4007.1 (a) – (d) (1).

17. In McNeil v. Jordan, 894 A.2d 1260, 1269 (Pa. 2006), the Pennsylvania Supreme Court stated: “there is no question or controversy concerning the right of a party to take pre-complaint discovery.”

18. In this case, the Plaintiff has abundantly met all of the requirements to obtain the requested pre-complaint discovery.

19. The requested pre-complaint discovery is necessary because, with respect to his planned defamation claim, the Plaintiff must meet his burden of pleading “actual malice” with clear and convincing evidence, but the Plaintiff has no access to any information respecting the dissemination of the Frank Article that would permit him to plead such facts without pre-complaint discovery.

20. In addition, the requested discovery is material and narrowly tailored to address only the information necessary to file a complaint. The requested pre-complaint discovery seeks information relating solely to whether the Defendants acted with “actual malice” in publishing the Frank Article. Thus, all of the requested information is, in addition to being necessary to filing a complaint, also “material.”

21. Further, because the Plaintiff seeks only information that is material and necessary to the filing of the complaint (and nothing else), and has narrowly tailored his discovery requests to address one discrete area of inquiry, the Plaintiff’s discovery requests are for a proper purpose. Because all pre-complaint discovery requests are related to the defamation claim that the Plaintiff contemplates, the discovery requests are not unreasonable.

22. Finally, because only three depositions are sought, and only four document requests were submitted, the requested pre-complaint discovery will not cause unreasonable annoyance, oppression, burden or expense to Defendants.

23. For these reasons, as more fully set forth in the Plaintiff’s supporting brief, the Plaintiff’s pre-complaint discovery requests are material and necessary to the filing of a complaint, are submitted for a proper purpose, and will not cause unreasonable annoyance, oppression, burden or expense to Defendants. Therefore, the Plaintiff



respectfully requests that the Court compel the requested pre-complaint discovery as set forth in the attached Order.

**IV. THE RULE TO FILE COMPLAINT SHOULD BE STRICKEN**

24. Pennsylvania law is clear that the Plaintiff is entitled to pre-complaint discovery to aid him in drafting his complaint. McNeil, 894 A.2d at 1278.

25. Because the June 3, 2009 Rule to File Complaint will effectively preclude the ability of the Plaintiff to take pre-complaint discovery to which the Plaintiff is manifestly entitled under the Pennsylvania Rules of Civil Procedure, the Plaintiff respectfully requests that the Court strike the Rule to File Complaint without prejudice pending the completion of the Plaintiff's pre-complaint discovery.

**V. EMERGENCY RELIEF IS NECESSARY**

26. This matter must be heard on an "emergency" basis because in the absence of expedited relief, the Plaintiff will not be able to obtain the required relief, and obtain pre-complaint discovery, prior to the deadline to file a complaint imposed by the June 3, 2009 Rule to File a Complaint. Therefore, the Defendants will be able to effectively defeat the Plaintiff's clear and indisputable right to pre-complaint discovery as set forth in Pennsylvania Rule of Civil Procedure 4003.8.

27. For these reasons, the Plaintiff respectfully requests that the Court hear this Motion on an expedited basis.


WHEREFORE, Plaintiff Arthur Alan Wolk respectfully requests that this Court grant emergency relief, and hold that the Defendants be compelled to respond in full, without further objection or obstruction except for privilege, to the Requests for Production of Documents set forth in the Notice of Pre-Complaint Deposition and Pre-

Complaint Request for Production within ten (10) days from the date of the Court's Order, and to produce for Pre-Complaint Depositions Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, within ten (10) days thereafter, or suffer sanctions upon further application to the Court. Plaintiff also respectfully moves this Court for an Order striking without prejudice the June 3, 2009 Rule to File Complaint pending completion of the Pre-Complaint Depositions and Document Production described above.

Respectfully Submitted,

**SPECTOR GADON & ROSEN, P.C.**

By: \_\_\_\_\_



Paul R. Rosen, Esquire (PA Id. 13396)  
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Date: June 4, 2009

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Attorneys for Plaintiffs

<b>ARTHUR ALAN WOLK, ESQUIRE</b>	:	<b>CIVIL ACTION – LAW</b>
<b>Plaintiff</b>	:	
<b>vs.</b>	:	<b>MAY TERM, 2009</b>
	:	
<b>WALTER K. OLSON, ESQUIRE</b>	:	<b>NO.: 1489</b>
<b>THEODORE H. FRANK, ESQUIRE</b>	:	
<b>DAVID M. NIEPORENT, ESQUIRE</b>	:	<b>JURY TRIAL DEMANDED</b>
<b>THE OVERLAWYERED GROUP</b>	:	
<b>And OVERLAWYERED.COM</b>	:	
	:	
<b>Defendants</b>	:	

**PLAINTIFF’S BRIEF IN SUPPORT OF EMERGENCY MOTION TO COMPEL  
PRE-COMPLAINT PRODUCTION OF DOCUMENTS AND DEPOSITIONS AND  
MOTION TO STRIKE RULE TO FILE COMPLAINT**

Plaintiff Arthur Alan Wolk, Esquire (“Plaintiff”), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby submits the following Memorandum of Law in support of his Emergency Motion for an Order compelling Defendants to respond fully to Plaintiff’s Pre-Complaint Requests for Production of Documents within ten (10) days, and thereafter, to produce for Pre-Complaint Depositions Walter K. Olson, Esquire (“Olson”), Theodore H. Frank, Esquire (“Frank”), and David M. Nieporent, Esquire (“Nieporent”) (collectively “Defendants”), within ten (10) days following the document production. Plaintiff also respectfully moves this Court for an Order striking without prejudice the June 3, 2009, Rule to File Complaint

pending the completion of the Pre-Complaint Depositions and Document Production described above.

**I. MATTER BEFORE THE COURT**

In this emergency motion, Plaintiff asks the Court to compel Defendants to provide the pre-complaint discovery requested by the Plaintiff on May 13, 2009, which the Defendants have willfully and wrongfully refused to provide. Plaintiff also respectfully requests that this Court strike without prejudice the June 3, 2009 Rule to File Complaint that was served on the Plaintiff, until completion of the requested pre-complaint discovery.

Pennsylvania Rule of Civil Procedure 4003.8 expressly permits a party to initiate an action by Writ of Summons, and to take pre-complaint discovery prior to filing a complaint. While the natural impulse of the recipient of a summons and request for pre-complaint discovery may be to file a rule to file a complaint, in order to prevent the requested pre-complaint discovery, and to seek to challenge the sufficiency of a complaint before engaging in discovery, the Pennsylvania Rules of Civil Procedure do not permit a Defendant to utilize a Rule to File Complaint to defeat a Plaintiff's right to pre-complaint discovery. If a Defendant could defeat the Plaintiff's right to pre-complaint discovery through the procedural vehicle of a Rule to File a Complaint, Rule 4003.8 would be meaningless, as a defendant in any action commenced by writ of summons could always defeat a plaintiff's right to pre-complaint discovery through the filing of a Rule to File Complaint. That is not what the Pennsylvania Courts envisioned in enacting Rule 4003.8. Accordingly, to effectuate the purposes of the Pennsylvania Rules of Civil Procedure, this Court should rule that the Plaintiff in this case is entitled to

pre-complaint discovery, and that the Defendant in this case may not defeat the Plaintiff's right to pre-complaint discovery through a Rule to File a Complaint.

In this case, the Plaintiff commenced the above-captioned action by Writ of Summons. Pursuant to Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c) – (d) (1), Plaintiff served upon Defendants, concurrently with the Writ of Summons, a Notice of pre-complaint depositions and document discovery (the “Notice”). The purpose of this Notice is to ascertain whether the Defendants, in writing and disseminating a defamatory article about the Plaintiff, which accused the Plaintiff of, *inter alia*, selling out his client, and accepting a lesser settlement in a case, in order to protect himself from professional liability exposure and in the hope of obtaining future business from other clients, made the defamatory statements with knowledge of their falsity and/or reckless disregard for their truthfulness. Because the Plaintiff is a nationally-known aviation attorney, the Plaintiff must plead the “New York Times” standard for a defamation claim, but the Plaintiff is unable to properly plead his allegations without receiving the requested pre-complaint discovery. Thus, the following information is material and necessary to the filing of a Complaint by the Plaintiff in this case:

- Information relating to any investigation and research performed by the author of the defamatory article, the editor of the article, and contributors to article, prior to the dissemination of the article;
- Information relating to the results of any investigation performed;
- Information relating to editorial controls with respect to the defamatory article;

- Information relating to conformity with journalistic standards; and
- Information relating to whether the Defendants knew that the statements made in the defamatory article were false.

The requested discovery is narrowly tailored to address only the information necessary to file a Complaint against Defendants, and is not sought for any improper purpose. To date, Defendants have refused to provide any of the requested pre-complaint discovery. Accordingly, Plaintiff respectfully requests that this Court order the Defendants to provide the requested pre-complaint discovery.

Also, in conjunction with the Defendant's refusal to provide the requested pre-complaint discovery, the Prothonotary issued (at the Defendants' request) a Rule to File Complaint ordering the Plaintiff to file a Complaint within twenty (20) days of June 3, 2009. The Plaintiff respectfully requests that the Court strike or stay the Rule to File Complaint without prejudice pending the completion of the pre-complaint discovery.

This matter must be heard on an "emergency" basis because in the absence of expedited relief, the Plaintiff will not be able to obtain the required relief, and obtain pre-complaint discovery, prior to the deadline to file a complaint imposed by the June 3, 2009 Rule to File a Complaint. Therefore, the Defendants will be able to effectively defeat the Plaintiff's indisputable right to pre-complaint discovery which is permitted as a matter of law by Pennsylvania Rule of Civil Procedure 4003.8. For these reasons, the Plaintiff respectfully requests that the Court hear this Motion on an expedited basis.

## **II. STATEMENT OF THE QUESTIONS INVOLVED**

1. Is the pre-complaint discovery sought by the Plaintiff material and necessary to the filing of the Plaintiff's Complaint?

**Suggested answer: Yes.**

2. Will the pre-complaint discovery sought by the Plaintiff cause unreasonable annoyance, embarrassment, oppression, burden or expense to Defendants?

**Suggested answer: No.**

### **III. FACTS**

#### **a. Factual And Procedural History**

This is a defamation case. Wolk is a nationally-known aviation attorney. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the "Taylor Case"). After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk's conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the "Wolk Case"). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously

agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

On or about April 8, 2007, Defendant Frank, writing for the legal blog “Overlawyered.com,” which is operated and edited by Defendant Olson and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case (the “Frank Article”). However, after a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties. Wolk was unaware of the Frank Article until he discovered it in April 2009. The statements in the Frank Article are false and defamatory as a matter of law.

The Plaintiff filed a Praecipe to Issue Writ of Summons, and Summonses were issued in this matter on May 13, 2009. On the same date, the Plaintiff served upon the Defendants a Notice of Pre-Complaint Discovery Pursuant to Rule 4003.8 and Rule 4007.1 (c), and Notice of Pre-Complaint Request for Production of Documents pursuant to Rule 4007 (d) (1) (the “Notice”). (See the Notice, attached as Exhibit “A”). As required by Rule 4007.1, the Notice provides a “Brief Statement of the Nature of the Action and the Matters to Be Inquired Into,” which is largely as discussed above. (Id.) The Notice then seeks the pre-complaint depositions of Nieporent, Frank and Olson. (Id.) The Notice also requests the following documents:

All documents and communications, including but not limited to searches on the internet, that You initiated to any



third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

(Id.)

**b. The Requested Pre-Complaint Discovery Is Material And Necessary To The Filing Of The Complaint**

**1. Pre-Complaint Discovery Is Necessary**

The Plaintiff's requested pre-complaint discovery is necessary under Pennsylvania's "fact pleading" regime, in order to enable the Plaintiff to plead sufficient facts to overcome a demurrer as to the Plaintiff's contemplated defamation cause of action. As noted by the Pennsylvania Supreme Court in McNeil v. Jordan, 894 A.2d 1260 (Pa. 2006), Pennsylvania Rule of Civil Procedure 1019 (a) requires specificity in pleading and institutes a "fact pleading regime." Also, the Dragonetti Act, 42 Pa.C.S. § 8352 imposes strict consequences for the failure to provide these facts. Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c) – (d) permit pre-complaint discovery specifically to enable a Plaintiff to meet his fact-pleading requirement.

Thus, to satisfy Pennsylvania's fact pleading regime, the Plaintiff herein must obtain and plead facts sufficient to establish the elements of the defamation cause of action that will be set forth in the Complaint. As to the Plaintiff's contemplated cause of action for defamation, because the Plaintiff is a public figure, the Plaintiff must plead and establish not only that the statements in the Frank Article were false, but also that the statements made in the Frank Article were knowingly false and made with actual malice. Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652, 659 (Pa. 1981) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In other words, defamation claims involving public figures must be pled with heightened specificity, such that the facts alleged will, if proven, permit a jury to find the existence of "actual malice" by clear and convincing evidence. Jones v. City of Philadelphia, 893 A.2d 837, 843 (Pa.Cmwlth. 2006) (citing Tucker v. Philadelphia Daily News, 848 A.2d 113 (Pa.2004)).

Thus, in order to sufficiently plead a defamation claim against the Defendants, under the heightened Pennsylvania pleading standards, the Plaintiff must obtain sufficient information regarding the investigation and research performed prior to posting the Frank Article, by the author, Frank, and the Editor, Olson, and contributors such as David Nieporent, and what was done as well as the fruits of any investigation, to ascertain whether the Defendants determined the falsity of what they published, and then published the Frank Article knowing it was false. The Plaintiff has no other access to the required information, and therefore, there is no other way, prior to filing a complaint, that the Plaintiff can obtain this information in a manner sufficient to meet the Plaintiff's heightened burden of pleading under Pennsylvania law. For this reason, the requested discovery, seeking information relating to whether the Defendants published the Frank

Article with “actual malice,” is **necessary** to the filing of a complaint. Only after receipt of the requested pre-complaint discovery will the Plaintiff be able to meet his burden of fact pleading, and marshal facts sufficient to withstand a demurrer, in order to enable the Plaintiff to file a meaningful complaint.

2. **The Notice Is Narrowly Tailored To Seek Only Material Information That Will Aid In Drafting The Complaint, And Does Not Seek Discovery For An Improper Purpose**

The discovery sought by the Plaintiff is also narrowly tailored to seek only material information that he must obtain in order to plead the elements of his contemplated defamation cause of action, and more specifically, the “actual malice” element. Because the Plaintiff contemplates only a defamation cause of action, and must plead and establish by clear and convincing evidence in the Complaint that the defendants acted with knowledge of the falsity of their statements and/or a reckless disregard for the same, the information requested in the Plaintiff’s pre-complaint request for production of documents is narrowly tailored to address only the Defendants’ knowledge and state of mind upon disseminating the article. The Notice seeks the following documents:

- documents reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article;
- documents relating to any investigation with respect to the subjects covered in the April 7, 2008 Frank Article;
- documents respecting communications with third parties relating to the Frank Article;

The Plaintiff’s document requests seek only information relating to the “actual malice” element of the Plaintiff’s prospective defamation claim, and nothing else. Therefore, all

of the requested discovery is “material,” and none of the requested discovery is sought for an improper purpose

As to the requested pre-complaint depositions, the Brief Statement contained in the Notice explains their necessity, as required by Pennsylvania Rule of Civil Procedure 4007.1 (c). The Brief Statement explains, *inter alia*, that the Defendants disseminated the defamatory Frank Article, but the Plaintiff needs additional information to determine whether the Defendants acted with actual malice when disseminating the Frank Article. To ascertain this information, pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), the Plaintiff seeks depositions from Frank, Olson and Nieporent, those responsible for the dissemination of the Frank Article. Therefore, the information sought through these depositions is “material” to the filing of the Plaintiff’s complaint. The information sought through pre-complaint depositions will be limited to the subject of the Notice, i.e., the “actual malice” element, and will therefore be narrowly tailored to address only that which is material to enable the Plaintiff to file his complaint.

Accordingly, the Plaintiff’s requested pre-complaint discovery is material and necessary to the filing of a complaint. The requested pre-complaint discovery is narrowly tailored to only address specific elements of required fact pleading. As such, the requested discovery is not sought for any improper purpose, and is not sought to harass, annoy or embarrass the Defendants. Therefore, under settled Pennsylvania law, as discussed below, the Plaintiff is entitled to the requested pre-complaint discovery.

#### IV. ARGUMENT

##### A. The Requested Pre-Complaint Discovery Must Be Compelled, Because It Is Material And Necessary To The Filing Of A Complaint, And It Is Not Sought For An Improper Purpose

Under Pennsylvania law, all that is required for a Plaintiff to obtain pre-complaint discovery is that the requested information is material and necessary to filing a complaint, and that the requested information is sought for a proper purpose. The Plaintiff has been defamed by the false “Frank Article,” but the Plaintiff does not have access to information through which he would be able to plead and/or establish that the Defendants acted with “actual malice” in disseminating the Frank Article, except through pre-complaint discovery. Therefore, the Plaintiff seeks pre-complaint discovery that is narrowly tailored to address only facts that are relevant to the “actual malice” inquiry with respect to the Plaintiff’s defamation claim, such information is material and necessary to the filing of the Plaintiffs’ complaint, and the Plaintiff does not seek this discovery for an improper purpose. As a matter of law, this Court should compel the Defendants to provide all of the requested discovery.

Pre-complaint discovery in Pennsylvania is controlled by Pennsylvania Rule of Civil Procedure 4003.8. However, to understand pre-complaint discovery in Pennsylvania, one must begin with the Pennsylvania Supreme Court’s holding in McNeil v. Jordan, 894 A.2d 1260 (Pa. 2006). McNeil, which was decided prior to the incorporation of Rule 4003.8, involved the son of a decedent who filed a claim against his sister, alleging intentional interference with testamentary expectancy. After the plaintiff’s initial complaint was dismissed on preliminary objection, the plaintiff sought pre-complaint discovery. The trial court denied the request for pre-complaint discovery,

and the Superior Court upheld the denial. The Superior Court reasoned that the Plaintiff needed to demonstrate a *prima facie* case prior to obtaining pre-complaint discovery. However, the Supreme Court noted that such a rule would produce an absurd result, as it would require a plaintiff to show a *prima facie* case in order to take pre-complaint discovery, when the only reason pre-complaint discovery would be necessary is if a *prima facie* case could not be made. McNeil, 894. A.2d at 1268. Next, noting that a plaintiff in Pennsylvania has a significant burden to plead facts in a complaint, the Supreme Court unambiguously affirmed the right of litigants in Pennsylvania to take pre-complaint discovery: “Thus, there is no question or controversy concerning the right of a party to take pre-complaint discovery. Indeed, because of the need for specificity in pleading under Rule 1019(a), the provisions quoted above play a critically important role in Pennsylvania's pleading scheme.” Id. at 1269.

The Supreme Court then addressed what a plaintiff must show in order to obtain pre-complaint discovery. The Court explained that a plaintiff must show “probable cause to believe that pre-complaint discovery is necessary to the formation of a legally sufficient complaint.” Id. at 1275. In other words, “pre-complaint discovery is a means to the specific end of gathering sufficient information for the filing of a complaint, and is appropriate only when there is probable cause to believe it will achieve that end.” Id. at 1278. In sum, the Supreme Court explained:

Accordingly, to obtain pre-complaint discovery a litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery

request, he will be unable to formulate a legally sufficient pleading.

Id. Finally, in footnote 27 of the McNeil Opinion, Judge Baer of the Supreme Court stated that he was referring the matter of pre-complaint discovery to the Civil Procedural Rules Committee to address pre-complaint discovery, and to "recommend any amendments that might clarify this vexing area of civil procedure." Id. at 1279, n. 27.

Pursuant to the referral from the Supreme Court, Pennsylvania Rule of Civil Procedure 4003.8 was adopted on September 20, 2007, and effective November 1, 2008. Rule 4003.8 provides:

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

Pa.R.Civ.P. 4003.8 (a).

However, the comment to Rule 4003.8 both explains the content of Rule 4003.8, and expressly notes that the "probable cause" standard, established by McNeil, was purposefully omitted from the Rule:

New Rule 4003.8 has established in subdivision (a) a two-prong test for pre-complaint discovery: (1) the information sought must be material and necessary to the filing of the complaint and (2) "the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party." The first prong incorporates the language of the [McNeil] opinion quoted above that the information sought be both "material and necessary" to the filing of a complaint in a pending action. **The requirement of the opinion that there be "probable cause" that the information sought is material and necessary has not been included in the rule.** The language of the second prong that the discovery not cause "unreasonable annoyance, embarrassment, oppression, burden or expense" is taken verbatim from present Rule

4011(b) governing limitation of scope of discovery and deposition.

Pa.R.Civ.P. 4003.8 (a) (explanatory comment – 2007) (emphasis supplied).

Therefore, the only requirements to take pre-complaint discovery in Pennsylvania are that the information sought is “material and necessary to the filing of the complaint,” and that the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party. Pa.R.Civ.P. 4003.8 (a). The “probable cause” requirement articulated in McNeil was not incorporated into Rule 4003.8.

Pennsylvania Rule of Civil Procedure 4007.1 (a) – (d) (1) provides that a party may obtain pre-complaint depositions and document production, as follows:

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ... A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this Rule ...

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into.

(d)(1) If the person to be examined is a party, the notice may include a request made in compliance with Rule 4009.1 et seq., for the production of documents and tangible things at the taking of the deposition.

Pa.R.Civ.P. 4007.1 (a) – (d) (1).



In this case, the Plaintiff has abundantly met all of the requirements to obtain the requested pre-complaint discovery. The Plaintiff has been defamed by the false Frank Article that falsely asserts that the Plaintiff committed heinous professional misconduct. Thus, the Plaintiff believes in good faith that he will be able to state causes of action against the Defendant for defamation. The Plaintiff is required to plead “actual malice” through clear and convincing evidence. However, the Plaintiff does not have access to the facts necessary to sustain his burden of pleading under Pennsylvania’s fact pleading regime with respect to the “actual malice” issue, and the Plaintiff needs sufficient facts to be able to withstand the demurrer that will certainly be filed by the Defendants. These facts include, *inter alia*, the amount of research performed prior to disseminating the Frank Article, the investigation performed prior to disseminating the Frank Article, documents relied upon in disseminating the Frank Article, and communications with third parties relating to the Frank Article. Accordingly, the requested discovery is necessary to enable the Plaintiff to file his complaint.

In addition, all of the requested discovery is material and narrowly tailored to address only the information necessary to file a complaint. The requested pre-complaint discovery seeks information relating solely to whether the Frank Article was published with knowledge of falsity and/or reckless disregard for the truth. No information extraneous to the this subject is included in the request. Thus, all of the requested information is, in addition to being necessary to filing a complaint, also material.

Further, because the Plaintiff seeks only information that is material and necessary to the filing of the complaint (and nothing else), and has narrowly tailored his discovery requests to address the “actual malice” inquiry, the Plaintiff’s discovery

requests are for a proper purpose. Because they are all related to the claim that the Plaintiff contemplates, the discovery requests are reasonable. Finally, because only three depositions are sought, and only four document requests were submitted, the requested pre-complaint discovery will not cause unreasonable annoyance, oppression, burden or expense to the Defendants.

Thus, the pre-complaint discovery sought is material and necessary, and not sought for an improper purpose. As a matter of law, the Court should order Defendants to provide the requested pre-complaint discovery as described in the attached proposed Order.

**B. The Rule To File Complaint Should Be Stricken Pending Completion Of Pre-Complaint Discovery**

As noted above, Pennsylvania law is clear that the Plaintiff is entitled to pre-complaint discovery to aid the Plaintiff in drafting the complaint. McNeil, 894 A.2d at 1278. However, in an attempt to contravene Pennsylvania procedure and deny the Plaintiff his right to pre-complaint discovery, the Defendants served upon the Plaintiff a Rule to File Complaint directing him to file a Complaint within twenty (20) days from June 3, 2009.

The Plaintiff respectfully asks that this Court dismiss the Rule without prejudice, or stay the effect of the Rule, until the Plaintiff has completed the requested pre-complaint discovery. This will ensure that the Plaintiff is given the benefit of the pre-complaint discovery permitted by the Pennsylvania Rules of Civil Procedure.

**C. Emergency Relief Is Necessary**

As discussed above, this matter must be heard on an “emergency” basis because in the absence of expedited relief, the Plaintiff will not be able to obtain the required

relief, and obtain pre-complaint discovery to which he is manifestly entitled, prior to the deadline to file a complaint imposed by the June 3, 2009 Rule to File a Complaint. Therefore, the Defendants will be able to effectively and impermissibly defeat the Plaintiff's clear right to pre-complaint discovery as set forth in Pennsylvania Rule of Civil Procedure 4003.8. For these reasons, the Plaintiff respectfully requests that the Court hear this Motion on an expedited basis.

**V. RELIEF**


For these and other reasons, Plaintiff Arthur Alan Wolk respectfully requests that this Court grant emergency relief, and that the Defendants be compelled to respond in full, without further objection or obstruction except for privilege, to the Requests for Production of Documents set forth in the Plaintiff's May 13, 2009 Notice of Pre-Complaint Deposition and Pre-Complaint Request for Production within ten (10) days from the date of the Court's Order, and to produce for Pre-Complaint Depositions Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, within ten (10) days thereafter, or suffer sanctions upon further application to the Court.

Plaintiff also respectfully moves this Court for an Order striking without prejudice the June 3, 2009 Rule to File Complaint pending completion of the Pre-Complaint Depositions and Document Production described above.

Respectfully Submitted,

**SPECTOR GADON & ROSEN, P.C.**

By: \_\_\_\_\_

  
Paul R. Rosen, Esquire (PA Id. 13396)  
Andrew J. DeFalco, Esquire (PA Id. 84360)  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103  
(215) 241-8888  
(215) 241-8844 (fax)  
*Attorneys for Plaintiff*

Date: June 4, 2009

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire

Attorney I.D. No. 13396

prosen@lawsgr.com

By: Andrew J. DeFalco, Esquire

Attorney I.D. No. 84360

adefalco@lawsgr.com

Seven Penn Center Plaza

1635 Market Street, 7th Floor

Philadelphia, PA 19103

(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

**CIVIL ACTION – LAW**

**Plaintiff :**

**vs.**

**MAY TERM, 2009**

**WALTER K. OLSON, ESQUIRE :**

**NO.: 1489**

**THEODORE H. FRANK, ESQUIRE :**

**DAVID M. NIEPORENT, ESQUIRE :**

**JURY TRIAL DEMANDED**

**THE OVERLAWYERED GROUP :**

**And OVERLAWYERED.COM**

**:**

**Defendants**

**CERTIFICATION OF SERVICE**

I hereby certify that service of a true and correct copy of the enclosed Emergency

Motion to Compel and Strike Rule to File Complaint was made on this date, to the

following counsel by United States Mail, as well as by electronic mail:

Michael N. Onufrak, Esquire

White & Williams, LLP

1650 Market Street

One Liberty Place, Suite 1800

Philadelphia, PA 19103-7395

By: \_\_\_\_\_

Andrew J. DeFalco, Esquire (PA Id. 84360)

Attorney for Plaintiff

Date: June 4, 2009

**EXHIBIT “A”**

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire  
Attorney I.D. No. 13396  
prosen@lawsgr.com  
By: Andrew J. DeFalco, Esquire  
Attorney I.D. No. 84360  
adefalco@lawsgr.com  
Seven Penn Center Plaza  
1635 Market Street, 7th Floor  
Philadelphia, PA 19103  
(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE** :  
1710-12 Locust Street  
Philadelphia, PA 19103

**THIS IS NOT AN ARBITRATION**  
: **CASE**

**Plaintiffs**

: **AN ASSESSMENT OF DAMAGES IS**  
**NOT REQUIRED**

**vs.**

**WALTER K. OLSON, ESQUIRE**  
875 King Street  
Chappaqua, NY 10514-3430

: **CIVIL ACTION – LAW**

: **NO.:**

**And**

**THEODORE H. FRANK, ESQUIRE**  
901 North Monroe Street, Apt. 1007  
Arlington, VA 22201-2353

: **JURY TRIAL DEMANDED**  
: **Civil – Commerce Program**

**And**

**DAVID M. NIEPORENT, ESQUIRE**  
155 Tillotson Road  
Fanwood, NJ 07023

**And**

**THE OVERLAWYERED GROUP**  
875 King Street  
Chappaqua, NY 10514-3430

**And**

**OVERLAWYERED.COM**  
318 State Street  
Santa Barbara, CA 93101-2361

And

JOHN DOE

And

JANE DOE

**Defendants**

**TO:**

Walter K. Olson, Esquire  
875 King Street  
Chappaqua, NY 10514-3430

**TO:**

Theodore H. Frank, Esquire  
901 North Monroe Street, Apt. 1007  
Arlington, VA 22201-2353

**TO:**

David M. Nieporent, Esquire  
155 Tillotson Road  
Fanwood, NJ 07023

**NOTICE OF PRE-COMPLAINT DISCOVERY PURSUANT TO RULE 4003.8  
AND RULE 4007.1 (c) AND NOTICE OF PRE-COMPLAINT REQUEST FOR  
PRODUCTION OF DOCUMENTS PURSUANT TO RULE 4007.1 (d) (1)**

Plaintiff, Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk"), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby serves the following Notice of Pre-Complaint Discovery pursuant to Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c), and the following Pre-Complaint Request for Production of Documents pursuant to Pennsylvania Rule of Civil Procedure 4007 (d) (1), to the Defendants. In support thereof, Plaintiff states:

**I. BRIEF STATEMENT OF THE NATURE OF THE ACTION AND  
MATTERS TO BE INQUIRED INTO PURSUANT TO RULE 4007.1 (c)**

This is a defamation case. Wolk is a nationally-known aviation attorney. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a



case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the “Taylor Case”). After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk’s conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the “Wolk Case”). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

On or about April 8, 2007, Defendant Theodore H. Frank, Esquire (“Frank”), writing for the legal blog “Overlawyered.com,” which is operated and edited by Defendant Walter K. Olson, Esquire (“Olson”) and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case (the “Frank Article”). However, after a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being

impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties. Wolk was unaware of the Frank Article until he discovered it in April 2009.

Wolk understands that as a public figure he must show not only that the statements in the Frank Article were false, but also that that the statements made in the Frank Article were knowingly false and made with actual malice. Pre-complaint discovery is required to determine whether a complaint can be brought under the standards required to file a defamation complaint as a public figure.

Information respecting the investigation and research performed prior to posting the Frank Article, by the author, Frank, and the Editor, Olson, and contributors such as David Nieporent, and what was done as well as the fruits of any investigation, is necessary to see if they determined the truth of what they published and then published the Frank Article knowing it was false, or their lack of a reasonable standard of news gathering and proof of fact before publishing statements that accuse a nationally known attorney of unethical and unprofessional conduct and violations of his duties to his client. This information is therefore material and necessary to determine whether a defamation claim arising from the Frank Article can meet the burden of pleading established in Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652, 659 (Pa. 1981) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Through pre-complaint discovery permitted by Pennsylvania Rule of Civil Procedure 4003.8, Wolk now seeks to determine the nature and extent of the research and investigation made by Frank and Olson prior to posting the Frank Article.

## **II. NOTICE OF DEPOSITION OF THEODORE H. FRANK, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of the **Theodore H. Frank, Esquire**, to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 24, 2009, at 10:00 a.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

## **III. NOTICE OF DEPOSITION OF WALTER K. OLSON, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of **Walter K. Olson, Esquire** to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 25, 2009, at 10:00 p.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

### **III. NOTICE OF DEPOSITION OF DAVID M. NIEPORENT, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of **David M. Nieporent, Esquire** to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 26, 2009, at 10:00 p.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

### **V. PRODUCTION OF DOCUMENTS**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (d), Defendants are hereby commanded to produce documents and tangible things **on or before June 19, 2009, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103**, as follows:

#### **a. Document Requests**

1. All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

2. All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7,

2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

3. All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

4. All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

## **V. INSTRUCTIONS AND DEFINITIONS**

The following instructions and definitions shall be applicable to the Request for Production of Documents in Section IV, above.

### **a. Instructions**

1. These document requests shall be deemed continuing and shall require supplemental answers if additional documents are acquired after the date of deposition, as soon as practicable but in any event not later than thirty (30) days from the date of discovery.

2. With respect to any document the deponent deems privileged, provide a statement setting forth as to each document:

- (a) the date appearing on the document, or if no date appears, the date on which the document was prepared;
- (b) the name of each person to whom the document was addressed;
- (c) the name of each person to whom the document, or a copy thereof, was sent, or with whom the document was discussed;
- (d) the name of each person who signed the documents, or if not signed, the name of each person who prepared it;

(e) the name of each person making any contribution to the authorship of the document;

(f) the employer and job title of each person identified in (b), (c), (d) or (e) above;

(g) the date the document was received or discussed by each of the persons identified in (b) or (c) above;

(h) the general nature or description of the document, or part claimed to be privileged, and the number of pages of which it consists;

(i) the name of each person who has custody of the document;

(j) the specific ground(s) on which the claim of privilege rests.

3. In producing documents, you are requested to produce the original of each document together with all non-identical copies and drafts of that document. If the original of any document cannot be located, a copy shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

4. Documents shall be produced as they are kept in the usual course of business. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained. All documents shall be produced intact in their original files, without disturbing the organization of documents employed during the conduct of the ordinary course of business, and during the subsequent maintenance of the documents.

5. All documents shall be produced which respond to any part or clause of any paragraph of a request. Each document requested shall be produced in its entirety and without deletion or excisions, regardless of whether you consider the entire document

to be relevant or responsive. If you have redacted any portion of a document, stamp or write or otherwise affix the word "REDACTED" on each page of the document which you have redacted, and provide a separate statement explaining the basis for each redaction.

**b. Definitions**

1. "You" and "Your" refer to the persons upon whom this document has been served, including their agents, servants, employees, officers, directors, members, affiliates, attorneys, subsidiaries, parent companies, related entities and those persons in active concert or participation with them, all other persons acting or purporting to act on their behalf, as well as the Overlawyered Group and Overlawyered.com. "You" and "your" when used in reference to "materials" and "documents" shall include materials and documents in your possession or under your control, and materials and documents whose present and past existence you are aware of, as well as materials and documents prepared by you unless otherwise stated.

3. "Frank Article" means the April 7, 2008 article written by Theodore H. Frank, Esquire entitled Arthur Alan Wolk v. Teledyne Industries, Inc.

5. "Writings" or "Document" are used herein in the broadest sense, and mean all written or printed matter of any kind, including the originals and all non-identical copies, including drafts, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation correspondence, electronic mail messages, memoranda, reports, notes, diaries, statistics, letters, telegraphs, minutes, agendas, contracts, reports, studies, checks, statements, receipts, returns, financial sheets, schedules, invoices, drafts, projections, summaries, pamphlets,

books, prospectuses, inter-office and intra-office communications, offers, notations of any sort of conversations, bulletins, computer printouts, teletypes, telefaxes, invoices, worksheets and all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or manual records or representations of any kind including without limitation photographs, charts, graphs, microfiche, microfilm, videotapes, audiotapes, records, motion pictures, and electronic, mechanical, computer or electric records or representations of any kind, including without limitation, tapes, cassettes and all recordings, computer discs, both hard and floppy, CD's, and CD-ROMs and computer hard, JAZ and ZIP drives. Two or more copies of a document bearing divergent or different notations, handwritten or typewritten, shall be treated as separate documents for this purpose, as well as all drafts of documents. All attachments or documents referred to by documents responsive to any request shall be produced.

7. As used herein, the term "Person" or "persons" mean any individual, corporation, partnership, joint venture, firm, association, organization, society, proprietorship, agency, board, authority, commission or other entity.

8. "Communicate" or "communication" mean every manner or means of disclosure, transfer, or exchange, and every disclosure, transfer, or exchange of information whether orally or by document or whether face-to-face, by telephone, mail, electronic mail, personal delivery or otherwise.

9. The phrase "referring or relating to", or any variant thereof, means in any way, directly or indirectly, showing, disclosing, advertizing to, embodying, reflecting, evidencing, constituting, mentioning, or revealing, either in whole or in part.



10. The singular includes the plural and vice versa. The masculine includes the feminine and neuter genders. The term "between" means "among" and vice versa. The past tense includes the present tense, and vice versa, when the clear meaning is not distorted by changing of tense.

11. The phrase "and" and "or" shall mean "and/or", "any" shall include "all" and "every" and vice versa.

**SPECTOR GADON & ROSEN, P.C.**

A handwritten signature in black ink, appearing to read 'AS de', is written over a horizontal line.

Paul R. Rosen, Esquire  
Andrew J. DeFalco, Esquire  
Attorneys for Plaintiffs

Date: 5/13/09

## **EXHIBIT 6**

ARTHUR ALAN WOLK, ESQUIRE :  
**Plaintiff** :  
 vs. :  
 WALTER K. OLSON, ESQUIRE :  
 THEODORE H. FRANK, ESQUIRE :  
 DAVID M. NIEPORENT, ESQUIRE :  
 THE OVERLAWYERED GROUP :  
 And OVERLAWYERED.COM :  
**Defendants** :

**CIVIL ACTION – LAW**

**MAY TERM, 2009**

**NO.: 1489**

**JURY TRIAL DEMANDED**



**STIPULATION AND ORDER REGARDING DEFENDANTS’ RULE TO FILE  
 COMPLAINT AND PLAINTIFF’S REQUEST FOR PRE-COMPLAINT DISCOVERY**

This Stipulation Regarding Defendants’ Rule to File Complaint and Plaintiff’s Request for Pre-Complaint Discovery, by and between (1) Plaintiff Arthur Alan Wolk, Esquire (“Plaintiff”) and his counsel, Paul R. Rosen, Esquire and Spector Gadon & Rosen, P.C.; and (2) Defendants in the above-captioned matter, Walter K. Olson, Esquire, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com (collectively “Defendants”) (the Plaintiff and the Defendants will collectively be referred to as the “Parties”) and Defendants’ counsel, Michael Onufrak and White & Williams, LLP, states:

**RECITALS**

**WHEREAS**, Plaintiff initiated this action by Writ of Summons on May 13, 2009, and served the Writ of Summons upon the Defendants with a request for pre-complaint discovery under Pennsylvania Rule of Civil Procedure 4003.8;

**WHEREAS**, on June 3, 2009, the Defendants filed a Rule to File Complaint requiring the Plaintiff to file a complaint in the above-captioned action within twenty (20) days;

**WHEREAS**, on June 4, 2009, Plaintiffs filed an Emergency Motion to Compel Pre-Complaint Discovery to preclude Defendant's attempt to prevent pre-complaint discovery through the Rule to File Complaint requested by the Defendants and issued by the Prothonotary;

**WHEREAS**, the Plaintiffs' Emergency Motion to Compel Pre-Complaint Discovery is presently scheduled to be heard on Tuesday, June 9, 2009, at 11:30 a.m., in Courtroom 296, City Hall, Philadelphia, Pennsylvania; and

**WHEREAS**, the parties wish to avoid the necessity for the Plaintiff's motion to be heard on an emergency basis.

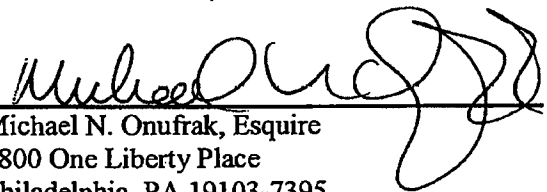

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED** by and between the Parties as follows:

1. The Parties hereby agree that the June 4, 2009 Emergency Motion to Compel Pre-Complaint Discovery and Strike Rule to File a Complaint will not be heard as an "Emergency" motion, but instead, the Plaintiff will re-file the Motion as a standard motion with a twenty (20) day response time.

2. The Parties further agree that the May 13, 2009 Notice of Pre-Complaint Discovery is deferred pending the Court's disposition on the Plaintiff's Motion to Compel pre-complaint discovery.

3. The Parties further agree that, in the event the Court permits the pre-complaint discovery requested by the Plaintiff, or permits any pre-complaint discovery by the Plaintiff, the Parties will extend the time for the Plaintiff to file a Complaint for twenty (20) days following the completion of the pre-complaint discovery permitted by the Court.

4. However, the Parties agree that if the Court does not permit any pre-complaint discovery, then the Plaintiff will have twenty (20) days from the Court's denial of the Plaintiff's Motion to Compel Pre-Complaint Discovery to respond to the Rule to File Complaint.

<b>White &amp; Williams, LLP</b>  Michael N. Onufrak, Esquire 1800 One Liberty Place Philadelphia, PA 19103-7395 Attorneys for Defendants	<b>Spector Gadon &amp; Rosen, P.C.</b>  Paul R. Rosen, Esquire Andrew J. DeFalco, Esquire 1635 Market Street, 7 <sup>th</sup> Floor Philadelphia, Pennsylvania 19102 Attorneys for Plaintiff
---	--

**APPROVED BY THE COURT:**

Dated:

6/9/09

\_\_\_\_\_, J.

## **EXHIBIT 7**

**FILED**  
09 JUN 2009 10:53 am  
**Civil Administration**

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire

Attorney I.D. No. 13396

prosen@lawsgr.com

By: Andrew J. DeFalco, Esquire

Attorney I.D. No. 84360

adefalco@lawsgr.com

Seven Penn Center Plaza

1635 Market Street, 7th Floor

Philadelphia, PA 19103

(215) 241-8888

Attorneys for Plaintiff

**ARTHUR ALAN WOLK, ESQUIRE :**

**Plaintiff**

**vs.**

**WALTER K. OLSON, ESQUIRE**

**THEODORE H. FRANK, ESQUIRE :**

**DAVID M. NIEPORENT, ESQUIRE**

**THE OVERLAWYERED GROUP :**

**And OVERLAWYERED.COM**

**Defendants**

**CIVIL ACTION – LAW**

**MAY TERM, 2009**

**NO.: 1489**

**JURY TRIAL DEMANDED**

**PLAINTIFF'S PRAECIPE TO WITHDRAW EMERGENCY MOTION**  
**WITHOUT PREJUDICE**

**TO THE PROTHONOTARY:**

Pursuant to a Stipulation and Order filed of record today, kindly withdraw without prejudice the Emergency Motion to Compel Pre-Complaint Discovery filed by the Plaintiff, which filing was accepted by the Prothonotary on June 5, 2009, and given Control No. 28-09060828. The Emergency Motion to Compel will be re-filed as a regular motion, with a regular response date, pursuant to the Stipulation and Order.

Respectfully submitted,

**SPECTOR GADON & ROSEN**



Andrew J. DeFalco

Date: June 9, 2009

Case ID: 090501489

Control No.: 09060828

**CERTIFICATE OF SERVICE**

The undersigned hereby acknowledges that an exact copy of the above and foregoing document was provided to all counsel of record on this June 9, 2009, via first-class mail.

  
\_\_\_\_\_  
Andrew J. DeFalco



## **EXHIBIT 8**

ARTHUR ALAN WOLK, ESQUIRE  Plaintiff  vs.  WALTER K. OLSON, ESQUIRE THEODORE H. FRANK, ESQUIRE DAVID M. NIEPORENT, ESQUIRE THE OVERLAWYERED GROUP And OVERLAWYERED.COM  Defendants	:  :  :  :  :  :  :  :	CIVIL ACTION – LAW  MAY TERM, 2009  NO.: 1489  JURY TRIAL DEMANDED
--	--	--

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2009, it is hereby **ORDERED** and **DECREED** Plaintiff's Motion to Compel Pre-Complaint Discovery is **GRANTED**. We direct that the following Order be entered:

1. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, are **ORDERED** to fully and completely respond to the Plaintiff's Pre-Complaint Requests for Production of Documents, pursuant to the Plaintiff's May 13, 2009 Notice, without further objection or obstruction except for claims of privilege, within ten (10) days of the date of this Order.
2. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire are **ORDERED** to submit a privilege log with their production of documents, identifying all documents withheld or redacted due to a claim of privilege, and the basis for the claim of privilege.
3. Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire are **ORDERED** to appear for depositions, pursuant to the

Plaintiff's May 13, 2009 Notice, within ten (10) days of the date of the Defendant's production of documents.

4. Should Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire fail to comply with this Order, Defendants Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire will suffer sanctions upon further application to this Court.

**BY THE COURT:**

---

J.

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire  
Attorney I.D. No. 13396  
prosen@lawsgr.com  
By: Andrew J. DeFalco, Esquire  
Attorney I.D. No. 84360  
adefalco@lawsgr.com  
Seven Penn Center Plaza  
1635 Market Street, 7th Floor  
Philadelphia, PA 19103  
(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

**Plaintiff :**

**vs. :**

**WALTER K. OLSON, ESQUIRE  
THEODORE H. FRANK, ESQUIRE  
DAVID M. NIEPORENT, ESQUIRE  
THE OVERLAWYERED GROUP  
And OVERLAWYERED.COM**

**Defendants :**

**CIVIL ACTION – LAW**

**MAY TERM, 2009**

**NO.: 1489**

**JURY TRIAL DEMANDED**

**PLAINTIFF’S MOTION TO COMPEL PRE-COMPLAINT PRODUCTION OF  
DOCUMENTS AND DEPOSITIONS**

Plaintiff Arthur Alan Wolk, Esquire (“Plaintiff”), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby submits the following Motion for an Order compelling Defendants to respond fully to Plaintiff’s Pre-Complaint Requests for Production of Documents within ten (10) days, and thereafter, to produce for Pre-Complaint Depositions Walter K. Olson, Esquire (“Olson”), Theodore H. Frank, Esquire (“Frank”), and David M. Nieporent, Esquire (“Nieporent”) (collectively “Defendants”), within ten (10) days following the document production. In support thereof, Plaintiff avers as follows:

## **I. INTRODUCTION**

1. Pennsylvania Rule of Civil Procedure 4003.8 expressly permits a party to initiate an action by Writ of Summons, and to take pre-complaint discovery prior to filing a complaint. That is what the Plaintiff has done here. The pre-complaint discovery sought by the Plaintiff is both material and necessary to the filing of the Plaintiff's Complaint, as the Plaintiff will be unable properly plead the "actual malice" element of his prospective defamation claim, and the Plaintiff cannot determine the identity of all of the persons involved with the defamatory publication, without pre-complaint discovery. The discovery sought by the Plaintiff is narrowly tailored to effectuate the ends of Rule 4003.8, and is not submitted for any improper purpose. Accordingly, the Plaintiff is manifestly entitled to the pre-complaint discovery he seeks, as more fully set forth below.

## **II. FACTS**

2. Wolk is a nationally-known aviation attorney.

3. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the "Taylor Case").

4. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk's conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order.

5. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

6. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the “Wolk Case”). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

7. On or about April 8, 2007, Defendant Frank, writing for the legal blog “Overlawyered.com,” which is operated and edited by Defendant Olson and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case (the “Frank Article”).

8. However, after a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties.

9. Wolk was unaware of the Frank Article until he discovered it in April 2009. The statements in the Frank Article are false and defamatory as a matter of law.

10. The Plaintiff filed a Praecipe to Issue Writ of Summons, and Summonses were issued in this matter on May 13, 2009.

11. On the same date, the Plaintiff served upon the Defendants a Notice of Pre-Complaint Discovery Pursuant to Rule 4003.8 and Rule 4007.1 (c), and Notice of Pre-Complaint Request for Production of Documents pursuant to Rule 4007 (d) (1) (the "Notice"). (See the Notice, attached as Exhibit "A").

12. As required by Rule 4007.1, the Notice provides a "Brief Statement of the Nature of the Action and the Matters to Be Inquired Into," which is largely as discussed above. (Id.)

13. The Notice then seeks the pre-complaint depositions of Nieporent, Frank and Olson. (Id.) The Notice then requests the following documents:

All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

(Id.)

14. The Plaintiff incorporates by reference, as though fully set forth herein, the "Facts" section of his supporting Brief.

**III. PLAINTIFF IS ENTITLED TO PRE-COMPLAINT DISCOVERY AND DOCUMENT PRODUCTION**

15. Pennsylvania Rule of Civil Procedure 4003.8 (a), which was adopted September 20, 2007, and effective November 1, 2008, provides that a Plaintiff may obtain pre-complaint discovery as follows:

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

Pa.R.Civ.P. 4003.8 (a).

16. Pennsylvania Rule of Civil Procedure 4007.1 (a) – (d) (1) provides that a party may obtain pre-complaint depositions and document production, as follows:

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ... A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this Rule ...

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into.

(d)(1) If the person to be examined is a party, the notice may include a request made in compliance with Rule 4009.1 et seq., for the production of documents and tangible things at the taking of the deposition.



Pa.R.Civ.P. 4007.1 (a) – (d) (1).

17. In McNeil v. Jordan, 894 A.2d 1260, 1269 (Pa. 2006), the Pennsylvania Supreme Court stated: “there is no question or controversy concerning the right of a party to take pre-complaint discovery.”

18. In this case, the Plaintiff has abundantly met all of the requirements to obtain the requested pre-complaint discovery.

19. The requested pre-complaint discovery is necessary because, with respect to his planned defamation claim, the Plaintiff must meet his burden of pleading “actual malice” with clear and convincing evidence, but the Plaintiff has no access to any information respecting the dissemination of the Frank Article that would permit him to plead such facts without pre-complaint discovery. Also, the Plaintiff needs to determine the identity of all persons involved in the dissemination of the defamatory Frank Article, but the Plaintiff has no way to do so absent pre-complaint discovery.

20. In addition, the requested discovery is material and narrowly tailored to address only the information necessary to file a complaint. The requested pre-complaint discovery seeks information relating solely to whether the Defendants acted with “actual malice” in publishing the Frank Article, and the identity of the offending parties. Thus, all of the requested information is, in addition to being necessary to filing a complaint, also “material.”

21. Further, because the Plaintiff seeks only information that is material and necessary to the filing of the complaint (and nothing else), and has narrowly tailored his discovery requests to address one discrete area of inquiry, the Plaintiff’s discovery requests are for a proper purpose. Because all pre-complaint discovery requests are

related to the defamation claim that the Plaintiff contemplates, the discovery requests are not unreasonable.

22. Finally, because only three depositions are sought, and only four document requests were submitted, the requested pre-complaint discovery will not cause unreasonable annoyance, oppression, burden or expense to Defendants.

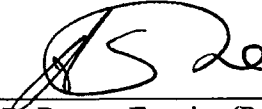
23. For these reasons, as more fully set forth in the Plaintiff's supporting brief, the Plaintiff's pre-complaint discovery requests are material and necessary to the filing of a complaint, are submitted for a proper purpose, and will not cause unreasonable annoyance, oppression, burden or expense to Defendants. Therefore, the Plaintiff respectfully requests that the Court compel the requested pre-complaint discovery as set forth in the attached Order.

WHEREFORE, Plaintiff Arthur Alan Wolk respectfully requests that this Court grant hold that the Defendants be compelled to respond in full, without further objection or obstruction except for privilege, to the Requests for Production of Documents set forth in the Notice of Pre-Complaint Deposition and Pre-Complaint Request for Production within ten (10) days from the date of the Court's Order, and to produce for Pre-Complaint

Depositions Walter K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, within ten (10) days thereafter, or suffer sanctions upon further application to the Court.

Respectfully Submitted,

**SPECTOR GADON & ROSEN, P.C.**

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Date: June 12, 2009

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Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

**Plaintiff :**

**vs. :**

**WALTER K. OLSON, ESQUIRE :**

**THEODORE H. FRANK, ESQUIRE :**

**DAVID M. NIEPORENT, ESQUIRE :**

**THE OVERLAWYERED GROUP :**

**And OVERLAWYERED.COM :**

**Defendants**

**CIVIL ACTION – LAW**

**MAY TERM, 2009**

**NO.: 1489**

**JURY TRIAL DEMANDED**

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION TO COMPEL PRE-  
COMPLAINT PRODUCTION OF DOCUMENTS AND DEPOSITIONS**

Plaintiff Arthur Alan Wolk, Esquire (“Plaintiff”), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby submits the following Memorandum of Law in support of his Motion for an Order compelling Defendants to respond fully to Plaintiff’s Pre-Complaint Requests for Production of Documents within ten (10) days, and thereafter, to produce for Pre-Complaint Depositions Walter K. Olson, Esquire (“Olson”), Theodore H. Frank, Esquire (“Frank”), and David M. Nieporent, Esquire (“Nieporent”) (collectively “Defendants”), within ten (10) days following the document production.

## **I. MATTER BEFORE THE COURT**

In this motion, Plaintiff asks the Court to compel Defendants to provide the pre-complaint discovery requested by the Plaintiff on May 13, 2009, which the Defendants have willfully and wrongfully refused to provide. Pennsylvania Rule of Civil Procedure 4003.8 expressly permits a party to initiate an action by Writ of Summons, and to take pre-complaint discovery prior to filing a complaint. In this case, the Plaintiff commenced the above-captioned action by Writ of Summons. Pursuant to Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c) – (d) (1), Plaintiff served upon Defendants, concurrently with the Writ of Summons, a Notice of pre-complaint depositions and document discovery (the “Notice”). The purpose of this Notice is to ascertain whether the Defendants (and possibly others), in writing and disseminating a defamatory article about the Plaintiff, which accused the Plaintiff of, *inter alia*, selling out his client, and accepting a lesser settlement in a case, in order to protect himself from professional liability exposure and in the hope of obtaining future business from other clients, made the defamatory statements with knowledge of their falsity and/or reckless disregard for their truthfulness. Because the Plaintiff is a nationally-known aviation attorney, the Plaintiff must plead the “New York Times” standard for a defamation claim, but the Plaintiff is unable to properly plead his allegations without receiving the requested pre-complaint discovery. Thus, the following information is material and necessary to the filing of a Complaint by the Plaintiff in this case:

- Information relating to any investigation and research performed by the author of the defamatory article, the editor of the article, and contributors to article, prior to the dissemination of the article;

- Information relating to the results of any investigation performed;
- Information relating to editorial controls with respect to the defamatory article;
- Information relating to conformity with journalistic standards; and
- Information relating to whether the Defendants knew that the statements made in the defamatory article were false.
- Information relating to other persons involved in the dissemination of the article, currently identified as “John Does.”

The requested discovery is narrowly tailored to address only the information necessary to file a Complaint against Defendants, and is not sought for any improper purpose. To date, Defendants have refused to provide any of the requested pre-complaint discovery. Accordingly, Plaintiff respectfully requests that this Court order the Defendants to provide the requested pre-complaint discovery.

## **II. STATEMENT OF THE QUESTIONS INVOLVED**

1. Is the pre-complaint discovery sought by the Plaintiff material and necessary to the filing of the Plaintiff’s Complaint?

**Suggested answer: Yes.**

2. Will the pre-complaint discovery sought by the Plaintiff cause unreasonable annoyance, embarrassment, oppression, burden or expense to Defendants?

**Suggested answer: No.**

### **III. FACTS**

#### **a. Factual And Procedural History**

This is a defamation case. Wolk is a nationally-known aviation attorney. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the "Taylor Case"). After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk's conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the "Wolk Case"). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

On or about April 8, 2007, Defendant Frank, writing for the legal blog "Overlawyered.com," which is operated and edited by Defendant Olson and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case

(the “Frank Article”). Other than the named Defendants, the Plaintiff does not know the identity of all of those involved in the publishing of the article. After a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties. Wolk was unaware of the Frank Article until he discovered it in April 2009. The statements in the Frank Article are false and defamatory as a matter of law.

The Plaintiff filed a Praecipe to Issue Writ of Summons, and Summonses were issued in this matter on May 13, 2009. On the same date, the Plaintiff served upon the Defendants a Notice of Pre-Complaint Discovery Pursuant to Rule 4003.8 and Rule 4007.1 (c), and Notice of Pre-Complaint Request for Production of Documents pursuant to Rule 4007 (d) (1) (the “Notice”). (See the Notice, attached as Exhibit “A”). As required by Rule 4007.1, the Notice provides a “Brief Statement of the Nature of the Action and the Matters to Be Inquired Into,” which is largely as discussed above. (Id.) The Notice then seeks the pre-complaint depositions of Nieporent, Frank and Olson. (Id.) The Notice also requests the following documents:

All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 Frank Article, in drafting,



editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

(Id.)

**b. The Requested Pre-Complaint Discovery Is Material And Necessary To The Filing Of The Complaint**

**1. Pre-Complaint Discovery Is Necessary**

The Plaintiff's requested pre-complaint discovery is necessary under Pennsylvania's "fact pleading" regime, in order to enable the Plaintiff to plead sufficient facts to overcome a demurrer as to the Plaintiff's contemplated defamation cause of action. As noted by the Pennsylvania Supreme Court in McNeil v. Jordan, 894 A.2d 1260 (Pa. 2006), Pennsylvania Rule of Civil Procedure 1019 (a) requires specificity in pleading and institutes a "fact pleading regime." Also, the Dragonetti Act, 42 Pa.C.S. § 8352 imposes strict consequences for the failure to provide these facts. Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c) – (d) permit pre-complaint discovery specifically to enable a Plaintiff to meet his fact-pleading requirement.

Thus, to satisfy Pennsylvania's fact pleading regime, the Plaintiff herein must obtain and plead facts sufficient to establish the elements of the defamation cause of action that will be set forth in the Complaint. As to the Plaintiff's contemplated cause of action for defamation, because the Plaintiff is a public figure, the Plaintiff must plead and establish not only that the statements in the Frank Article were false, but also that that the

statements made in the Frank Article were knowingly false and made with actual malice. Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652, 659 (Pa. 1981) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In other words, defamation claims involving public figures must be pled with heightened specificity, such that the facts alleged will, if proven, permit a jury to find the existence of “actual malice” by clear and convincing evidence. Jones v. City of Philadelphia, 893 A.2d 837, 843 (Pa.Cmwlt. 2006) (citing Tucker v. Philadelphia Daily News, 848 A.2d 113 (Pa.2004)). The Plaintiff must also plead the identity of all of the offending individuals and entities.

Thus, in order to sufficiently plead a defamation claim against the Defendants, under the heightened Pennsylvania pleading standards, the Plaintiff must obtain sufficient information regarding the investigation and research performed prior to posting the Frank Article, by the author, Frank, and the Editor, Olson, and contributors such as David Nieporent, and what was done as well as the fruits of any investigation, to ascertain whether the Defendants determined the falsity of what they published, and then published the Frank Article knowing it was false. The Plaintiff has no other access to the required information, and therefore, there is no other way, prior to filing a complaint, that the Plaintiff can obtain this information in a manner sufficient to meet the Plaintiff’s heightened burden of pleading under Pennsylvania law. For this reason, the requested discovery, seeking information relating to whether the Defendants published the Frank Article with “actual malice,” is necessary to the filing of a complaint.

Further, the Plaintiff must be able to identify all other persons involved in the dissemination of the article, currently identified as “John Does.” The only way the Plaintiff has to obtain this information, to include the information in the Complaint, is

through pre-complaint discovery. Only after receipt of the requested pre-complaint discovery will the Plaintiff be able to meet his burden of fact pleading, and marshal facts sufficient to withstand a demurrer, in order to enable the Plaintiff to file a meaningful complaint.

**2. The Notice Is Narrowly Tailored To Seek Only Material Information That Will Aid In Drafting The Complaint, And Does Not Seek Discovery For An Improper Purpose**

The discovery sought by the Plaintiff is also narrowly tailored to seek only material information that he must obtain in order to plead the elements of his contemplated defamation cause of action, and more specifically, the “actual malice” element, as well as the identity of all involved parties. Because the Plaintiff contemplates only a defamation cause of action, and must plead and establish by clear and convincing evidence in the Complaint that the defendants acted with knowledge of the falsity of their statements and/or a reckless disregard for the same, the information requested in the Plaintiff’s pre-complaint request for production of documents is narrowly tailored to address only the Defendants’ knowledge and state of mind upon disseminating the article.

The Notice seeks the following documents:

- documents reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article;
- documents relating to any investigation with respect to the subjects covered in the April 7, 2008 Frank Article;
- documents respecting communications with third parties relating to the Frank Article;

The Plaintiff’s document requests seek only information relating to the “actual malice” element of the Plaintiff’s prospective defamation claim, and the identity of persons

involved in making the defamatory statement, and nothing else. Therefore, all of the requested discovery is “material,” and none of the requested discovery is sought for an improper purpose

As to the requested pre-complaint depositions, the Brief Statement contained in the Notice explains their necessity, as required by Pennsylvania Rule of Civil Procedure 4007.1 (c). The Brief Statement explains, *inter alia*, that the Defendants disseminated the defamatory Frank Article, but the Plaintiff needs additional information to determine whether the Defendants acted with actual malice when disseminating the Frank Article, and the identity of other persons or entities involved in the defamatory dissemination. To ascertain this information, pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), the Plaintiff seeks depositions from Frank, Olson and Nieporent, those responsible for the dissemination of the Frank Article. Therefore, the information sought through these depositions is “material” to the filing of the Plaintiff’s complaint. The information sought through pre-complaint depositions will be limited to the subject of the Notice, i.e., the “actual malice” element and the identity of the defaming persons or entities, and will therefore be narrowly tailored to address only that which is material to enable the Plaintiff to file his complaint.

Accordingly, the Plaintiff’s requested pre-complaint discovery is material and necessary to the filing of a complaint. The requested pre-complaint discovery is narrowly tailored to only address specific elements of required fact pleading. As such, the requested discovery is not sought for any improper purpose, and is not sought to harass, annoy or embarrass the Defendants. Therefore, under settled Pennsylvania law, as discussed below, the Plaintiff is entitled to the requested pre-complaint discovery.

#### **IV. ARGUMENT**

##### **A. The Requested Pre-Complaint Discovery Must Be Compelled, Because It Is Material And Necessary To The Filing Of A Complaint, And It Is Not Sought For An Improper Purpose**

Under Pennsylvania law, all that is required for a Plaintiff to obtain pre-complaint discovery is that the requested information is material and necessary to filing a complaint, and that the requested information is sought for a proper purpose. The Plaintiff has been defamed by the false “Frank Article,” but the Plaintiff does not have access to information through which he would be able to plead and/or establish that the Defendants acted with “actual malice” in disseminating the Frank Article, and identify all those involved in disseminating the defamatory Frank Article, except through pre-complaint discovery. Therefore, the Plaintiff seeks pre-complaint discovery that is narrowly tailored to address only facts that are relevant to the “actual malice” inquiry and the identity of the persons responsible for the defamatory Frank Article, with respect to the Plaintiff’s defamation claim, such information is material and necessary to the filing of the Plaintiffs’ complaint, and the Plaintiff does not seek this discovery for an improper purpose. As a matter of law, this Court should compel the Defendants to provide all of the requested discovery.

Pre-complaint discovery in Pennsylvania is controlled by Pennsylvania Rule of Civil Procedure 4003.8. However, to understand pre-complaint discovery in Pennsylvania, one must begin with the Pennsylvania Supreme Court’s holding in McNeil v. Jordan, 894 A.2d 1260 (Pa. 2006). McNeil, which was decided prior to the incorporation of Rule 4003.8, involved the son of a decedent who filed a claim against his sister, alleging intentional interference with testamentary expectancy. After the

plaintiff's initial complaint was dismissed on preliminary objection, the plaintiff sought pre-complaint discovery. The trial court denied the request for pre-complaint discovery, and the Superior Court upheld the denial. The Superior Court reasoned that the Plaintiff needed to demonstrate a *prima facie* case prior to obtaining pre-complaint discovery. However, the Supreme Court noted that such a rule would produce an absurd result, as it would require a plaintiff to show a *prima facie* case in order to take pre-complaint discovery, when the only reason pre-complaint discovery would be necessary is if a *prima facie* case could not be made. McNeil, 894. A.2d at 1268. Next, noting that a plaintiff in Pennsylvania has a significant burden to plead facts in a complaint, the Supreme Court unambiguously affirmed the right of litigants in Pennsylvania to take pre-complaint discovery: "Thus, there is no question or controversy concerning the right of a party to take pre-complaint discovery. Indeed, because of the need for specificity in pleading under Rule 1019(a), the provisions quoted above play a critically important role in Pennsylvania's pleading scheme." Id. at 1269.

The Supreme Court then addressed what a plaintiff must show in order to obtain pre-complaint discovery. The Court explained that a plaintiff must show "probable cause to believe that pre-complaint discovery is necessary to the formation of a legally sufficient complaint." Id. at 1275. In other words, "pre-complaint discovery is a means to the specific end of gathering sufficient information for the filing of a complaint, and is appropriate only when there is probable cause to believe it will achieve that end." Id. at 1278. In sum, the Supreme Court explained:

Accordingly, to obtain pre-complaint discovery a litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending

action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading.

Id. Finally, in footnote 27 of the McNeil Opinion, Judge Baer of the Supreme Court stated that he was referring the matter of pre-complaint discovery to the Civil Procedural Rules Committee to address pre-complaint discovery, and to “recommend any amendments that might clarify this vexing area of civil procedure.” Id. at 1279, n. 27.

Pursuant to the referral from the Supreme Court, Pennsylvania Rule of Civil Procedure 4003.8 was adopted on September 20, 2007, and effective November 1, 2008. Rule 4003.8 provides:

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

Pa.R.Civ.P. 4003.8 (a).

However, the comment to Rule 4003.8 both explains the content of Rule 4003.8, and expressly notes that the “probable cause” standard, established by McNeil, was purposefully omitted from the Rule:

New Rule 4003.8 has established in subdivision (a) a two-prong test for pre-complaint discovery: (1) the information sought must be material and necessary to the filing of the complaint and (2) “the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.” The first prong incorporates the language of the [McNeil] opinion quoted above that the information sought be both “material and necessary” to the filing of a complaint in a pending action. **The requirement of the opinion that there be “probable cause” that the information sought is material and**

**necessary has not been included in the rule.** The language of the second prong that the discovery not cause "unreasonable annoyance, embarrassment, oppression, burden or expense" is taken verbatim from present Rule 4011(b) governing limitation of scope of discovery and deposition.

Pa.R.Civ.P. 4003.8 (a) (explanatory comment – 2007) (emphasis supplied).

Therefore, the only requirements to take pre-complaint discovery in Pennsylvania are that the information sought is "material and necessary to the filing of the complaint," and that the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party. Pa.R.Civ.P. 4003.8 (a). The "probable cause" requirement articulated in McNeil was not incorporated into Rule 4003.8.

Pennsylvania Rule of Civil Procedure 4007.1 (a) – (d) (1) provides that a party may obtain pre-complaint depositions and document production, as follows:

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ... A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this Rule ...

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into.

(d)(1) If the person to be examined is a party, the notice may include a request made in compliance with Rule 4009.1 et seq., for the production of documents and tangible things at the taking of the deposition.



Pa.R.Civ.P. 4007.1 (a) – (d) (1).

In this case, the Plaintiff has abundantly met all of the requirements to obtain the requested pre-complaint discovery. The Plaintiff has been defamed by the false Frank Article that falsely asserts that the Plaintiff committed heinous professional misconduct. Thus, the Plaintiff believes in good faith that he will be able to state causes of action against the Defendant for defamation. The Plaintiff is required to plead “actual malice” through clear and convincing evidence. However, the Plaintiff does not have access to the facts necessary to sustain his burden of pleading under Pennsylvania’s fact pleading regime with respect to the “actual malice” issue, the Plaintiff does not otherwise have access to information that would permit the Plaintiff to identify all persons or entities involved in disseminating the defamatory Frank Article, and the Plaintiff needs sufficient facts to be able to withstand the demurrer that will certainly be filed by the Defendants. These facts include, *inter alia*, the amount of research performed prior to disseminating the Frank Article, the investigation performed prior to disseminating the Frank Article, documents relied upon in disseminating the Frank Article, communications with third parties relating to the Frank Article, and the identity of others involved in the dissemination, currently named as “John Does” in the Complaint. Accordingly, the requested discovery is necessary to enable the Plaintiff to file his complaint.

In addition, all of the requested discovery is material and narrowly tailored to address only the information necessary to file a complaint. The requested pre-complaint discovery seeks information relating solely to whether the Frank Article was published with knowledge of falsity and/or reckless disregard for the truth, and the identity of the persons responsible for making the defamatory statements. No information extraneous to

the this subject is included in the request. Thus, all of the requested information is, in addition to being necessary to filing a complaint, also material.

Further, because the Plaintiff seeks only information that is material and necessary to the filing of the complaint (and nothing else), and has narrowly tailored his discovery requests to address the “actual malice” and “identity” inquiries, the Plaintiff’s discovery requests are for a proper purpose. Because they are all related to the claim that the Plaintiff contemplates, the discovery requests are reasonable. Finally, because only three depositions are sought, and only four document requests were submitted, the requested pre-complaint discovery will not cause unreasonable annoyance, oppression, burden or expense to the Defendants.

Thus, the pre-complaint discovery sought is material and necessary, and not sought for an improper purpose. As a matter of law, the Court should order Defendants to provide the requested pre-complaint discovery as described in the attached proposed Order.

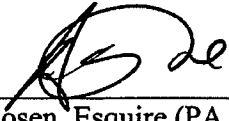
**V. RELIEF**

For these and other reasons, Plaintiff Arthur Alan Wolk respectfully requests that this Court grant emergency relief, and that the Defendants be compelled to respond in full, without further objection or obstruction except for privilege, to the Requests for Production of Documents set forth in the Plaintiff’s May 13, 2009 Notice of Pre-Complaint Deposition and Pre-Complaint Request for Production within ten (10) days from the date of the Court’s Order, and to produce for Pre-Complaint Depositions Walter

K. Olson, Esquire, Theodore H. Frank, Esquire, and David M. Nieporent, Esquire, within ten (10) days thereafter, or suffer sanctions upon further application to the Court.

Respectfully Submitted,

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Date: June 12, 2009

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire  
Attorney I.D. No. 13396  
prosen@lawsgr.com  
By: Andrew J. DeFalco, Esquire  
Attorney I.D. No. 84360  
adefalco@lawsgr.com  
Seven Penn Center Plaza  
1635 Market Street, 7th Floor  
Philadelphia, PA 19103  
(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE :**

**Plaintiff :**

**vs. :**

**WALTER K. OLSON, ESQUIRE  
THEODORE H. FRANK, ESQUIRE  
DAVID M. NIEPORENT, ESQUIRE  
THE OVERLAWYERED GROUP  
And OVERLAWYERED.COM**

**Defendants**

**CIVIL ACTION – LAW**

**MAY TERM, 2009**


**NO.: 1489**

**JURY TRIAL DEMANDED**

**CERTIFICATION OF SERVICE**

I hereby certify that service of a true and correct copy of the enclosed Motion to Compel was made on this date, to the following counsel by United States Mail, as well as by electronic mail:

Michael N. Onufrak, Esquire  
White & Williams, LLP  
1650 Market Street  
One Liberty Place, Suite 1800  
Philadelphia, PA 19103-7395

By:   
Andrew J. DeFalco, Esquire (PA Id. 84360)  
Attorney for Plaintiff

Date: June 12, 2009

**EXHIBIT "A"**

**SPECTOR GADON & ROSEN, P.C.**

By: Paul R. Rosen, Esquire  
Attorney I.D. No. 13396  
prosen@lawsgr.com  
By: Andrew J. DeFalco, Esquire  
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Philadelphia, PA 19103  
(215) 241-8888

Attorneys for Plaintiffs

**ARTHUR ALAN WOLK, ESQUIRE** :  
**1710-12 Locust Street** :  
**Philadelphia, PA 19103** :

**Plaintiffs**

**vs.**

**WALTER K. OLSON, ESQUIRE** :  
**875 King Street** :  
**Chappaqua, NY 10514-3430** :

**And**

**THEODORE H. FRANK, ESQUIRE** :  
**901 North Monroe Street, Apt. 1007** :  
**Arlington, VA 22201-2353** :

**And**

**DAVID M. NIEPORENT, ESQUIRE** :  
**155 Tillotson Road** :  
**Fanwood, NJ 07023** :

**And**

**THE OVERLAWYERED GROUP** :  
**875 King Street** :  
**Chappaqua, NY 10514-3430** :

**And**

**OVERLAWYERED.COM** :  
**318 State Street** :  
**Santa Barbara, CA 93101-2361** :

**THIS IS NOT AN ARBITRATION**  
**CASE**

**AN ASSESSMENT OF DAMAGES IS**  
**NOT REQUIRED**

**CIVIL ACTION – LAW**

**NO.:**

**JURY TRIAL DEMANDED**  
**Civil – Commerce Program**

And

JOHN DOE

And

JANE DOE

Defendants

TO:

Walter K. Olson, Esquire  
875 King Street  
Chappaqua, NY 10514-3430

TO:

Theodore H. Frank, Esquire  
901 North Monroe Street, Apt. 1007  
Arlington, VA 22201-2353

TO:

David M. Nieporent, Esquire  
155 Tillotson Road  
Fanwood, NJ 07023

**NOTICE OF PRE-COMPLAINT DISCOVERY PURSUANT TO RULE 4003.8  
AND RULE 4007.1 (c) AND NOTICE OF PRE-COMPLAINT REQUEST FOR  
PRODUCTION OF DOCUMENTS PURSUANT TO RULE 4007.1 (d) (1)**

Plaintiff, Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk"), by and through his attorneys, Paul R. Rosen, Esquire and Spector, Gadon & Rosen, P.C., hereby serves the following Notice of Pre-Complaint Discovery pursuant to Pennsylvania Rules of Civil Procedure 4003.8 and 4007.1 (c), and the following Pre-Complaint Request for Production of Documents pursuant to Pennsylvania Rule of Civil Procedure 4007 (d) (1), to the Defendants. In support thereof, Plaintiff states:

**I. BRIEF STATEMENT OF THE NATURE OF THE ACTION AND  
MATTERS TO BE INQUIRED INTO PURSUANT TO RULE 4007.1 (c)**

This is a defamation case. Wolk is a nationally-known aviation attorney. Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in a

case venued in the United States District Court for the Northern District of Georgia, captioned Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the “Taylor Case”). After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 discovery order critical of Wolk’s conduct during discovery, even though Wolk was not personally involved in any of the asserted conduct. In 2003, the Trial Judge vacated the September 2002 discovery order, and precluded all parties from publicizing the September 2002 order. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case. Wolk then sued certain of the Defendants in the Taylor Case for defamation in a case brought in the United States District Court for the Eastern District of Pennsylvania, captioned Arthur Alan Wolk v. Teledyne Industries, Inc., No. 03-5693 (the “Wolk Case”). The Wolk Case settled after it was mediated by a federal judge. As part off the settlement, all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional or wrongful conduct in the Taylor Case.

On or about April 8, 2007, Defendant Theodore H. Frank, Esquire (“Frank”), writing for the legal blog “Overlawyered.com,” which is operated and edited by Defendant Walter K. Olson, Esquire (“Olson”) and his entity, The Overlawyered Group, wrote an article relating to the Wolk Case and the Taylor Case (the “Frank Article”). However, after a brief reference to the Wolk Case, the Frank Article accused Wolk of “selling out” his client in the Taylor Case, accepting a lesser settlement in the Taylor Case for his client in order obtain future business from other clients and to avoid being



impaired by remarks regarding unprofessional conduct in the discovery order in the Taylor Case (which was vacated), and violating his professional and ethical responsibilities and duties. Wolk was unaware of the Frank Article until he discovered it in April 2009.

Wolk understands that as a public figure he must show not only that the statements in the Frank Article were false, but also that that the statements made in the Frank Article were knowingly false and made with actual malice. Pre-complaint discovery is required to determine whether a complaint can be brought under the standards required to file a defamation complaint as a public figure.

Information respecting the investigation and research performed prior to posting the Frank Article, by the author, Frank, and the Editor, Olson, and contributors such as David Nieporent, and what was done as well as the fruits of any investigation, is necessary to see if they determined the truth of what they published and then published the Frank Article knowing it was false, or their lack of a reasonable standard of news gathering and proof of fact before publishing statements that accuse a nationally known attorney of unethical and unprofessional conduct and violations of his duties to his client. This information is therefore material and necessary to determine whether a defamation claim arising from the Frank Article can meet the burden of pleading established in Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652, 659 (Pa. 1981) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Through pre-complaint discovery permitted by Pennsylvania Rule of Civil Procedure 4003.8, Wolk now seeks to determine the nature and extent of the research and investigation made by Frank and Olson prior to posting the Frank Article.

## **II. NOTICE OF DEPOSITION OF THEODORE H. FRANK, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of the **Theodore H. Frank, Esquire**, to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 24, 2009, at 10:00 a.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

## **III. NOTICE OF DEPOSITION OF WALTER K. OLSON, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of **Walter K. Olson, Esquire** to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 25, 2009, at 10:00 p.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

### **III. NOTICE OF DEPOSITION OF DAVID M. NIEPORENT, ESQUIRE**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (c), Paul R. Rosen, Esquire of Spector, Gadon & Rosen, P.C., on behalf of the Plaintiff, will take the deposition of **David M. Nieporent, Esquire** to testify as to the matters discussed in Section I, above, with regard to the above-referenced action. This deposition will take place on **June 26, 2009, at 10:00 p.m.**, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103, and continuing thereafter from day to day until completed. A brief statement of the nature of the action and the matters to be inquired into is provided in Section I, above. The witness is further requested to bring with him to the deposition the documents requested in Section V of this document, below.

### **V. PRODUCTION OF DOCUMENTS**

Pursuant to Pennsylvania Rule of Civil Procedure 4007.1 (d), Defendants are hereby commanded to produce documents and tangible things **on or before June 19, 2009, at the offices of Spector Gadon & Rosen, P.C., Seven Penn Center, 1635 Market Street, 7<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103**, as follows:

#### **a. Document Requests**

1. All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.

2. All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7,

2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.

3. All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.

4. All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.

## **V. INSTRUCTIONS AND DEFINITIONS**

The following instructions and definitions shall be applicable to the Request for Production of Documents in Section IV, above.

### **a. Instructions**

1. These document requests shall be deemed continuing and shall require supplemental answers if additional documents are acquired after the date of deposition, as soon as practicable but in any event not later than thirty (30) days from the date of discovery.

2. With respect to any document the deponent deems privileged, provide a statement setting forth as to each document:

- (a) the date appearing on the document, or if no date appears, the date on which the document was prepared;
- (b) the name of each person to whom the document was addressed;
- (c) the name of each person to whom the document, or a copy thereof, was sent, or with whom the document was discussed;
- (d) the name of each person who signed the documents, or if not signed, the name of each person who prepared it;

(e) the name of each person making any contribution to the authorship of the document;

(f) the employer and job title of each person identified in (b), (c), (d) or (e) above;

(g) the date the document was received or discussed by each of the persons identified in (b) or (c) above;

(h) the general nature or description of the document, or part claimed to be privileged, and the number of pages of which it consists;

(i) the name of each person who has custody of the document;

(j) the specific ground(s) on which the claim of privilege rests.

3. In producing documents, you are requested to produce the original of each document together with all non-identical copies and drafts of that document. If the original of any document cannot be located, a copy shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

4. Documents shall be produced as they are kept in the usual course of business. All documents shall be produced in the file folder, envelope or other container in which the documents are kept or maintained. All documents shall be produced intact in their original files, without disturbing the organization of documents employed during the conduct of the ordinary course of business, and during the subsequent maintenance of the documents.

5. All documents shall be produced which respond to any part or clause of any paragraph of a request. Each document requested shall be produced in its entirety and without deletion or excisions, regardless of whether you consider the entire document

to be relevant or responsive. If you have redacted any portion of a document, stamp or write or otherwise affix the word "REDACTED" on each page of the document which you have redacted, and provide a separate statement explaining the basis for each redaction.

**b. Definitions**

1. "You" and "Your" refer to the persons upon whom this document has been served, including their agents, servants, employees, officers, directors, members, affiliates, attorneys, subsidiaries, parent companies, related entities and those persons in active concert or participation with them, all other persons acting or purporting to act on their behalf, as well as the Overlawyered Group and Overlawyered.com. "You" and "your" when used in reference to "materials" and "documents" shall include materials and documents in your possession or under your control, and materials and documents whose present and past existence you are aware of, as well as materials and documents prepared by you unless otherwise stated.

3. "Frank Article" means the April 7, 2008 article written by Theodore H. Frank, Esquire entitled Arthur Alan Wolk v. Teledyne Industries, Inc.

5. "Writings" or "Document" are used herein in the broadest sense, and mean all written or printed matter of any kind, including the originals and all non-identical copies, including drafts, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation correspondence, electronic mail messages, memoranda, reports, notes, diaries, statistics, letters, telegraphs, minutes, agendas, contracts, reports, studies, checks, statements, receipts, returns, financial sheets, schedules, invoices, drafts, projections, summaries, pamphlets,

books, prospectuses, inter-office and intra-office communications, offers, notations of any sort of conversations, bulletins, computer printouts, teletypes, telefaxes, invoices, worksheets and all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or manual records or representations of any kind including without limitation photographs, charts, graphs, microfiche, microfilm, videotapes, audiotapes, records, motion pictures, and electronic, mechanical, computer or electric records or representations of any kind, including without limitation, tapes, cassettes and all recordings, computer discs, both hard and floppy, CD's, and CD-ROMs and computer hard, JAZ and ZIP drives. Two or more copies of a document bearing divergent or different notations, handwritten or typewritten, shall be treated as separate documents for this purpose, as well as all drafts of documents. All attachments or documents referred to by documents responsive to any request shall be produced.

7. As used herein, the term "Person" or "persons" mean any individual, corporation, partnership, joint venture, firm, association, organization, society, proprietorship, agency, board, authority, commission or other entity.

8. "Communicate" or "communication" mean every manner or means of disclosure, transfer, or exchange, and every disclosure, transfer, or exchange of information whether orally or by document or whether face-to-face, by telephone, mail, electronic mail, personal delivery or otherwise.

9. The phrase "referring or relating to", or any variant thereof, means in any way, directly or indirectly, showing, disclosing, advertizing to, embodying, reflecting, evidencing, constituting, mentioning, or revealing, either in whole or in part.

10. The singular includes the plural and vice versa. The masculine includes the feminine and neuter genders. The term "between" means "among" and vice versa. The past tense includes the present tense, and vice versa, when the clear meaning is not distorted by changing of tense.

11. The phrase "and" and "or" shall mean "and/or", "any" shall include "all" and "every" and vice versa.

**SPECTOR GADON & ROSEN, P.C.**

A handwritten signature in black ink, appearing to be 'AS de', written over a horizontal line.

Paul R. Rosen, Esquire  
Andrew J. DeFalco, Esquire  
Attorneys for Plaintiffs

Date: 5/13/09



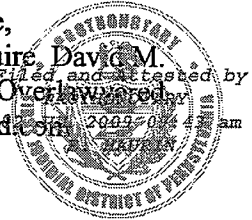
## **EXHIBIT 9**

**WHITE AND WILLIAMS LLP**

BY: Siobhan K. Cole  
Identification No(s). 209234  
1650 Market Street  
One Liberty Place, Suite 1800  
Philadelphia, PA 19103-7395  
215.864.6891  
coles@whiteandwilliams.com

**Attorneys for Defendants**

Walter K. Olson, Esquire,  
Theodore H. Frank, Esquire, David M.  
Nieporent, Esquire, The Overlawyered  
Group, and Overlawyered.com



ARTHUR ALAN WOLK, ESQUIRE

Plaintiff,

v.

WALTER K. OLSON,  
THEODORE H. FRANK, ESQUIRE,  
DAVID M. NIEPORENT, ESQUIRE,  
THE OVERLAWYERED GROUP,  
OVERLAWYERED.COM,  
JOHN DOE and JANE DOE

Defendants.

: PHILADELPHIA COUNTY  
: COURT OF COMMON PLEAS  
:  
: MAY TERM 2009  
:  
: NO. 1489  
:  
: CIVIL ACTION – LAW  
:  
: JURY TRIAL DEMANDED  
:  
:  
:  
:

**ENTRY OF APPEARANCE**

Kindly enter my appearance on behalf of Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com in the above matter.

WHITE AND WILLIAMS LLP

BY:

Siobhan K. Cole

Attorneys for Defendants

Walter K. Olson,

Theodore H. Frank, Esquire, David M.

Nieporent, Esquire, The Overlawyered

Group, and Overlawyered.com

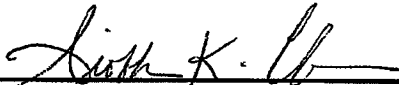
Dated: July 2, 2009

**CERTIFICATE OF SERVICE**

I, Siobhan K. Cole, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Entry of Appearance on counsel listed below on July 2, 2009:

Paul R. Rosen, Esquire  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

Andrew J. DeFalco  
SPECTOR GADON & ROSEN, P.C.  
Seven Penn Center Plaza  
1635 Market Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19103

  
\_\_\_\_\_  
Siobhan K. Cole

## **EXHIBIT 10**

**FILED**

## Civil Administration

Arthur Alan Wolk, Esquire

V.

**Defendants.**

## ORDER

**Plaintiff's Motion to Compel Pre-Complaint Discovery is DENIED.**

J.

**THIS IS NOT AN ARBITRATION  
CASE/ASSESSMENT OF DAMAGES HEARING  
REQUIRED**

**WHITE AND WILLIAMS LLP**

BY: Michael N. Onufrak  
Siobhan K. Cole  
Identification No(s). 43064/209234  
1650 Market Street  
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coles@whiteandwilliams.com

Attorneys for Defendants  
Walter K. Olson, Theodore H. Frank,  
David M. Nieporent, The Overlawyered  
Group and Overlawyered.Com

Arthur Alan Wolk, Esquire	:	PHILADELPHIA COUNTY
Plaintiff,	:	COURT OF COMMON PLEAS
v.	:	
	:	CIVIL ACTION – LAW
Walter K. Olson, Theodore H. Frank, Esquire,	:	
David M. Nieporent, Esquire,	:	MAY TERM, 2009
The Overlawyered Group	:	
and Overlawyered.Com	:	NO. 01489
Defendants.	:	

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO  
COMPEL PRE-COMPLAINT PRODUCTION OF DOCUMENTS AND DEPOSITIONS**

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby submit the following Response in Opposition to Plaintiff Arthur Alan Wolk, Esquire's ("Plaintiff" or "Wolk") Motion to Compel Pre-Complaint Production of Documents and Depositions. In support thereof, Defendants aver as follows:

I. INTRODUCTION

In an attempt to intimidate Defendants, the Plaintiff wrongfully initiated this lawsuit by writ of summons, knowing that his alleged defamation claim, based on a more than two-year-old weblog article, cannot survive even the initial complaint and answer stage of pleading.

Pennsylvania has a one year statute of limitations for all defamation claims. Despite that fact, and in pursuit of his quest to cause Defendants as much harm as possible before his claim is dismissed, Wolk filed the instant Motion to Compel Pre-Complaint Discovery, in which he claims such discovery is necessary and material to his drafting a legally sufficient complaint. Wolk knows, however, that his claim of alleged defamation is barred by both the statute of limitations and the First Amendment and that he cannot produce a complaint capable of surviving a motion to dismiss, even with pre-complaint discovery. It is clear therefore, that this Motion to Compel is an abuse of procedure under Pa.R.C.P. 4003.8, calculated merely to subject Defendants to the annoyance, burden and expense of pre-complaint discovery, and should be denied.

Defendants' specific responses to Wolk's improper allegations are as follows:

1. Denied as conclusions of law to which no responsive pleading is required. By way of further response, and for all of the reasons set forth fully in the accompanying Memorandum of Law, incorporated herein by reference, Plaintiff's Motion to Compel Pre-Complaint Discovery should be denied because, first and foremost, Plaintiff's case is inescapably time-barred. In addition, even if Plaintiff's claims were not time-barred, Plaintiff already possesses any and all information that could possibly lead to the filing of a legally sufficient complaint. Furthermore, under the free speech safeguards provided by the First Amendment, the

statements in the Frank Article, attached hereto as Exhibit “A” and incorporated by reference as though fully set forth herein, are not actionable, regardless of the statute of limitations.

Therefore, no amount of discovery can provide information to create a meritorious complaint.

Although Pennsylvania Rule of Civil Procedure 4003.8 allows a plaintiff to obtain pre-complaint discovery, both the Rule and Pennsylvania case law are clear that pre-complaint discovery is only available where the information sought is material and necessary to the filing of a legally sufficient complaint. That is not the case here. In this case, Wolk already has at his disposal, (1) the contents of the Frank Article, (2) the name and location of its author, (3) the date and source of publication and, (4) the names and addresses of all persons responsible for the publishing entity.<sup>1</sup>

In support of his improper Motion to Compel, Wolk admits that his claim is subject to the heightened standard of proof required for defamation claims brought by public figures. Wolk asserts, however, that without pre-complaint discovery he will be unable to properly plead the requisite “actual malice” element of his prospective defamation claim, or determine the identity of all persons involved with the Frank Article. Wolk believes therefore, that he “is manifestly entitled to the pre-complaint discovery he seeks.” Wolk is, quite simply, mistaken. In fact, neither of Wolk’s arguments justify the discovery he seeks, and even more importantly, no amount of pre-complaint discovery will afford Wolk an escape from the First Amendment or the statute of limitations, both of which bar his claim.

---

<sup>1</sup> Defendants’ statement that Wolk has knowledge of the names and addresses of all persons responsible for the publishing entity is in no way a concession that David M. Nieporent is responsible for either the Frank Article, or the actions of The Overlawyered Group or Overlawyered.com. In fact, Nieporent is simply a contributing author to the weblog, who had nothing to do with the Frank Article, is wholly uninvolved with any of the issues in this case, and whom Wolk improperly entangled in this law suit.



First, Wolk's claim is time-barred. Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims for libel and/or slander are subject to Pennsylvania's one year statute of limitations. Wolk instituted this action by praecipe on May 13, 2009. The Frank Article was published on April 8, 2007. Consequently, any claim for libel and/or slander Wolk may have had expired in April, 2008. Therefore, the information Wolk seeks is neither material nor necessary to the filing of a legally sufficient complaint, because no information can lead to a legally sufficient complaint.

Second, Pennsylvania Rule of Civil Procedure 1019(b) clearly states, "Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge and other conditions of mind may be averred generally." Pa.R.Civ.P. 1019(b) (emphasis added).

Third, Plaintiff already initiated suit against all individuals who are in any way associated with the Frank Article, as well as David M. Nieporent, who is not. In the unlikely event that any additional responsible individuals ever are identified, Plaintiff remains free to either amend his complaint or initiate another action. The remote possibility that some other unknown, potentially-responsible individual might exist cannot justify Plaintiff's attempts to compel pre-complaint discovery from those he already identified.

Finally, Wolk's claim is barred by the First Amendment. Wolk cannot deny that the privilege to speak one's mind and debate public issues is closely guarded by the United States Constitution and every court operating thereunder. In his Motion to Compel Pre-Complaint discovery, Wolk himself relies on the seminal case, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), wherein the Supreme Court created the requirement that public officials prove falsity and actual malice in order to recover in defamation, precisely because, "debate on public issues should be uninhibited, robust and wide-open, and that it may well

include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Sullivan, at 270.

In Curtis Publishing Co. v. Butts, the Supreme Court extended the requirement that actual malice be proven by clear and convincing evidence, to cases filed by any public figure, which Wolk freely concedes he is. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 87 S.Ct. 1975 (1967). The Supreme Court purposely created, and subsequently extended, this extremely high constitutional obstacle to defamation suits brought by public figures, in order to encourage exactly the type of thought and discussion contained in the Frank Article. A review of the article, attached hereto as Exhibit “A”, reveals only Frank’s opinion that courts considering potential settlement agreements ought to do more to protect fiduciaries when the agreement contains bargained for provisions benefiting an attorney rather than a party. By way of example, Frank simply wonders, hypothetically, whether Wolk’s client in Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the “Taylor Case”), received a reduced settlement amount because the agreement included a provision vacating one of the Court’s orders, which criticized Wolk. The article does not, directly or indirectly, accuse Wolk of any wrongdoing, rather it simply ponders the role his personal interests may have played in settlement negotiations. In fact, it is only the Court, and not Wolk, that the article actually criticizes. Clearly therefore, the Frank Article, and the questions for thought it poses, qualify for constitutional protection, regardless of whether Wolk believes they portray his handling of the Taylor Case unfairly or incorrectly.

Accordingly, for all of the foregoing reasons, which are not exhaustive, the Plaintiff is clearly not entitled to the pre-complaint discovery he seeks.

## II. FACTS

2. Admitted.

3. Admitted.

4. Admitted in part; denied in part. Upon information and belief the Trial Judge in the Taylor Case, issued a September 2002 discovery order, critical of Wolk's conduct during discovery, but later vacated the Order and precluded all parties to the Taylor law suit from publicizing same. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of all other statements in Plaintiff's paragraph No. 4.

5. Denied. After reasonable investigation Defendants are without knowledge or information sufficient to form a belief as to the truth of the statement in Plaintiff's paragraph No. 5.

6. Admitted.

7. Admitted.

8. Denied. Defendants specifically deny that the phrase "selling out" appears in the Frank Article. Defendants further deny that the Frank Article directly accuses Wolk of any misconduct. To the contrary, the Frank Article contains only statements of undisputed fact regarding the settlement of the Taylor case, and questions, hypothetically posed by the author, as to whether (1) Wolk's own interests may have affected the settlement amount, and (2) whether courts should do more to protect parties' interests when, as in the Taylor case, an attorney participating in settlement negotiations develops interests which potentially conflict with those of his client.

9. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, the statements in the Frank Article are statements of fact and opinion, regarding a matter of public interest, protected by the First Amendment, which are neither false nor defamatory. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the statement “Wolk was unaware of the Frank Article until he discovered it in April 2009”, and demand strict proof of same. Even if Wolk was unaware of the Frank Article until April, 2009, Wolk’s failure to discover the article did not toll the running of the statute of limitations. The Frank Article was published on April 8, 2007. Therefore, any claim for defamation Wolk might have had expired in April, 2008. Wolk instituted this time-barred action by writ on May 13, 2009, more than a full year after the expiration of the limitations period. Defendants are left to assume that Wolk intends to invoke the discovery rule, however, Pennsylvania law is clear that where, as here, defamation claims are based on written statements, widely circulated at the moment of publication, the discovery rule does not apply. See Barrett v. Catacombs Press, 64 F. Supp. 2d 440, 444 (E.D.Pa. 1999); Bradford v. American Media Operations, Inc., 882 F. Supp. 1508, 1519 (E.D.Pa. 1995); Smith v. IMG Worldwide, Inc., 437 F. Supp. 2d 297, 306 (E.D.Pa. 2006) (each applying Pennsylvania law).

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendants incorporate by reference, as though fully set forth herein, the “Facts” section of their supporting Brief.

III. PLAINTIFF IS NOT ENTITLED TO PRE-COMPLAINT DISCOVERY OR DOCUMENT PRODUCTION

15. Admitted in part; denied in part. Defendants admit that Pennsylvania Rule of Civil Procedure 4003.8 (a) was adopted September 20, 2007, and provides that a Plaintiff may obtain pre-complaint discovery as follows:

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

Defendants deny Rule 4003.8 (a) became effective November 1, 2008. By way of further answer, Rule 4003.8 (a) became effective November 1, 2007.

16. Admitted in part; denied in part. Defendants admit that the language quoted in Plaintiff's paragraph No. 16 can be found in Pennsylvania Rule of Civil Procedure 4007.1(a)-(d)(1). Defendants deny that the language quoted in Plaintiff's paragraph No. 16 represents the entirety of Rule 4007.1(a)-(d)(1). Defendants further deny that Rule 4007.1 (a)-(d) (1) alone governs *pre-complaint* depositions and document production. Rather, Rule 4007.1(a)-(d) (1) pertains to the taking of depositions and document production *generally*, with reference to Rule 4003.8 as governing pre-complaint discovery specifically.

17. Admitted in part; denied in part. Defendants admit that the language quoted in Plaintiff's paragraph No. 17 can be found in the Pennsylvania Supreme Court's decision in McNeil v. Jordan, 894 A.2d 1260, 1269 (Pa. 2006). Defendants deny that the Court's statement in McNeil, taken by Plaintiff and restated out-of-context in Plaintiff's paragraph No. 17, stands for the proposition that every party is always afforded the right to take pre-complaint discovery. In fact, as the McNeil Court noted, a complaining party's right to pre-complaint discovery must

be balanced with the right of a responding party to be free from intrusive and burdensome discovery demands lodged prior to the vesting of any right to respond to the premises underlying the plaintiff's suit. Id.

18. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, Defendants deny that Plaintiff has met any of the requirements for obtaining pre-complaint discovery. Specifically, Plaintiff does not – and cannot – demonstrate that any further information is necessary for, or capable of, leading to a legally sufficient complaint for defamation.

19. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, Plaintiff is already in possession of all information necessary to plead “actual malice.” The fact that Plaintiff does not possess information, because none exists, sufficient to prove actual malice with clear and convincing evidence, does not entitle him to pre-complaint discovery. Defendants further deny that Plaintiff has any right to subject Defendants to the annoyance, burden and expense of pre-complaint discovery in the hopes of discovering other fictitious “persons involved in the dissemination of” the Frank Article.

20. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, the claim Plaintiff contemplates is time-barred and therefore, information relating to Defendants’ state of mind at the time of publication is neither material nor necessary to the filing of a legally sufficient complaint.

21. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, the claim Plaintiff contemplates is time-barred and therefore, information sought is neither material and necessary to the filing of a legally sufficient complaint, nor is it for a proper purpose, making the discovery requests unreasonable.

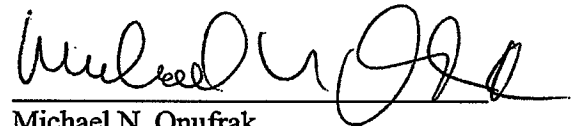
22. Denied. Plaintiff's claim is time-barred, frivolous and calculated merely to harass Defendants. Therefore, any pre-complaint discovery will cause unreasonable annoyance, oppression, burden and expense to Defendants.

23. Denied. As Defendants state fully above, and in their accompanying brief, incorporated by reference as though fully set forth herein, Plaintiff's pre-complaint discovery requests are not material and necessary to the filing of a legally sufficient complaint, are not submitted for a proper purpose, and will cause unreasonable annoyance, oppression, burden and expense to Defendants. Therefore, Defendants respectfully request that the Court deny the requested pre-complaint discovery as set forth in Plaintiff's proposed Order.

WHEREFORE, Defendants Walter K. Olson, Theodore H. Frank, David M. Nieporent, The Overlawyered Group and Overlawyered.com, hereby respectfully request that this Court deny Plaintiff's Motion to Compel Pre-Complaint Discovery.

WHITE AND WILLIAMS LLP

BY:



Michael N. Onufrak  
Siobhan K. Cole  
Attorneys for Defendants  
Walter K. Olson, Theodore H. Frank,  
David M. Nieporent, The Overlawyered  
Group and Overlawyered.Com

Dated: July 2, 2009

# EXHIBIT A



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## Overlawyered

Chronicling the high cost of our legal system

# Arthur Alan Wolk v. Teledyne Industries, Inc.

by [Ted Frank](#) on April 8, 2007

Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other attorney for defamation. No dice, but even this ludicrous suit does not result in sanctions. [[Beck/Herrmann](#)]

Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, *Taylor v. Teledyne*, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), *aff'd* in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).

We've earlier reported on Mr. Wolk for his lawsuits against commenters at an aviation website that criticized him: [Sep. 16-17, 2002](#). As the *Taylor* opinion notes, Wolk also threatened to sue the federal judge in that case. He also filed what the Eleventh Circuit called a [frivolous mandamus petition](#).

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**THIS IS NOT AN ARBITRATION  
CASE/ASSESSMENT OF DAMAGES HEARING  
REQUIRED**

**WHITE AND WILLIAMS LLP**

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Group and Overlawyered.Com

Arthur Alan Wolk, Esquire	:	PHILADELPHIA COUNTY
Plaintiff,	:	COURT OF COMMON PLEAS
v.	:	
	:	CIVIL ACTION – LAW
Walter K. Olson, Theodore H. Frank, Esquire,	:	
David M. Nieporent, Esquire,	:	MAY TERM, 2009
The Overlawyered Group	:	
and Overlawyered.Com	:	NO. 01489
Defendants.	:	

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION TO COMPEL PRE-COMPLAINT PRODUCTION OF  
DOCUMENTS AND DEPOSITIONS**

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby submit the following Memorandum of Law in support of their Response in Opposition to Plaintiff Arthur Alan Wolk, Esquire's ("Plaintiff" or "Wolk") Motion to Compel Pre-Complaint Production of Documents and Depositions.

I. MATTER BEFORE THE COURT

Plaintiff wrongfully initiated the above-captioned law suit by writ of summons, knowing that his alleged defamation claim is both time-barred and merit-less, and cannot survive even the initial complaint and answer stage of pleading. Plaintiff now asks the Court to compel Defendants to provide pre-complaint documents and depositions, merely to subject Defendants to the annoyance, burden and expense of pre-complaint discovery.

Although a Plaintiff is permitted, under the Pennsylvania Rules of Civil Procedure, to commence an action by Writ of Summons, and when necessary under Rule 4003.8, seek pre-complaint discovery of material information in order to the draft a legally sufficient complaint, that right is limited, and in this case, unavailable.

Plaintiff states that the purpose of his Notice of, and subsequent Motion to Compel, pre-complaint discovery is to ascertain whether the Defendants (and possibly others), acted with actual malice and knowledge of the falsity of their statements, so that he may draft a legally sufficient complaint for defamation. The problem with Plaintiff's request is that no amount of discovery or information can lead to a legally sufficient complaint for defamation because, (a) the statute of limitations has run, and (b) the statements in the article are protected by the First Amendment. Thus, the information Plaintiff seeks is neither material nor necessary to the filing of a legally sufficient complaint, because no amount of information can lead to a legally sufficient complaint.

Therefore, Plaintiff's request is unnecessary, burdensome and for an improper purpose, and Defendants respectfully request that this Court deny the instant Motion to Compel.

## II. STATEMENT OF THE QUESTIONS INVOLVED

1. Is the pre-complaint discovery sought by the Plaintiff material and necessary to the filing of a legally sufficient complaint?

**Suggested answer: No.**

2. Is it possible that the pre-complaint discovery sought by the Plaintiff will lead to the filing of a legally sufficient complaint?

**Suggested answer: No.**

2. Will the pre-complaint discovery sought by the Plaintiff cause unreasonable annoyance, embarrassment, oppression, burden and expense to Defendants.

**Suggested answer: Yes.**

## III. FACTS

Wolk is a nationally-known aviation attorney. Defendant Olson, through his sole proprietorship, The Overlawyered Group, operates a legal blog called "Overlawyered.com." The blog, which normally posts two or more articles per day, examines problems in the civil and criminal justice systems, and provides commentary on issues in the news and recent case developments. Defendant Frank is an attorney and contributing author to Overlawyered.com.

Beginning in 2000, Wolk's law firm represented the plaintiff in Taylor v. Teledyne Technologies, Inc., No. 00-cv-1741 (the "Taylor Case"). As the result of a discovery dispute in the Taylor Case, the Trial Judge issued a September 2002 Order, critical of Wolk's conduct during discovery. The Taylor Case settled, and the Trial Judge vacated the September 2002 Order, precluding all parties to the Taylor Case from publicizing same. Wolk then sued certain

of the Defendants and their attorneys for defamation, because defense counsel shared the critical Order with their client. Wolk's defamation suit was mediated to settlement.

On April 8, 2007, Defendant Frank became aware of the case of Wolk v. Teledyne Industries, Inc., No. 03-5693 (the "Wolk Case"). Curious about the underlying opinion in the Taylor case, Frank researched the publicly available Taylor docket, where he found the discovery order criticizing Wolk. Frank was surprised to discover that the order was vacated as a precondition to settling the Taylor Case, and decided to write an article on the issue involved (*i.e.*, when an attorney develops a personal interest in settlement negotiations) for Overlawyered.com.

In his article, Frank related an abbreviated procedural history of both Wolk's defamation suit, and the Taylor Case, and then questioned whether, "Wolk's client suffer[ed] from a reduced settlement so that his attorney could avoid having the order used against him in other litigation?" Frank further questioned whether Wolk's client, and the Court, were fully aware of the potential effect of Wolk's conflicting interest on the settlement amount, and whether courts have a duty, in that situation, to do more to protect plaintiffs from the self-interest of their attorneys. Defendant Frank's article, (the "Frank Article") was posted to Overlawyered.com on April 8, 2007, where it became instantaneously available to anyone with internet access.

On May 13, 2009 Wolk commenced this action by writ, claiming he was defamed by the Frank Article. On the same date, Wolk served Defendants with a Notice of Pre-Complaint Discovery. On June 12, 2009 Wolk filed the instant Motion to Compel, which Defendants herein oppose.

#### IV. ARGUMENT

Plaintiff's Motion to Compel Pre-Complaint Discovery is improper because, first and foremost, Plaintiff's case is inescapably time-barred. Additionally, under the free speech safeguards provided by the First Amendment, the statements in the Frank Article are not actionable, regardless of the statute of limitations. Therefore, because it is impossible for pre-complaint discovery to lead to a meritorious complaint, in this time-barred and constitutionally barred action, it would be manifestly unfair to subject Defendants to the unreasonable annoyance, embarrassment, oppression, burden and expense of pre-complaint discovery.

Furthermore, even if this Court were to find that Plaintiff's claims are not barred by time and the First Amendment, Plaintiff would still not be entitled to pre-complaint discovery because, as outlined below, Plaintiff is already in possession of any and all information that could possibly lead to the filing of a legally sufficient complaint.

##### A. Plaintiff's Defamation Claim is Time-Barred, Therefore, Pre-Complaint Discovery is Unavailable

Wolk's claim is time-barred. Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims for libel and/or slander are subject to Pennsylvania's one year statute of limitations. The Frank Article was published on April 8, 2007. Wolk instituted this action by praecipe on May 13, 2009. Therefore, the information Wolk seeks is neither material nor necessary to the filing of a legally sufficient complaint, because no information can lead to a legally sufficient complaint, more than a full year after the expiration of the limitations period.

Wolk claims that he was unaware of the Frank Article until April, 2009. Even if that claim is true, however, Wolk's failure to discover the article did not toll the running of the statute of limitations. The Frank Article was published on April 8, 2007, and consequently any claim

for defamation Wolk might have had, expired in April, 2008. Defendants are left to assume that, in order to save his defamation claim, Wolk will try to invoke the discovery rule. Pennsylvania law is clear, however, that where, as here, defamation claims are based on written statements, widely circulated at the moment of publication, the discovery rule does not apply.

Applying Pennsylvania law, the Eastern District of Pennsylvania repeatedly has held that when defamation claims are based on written statements, widely circulated at the moment of publication, the discovery rule simply does not apply. For example, in Barrett v. Catacombs Press, 64 F. Supp. 2d 440, 444 (E.D.Pa. 1999), the court held that, where a defendant's alleged defamation was not published in a manner meant to conceal the subject matter of the defamation, the discovery rule should not apply. The Barrett Court further emphasized, "that in the case of a media-public defamation action, where the defamatory writing has actually been published, there is an even stronger rationale for eschewing the discovery rule." Id.

In Bradford v. American Media Operations, Inc., 882 F. Supp. 1508, 1519 (E.D.Pa. 1995), the Court refused to apply the discovery rule, stating, "'publication' is the objective triggering event for the statute of limitations in libel cases, and thus the happenstance of when one particular plaintiff happens to see the offending publication can be of no legal moment." See also Smith v. IMG Worldwide, Inc., 437 F. Supp. 2d 297, 306 (E.D.Pa. 2006) (citing Barrett and Bradford, among others, in the Court's analysis of the applicability of the discovery rule to defamation claims based on private conversations but not publications).

However, even if the discovery rule did apply to defamation claims such as Wolk's, in order to invoke the discovery rule, and toll the statute of limitations in Pennsylvania, Wolk would have to show that he did not know, nor could he reasonably have discovered, the existence of the Frank Article. Clearly Wolk cannot satisfy this standard. Not only is Wolk a

sophisticated attorney with numerous resources at his disposal, but Wolk also has a public history of seeking out and enforcing his rights against members of the legal and aviation communities who issue allegedly defamatory statements against him. Given that Wolk has a history of initiating defamation claims, and the fact that a simple internet search using Wolk's name instantaneously produces the Frank Article, it is inconceivable that Wolk could not reasonably have discovered his injury within the limitations period. Therefore, with or without the discovery rule, Wolk's claim is time-barred in Pennsylvania, making pre-complaint discovery futile and unavailable.

**B. The Frank Article is Non-Defamatory Speech Protected by the First Amendment, Therefore, Pre-Complaint Discovery is Unavailable**

Wolk's claim is also barred by the First Amendment, making it further impossible for pre-complaint discovery to lead to a legally sufficient complaint. The privilege to speak one's mind and debate public issues is closely guarded by the United States Constitution and every court operating thereunder. In his Motion to Compel Pre-Complaint discovery, Wolk himself relies on the seminal case, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), wherein the Supreme Court created the requirement that public officials prove falsity and actual malice in order to recover in defamation, precisely because, "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Sullivan, at 270.

In Curtis Publishing Co. v. Butts, the Supreme Court extended the requirement that actual malice be proven by clear and convincing evidence, to cases filed by any public figure, which Wolk freely concedes he is. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 87 S.Ct. 1975 (1967). The Supreme Court purposely created, and subsequently extended, this extremely high



constitutional obstacle to defamation suits brought by public figures, for the express purpose of protecting exactly the type of thought and discussion contained in the Frank Article. As the Curtis Court stated:

“The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an ‘unalienable right’ that ‘governments are instituted among men to secure.’ History shows us that the Founders were not always convinced that unlimited discussion of public issues would be ‘for the benefit of all of us’ but that they firmly adhered to the proposition that the ‘true liberty of the press’ permitted ‘every man to publish his opinion.’” (Id. at 149) (citing Respublica v. Oswald, 1 Dall. 319, 325, 1 L.Ed. 155 (Pa.)).

A review of the Frank Article reveals only Frank’s protected opinion, that courts considering potential settlement agreements ought to do more to protect clients when the agreement contains bargained for provisions benefiting an attorney rather than a party. By way of example, Frank simply asks whether Wolk’s client in the Taylor case received a reduced settlement amount because the agreement included a provision vacating an Order that criticized Wolk. The article does not, directly or indirectly, accuse Wolk of any wrongdoing, rather it simply ponders the role his personal interests played in settlement negotiations. In fact, it is only the Court, and not Wolk, that the article actually criticizes for not doing more to protect parties’ interests when, as in the Taylor case, an attorney participating in settlement negotiations develops interests which potentially conflict with those of his client.

Therefore, even if this Court assumes *arguendo*, that Wolk’s claims were not time-barred, pre-complaint discovery would still remain futile and inappropriate because the Frank Article is constitutionally protected, non-actionable, free speech.

**C. Pre-Complaint Discovery is Unnecessary and Unavailable Because Plaintiff Cannot Demonstrate that the Requested Discovery Will Lead to a Cognizable Claim**

Although Pennsylvania Rule of Civil Procedure 4003.8 allows a plaintiff to obtain pre-complaint discovery, both the Rule and Pennsylvania case law are clear that pre-complaint discovery is only available where the information sought is material and necessary to the filing of a legally sufficient complaint. That is not the case here. In this case, Wolk already has at his disposal, (1) the contents of the Frank Article, (2) the name and location of its author, (3) the date and source of publication and, (4) the names and addresses of all persons responsible for the publishing entity.<sup>1</sup>

In an effort to manufacture necessity, Wolk concedes that his claim is subject to the heightened standard of proof required for defamation claims brought by public figures. Wolk then attempts to use that concession to his advantage and asserts that without pre-complaint discovery, he will be unable to properly plead the requisite “actual malice” element of his prospective defamation claim. Wolk further claims that without pre-complaint discovery he will be unable to determine the identity of all persons involved with the Frank Article and therefore, he “is manifestly entitled to the pre-complaint discovery he seeks.” Wolk is, quite simply, mistaken. In fact, neither of Wolk’s arguments justify the discovery he seeks, and even more importantly, no amount of pre-complaint discovery will afford Wolk an escape from the First Amendment or the statute of limitations, both of which bar his claim.

First, Wolk relies on McNeil v. Jordan, 894 A. 2d 1260,1269 (2006), in support of his claim that actual malice must be plead with specificity. Defendants agree that the McNeil

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<sup>1</sup> Defendants’ statement that Wolk has knowledge of the names and addresses of all persons responsible for the publishing entity is in no way a concession that David M. Nieporent is responsible for either the Frank Article, or the actions of The Overlawyered Group or Overlawyered.com. In fact, Nieporent is simply a contributing author, wholly uninvolved with any of the issues in this case, who Wolk improperly entangled in this law suit.

decision, in conjunction with Rule 4003.8, governs pre-complaint discovery in Pennsylvania. However, Wolk repeatedly misconstrues, takes out of context, and inappropriately emphasizes certain portions of the McNeil decision, in order to suit his arguments, while picking and choosing to follow only portions of the Court's holding and ignoring the fact that ultimately, McNeil's request for pre-complaint discovery was denied.

Wolk cites McNeil for the proposition that Pennsylvania Rule of Civil Procedure 1019(a) requires specificity in pleading. While it is true that the McNeil opinion does reference the need for specificity in pleading, neither the McNeil opinion, nor Rule 1019 "require specificity in pleading and institute a 'fact pleading regime'" for all pleadings alike, as Wolk incorrectly implies in his Brief.

The title of Rule 1019, "Contents of Pleadings. General and Specific Averments", contradicts Plaintiff's statement that factual specificity is always required. To the contrary, the Rule first makes clear the requirements for all pleadings generally, and then distinguishes between averments which require specificity and those which do not. Rule 1019(a) clearly states, "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Sub-part (b) of the rule then clarifies, "Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge and other conditions of mind may be averred generally." Pa.R.Civ.P. 1019(a-b) (emphasis added).

Furthermore, the facts of McNeil, which no doubt caused the Pennsylvania Supreme Court to state the need for specificity in pleading, are distinguishable from the facts in this case. In McNeil, the Plaintiff failed to aver, even generally, the element of testamentary intent to change one's will, required for a claim of tortious interference with testamentary expectancy. Therefore, the McNeil Trial Court, dismissed the Plaintiff's claim, explicitly providing leave to

amend and plead the requisite intent. The Plaintiff in McNeil then requested pre-amended-complaint discovery, which was partially denied. Instead the Trial Court offered a compromise wherein the Plaintiff's attorneys would be allowed access to the testator's estate planning files so that they could prepare an amended complaint. The Plaintiff refused the court's offer, and instead chose to appeal the denial of full pre-complaint discovery.

In this case, Plaintiff already possesses all of the information generally necessary for the drafting of a complaint in defamation. As Rule 1019 makes clear, defamation claims brought by public figures are not subject to a heightened standard of pleading, they are subject to a heightened standard of proof. The fact that Plaintiff does not possess information, because none exists, sufficient to prove actual malice with clear and convincing evidence, does not prevent him from generally averring his belief in its existence, and certainly does not entitle him to pre-complaint discovery.

Second, Plaintiff already initiated suit against all individuals who are in any way associated with the alleged defamatory statement, as well as David M. Nieporent, who is not. In the unlikely event that any additional responsible individuals ever are identified, Plaintiff remains free to either amend his complaint or initiate another action. The remote possibility that some other unknown, potentially-responsible individual might exist cannot justify Plaintiff's attempts to compel pre-complaint discovery from those he already identified.

Finally, it is the Pennsylvania Supreme Court's holding in McNeil, which coincidentally Wolk disclaims, and not its articulation of the need for specificity in pleadings, that should determine Wolk's right to pre-complaint discovery. After an extensive review of Pennsylvania case law on pre-complaint discovery, the McNeil Court held that in order to obtain pre-complaint discovery, a litigant is required to demonstrate (1) good faith; (2) probable cause that the

information is both material and necessary to the filing of a complaint in a pending action; (3) that but for the discovery request, he will be unable to formulate a legally sufficient pleading; and (4) describe with reasonable detail the materials sought.

Wolk has not met any of the first three requirements for obtaining pre-complaint discovery. Specifically, Wolk is a highly sophisticated attorney who cannot deny his claim is barred by both time and the First Amendment and therefore, his request for pre-complaint discovery is not in good faith. Furthermore, Plaintiff does not – and cannot – demonstrate that any further information is necessary for, or capable of, leading to a legally sufficient complaint for defamation.

Although Pa.R.C.P. 4003.8 does not incorporate the McNeil probable cause requirement, it does specifically embrace the McNeil decision, adopting its language in section (a) of the two-part test for pre-complaint discovery, requiring the information sought to be material and necessary. The Superior Court of Pennsylvania recently held that, “merely stating that the information sought in discovery is ‘material and necessary’ to draft a ‘legally sufficient Complaint,’ and then simply listing the materials requested, does not satisfy the McNeil probable cause standard of presenting ‘facts supporting a reasonable belief that the evidence will support a cognizable cause of action.’” Cooper v. Frankford Health Care System, 960 A.2d 134, 142 (Pa. Super 2008).

Clearly neither Rule 4003.8 nor the Court’s decision in McNeil stand for the proposition that every party is always afforded the right to take pre-complaint discovery. In fact, the Supreme Court unequivocally stated in McNeil, that “a complaining party’s right to pre-complaint discovery must be balanced with the right of a responding party to be free from intrusive and burdensome discovery demands lodged prior to the vesting of any right to respond

to the premises underlying the plaintiff's suit." McNeil, 894 A.2d at 1269. Wolk's entire claim is time-barred, frivolous and calculated merely to harass Defendants. Thus, any pre-complaint discovery will cause unreasonable annoyance, oppression, burden and expense to Defendants. Accordingly, for all of the foregoing reasons, which are not exhaustive, the Plaintiff is clearly not entitled to the pre-complaint discovery he seeks.

V. RELIEF

The claim Plaintiff contemplates is time and constitutionally barred and therefore, the information Plaintiff seeks through pre-complaint discovery can be neither material and necessary to the filing of a legally sufficient complaint, nor is it for a proper purpose. Therefore, pre-complaint discovery will cause unreasonable annoyance, oppression, burden and expense to Defendants.

WHEREFORE, Defendants Walter K. Olson, Theodore H. Frank, David M. Nieporent, The Overlawyered Group and Overlawyered.com, hereby respectfully request that this Court deny Plaintiff's Motion to Compel Pre-Complaint Discovery.

WHITE AND WILLIAMS LLP

BY: 

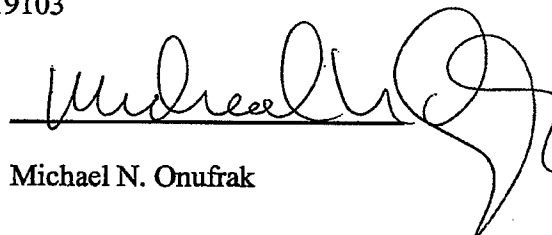
Michael N. Onufrak  
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David M. Nieporent, The Overlawyered  
Group and Overlawyered.Com

Dated: July 2, 2009

### **CERTIFICATE OF SERVICE**

I, Michael N. Onufrak, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Response in Opposition to Plaintiff's Motion to Compel Pre-Complaint Production of Documents and Depositions, as well as Defendant's Brief in Support of same, on counsel listed below on July 2, 2009:

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Michael N. Onufrak

## **EXHIBIT 11**





IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

WOLK  
VS  
OLSON ETAL

May Term 2009

No. 01489

**DOCKETED**

**AUG 04 2009**

**PAUL SALTER**

CASE MANAGEMENT ORDER  
COMPLEX TRACK

AND NOW, 04-AUG-2009, it is Ordered that:

1. The case management and time standards adopted for complex track cases shall be applicable to this case and are hereby incorporated into this Order.
2. All *discovery* on the above matter shall be completed not later than **06-DEC-2010**.
3. *Plaintiff* shall identify and submit *curriculum vitae and expert reports* of all expert witnesses intended to testify at trial to all other parties not later than **03-JAN-2011**.
4. *Defendant and any additional defendants* shall identify and submit curriculum vitae and expert reports of all expert witnesses intended to testify at trial not later than **07-FEB-2011**.
5. All *pre-trial motions* shall be filed not later than **07-FEB-2011**.
6. A *settlement conference* may be scheduled at any time after **07-MAR-2011**. Prior to the settlement conference all counsel shall serve all opposing counsel and file a settlement memorandum containing the following:
  - (a). A concise summary of the nature of the case if *plaintiff* or of the defense if defendant or additional defendant;
  - (b). A statement by the plaintiff or all damages accumulated, including an itemization of injuries and all special damages claimed by categories and amount;
  - (c). Defendant shall identify all applicable insurance carriers, together with applicable limits of liability.
7. A *pre-trial conference* will be scheduled any time after **02-MAY-2011**. Fifteen days prior to pre-trial conference, all counsel shall serve all opposing counsel and file a pre-trial memorandum containing the following:
  - (a). A concise summary of the nature of the case if *plaintiff* or the defense if defendant or

Wolk Vs Olson Etal-CMOIS



additional defendant;

- (b). A list of all witnesses who may be called to testify at trial by name and address. Counsel should expect witnesses not listed to be precluded from testifying at trial;
  - (c). A list of all exhibits the party intends to offer into evidence. All exhibits shall be pre-numbered and shall be exchanged among counsel prior to the conference. Counsel should expect any exhibit not listed to be precluded at trial;
  - (d). Plaintiff shall list an itemization of injuries or damages sustained together with all special damages claimed by category and amount. This list shall include as appropriate, computations of all past lost earnings and future lost earning capacity or medical expenses together with any other unliquidated damages claimed; and
  - (e). Defendant shall state its position regarding damages and shall identify all applicable insurance carriers, together with applicable limits of liability;
  - (f). Each counsel shall provide an estimate of the anticipated length of trial.
8. *It is expected that the case will be ready for trial 06-JUN-2011*, and counsel should anticipate trial to begin expeditiously thereafter.
9. All counsel are under a continuing obligation and are hereby ordered to serve a copy of this order upon all unrepresented parties and upon all counsel entering an appearance subsequent to the entry of this Order.

**BY THE COURT:**

---

**JACQUELINE ALLEN, J.**  
**TEAM LEADER**

WPTS69599 (Rev 11/04)

**DOCKETED**

**AUG 04 2009**

**PAUL SALTER**

## **EXHIBIT 12**

**FILED**  
02 JUL 2009 12:16 pm  
**Civil Administration**  
D. DAILEY

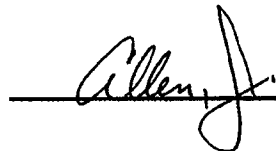
Arthur Alan Wolk, Esquire	:	PHILADELPHIA COUNTY
Plaintiff,	:	COURT OF COMMON PLEAS
v.	:	
	:	CIVIL ACTION - LAW
Walter K. Olson, Theodore H. Frank, Esquire,	:	
David M. Nieporent, Esquire,	:	MAY TERM, 2009
The Overlawyered Group	:	
and Overlawyered.Com	:	NO. 01489
Defendants.	:	

**ORDER**

AND NOW, this 27<sup>th</sup> day of JULY, 2009, it is hereby **ORDERED**  
and **DECREED** that

Plaintiff's Motion to Compel Pre-Complaint Discovery is **DENIED**.

**BY THE COURT:**

  
J.

DOCKETED  
JUL 23 2009  
J. DIROSA  
CIVIL ADMINISTRATION

COPIES SENT  
PURSUANT TO Pa.R.C.P. 236(b)  
JUL 29 2009  
FIRST JUDICIAL DISTRICT OF PA  
USER I.D.: \_\_\_\_\_

Wolk Vs Olson Etal-ORDER



Case ID: 090501489  
Control No.: 09061584

## **EXHIBIT 13**

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION - CIVIL

RECEIVED  
7/21/09

SIOBHAN COLE  
WHITE AND WILLIAMS LLP  
1800 ONE LIBERTY PLACE  
1650 MARKET STREET  
PHILA, PA 19103

WOLK VS OLSON ETAL  
090501489

SCHEDULING ORDER

AND NOW, JULY 14, 2009, it is hereby Ordered that:

1. A Case Management Conference is scheduled on August 04, 2009 at 11:00 A.M. at the Case Management Conference Center, Room 613 City Hall, Philadelphia, Pa 19107.
2. Counsel for the Plaintiff is directed to serve a copy of this Order on any unrepresented party and any attorney entering an appearance subsequent to the issuance of this Order. Attendance by all counsel of record is mandatory.
3. This conference will be conducted by a Civil Case Manager who shall act on behalf of the Honorable JACQUELINE ALLEN.
4. Counsel must be prepared to address all relevant issues concerning venue, service of process, pleadings, discovery, possible joinder of additional parties, theories of liability or defenses and damages claimed.
5. At the conclusion of the conference a Case Management Order shall be entered which shall govern this case.
6. All applicable parts of the enclosed conference memorandum shall be completed and brought to the Case Management Conference.
7. If the case settles prior to conference, fax a notice to 215-686-3709. Questions concerning this order and its contents shall be referred to 215-686-3710.

OFFICE OF CIVIL ADMINISTRATION