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. 2:09-CV-4001 CIVIL ACTION JURY TRIAL DEMANDED

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

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 reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6).

INTRODUCTION

In his Response in Opposition to Defendants' Motion to Dismiss, Plaintiff Arthur Alan Wolk ("Plaintiff" or "Wolk") misinterprets and misapplies Pennsylvania law, boldly states that this Court wrongly decided multiple cases concerning the applicability of the discovery rule, and repeatedly attempts to mask his legal conclusions as facts this Court must accept as true.[1] For all

[1] In a footnote, Plaintiff also claims that Defendants' Motion to Dismiss was not timely filed under Fed. R. Civ. P. 81(c)(2). Plaintiff is mistaken. Defendants removed the above captioned matter to this Court on Tuesday September 1, 2009. Pursuant to Rule 81(c)(2)(C) Defendants were required to answer or present other defenses within five days, exclusive of weekends and National Holidays, after the notice of removal was filed. Monday September 7, 2009, Labor

of the following reasons, Defendants respectfully request that this Court lend no weight to Plaintiff's untenable Response and instead grant the instant Motion to Dismiss, thereby freeing Defendants from the burdens of this frivolous suit.

ARGUMENT

I. STANDARD OF REVIEW

This Court may properly dismiss Wolk's Complaint pursuant to Rule 12(b)(6) because, even accepting all factual allegations therein as true, it fails to state a legally sufficient claim. A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a Complaint. Bell Atlantic v. Twombly, 550 U.S. 554, 573, 127 S.Ct. 1955, 1975 (2007). If the Complaint requests relief that is barred by the applicable statute of limitations, it is legally insufficient and subject to dismissal for failure to state a claim. Jones v. Bock, 549 U.S. 199,215, 127 S.Ct. 910, 921 (2007).

It is undisputed that Wolk's claims of defamation, false light invasion of privacy, and intentional interference with prospective contractual relations are based solely upon an article authored by Defendant Frank and published to the legal weblog Overlawyered.com on April 8, 2007 (the "Frank Article"). Because Wolk did not commence this action until May 13, 2009, more than a full year after the expiration of the limitations period, Wolk's claims are time-barred pursuant to 42 Pa.C.S.A. § 5523(1).

In deciding the instant Motion to Dismiss, this Court must accept as true all of Wolk's factual allegations. What this Court is not required to accept are Wolk's naked assertions and legal conclusions. Recently, in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50, 173 L.Ed. 2d 868 (2009), the Supreme Court reaffirmed and clarified the Twombly standard, emphasizing that although a court must accept all factual allegations as true for purposes of deciding a motion to

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Day, was a National Holiday according to Rule 6(a)(4)(A). Therefore, Defendants' Motion to Dismiss was timely filed on September 9, 2009.

dismiss, that rule does not apply to legal conclusions or to "legal conclusions couched as factual allegations," and that courts need not accept threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Therefore, this Court need not accept as true Wolk's bald assertion that the Defendants conspired with aircraft engine manufacturers and other organizations to harm Wolk, his conclusion that the Frank Article "accused Wolk of 'selling out' his client," his conclusion that the Frank Article is defamatory *per se*, or most importantly, his conclusion that his lack of knowledge was reasonable. As this memorandum more fully discusses below, these conclusions of law are the proper province of this Court, not Wolk.

II. ALL CLAIMS ASSERTED ARE TIME-BARRED

A. The Discovery Rule Does Not Apply to Defamation Claims Based Upon Written Statements Widely Circulated at the Moment of Publication

In their Memorandum of Law in Support of the Motion to Dismiss, Defendants relied on this Court's decisions in 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) and Smith v. IMG Worldwide, Inc., 437 F. Supp. 2d 297, 306 (E.D.Pa. 2006) for the proposition that where, as here, defamation claims are based on written statements, widely circulated at the moment of publication, the discovery rule does not apply.

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).

In response, Wolk claims that the Pennsylvania Supreme Court's decisions in Wilson v. El-Daief, 964 A.2d 354 (2009), Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (2005) and Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606 (2000) render the Barrett and Bradford opinions inapplicable, wrongly decided contraventions of Pennsylvania law, and that this Court "erred as a matter of law." (Plaintiff's Brief in Opposition at Pgs. 9, 18-22).

Wolk's claims are not only presumptuous, they are wrong. First and foremost, neither Wilson, Fine nor Crouse overturn or even distinguish this Court's holdings in Barrett or Bradford, nor do they require, as Wolk repeatedly asserts in Response to the Motion to Dismiss, that the discovery rule apply to all causes of action involving a Pennsylvania statute of limitation.

Fine v. Checcio was a medical malpractice case decided by the Supreme Court of Pennsylvania in March, 2005. Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (2005). The import of the Fine decision was not, as Wolk would have this Court believe, that the discovery rule applies to all cases, or that the policies and standards applied in Barrett and Bradford are no longer good law. To the contrary, Fine supports much of the analysis this Court employed in Barrett and Bradford. For example, the Fine Court stated:

> "Our analysis begins with the principles in this area of the law that are settled. ... In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. Thus, we have stated that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. Mistake, misunderstanding, or lack of knowledge in themselves do

> not toll the running of the statute. Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action." Fine, 582 Pa. at 266 (internal citations omitted);

Compare Bradford, 882 F. Supp. at 1518 ("such a rule is typically applied to limitations statutes in 'malpractice cases i.e., the cause of action does not accrue, until the date of discovery of the malpractice, or the date when, by the exercise of reasonable care and diligence, the patient should have discovered the wrongful act'."). The Fine Court then continued with an in-depth re-statement of Pennsylvania precedents regarding the broad parameters of the discovery rule, which the Court describes as "established", and wherein it repeatedly relied on the same case law cited in Barrett:

> "As the discovery rule has developed, the salient point giving rise to its application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause...Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law." Fine, 582 Pa. at 267-268 (citing Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (1983)) (internal citations omitted).

The true significance of, and in fact the primary reason for, the Fine decision was to clarify whether a party's access to the discovery rule is premised on whether or not the prescribed period has expired when he discovers his injury. Fine, 582 Pa. at 269. The court held that it was of no importance whether a party actually discovered his injury within or outside of the prescribed period, reasoning:

> "Under such a conclusion, for example, a party who is reasonably diligent, but is unable to ascertain that he is injured until the day before the limitations period has run, must file suit within twenty-four hours or be time-barred by the statute of limitations. If that same party, however, reasonably discovers his injury the day after the prescribed period has expired, he has the full statutory period within which to commence an action." Id. at 270.

This decision by the Fine Court, has no significance in this case. It does not undermine this Court's decision in Barrett and Bradford, nor does it suggest that if those cases had been decided post-Fine, an alternate analysis or outcome would be required.

Wilson v. El-Daief, 964 A.2d 354 (2009) is also a medical malpractice case, with an opinion heavily tailored to that context. In Wilson, the Court simply decided, whether in light of Fine, a plaintiff's knowledge of her injury commenced the running of the limitations period or whether it was tolled until she learned of its cause via a definitive medical diagnosis. Wilson, 964 A.2d at 365. In fact, other than confirming that the reasonable diligence standard, as described in Fine, is the appropriate standard for the application of the discovery rule, the Wilson decision did nothing to advance or alter the applicability of Pennsylvania's discovery rule in any context other than medical malpractice cases. Therefore, the Wilson decision has no bearing on either this case or Barrett and Bradford.

Because Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606 (2000) is little more than an outline of the standard, generally applicable in all cases where a plaintiff invokes the discovery rule, which does nothing to upset either Barrett or Bradford, an in-depth analysis of its holding is unnecessary.

In addition, Wolk wholly ignores the fact that Defendants also relied upon Smith v. IMG Worldwide, Inc., which was decided after both Crouse and Fine, wherein the court cited to Barrett and Bradford for its analysis of the applicability of the discovery rule in defamation cases based on private conversations but not publications. Smith, 437 F. Supp. 2d 297, 306 (E.D.Pa. 2006). Further undermining Wolk's argument that Barrett and Bradford are contrary to current Pennsylvania law is this Court's February, 2008 decision in Drozdowski v. Callahan, clearly stating, "As noted by Judge Van Antwerpen in *Barrett v. Catacombs Press*, the discovery rule has no application 'where allegedly defamatory material was published, advertised and

distributed freely to any willing purchaser.'" Drozdowski v. Callahan, 2008 WL 375110 (E.D.Pa. 2008).

The precise issue at hand is whether the discovery rule applies to claims arising from an allegedly defamatory statement, widely circulated at the moment of publication. Clearly, Barrett, Bradford, Smith, and Drozdowski, deal with this issue while Fine, Wilson and Crouse do not. Therefore, Fine, Wilson and Crouse simply cannot undermine the multiple decisions by this Court, which clearly state that the discovery rule does not apply to this case. Despite all of this misdirection, however, Wolk cannot escape the fact that all of the applicable decisions, including Wilson, Fine and Crouse, clearly state that in order to invoke the protection of the discovery rule, a plaintiff must have exercised reasonable diligence, and that Wolk admittedly exercised none.

B. Wolk Did Not Exercise Reasonable Diligence

Wolk's only hope for surviving the instant Motion to Dismiss rests with the discovery rule. However, Pennsylvania's discovery rule will not toll the statute of limitations where, as here, the Plaintiff either knew or should have known of his injury through the exercise of reasonable diligence. "Mistake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute. Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action." Fine v. Checcio, 582 Pa. 253, 266, 870 A.2d 850, 857 (2005) (citing Nesbitt v. Erie Coach Co., 416 Pa. 89, 204 A.2d 473, 475 (1964); Pocono International, 468 A.2d at 471).

Wolk's cause of action accrued on April 8, 2007, the date the Frank Article was published, and expired one year later on April 8, 2008. Wolk claims, however, that he was unaware of the Frank Article until April, 2009. Even assuming, as we must, Wolk's claim that he first read the Frank Article in 2009 is true, his simple lack of knowledge did not toll the running of the statute of limitations. To the contrary, in order to invoke Pennsylvania's

discovery rule, Wolk must allege not only that he lacked knowledge of his injury, but that his lack of knowledge was reasonable. "As the discovery rule has developed, the salient point giving rise to its application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause." Fine, 582 Pa. at 267.

Despite Wolk's repeated assertions that his lack of knowledge was reasonable, correct application of the reasonable diligence standard, as articulated by the Pennsylvania Supreme Court in Fine v. Checcio, clearly shows that Wolk cannot satisfy his burden. Therefore, the discovery rule cannot apply to toll the statute of limitations. As stated by the Fine Court and confirmed by the Wilson Court:

> "[R]easonable diligence is not an absolute standard, but is what is expected from a party who has been given reason to inform himself of the facts upon which his right to recovery is premised. As we have stated there are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence." Fine, 582 Pa. at 267; Wilson v. El-Daief, 964 A.2d 354, 362 (2009) (citing Fine and reiterating the above standard and also holding that "the party relying on the discovery rule bears the burden of proof.").

According to Wolk's own admissions:

> **"Wolk has been a favorite target of criticism and ridicule from Overlawyered.com.** For example, after Wolk secured 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." (Complaint at ¶ 25)(emphasis added).
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> "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." (Complaint at ¶ 26).
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> "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." (Complaint at ¶ 36).

"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." (Complaint at ¶ 35).

"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." (Complaint at ¶ 22).

"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**." (Complaint at ¶ 63)(emphasis added).

"Wolk is perhaps the most prominent aviation attorney in the United States of America." (Complaint at ¶ 13).

"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." (Complaint at ¶ 15).

Notwithstanding Wolk's claims that he is the most prominent aviation attorney in the country, a major target of the aircraft industry, a favorite target of Overlawyered.com, and that the Frank Article was so widely disseminated that it is "public knowledge", Wolk would like this Court to believe that there was nothing that should have "awakened his inquiry" in the more than two years between the publication of the Frank Article and his initiation of this lawsuit. This Court need not accept Wolk's argument. All this Court must accept is that Wolk *did not* know of his alleged injury until April, 2009, not that he *should not* have known of it at the time his cause of action accrued. The fact that Wolk should have known of his injury is demonstrated by his own Complaint, and is more than enough to make the discovery rule inapplicable to this case.

C. Reasonable Minds Cannot Differ That the Discovery Rule is Inapplicable to This Case

Perhaps realizing that his own Complaint vitiates his only defense to the Motion to Dismiss, Wolk's Response to the Motion first focuses on misinterpreting and misapplying recent Pennsylvania case law to suggest not only that Defendants relied on bad law, but that this Court wrongly decided multiple cases involving application of the discovery rule to defamation cases.

Wolk then claims that a jury must decide whether he was able, in the exercise of reasonable diligence, to know of his injury and its cause. Although ordinarily that question does involve a factual determination, such that it must be decided by a jury, courts are clear that where, as here, "reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence, of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law." Fine, 582 Pa. at 268 (citing Pocono International, 468 A.2d at 471); Wilson, 964 A.2d at 362 (" '[W]e have not hesitated to find as a matter of law that a party has not used reasonable diligence in ascertaining the cause of an injury thus barring the party from asserting their claim under the discovery rule'...The party relying on the discovery rule bears the burden of proof." (citing Cochran v. GAF Corp., 542 Pa. 210, 216, 666 A.2d 245, 248-249 (1995).

Relying solely on the statements in Wolk's Complaint, it is clear that reasonable minds could not differ as to whether he was able, in the exercise of reasonable diligence, to know of his injury and its cause. By Wolk's own admission he is a nationally known attorney, repeatedly criticized by both the legal and aviation communities, who is "a favorite target" of Overlawyered.com. Taking those statements in conjunction with the fact that Wolk has ample financial resources and a history of instituting defamation claims against persons who issue allegedly defamatory statements against him, it is inconceivable that a trier of fact could find that Wolk was unable, despite the exercise of reasonable diligence, to know of his injury. Therefore,

this Court may properly decide, as a matter of law, that the discovery rule does not apply, that the statute of limitations was not tolled, that Wolk's claims are time-barred, and his Complaint is legally insufficient.

D. Pennsylvania Law is Clear That the Doctrine of Fraudulent Concealment Does Not Apply to This Case

The Doctrine of Fraudulent Concealment is wholly inapplicable to this cause of action, which is based upon an allegedly defamatory legal opinion, published to a widely read and publicly available website, that became instantly available to anyone with access to the internet on April 8, 2007. The doctrine of fraudulent concealment provides that a "defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts." Fine v. Checcio, 582 Pa. 253, 271, 870 A.2d 850, 860 (2005) In order for the doctrine of fraudulent concealment to have any effect, this Court would have to find that by publishing the Frank Article, the Defendants somehow concealed it from Wolk, causing him to relax his vigilance. Clearly, such a finding is illogical and impossible. Furthermore, in order to invoke the doctrine, case law is clear that "[t]he plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence." Id. (citing Molineux v. Reed, 516 Pa. 398, 532 A.2d 792, 794 (1987). Because Wolk does not present any evidence, let alone clear and convincing evidence, of any attempts by Defendants to conceal the Frank Article, the Court may completely disregard Wolk's ridiculous grasp for this straw.

III. THE FRANK ARTICLE IS NOT DEFAMATORY

A. Whether the Frank Article is Capable of Defamatory Meaning is a Question of Law

It is the province of this Court to decide whether the Frank Article is capable of defamatory meaning. "Under Pennsylvania law, the question of whether a publication is capable

of defamatory meaning is for the court in the first instance, and not for the jury." Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1281 (3d. Cir. 1979) (citing Pierce v. Capital Cities Communications, Inc., 576 F.2d 496, 502 (3d. Cir. 1978). It is only after the court determines that a statement is capable of a defamatory meaning that a jury must determine whether it was so understood by the recipient. Pierce, 576 F.2d at 502 (citing Restatement (Second) Torts § 614 (1977); Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971) (overruled on other grounds by Dunlap v. Philadelphia Newspapers, Inc., 301 Pa.Super. 475, 448 (1982)).

Under Pennsylvania law, a plaintiff must prove the defamatory character of a communication. 42 Pa.C.S.A. §8343(a). The expression of an opinion, without more, is not actionable as libel. Bogash v. Elkins, 405 Pa. 437, 440, 176 A.2d 677, 679 (1962). It is a matter of public record that Judge Carnes issued an Omnibus Discovery Order, which was extremely critical of Wolk's conduct, and that Wolk sued opposing counsel in the Taylor Case, for "disseminating" that same Order. By Judge Carnes' own detailed account of the underlying disputes, Wolk required the Court's vacatur of the Order as a precondition to settlement of the Taylor Case.

A review of the remainder of the Frank Article reveals only Frank's protected opinion that courts should be careful to protect fiduciaries of plaintiffs' attorneys when signing off on settlements which contain bargained for terms which exist solely for the benefit of the attorney. In fact, the single sentence which Wolk bases his entire Complaint upon simply asks, "Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation?" A question is just that: a question. It is not an accusation, especially here where the Frank Article plainly does not try to answer the question, but simply complains that a judge did not try to do so.

In Redding v. Carlton, the Court held a defendant's statement that "[t]his is a conflict of interests at the very least, and perhaps much more" was non-actionable because it was a truthful remark characterized by the type of rhetorical hyperbole common to American politics. Redding v. Carlton, 223 Pa.Super. 136, 140, 296 A.2d 880, 882 (Pa.Super. 1972). Similarly here, Wolk cannot deny that when a settlement agreement contains a bargained for provision benefiting an attorney rather than a party, a conflict of interests arises. Defendant Frank's identification of that conflict, and his opinion that courts ought to protect fiduciaries when it does, is non-actionable.

In the seminal case, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), 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, 376 U.S. 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.

Therefore, even if this Court assumes, *arguendo*, that Wolk's claims were not time-barred, dismissal for failure to state a claim is still appropriate because this Court can decide, as a matter of law, that the Frank Article is not capable of defamatory meaning.

B. The Frank Article is Protected by the First Amendment

Wolk's claims are barred by the First Amendment, making it further impossible for him to prove any set of facts which would constitute a legally sufficient complaint. In Curtis Publishing Co. v. Butts, the Supreme Court held that any public figure seeking recovery for defamation must prove, by clear and convincing evidence, that the allegedly defamatory statement was made with actual malice. In support of that holding, the Court clearly stated, "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.'" Curtis Publishing Co. v. Butts, 388 U.S. 130, 149, 87 S.Ct. 1975 (1967) (citing Respublica v. Oswald, 1 Dall., 319, 325, 1 L.Ed. 155 (Pa.)).

A review of the Frank Article, when done in conjunction with Judge Carnes' opinion in Taylor v. Teledyne Technologies, Inc., 338 F.Supp.2d 1323, 1327-28, shows that Defendant Frank's reflections on the conflict of interests surrounding settlement of the Taylor Case are barely more than a recitation of Judge Carnes' publicly available decision. Defendant Frank's only addition to Judge Carnes' explanation of the issue was his suggestion 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. Clearly, this is the type of free discussion on a matter of public interest that the First Amendment is designed to protect. Wolk's conclusion that Defendant Frank's opinion amounts to an accusation that Wolk "effectively and unethically 'sold-out' his client" is without merit and should not be accepted by this Court.

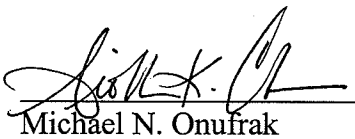
CONCLUSION

Plaintiff's claims of defamation, false light and intentional interference with prospective contractual relations are time and constitutionally barred, and therefore, the Complaint is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Despite Plaintiff's vehement, but baseless claims to the contrary, these are questions of law which this Court, and not a jury, should decide.

WHEREFORE, Defendants, Walter Olson, Theodore Frank, David Nieporent, The Overlawyered Group and Overlawyered.com respectfully request that this Court grant their Motion Pursuant to Rule 12(b)(6) and dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

WHITE AND WILLIAMS LLP

BY: 

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