UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE	:	**NO. 2:09-CV-4001**
Plaintiff	:	**CIVIL ACTION**
vs.	:	**JURY TRIAL DEMANDED**
WALTER K. OLSON, ESQUIRE **THEODORE H. FRANK, ESQUIRE** **DAVID M. NIEPORENT, ESQUIRE** **THE OVERLAWYERED GROUP** **And OVERLAWYERED.COM**	:	
Defendants	:	

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR RELIEF FROM THE AUGUST 2, 2010 ORDER PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 60(b)(2), (3), AND (6).

Plaintiff, Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk") respectfully files this Reply Brief in Support of His Motion for Relief from the August 2, 2010 Order, Pursuant to Rules 60(b)(2), (3), and (6) of the Federal Rules of Civil Procedure.

I. REPLY TO OVERLAWYERED'S RECITATION OF FACTS

Overlawyered's "software upgrade" argument does not accurately state the facts. The truth is that in May of 2008 Overlawyered did not "upgrade" the original "Moveable Type" software, it replaced it and deleted its entire website content using that software. Then, Overlawyered placed all content to new webpages using an entirely new and different computer program called Word Press. Defendant Olson himself blogged that he personally created new webpages (a.k.a. URLs).

> **By Walter Olson May 19, 2008:** "Moreover I've gotten the old URLs of those archives to redirect seamlessly to the new. Coming up soon: getting the old URLs of the MT-based 2003-2008 archives to redirect to the new, as much as possible.

By Walter Olson May 24, 2008: "Thanks in part to a very helpful plugin from developer Alex King, most individual post URLs from the old site now redirect seamlessly to the new."

(Ex. B and C.)

Further, it is also undeniable that the internet webpage that first published the Frank Blog was deleted by Overlawyered and no longer exists:

> **Our lawyers probably made us take that down...**
>
> At any rate, we can't find it -- it's a 404 Not Found. Check the spelling of the URL carefully, try searching the site for content you know is on the page, or just proceed back to Overlawyered.com's top page. And consider telling us about any broken links that led you to this page: editor - [at] - this-domain-name - dot - com.

(Ex. A www.overlawyered.com/2007/04/aurthur_alan_wolk_v_teledyne_in.html)(emphasis in original).) Overlawyered's original webpage for the Frank Blog does not advise of a "software upgrade," it advises that the communication as originally published no longer exists.

The creation of the new webpage hosting the Frank Blog, however, is also significant because Overlawyered intentionally altered the new webpage hosting the Frank Blog to thrust it into the forefront of search engine results, such as Google. On May 19, 2008 and May 27, 2008, Defendant Olson blogged:

> **By Walter Olson May 19, 2008:** One unexpected result of the archive changeover: Google News interpreted the arrival of the archived files on WordPress as if they'd been newly published, which has (temporarily) much expanded our presence on that site. Fortunately, the archives are prominently marked, which should keep readers from mistaking them from recent reportage.

(Ex. B.) (Emphasis in original.)

> **By Walter Olson May 27, 2008**: "And here's a neat trick: by tinkering with tag URLs, you can combine tags to find a subset of posts with overlapping tags. For example, the URL http://overlawyered.com/tag/illinois+family-law/ calls up all posts that are tagged with both "Illinois" and "family law." (Note the required placement of the plus sign and hyphen(s).)

(Ex. D.) (Emphasis in original.)

Therefore, at the time Overlawyered represented to this Court that the Frank Blog was published on April 8, 2007 and accessible to the entire world, Defendant Olson knew that the webpage hosting the Frank Blog was published on May 13, 2008 and modified to make it accessible to the world. No matter how Overlawyered seeks to cover up this discrepancy, it was misleading and tantamount to fraud.

II. REPLY TO OVERLAWYERED'S LEGAL ARGUMENT

Wolk's Rule 60 motion presents new evidence which was fraudulently concealed by the Defendants. It seeks relief which this Court may grant. The Defendants' response does not present a shred of case law to support its untenable legal arguments.

A. Defendants' Evidence vs. Theory Argument is Smoke and Mirrors

The falsity of Overlawyered's original arguments is not proved by a new legal theory; it is proved by facts reasonably unknown to Wolk which only a forensic investigation could reveal. These facts, however, were undeniably known to Overlawyered and within its exclusive control and concealed from Wolk and the Court. Thus, the April 2, 2010 order dismissing Wolk's case was not based on a truthful record and prevented Wolk from successfully defeating the motion.

Overlawyered's reliance on United States v. Cimera, 459 F.3d 452 (3d Cir. 2006) is misplaced because in that case the basis for a new trial was apparent on the face of the evidence used at trial. Such is not the case here where the Frank Blog bears no indicia of when it was actually published. In Cimera, the defendant sought a new trial under Federal Rule of Criminal Procedure 33 because he discovered the account numbers listed on the fraudulent checks which he was alleged to have cashed contained discrepancies which may have proved he did not cash them. The Third Circuit reversed the grant of a new trial because the account numbers **and**

discrepancies were on the backs of the checks that were submitted as evidence in the case. Id. at 460. In so ruling, the Third Circuit reasoned:

> Of course, Cimera potentially could have identified new evidence that would support these observations and conclusions. For example, an associated deposit slip could have provided evidence of what the illegible numbers should have been. Likewise, the testimony of a bank employee could have established that the account number on the legible check was used exclusively for checks cashed at the West Orange branch. Because Cimera has not identified any evidence which was not admitted at trial, however, his motion should have been denied.

Id. at 461.

Here, Wolk has identified new evidence in the form of a declaration detailing a forensic analysis of the Overlawyered defendants' website and the proofs obtained through that forensic investigation. In addition, Wolk has presented the defendants own prior statements confirming that the content of the Overlawyered website was placed on new modified webpages. (Exs. A through D.)

Unlike the checks in Cimera which contained the account numbers alleged to be new evidence, the new Frank Blog does not contain the evidence of publication alleged to be new. On this issue, Plaintiff leaves the Court with Olson's own words:

> Google News interpreted the arrival of the archived files on WordPress as if they'd been newly published, which has (temporarily) much expanded our presence on that site. **Fortunately, the archives are prominently marked, which should keep readers from mistaking them from recent reportage.**

(Ex. B.) (Emphasis added.)

B. Wolk has Shown the Utmost Diligence in the Discovery of Overlawyered's Misrepresentation

Overlawyered incorrectly contends that Wolk is precluded from seeking relief under Rule 60(b)(2) because the "new" evidence existed when the Rule 12(b)(6) motion as briefed. By nature of the rule, however, the evidence alleged to be the basis for a Rule 60(b)(2) motion must

have been in existence at the time of the dispositive proceeding. Coyler v. Cons. Rail Corp., 114 Fed.Appx. 473, 481 (3d Cir. 2004). Therefore, a court should not attribute lack of diligence to a party merely because evidence in existence was not discovered, but should consider whether the complaining party was "excusably ignorant" of the particular fact. Brown v. Pennsylvania R.R. Co., 282 F.2d 522, 526-27 (3d Cir. 1960).

The Third Circuit's discussion of the diligence requirement in Cimera is also instructive here. In Cimera, the court found that there was nothing in the record to suggest that the defendant and his counsel were unaware of the account number discrepancy and that the discrepancy could have been discovered by reasonable diligence by merely looking at the checks. Id. at 461-62. In fact, the identity of the person who did cash the checks was a hotly contested issue at trial and in closing counsel argued:

> I want you to look at something the Government never looked at carefully. I want you to look at the back of every single check in this case, and I want you to notice something that stands out like a sore thumb, that the deposit stamp used to deposit the checks is different on the backs of certain of the checks because those checks may have been diverted by Mr. Ferrante to some other Matt, Inc. check cashing. So I want you to remember this.

Id. at 462. Therefore, reasonable diligence was not exercised.

In addition, the duties of counsel (and the Overlawyered defendants are attorneys) not to misrepresent facts in a signed pleading serves as another basis the Court should consider in assessing Wolk's diligence. Overlawyered, having signed and submitted their motion to dismiss to the Court representing the publication date of the Frank Blog to be April 8, 2007, removed any reason for Wolk to hire an expert to prove the representation false. See F. R. Civ. P. 11. Furthermore, the Pennsylvania Code of Civility and the Rules of Professional Conduct provide overlapping obligations on attorneys. A lawyer "must not allow the tribunal to be misled by false statements of law or fact or evidence the lawyer knows to be false." Id. The Code of

Civility provides that "[a] lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court. 204 Pa.Code § 99.3. Pursuant to Rule 3.3 of the Rules of Professional Conduct, "a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Pa R.P.C. 3.3 (a)(1).

On the issue of Wolk's diligence, Olson's own words should be dispositive:

> **Fortunately, the archives are prominently marked, which should keep readers from mistaking them from recent reportage.**

(Ex. B.) (Emphasis added.) Because Overlawyered's blogs are "prominently" marked they cannot fault Wolk for not "mistaking [the Frank Blog] for recent reportage." In addition, Wolk was denied discovery against the Overlawyered Defendants because they objected to it. (Ex. E.) Wolk is not a computer expert, nor is he an expert in blogging or the creation of blogging websites. There is no way that Wolk could have learned that the webpage attached to his complaint was created on May 13, 2008 without retaining an expert to perform a forensic investigation of Overlawyered.com. There is no indication on the webpage itself of when it was created other than the date April 8, 2007 which as shown in the Declaration of DeGraff, was false. There was no reason for Wolk to retain an expert and assess the metamorphosis of the Frank Blog into what it is today. Indeed, the discovery of the publication date was accidental as the investigation was initiated to discover the extent to which Overlawyered, Olson, and Frank had been stalking Wolk, and the necessary steps that would have to be taken to cleanse the internet of defamation against Wolk to support his equity cause of action currently pending before this Court on a motion to remand.

Overlawyered presents two blogs dated April 21, 2008 and May 12, 2008 as proof that Wolk, had he read every article on Overlawyered.com and stumbled across these two blogs,

could have learned of the facts he claims were concealed. First, on the face of these proffered blogs, there is nothing in their text which would disclose their significance. In fact, without the forensic evaluation of Overlawyered.com and the Declaration of DeGraff, Wolk, and possibly the Court, would have no idea about what these blogs refer to or their significance. Rather, the new evidence obtained by Wolk and DeGraff places these blogs into their proper context and further proves that Overlawyered knowingly misrepresented facts to the Court.

C. The New Evidence Changes the Outcome of the August 2, 2010 Dismissal

Overlawyered relies upon a series of cases which it suggests have declined to consider software upgrades to amount to a republication of defamation. None of the cases, however, support that contention or otherwise concern an instance where the original defamatory webpage was deleted and a new one created.

First, in Churchill v. State, 876 A.2d 311 (N.J. Super. 2005), the court declined to find republication of internet defamation when the only changes to the website were the relocation of the menu bar and the change the color of the menu bar. Id. at 478. Thus in Churchill, it was the relocation of the menu bar which was a "mere technological change[] to a website such as changing the way an item of information is accessed" which did not constitute republication. In Re Davis, 347 B.R. 607, 611 (W.D.Ky. 2006)(citing Churchill). This is a far cry from Overlawyered's suggestion that changing the searchability of a communication by applying new tags and a brand new website falls within this rule.

Second, the holding in In Re Davis, 347 B.R. 607 (W.D.Ky. 2006) does not help Overlawyred. In that case, the time barred defamatory publication (an internet blog) was deemed to have been republished by virtue of the defendants' subsequent blog which referred to the earlier blog. Id. at. 611 (finding a new blog titled "breaking news" to constitute republication of

original blog). Here, that is exactly what Overlawyered did after the District Court dismissed Wolk's case. (Ex. F "Overlawyered in the news.") The case Mitan v. Davis, 243 F.Supp.2d 719 (W.D. Ky. 2003) was the precursor to the In Re Davis case and for the same reasons, does not help Overlawyered.

Third, the decision in The Traditional Cat Ass'n Inc. v. Gilbreath, 118 Cal. App. 4 th 392, 13 Cal. Rptr. 3d 353 (Cal. App. 2004), does not come close to supporting the legal proposition for which Overlawyered cites it. That court specifically stated

> As we noted, according to Herold the Web site was not altered after May 21, 2001. In opposing the motion to strike, plaintiffs did not offer any evidence which contradicted Herold's declaration or provide admissible evidence that the statements on the Web site had been republished in other formats in the year preceding the filing of their complaint

Id. at 405.

Fourth, Van Buskirk v. The New York Times Co., 325 F.3d 87 (2d Cir. 2003) is a case that has nothing at all to do with the concept of when defamation is republished on a website. In that case, the court merely cited to the original publication date without any argument that the webpage had been altered or republished.

Lastly, Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137 (5th Cir. 2007) was a case simply dealing with the Single Publication Act. It did not address republication.

Contrary to Overlawyered's arguments there is no "wealth of authority" supporting its argument. Only the Plaintiffs have presented a case on point holding a new webpage constitutes a new publication of defamation. Sundance Image Technology, Inc. v. Cone Editions Press, Ltd., No. 02 CV 2258 JM(AJB), 2007 WL 935703 (S.D.Cal. Mar. 7, 2007). In Sundance Image, the website containing the defamatory material underwent a header change from "Piezography BW" to "Piezography Bwicc" Id. at *7. The district court found that "[a] rational trier of fact could

find that the header change, which was made because Defendants wanted to promote BW ICC and stop promoting its original product…could constitute a new edition of the website since it appears the change was made deliberately and for a substantive purpose…." Id. at *8.

So too here, the original Frank Blog was deleted and republished for a substantive purpose of making it search engine optimized. It was modified to cause more harm to Plaintiff than the original website which was not search engine optimized. The Frank Blog attached to Plaintiffs' complaint was the "new edition" of the original blog which was search engine optimized and capable of causing far more damage than then original.

D. Plaintiffs have Presented Clear and Convincing Evidence of Fraud, Misrepresentation and/or Misconduct by Overlawyered to Justify Relief Under Rule 60(b)(3)

Overlawyered's Motion to Dismiss at pg. 5 stated **"[t]he Frank article was published on April 8, 2007**." The webpage hosting the article/blog attached to Plaintiff's complaint was published on May 13, 2008. (See Dec. of DeGraff.) What Overlawyered said to this Court was false and worse, the blogs from Defendant Olson in the May 2008 time period confirm that he knew that the Frank Blog had been published on a new webpage. (Ex. A through D). When a party makes a representation upon which a result is obtained, and that representation is proven false, relief should be granted. In Re. Vioxx Products, 489 F.Supp. 2d 587, 595 (E.D.La. 2007)(affording relief under Rule 60(b)(3) when expert testified he was board certified when he was not). Overlawyered knew their representation to this Court was false. Relief from the dismissal should follow.

E. Defendants' First Amendment Argument Fails

The Frank Blog is defamatory because it is premised upon the existence of a conflict of interest between Wolk and his client in Taylor. Falsely accusing an attorney of engaging in

unethical conduct is defamatory. See, e.g., Pelagatti v. Cohen, 536 A.2d 1337, 1345 (Pa. Super. 1987)(allegations imputing unethical conduct to attorney were defamatory *per se*); Capozzi v. Lucas, No. 03-811, 2004 WL 5572908, at *7 (M.D. Pa. 2004)(statements implying attorney "overbilled" clients were defamatory *per se*). If Overlawyered did not contend there was a conflict of interest, then there would be no need to criticize the District Court judge for not protecting the client from Wolk's alleged conflict of interest. For an attorney, such an allegation is a professional death sentence and connotes unethical conduct.

The fact that Overlawyered chose to use a question mark does not immunize the language from defamation liability where, as here, the question implies the existence of defamatory fact. See, e.g., Keohane v. Stewart, 882 P.2d 1293, 22 Media L. Rep (BNA) 2545 (Colo. 1994)(question about a judge – "What do you think, was [judge] paid in drugs or money?" held not opinion and actionable); Elder v. The Gaffney Ledger, Inc., 511 S.E.2d 383 (S.C. Ct. App. 1999)("defamatory meaning may be conveyed by means of a question . . . to be defamatory, a question must be reasonably read as an assertion of a false fact.")(citing 50 Am. Jur. 2d Libel and Slander § 156 (1995)); Lutz v. Watson, 136 A.D.2d 888, 890 (N.Y. App. Div. 1988)("The form of the language used is not controlling and a defamatory meaning may be conveyed by means of questions."); Spencer v. Minnick, 139 P. 130 (Okla. 1913)(defamation defendant cannot "escape liability through the use of a question mark.") The real issue in the "opinion" analysis is whether the statement implies provably false facts. See Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). As the Supreme Court in Milkowvich noted, the inquiry is whether the statement at issue expresses or implies a fact such that it is "provable as false." Id. 18-19. Further, even if the question in Overlawyered's blog was "opinion" (although it is clearly not), the blog is still not constitutionally protected. As the Supreme Court in Milkovich held, even if a defendant states

an opinion, the opinion statement is still actionable if the facts relied upon are (1) "incorrect;" (2) "incomplete;" or (3) "his [or her] assessment of them is erroneous." *Milkovich*, 497 U.S. at 18.

Here, Overlawyered did not just merely pose a question over whether Wolk sold out his client, but actually supplied the answer to the question with the affirmative false representation of fact that Wolk, in fact, suffered from a "conflict of interest." After posing the defamatory question, Overlawyered went on to criticize the Court in Taylor for not making sure that the client was "fully aware of the conflict of interest." This statement affirmatively concludes that Wolk, in fact, labored from a conflict of interest vis-à-vis his client's interest in the settlement and his own personal desire to vacate the discovery order.

Moreover, the allegation that Wolk sold out his client is dead false and Overlawyered knows it. Upon discovering the Frank Blog and its false accusation, Wolk immediately contacted Overlawyered and provided proof that the accusations were false. Teledyne Continental Motors, the defendant in the Taylor case, also contacted Overlawyered and informed them that they "do not agree that the Taylor Decisions or Mr. Wolk's actions in the Taylor case would support a basis for disqualification of negative action against Mr. Wolk in response to such claims or challenges of unprofessional conduct…." (Ex. G.) In addition, Wolk provided Overlawyered with letters from **the independent counsel who represented the Taylor clients during the alleged time period of Wolk's conflict of interest**. (Ex. H, I.) While the fact that the Taylor clients were independently represented negates any conflict of interest, the letters themselves confirmed the same.

Counsel for the Teledyne defendants in Wolk v. Teledyne, having reviewed the false representations that Overlawyered made to the Third Circuit in the pending appeal, provided that Court an affidavit on behalf of Wolk's adversary in the Taylor case to establish that Wolk's

claims in the subsequent Wolk v. Teledyne had merit and that his claim for damages did not disclose a conflict of interest. (Ex. J.)

No conflict of interest ever existed, Wolk did not sell out, and has never sold out, any of his clients, and for reasons of pride and arrogance, or their hatred for Wolk, the Overlawyered Defendants refused to remove the defamatory blog. In addition, counsel for Overlawyered has refused to remove their press release about the Frank Blog and this Court's August 2, 2010 opinion despite knowing the blog is false and that they did not disclose the true publication date of the blog to this Honorable Court. (Ex. K.)

III. CONCLUSION

There is no public policy that could justify the vicious stalking and internet bullying displayed by Overlawyered since the August 2, 2010 dismissal. What makes that conduct even more reprehensible than it already is - is the fact that the dismissal was procured by concealing the truth from this Honorable Court. Overlawyered's fraud prevented Plaintiff from defeating the motion to dismiss by arguing the true date of publication, arguing equitable estoppel, or otherwise arguing that defendants' modification of the searchibility of the website equitably tolled the statute of limitations. Justice was not served to anyone because Overlawyered misled everyone involved in the process. Their conduct should be condemned and Wolk's case should be reopened for further proceedings.

Respectfully submitted,

/s/ David P. Heim

Date: December 23, 2010 By: ________________________________

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CERTIFICATE OF SERVICE

I, David P. Heim, Esquire, hereby certify that I caused to be served a true and correct copy of the foregoing Plaintiff's Reply in Support of His Motion for Relief from the August 2, 2010 Order Pursuant to Federal Rules of Civil Procedure 60(b)(2), (3) and (6) upon the following counsel via electronic filing:

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/s/ David P. Heim
By:________________________________
David P. Heim, Esquire

Date: December 23, 2010