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		

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of the Defendants' Motion to Dismiss Pursuant to Rule 12 (b) (6), and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** that Defendants' Motion to Dismiss Pursuant to Rule 12 (b) (6) is hereby **DENIED**. Defendants shall file Answers to the Complaint within fourteen (14) days of the date hereof.

BY THE COURT:

_____
The Honorable Mary A. McLaughlin

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OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PURSUANT TO RULE 12 (b) (6)

Plaintiff, Arthur Alan Wolk, Esquire, by and through jos undersigned attorneys, respectfully opposes Defendants' Motion to Dismiss Pursuant to Rule 12 (b) (6) for the reasons set forth in the attached Memorandum of Law, which is incorporated by reference herein.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

By: AJD 3101

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Counsel for Plaintiff

Date: September 22, 2009

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PLAINTIFF'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS PURSUANT TO RULE 12 (b) (6) OF DEFENDANTS

Plaintiff Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk"), by and through his attorneys, respectfully submits the following Memorandum of Law in Opposition to the Motion to Dismiss Pursuant to Rule 12 (b) (6) of the Defendants. In support thereof, Plaintiff avers as follows:

I. INTRODUCTION

Having maliciously defamed the Plaintiff by posting an article on their "Overlawyered" website falsely accusing Wolk of selling out his client for his own personal benefit, while posing as responsible journalists and concealing the fact that they are controlled by the aviation lobby and paid to defame Wolk as part of their larger political mission to discredit accident victims on behalf of their benefactors, without ever asking Wolk for comment or notifying him that the false story would be disseminated, the Defendants now seek to hide behind the statute of limitations to avoid responsibility, and make the incredible argument that a false suggestion that an attorney committed

professional misconduct is somehow non-defamatory and a non-actionable statement of opinion. Defendants' arguments are meritless.

As to the statute of limitations, the discovery rule applies to toll the statute of limitations until Wolk's 2009 discovery of the defamatory article. It is undisputed for purposes of this motion that Wolk had no reason to awaken inquiry as to the existence of the defamatory April 8, 2007 article until he performed a "Google" search of himself on the advice of judges at a CLE which took place in April 2009. The discovery rule in Pennsylvania is a rule of statutory construction applicable to all cases, including this case. The reasoning in the two cases relied upon by the Defendants in support of their argument was expressly rejected by **three** subsequent Pennsylvania Supreme Court cases which control this inquiry, and provide that the discovery rule applies in this case as a matter of law to toll the statute of limitations. Further, the issue of the applicability of the discovery rule cannot be determined at this stage. Thus, this argument fails.

Defendants' other arguments are just as unavailing. The false accusation that Wolk committed professional misconduct is not only defamatory, it is defamatory *per se*, and any argument that a false statement, accusing Wolk of selling out his client for personal gain, is not defamatory, is just silly. The argument that the false accusation is a mere statement of "opinion" is just as unavailing, because (1) it is a non-protected "accusation," rather than an opinion, (2) it is "sufficiently factual to be susceptible of being proved true or false," and (3) even if it could be considered opinion, it implies undisclosed and untrue facts (such as the assertion that the settlement for Wolk's client was insufficient), and wholly miscasts, misrepresents, and omits critical facts from its discussion of the judicial opinion upon which it purported to rely. This article was

nothing more than a "hatchet-job" to knowingly disseminate a defamatory falsehood about Wolk to satisfy the political agenda of the Defendants' paid benefactors, and to demean Wolk so he would be a less effective advocate for the injured persons he represents. Wolk lost clients as a result of the defamatory article. Thus, as set forth more fully below, the Defendants' Motion to Dismiss must be denied in its entirety.

II. FACTS

A. Procedural History

Wolk initiated this action by filing a Writ of Summons in the Philadelphia County Court of Common Pleas on or about May 13, 2009. Wolk filed his Complaint, seeking recovery under theories of defamation, false light, and intentional interference with prospective contractual relations, in the Philadelphia County Court of Common Pleas, on August 17, 2009. Defendants removed the case to this Court on or about September 1, 2009, and filed the Motion to Dismiss on or about September 9, 2009.[1]

B. The Complaint

Wolk incorporates the entirety of his Complaint as though fully set forth herein. As discussed in the Complaint, Wolk is a prominent aviation attorney. [Complaint, ¶ 13]. Wolk is nationally known to be a zealous and successful advocate for his clients, and Wolk has ***never*** been accused of failing to zealously represent any client, or selling out a client to benefit himself financially. [Complaint, ¶ 16].

Overlawyered began in 1999. [Complaint, ¶ 17]. Overlawyered boasts approximately 9,000 "unique daily visitors," and the Defendants also disseminate an "Overlawyered" newsletter to "several thousand people." [Complaint, ¶¶ 23-24].

[1] Defendants' Motion to Dismiss was not timely filed under Federal Rule of Civil Procedure 81 (c) (2), as it was due on or before September 8, 2009. This Court should deny the within Motion on this basis alone.

Defendants Olson, Frank and Nieporent, who are attorneys, write for, edit and produce the content of Overlawyered, hold themselves out as having specialized knowledge in their field, and cast themselves as unbiased "watchdogs" over the legal system. [Complaint, ¶ 18-21]. In reality, the Defendants are funded by, seek to advance the agenda of, and controlled by, various industry and trade associations seeking to sway public opinion against accident victims. [Complaint, ¶ 28]. Defendants have never disclosed this affiliation, and the bias inherent in that assocation. [Complaint, ¶ 28].

Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in the Taylor Case described in the Complaint. [Complaint, ¶ 29]. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 order critical of Wolk's conduct during discovery. [Complaint, ¶ 30]. In 2003, after Wolk filed a motion to vacate the order, the order was vacated. [Complaint, ¶ 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. [Complaint, ¶ 32]. Neither Judge Carnes, nor any of the parties in Taylor, **ever suggested** that Wolk sold out his client for his personal gain, or that the settlement was inadequate, prior to the dissemination of the Frank Article.

On or about April 8, 2007, Defendants published an article relating to the Taylor Case (the "Frank Article"), on the Overlawyered website, which stated:

> 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. (Complaint, Ex. "A").

Wolk had absolutely no knowledge that the defamatory Frank Article had been published until the Spring of 2009. [Complaint, ¶ 47]. In April 2009, Wolk attended a Continuing Legal Education seminar where the speakers, a panel of judges, advised that during trial some jurors may perform a "Google" search on the attorneys in the case. Thus, the judges recommended that each listener perform a "Google" search on themselves. [Complaint, ¶ 46]. That night, for the first time, Wolk performed a "Google" search on himself, and saw the defamatory Frank Article. [Complaint, ¶ 47]. Because Wolk had no reason to "awaken inquiry" to determine the existence of the

defamatory article until April 2009, Pennsylvania's one-year statute of limitations was tolled until Wolk's discovery. Wolk subsequently learned that certain potential clients had, in fact, viewed the Overlawyered.com website and the defamatory Frank Article, 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. [Complaint, ¶ 50].

III. ARGUMENT

A. Standard Of Review

"Fed.R.Civ.P. 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests, and ... this standard does not require detailed factual allegations." Phillips v. Allegheny County, 515 F.3d 224, 231 (3d Cir. 2008). "[O]n a Rule 12 (b) (6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id. "Courts are required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party." Id. "Once a claim has been stated ... it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 232.

According to the Third Circuit, in light the United States Supreme Court's recent holding in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), a Plaintiff must plead sufficient facts to make a "showing," rather than a blanket assertion of entitlement to relief. In other words, the plaintiff must not only provide "fair notice," but also the

factual underpinnings on which the claim rests. Id. Thus, the Phillips Court summed up the holding in Twombly as follows:

> [A] claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. Id. at 234.

In this case, as set forth below, accepting all of the Plaintiff's well-pled factual allegations as true, the Defendants' Motion to Dismiss cannot be granted.

B. Choice Of Law: Pennsylvania's State Statute Of Limitations, And Pennsylvania State Tolling Principles, Must Be Applied

Pennsylvania's statute of limitations, and Pennsylvania's state tolling principles, must guide the Court's determination of this matter. The Defendants removed this case to this Court based upon diversity jurisdiction. Thus, this Court should apply Pennsylvania's conflict of law rules to determine which state's law is applicable. Franklin Prescriptions, Inc. v. The New York Times Co., 267 F.Supp.2d 425, 431 (E.D.Pa. 2003). It is well-settled in Pennsylvania defamation cases that "the state of plaintiff's domicile generally has the greatest concern in vindicating plaintiff's good name and providing compensation for harm caused by the defamatory publication." Id. See also Marcone v. Penthouse Int'l. Mag. for Men, 754 F.2d 1072, 1077 (3d Cir. 1985), cert. den., 474 U.S. 864 (1985). In this case, because the Plaintiff is based in Pennsylvania, and has suffered harm in Pennsylvania, Pennsylvania law is applicable.

Also, in Pennsylvania, statutes of limitation are part of the substantive law. Menichini v. Grant, 995 F.2d 1224, 1228 n. 2 (3d Cir. 1993). Because Pennsylvania law must be applied to the Plaintiff's substantive claims, Pennsylvania's state statute of

limitations must also be applied. As to Wolk's claims of defamation and invasion of privacy, Pennsylvania has a one-year statute of limitations. 42 Pa.C.S.A. § 5523 (1).

"Generally, if a federal court applies a state limitations period, it should also apply state tolling principles." Harmelin v. MAN Financial, Inc., No. 06-1944, 2007 WL 2702638, at *9 (E.D.Pa. Sept. 12, 2007) (citing In re Mushroom Transp. Co., Inc., 382 F.3d 325, 335 (3d Cir. 2004)). Because this federal court sitting in diversity must "borrow from state law the relevant tolling principles," Mushroom, 382 F.3d at Id., the recent rulings of the Pennsylvania Supreme Court respecting the application of Pennsylvania's "discovery rule" are controlling. Thus, both Pennsylvania's statute of limitations, and its tolling principles, including the "discovery rule," are applicable.

C. The Defendants' Motion To Dismiss On Statute Of Limitations Grounds Must Be Denied At This Stage Of The Proceedings Because Of The Applicability Of The Discovery Rule

To support their argument that Pennsylvania's "discovery rule" does not apply, the Defendants rely solely on two federal court cases that held, upon a motion for summary judgment, that the discovery rule is inapplicable, Barrett v. Catacombs Press, 64 F.Supp.2d 440 (E.D.Pa. 1999) and Bradford v. American Media Operations, Inc., 882 F.Supp. 1508 (E.D.Pa. 1995). However, since Barrett and Bradford were decided, the Pennsylvania Supreme Court has issued three (3) opinions defining the scope of Pennsylvania's discovery rule, Wilson v. El-Daief, M.D., 964 A.2d 354 (Pa. 2009); Fine v. Checcio, 870 A.2d 850 (Pa. 2005); and Crouse v. Cyclops Industries, 745 A.2d 606 (Pa. 2000). Contravening the holdings in Barrett and Bradford, Wilson, Fine and Crouse make it absolutely clear that:

> (1) the discovery rule is directly applicable in this case (and in **all** other cases subject to Pennsylvania's statutes of

> limitation) to determine when Wolk's cause of action "accrued;"
>
> (2) whether the discovery rule applies to toll the statute of limitations in this case is a question of fact for the jury that cannot be determined at this stage;
>
> (3) the "all vigilance" standard applied in Barrett and Bradford is rejected; and
>
> (4) because Wolk had no reason to "awaken inquiry and direct diligence" to determine whether he was defamed by the Defendants prior to April 2009, were the case to be submitted to a jury, a jury would be constrained to find that the discovery rule applies and Wolk's claims against the Defendants are timely.

Pursuant to Wilson, Fine and Crouse, this Court's holdings in Barrett and Bradford, which were decided prior to the Supreme Courts' holdings, have absolutely no applicability, and contain analyses that were expressly rejected by the Pennsylvania Supreme Court. Accordingly, the Defendants' statute of limitations argument is inappropriate for resolution at this stage, and even if the statute of limitations issue could be determined now, the discovery rule applies in this case to toll the statute of limitations.

1. Introduction To The Discovery Rule

The applicable Pennsylvania statute of limitation is 42 Pa.C.S.A. § 5523 (1), which provides: "[t]he following actions and proceedings must be commenced within one year: (1) An action for libel, slander or invasion of privacy." 42 Pa.C.S.A. § 5502 (a) provides the method of computing periods of limitation:

> **(a) General rule.**--The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action **accrued**, the criminal offense was committed or the right of appeal arose. (Emphasis supplied).

In Pennsylvania, the discovery rule is an exception to the general rule that "a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion." Fine, 870 A.2d at 857. "Although the discovery rule evolved out of the common law, it is now appropriately regarded as an application of statutory construction arising out of the interpretation of the concept of the 'accrual' of causes of action" described in 42 Pa.C.S.A. § 5502 (a). Wilson, 964 A.2d at 363. Accordingly, the Pennsylvania Supreme Court has made it crystal clear that the discovery rule applies to **all** causes of action that are subject to Pennsylvania's statutes of limitation:

> [T]he discovery rule applies to toll the statute of limitations in **any** case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises. Fine, 870 A.2d at 860 (emphasis supplied).

The discovery rule "tolls the running of the applicable statute of limitations until the point where the complaining party knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct." Crouse, 745 A.2d at 611. Further, the Pennsylvania Supreme Court has clarified the meaning of the term "reasonable diligence," and explained:

> [R]easonable diligence is not an absolute standard, but 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: "[T]here 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, 870 A.2d at 859 (citing Crouse, 745 A.2d at 611) (emphasis supplied).

Thus, "while reasonable diligence is an objective test, it is sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations

and the circumstances confronting them at the time in question." Fine, 870 A.2d at 859 (citing Crouse, 745 A.2d at 611). Following the Supreme Court's holdings in Fine and Crouse, it is now well-settled in Pennsylvania jurisprudence that in all cases, the discovery rule applies to toll the statute of limitations until the plaintiff is given "some reason to awaken inquiry and direct diligence" to inform himself of the facts upon which his right to recovery is premised.[2]

Further, in light of Fine and Crouse, the Pennsylvania Supreme Court in Wilson addressed two previous, and inconsistent, formulations of the discovery rule, and resolved the inconsistency by rejecting the "all vigilance" formulation of the discovery rule in Pennsylvania in favor of a "reasonable diligence" standard as applied in Fine and Crouse. The Wilson court noted that previously, some courts, citing language from Dalrymple v. Brown, 701 A.2d 164, 170 (Pa. 1997) stating that the discovery rule "applies only to those situations where the nature of the injury itself is such that no amount of vigilance will enable the plaintiff to detect an injury," applied an "all vigilance" standard that placed an absolute duty on a plaintiff to discover the cause of his injury. Under this formulation, a plaintiff could not benefit from the discovery rule even if the plaintiff was unaware that the defendant's conduct was injurious or the existence of the injury. Wilson, 964 A.2d at 362-63. However, in Wilson, the Pennsylvania Supreme Court **rejected** the "all vigilance" approach, and found that only "reasonable diligence" was the proper inquiry. Id. The Court explained: "Most cases apply a reasonable

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[2] See Drelles v. Manufacturers Life Ins. Co., 881 A.2d 822, 831 (Pa.Super. 2005); Caro v. Glah, 867 A.2d 531, 534 (Pa.Super. 2005); Burton-Lister v. Sigel, Sivits and Lebed Assocs., 798 A.2d 231, 237 (Pa.Super. 2002); Donovan v. Idant Labs., 625 F.Supp.2d 256, 266 (E.D.Pa. 2009); Padalino v. Standard Fire Ins. Co., 616 F.Supp.2d 538, 547 (E.D.Pa. 2008); Farm Credit Leasing Svcs. v. Ferguson Packaging Mach., Inc., No. 07-1900, 2007 WL 4276841, at *6 (E.D.Pa. Dec. 3, 2007) ("in all cases some event must trigger the plaintiff's obligation to investigate); Harmelin, 2007 WL 2702638, at *9.

diligence requirement as opposed to an all vigilance one, and reasonable diligence as described in Fine is the appropriate formulation." Id. (citing Fine 870 A.2d at 858) (internal citations omitted). Thus, "a party is not under an absolute duty to discover the cause of his injury." Crouse, 745 A.2d at 611. See also Drelles, 881 A.2d at 834 (same).

Finally, "[p]ursuant to the application of the discovery rule, the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom and experience of the jurors." Crouse, 745 A.2d at 611 (internal quotations omitted). "[O]nly where the facts are so clear that reasonable minds *cannot differ* may the commencement of the limitations period be determined as a matter of law." Id. See also Fine, 870 A.2d at 858-59 ("Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. 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 ..."); Wilson, 964 A.2d at 362 ("Fine also reflects that the determination concerning the plaintiff's awareness of the injury and its cause is fact intensive, and therefore, ordinarily is a question of fact for a jury to decide. However, courts may resolve the matter at the summary judgment stage where reasonable minds could not differ ...").

All of these principles are persuasively displayed in the Pennsylvania Supreme Court's Opinion in Crouse, where the Court affirmed (1) that there is no "all-vigilance" formulation, but only a "reasonable diligence" standard, (2) that the discovery rule applies unless and until the plaintiff has "some reason to awaken inquiry and direct

diligence" toward an investigation of whether he had been injured, and (3) that even where there arguably exists some reason to "awaken inquiry," it is for a jury to decide whether the plaintiff acted reasonably in pursuing his post-awakening investigation. In Crouse, an operator of a steel forge brought a promissory estoppel claim against a steel manufacturer from which it had purchased a steel forge, based on the manufacturer's alleged breach of its commitment to provide specified amounts of work. The transaction and the promise occurred in early 1987, and there was a four (4) year statute of limitations. In June 1987, the plaintiff's lenders began to pressure it because the forge was not doing enough business. In November 1987, the plaintiff wrote to his lender and explained that he was behind in payments because the defendant had not provided the promised work. However, the defendants continued to state that the business was forthcoming. The plaintiff filed suit in 1992.

At trial, the court denied the defendant's motion for a non-suit based upon the statute of limitations. The Superior Court reversed, finding that the statute of limitations had expired, and the discovery rule was inapplicable. On appeal, the Supreme Court reversed. Although the Court acknowledged that the plaintiff advised a lender in December 1997 that he had not received the promised work, it also found that the plaintiff could have believed that negotiations were ongoing and the promise would be kept. Thus, the Superior Court's determination constituted an improper factual determination that usurped the province of the jury. The Supreme Court also found that the trial court had erred by making such a determination, instead of letting a jury decide:

> Under these circumstances, where there were factual and credibility determinations to be made regarding Crouse's reasonable diligence in discovering whether Cyclops was in breach of promises relied on, the issue as to when Crouse

> knew or should have known of the breach should have gone to the jury. It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Thus, the trial judge, who was himself uncertain about the propriety of his own judgment call, mistook a factual finding for a legal conclusion and usurped the province of the jury. The credibility of evidence on both sides of the matter of whether Crouse exercised reasonable diligence in determining whether Cyclops intended to honor its promises ... and therefore whether he knew or should have known of the breach before the end of 1988 – was a factual determination for the jury. We therefore hold that the Superior Court erred in reweighing the factual finding of the trial judge instead of remanding to the jury the factual issue of when the statute of limitations began. Crouse, 745 A.2d at 612-13.[3]

Similarly, in Padalino, Judge Davis of this Court refused to grant a motion to dismiss based upon the statute of limitations because reasonable minds could differ on whether the plaintiffs had reasonable cause to "awaken inquiry" into the fact that the flood insurance policies they purchased did not cover their land. The plaintiffs purchased flood insurance to cover two properties in September 2004, and their broker represented that the insurance would cover the properties. A flood occurred in September 2006. Thereafter, the plaintiffs sought coverage from their insurer, but coverage was denied because the properties were in a flood plain. In 2008, plaintiffs filed suit against the broker, alleging, *inter alia*, fraud and negligence. Defendants moved to dismiss on statute of limitations grounds, contending the discovery rule was inapplicable. Judge Davis denied the motion, explaining: "we cannot accept [defendant's] argument at this stage of the proceedings," and that it could not hold on a motion to dismiss that the

[3] Importantly, in his dissenting opinion in Crouse, Justice Saylor disagreed with the Supreme Court's wholesale adoption of the "discovery rule" to apply to all causes of action in Pennsylvania, finding that the discovery rule should only apply to torts, and not to promissory estoppel claims. Crouse, 745 A.2d at 613, fn. 1 (Saylor, J. Dissenting). Of course, in Wilson, the Supreme Court re-affirmed that the "discovery rule" was a rule of statutory construction relating to when a cause of action "accrues" under 42 Pa.C.S.A. § 5502 (a), and therefore, the discovery rule is applicable to all Pennsylvania statutes of limitation. Wilson, 964 A.2d at 363

plaintiffs knew or should have known that the defendants misrepresented the validity of the policies. In his reasoning, the Court noted that the plaintiffs contended that they were assured by the defendants that their properties were insurable, and taking those allegations as true, reasonable minds could differ as to whether it was unreasonable for the plaintiffs to trust those representations. Judge Davis explained further:

> Reasonable minds could find that, by relying on Defendants as sophisticated parties involved in the insurance business, Plaintiffs had no reason to conduct their own due diligence into the insurability of their properties under federal law. Without a reason to "awaken inquiry," one could find that it was reasonable for Plaintiffs to fail to discover Defendants' alleged misrepresentations until their claims were denied in 2007 ... Because we cannot find that Plaintiffs' should have discovered their injury and its cause with reasonable diligence at the time their policies were issued, we cannot hold as a matter of law that the discovery rule does not toll the statute of limitations in this case. Padalino, 616 F.Supp. 2d at 548.

Applying these principles, this Court cannot grant the Defendants' Motions to Dismiss.

2. Because The Discovery Rule Applies In This Case, The Court Must Deny The Defendants' Motion To Dismiss On Statute Of Limitations Grounds

Applying the teaching of Crouse, Fine, and Wilson, as well as Padalino, it is clear that the Court cannot grant the Defendants' Motion to Dismiss on statute of limitations grounds, because the discovery rule is applicable. Factually, this Court must accept as true the following. The defamatory Frank Article was disseminated on the Overlawyered website on April 8, 2007. Overlawyered then sent out subsequent mailings that contained the defamatory Frank Article. Overlawyered is supposedly viewed by approximately 9,000 viewers per day. It is believed that the Frank Article remained on the front "page" of Overlawyered for approximately one month, and was then placed into an "archive" on

the Overlawyered site. Prior to April 2009, Wolk had never heard of Overlawyered, had never read any Overlawyered publication, and had no information that would have awakened his inquiry into whether he was defamed. Also prior to April 2009, Wolk had not done any "Google" searches on himself to determine whether there were any defamatory articles on the worldwide web concerning Wolk. Wolk discovered the defamatory article in April 2009 when he performed, for the first time, a "Google" search on himself upon the recommendation of certain judges at a CLE.

Applying these facts to the law discussed above, it is clear that at this stage of the litigation, the Court cannot hold with certainty that reasonable minds would not find that Wolk had no reason to conduct his own due diligence and discover the defamatory Wolk article. First, as discussed above, Pennsylvania's discovery rule is a rule of statutory construction that applies to **all** Pennsylvania's statutes of limitation, and the accrual thereof. Wilson, 964 A.2d at 363; Fine, 870 A.2d at 860. Thus, the discovery rule is applicable, as a matter of law, to the within defamation action.

Second, pursuant to the discovery rule, a Pennsylvania statute of limitations will be tolled until a plaintiff is given "some reason to awaken inquiry and direct diligence" to inform himself of the facts upon which his right to recovery is premised, at which time the running of the statute of limitations is triggered. Fine, 870 A.2d at 859. In this case, it cannot be disputed (for purposes of this motion) that Wolk had absolutely no knowledge of the defamatory Frank Article, or of the existence of the Overlawyered website, prior to April 2009. The Defendants do not, and cannot, point to any fact that would establish that Wolk was given any reason to awaken his inquiry and direct his diligence to discover any cause of action, prior to April 2009. As such, Wolk could not

have had any duty to discover the Frank Article, and his injury caused thereby, until, at the earliest, April 2009. After his discovery in April 2009, Wolk immediately contacted Overlawyered and asked them to delete the article, and initiated this lawsuit in May 2009. Given that there is absolutely nothing to indicate to the contrary, reasonable minds could plainly believe that Wolk had no reason to "awaken inquiry" until April 2009. Thus, reasonable minds could (and should) find that it was reasonable for the Plaintiff to fail to discover the Frank Article and his injury until April 2009.

In this connection, and as discussed more fully below, the Defendants' sole contention is that, regardless of whether Wolk had **any** reason to awaken inquiry, Wolk was obligated to take affirmative precautions to discover the existence of defamatory articles against him, even though he had no reason to suspect any such activity. In other words, the Defendants rely upon an "all vigilance" standard, and assert that because it was technically possible for Wolk to have performed an investigation, Wolk was bound to perform such an investigation. Of course, this argument was rejected squarely by the Pennsylvania Supreme Court in Wilson. Wilson, 964 A.2d at 362-63. Because the Pennsylvania Supreme Court has expressly rejected the Defendants' sole argument, this Court should reject the Defendants' Motion to Dismiss.

Finally, and even assuming *arguendo* that the Defendants could point to any fact which might have awakened Wolk's inquiry into whether he had been defamed (which they have not done and cannot do), it is clear that such a question as to the reasonableness of Wolk's conduct is one that is particularly reserved for the jury. Quite simply, reasonable minds could believe that Wolk acted properly in not performing internet searches on himself to determine whether any cyberspace entity had written a defamatory

article about him, Wolk was not required to act before he had reason to "awaken inquiry" in April 2009, and in light of this, the question of the applicability of the discovery rule "is a factual issue best determined by the collective judgment, wisdom and experience of the jurors." Crouse, 745 A.2d at 611.

In sum, the discovery rule is plainly applicable, generally, to defamation actions such as the instant case. Pursuant to Pennsylvania's discovery rule, the applicable statute of limitations is tolled until Wolk had reason to "awaken inquiry," which in this case occurred no sooner than April 2009. The Pennsylvania Supreme Court has soundly and explicitly rejected the "all vigilance" paradigm advanced by the Defendants. Finally, the issue of the discovery rule in this case must be one reserved for the jury, and is an inappropriate issue for disposition at this stage. For all of these reasons, this Court should deny the Defendants' Motion to Dismiss on statute of limitations grounds.

3. Barrett and Bradford Contravene Pennsylvania Law

In support of their Motion, Defendants' rely exclusively on Barrett and Bradford, two cases decided in the 1990's, prior to the Pennsylvania Supreme Court's decisions in Wilson, Fine and Crouse. As a result, Barrett and Bradford are wholly inconsistent with present Pennsylvania law, and are therefore inapposite. For example:

1. Barrett and Bradford hold that Pennsylvania's discovery rule is inapplicable to print libel claims involving large-scale advertisement and sale, when Wilson, Fine and Crouse make it clear that the discovery rule is applicable to all Pennsylvania statutes of limitation;

2. Barrett and Bradford apply an "all vigilance" standard, and reason that because the defamatory communications *could* have been discovered, the plaintiff had an affirmative duty to discover them – but this "all vigilance" standard was expressly rejected by the Pennsylvania Supreme Court in Wilson; and

3. Barrett and Bradford did not apply the "awaken inquiry" standard articulated in Wilson, Fine and Crouse;

Moreover, Barrett and Bradford are procedurally inapplicable, since both Barrett and Bradford were decided summary judgment based upon a full record, and included fact-intensive determinations respecting, *inter alia*, the circulation of the publications at issue, the public availability of the publications, and the advertising of the publications. By contrast, in this case, no such record has been developed. Finally, Barrett and Bradford are factually inapposite to this case because both involved media publications that were pervasively distributed, sold and advertised across the Country, whereas, in this case, the Overlawyered website is neither sold in stores nor advertised.

Bradford involved a claim made by a married couple relating to an article in *Star* Magazine. The plaintiff-wife was formerly a 1200 pound woman who lost approximately 900 pounds. Thereafter, the *Star* published an August 1993 article depicting her weight loss and the resumption of sexual relations with her husband. The plaintiffs filed suit in September 1994. After full discovery, the *Star* sought summary judgment. Discovery revealed that the subject issue of the *Star* sold a total of 3,003,235 copies, the *Star* was available on virtually every supermarket and newsstand shelf in the plaintiffs' neighborhood, and that the *Star* was the "third most widely circulated weekly publication in America." Based on those facts, the Court found the discovery rule was inapplicable without ever considering when the plaintiffs actually discovered the publication. First, referencing the "Uniform Single Publication Act" ("USPA"), 42 Pa.C.S.A. § 8341,[4] the Court found that the statute of limitations in libel actions always commenced on the date

[4] The Uniform Single Publication Act is not a statute of limitation, but only provides that one defamation cause of action may exist for any single publication.

of publication, such that the discovery rule could **never** apply. Second, the Court found, without analyzing whether the plaintiffs had cause to "awaken inquiry," that "no such person could be deemed unaware of a publication so widely distributed in Pennsylvania...". The Court stated: "We do not believe the Pennsylvania Supreme Court would give Mrs. Bradford the grace of [the discovery rule] for this, the third most widely circulated weekly publication in America." Bradford, 882 F.Supp. at 1519.

In Barrett, the plaintiff was a doctor in the Lehigh Valley who claimed to have been defamed by a book written and published by the defendants. Discovery revealed that printing was completed and the book was ready for sale in April 1997. The defendant authors then embarked upon an enormous publicity tour for the book, which included several appearances on television programs in the Lehigh Valley, including a program on the *Lifetime* Network that was rebroadcast several times. The book and the authors' appearances on radio and television talk shows were widely advertised in the Lehigh Valley. The book was distributed at a national convention for alternative medicine, and thereafter, the authors participated in one of the largest "BookExpo" events in America. There were also a wide range of other sales and promotions of the book, and the book was available to be purchased at several bookstores in the plaintiff's home town. Based on those facts, the Court held, on summary judgment, that the discovery rule was inapplicable. Legally, the Court relied on language from Dalrymple stating that the discovery rule can apply only where "no amount of vigilance" will enable the plaintiff to detect an injury, and therefore, the discovery rule did not apply in a context where "the allegedly defamatory material was published, advertised and distributed freely to any willing purchaser." Barrett, 64 F.Supp. at 445-46.

However, in light of the Pennsylvania Supreme Court's subsequent pronouncements in Wilson, Fine and Crouse, it is clear that Barrett and Bradford were wrongly decided. First, and most obviously, Barrett predicated its decision on the Dalyrmple rule, and therefore applied an "all vigilance" standard, finding that regardless of whether the plaintiff had any actual reason to "awaken inquiry," the plaintiff was under an absolute duty to discover his injury. The "all vigilance" standard articulated in Dalyrmple was expressly rejected in Fine and Wilson. See Wilson, 964 A.2d at 362-63. As Bradford also applied an "all diligence" standard, and never inquired as to whether the plaintiff had actual reason to "awaken inquiry," Bradford is also wrongly decided.

More fundamentally, Barrett and Bradford held, incorrectly, that the discovery rule was inapplicable to libel cases with similar facts. Had the Barrett and Bradford courts had the benefit of the later decisions from the Pennsylvania Supreme Court, the Barrett and Bradford Courts would have discerned that Pennsylvania's discovery rule is applicable to **all** cases involving Pennsylvania statutes of limitation, because it is a rule of statutory construction arising from the "accrual" language in 42 Pa.C.S.A. § 5502 (a). Wilson, 964 A.2d at 363. See also Fine, 870 A.2d at 860 ("[T]he discovery rule applies to toll the statute of limitations in **any** case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises."). This is particularly true in Barrett, where the Court relied on its interpretation of the USPA to determine whether the discovery rule applied. Because the discovery rule arises out of 42 Pa.C.S.A. § 5502 (a) and its corresponding statutes of limitation, including 42 Pa.C.S.A. § 5523 (1) for defamation, any reliance on the USPA to control the accrual of the statute of limitations is inconsistent with Wilson, Fine and Crouse.

Finally, even if this Court were to hold, against the clear authority of Wilson, Fine and Crouse, that Barrett and Bradford were correctly decided, this Court could still not grant the Defendants' Motion to Dismiss in this case. Barrett and Bradford were only decided on a full record pursuant to a motion for summary judgment, and reflect an (erroneous) decision by the Court that, after all discovery had been taken, the pervasive availability and advertisement of the publications rendered the discovery rule inapplicable. Plainly, this Court cannot even apply Barrett and Bradford on a Motion to Dismiss, because there has been no substantive evidence taken regarding whether the Frank Article was ever disseminated and advertised in a manner consistent with the pervasive advertisement and availability of the publications at issue in Barrett and Bradford. Further, on the state of the present record, the Frank Article, which was disseminated on a website and to certain newsletter subscribers, without any advertisement whatsoever, cannot even approach the level of pervasive availability and advertisement upon which the decisions in Barrett and Bradford were based.

Finally, pursuant to Wilson, Fine and Crouse, the Court in Barrett and Bradford erred as a matter of law because it substituted its judgment for that of the jury. Wilson, Fine and Crouse make it clear that when reasonable minds can differ as to any element of the discovery rule analysis, such a determination is the particular province of the jury. Here, it is clear that reasonable minds can differ as to whether Wolk actually had reason to "awaken inquiry," and whether Wolk acted reasonably in not performing "Google" searches on himself before April 2009. The issue of the discovery rule in this case must be reserved for the jury, and the Court cannot rule as a matter of law. For these reasons as well, the Defendants' Motion to Dismiss must be denied.

D. The Defendants' Motion To Dismiss On Statute Of Limitations Grounds Must Be Denied At This Stage Of The Proceedings Because Of The Applicability Of The Doctrine Of Fraudulent Concealment To Toll The Statute Of Limitations

The doctrine of fraudulent concealment also precludes the Defendants from raising a statute of limitations defense. As also set forth in Fine and numerous other Pennsylvania cases:

> In addition to the discovery rule, the doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of estoppel, and provides that the 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. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. Fine, 870 A.2d at 860.

In Fine, for example, the Supreme Court found that the doctrine of fraudulent concealment could properly be applied where a doctor told the plaintiff that her facial numbness was a typical condition of dental surgery. Id.

In this case, the doctrine of fraudulent concealment applies on its face because the Defendants, who now seek refuge under the statute of limitations, **never sought comment from Wolk regarding the allegations made in the Frank Article**. Any responsible journalist, when writing an article about a case involving an attorney, particularly one alleging misconduct by an attorney, would contact the attorney involved to ask for comment or for his side of the story. Clearly, Wolk could have reasonably relied on the expectation that any responsible journalist, as the Defendants purport to be, would have requested such a comment, thereby alerting him that an article about him would be written, and "awakening his inquiry." Because they never sought comment

from Wolk, Wolk's inquiry was never "awakened." Of course, the decision not to seek Wolk's comment was a conscious decision made by the Defendants – they had already made up their minds, and they knew that they were going to write a "hatchet-job" story about Wolk, regardless of its falsity, because that is what they were secretly paid and funded to do by their clandestine and undisclosed benefactors, in order to further their political mission of swaying public opinion in their benefactors' favor. Because it is evident that the Defendants made a conscious decision not to seek comment from Wolk prior to publishing the Frank Article, where such a request would have "awakened inquiry" into the defamatory article, it is clear that the Defendants are now estopped from asserting the statute of limitations as a defense to Wolk's claims.

E. The Defendants' Other Contentions Are Meritless

The next portion of the Defendants' Motion to Dismiss constitutes a hodge-podge of half-hearted assertions without citation to proper authority. Namely, Defendants argue that the Frank Article was not defamatory, that the Frank Article constitutes non-actionable opinion, and that the Frank article was "true." These contentions are meritless.

1. Frank Article Is Defamatory

Defendants' argument that the Frank Article is not defamatory has absolutely no merit whatsoever, and constitutes an impermissible attempt by the Defendants' to remove this issue from the jury and have it decided by this Court. The Frank Article suggests, without any basis in fact, that Wolk effectively and unethically "sold-out" his client in the Taylor case for personal gain: "Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in litigation?" [Complaint, Ex. "A"]. This accusation is defamatory *per se*.

To succeed on a claim for defamation in Pennsylvania, a Plaintiff must establish, *inter alia*, the "defamatory character of the communication." Pelagatti v. Cohen, 536 A.2d 1337, 1345 (Pa.Super. 1988). "A publication is defamatory if it tends to blacken a person's reputation or ... injure him in his business or profession." Green v. Minzer, 692 A.2d 169, 172 (Pa.Super. 1997). "When communications tend to lower a person in the estimation of the community, deter third persons from associating with him, or adversely affect his fitness for the proper conduct of his lawful business or profession, they are deemed defamatory." Id.

Generally, to determine if a statement is defamatory, one must "evaluate the effect [the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Tucker v. Fischbein, 237 F.3d 275, 282 (3d Cir. 2001). Under normal circumstances, the issue of whether a publication is defamatory is for the jury, and should not be made by the Court:

> Where there is any doubt that the communication disparages or harms the complainant in his business or profession, that doubt must be resolved in favor of the complainant, even where a plausible innocent explanation of the communication exists, if there is an alternative defamatory interpretation, it is fur the jury to determine if the defamatory meaning was understood by the recipient. Pelagatti, 536 A.2d at 1345.

In other words, "if the allegedly defamatory statements are susceptible to several interpretations, some of which are benign, some of which are not, it is for the jury to decide how the statement is likely to be interpreted by the intended audience." Valjet v. Wal-Mart, No. 06-01842, 2007 WL 4323377, at *8 (E.D.Pa. Dec. 11, 2007) (Buckwalter, J.) (quoting Smyth v. Barnes, No. 04-930, 1995 WL 576935, at *10 (M.D.Pa. Sept. 25,

1995)). Thus, "a court should not dismiss a complaint unless it is clear that the publication is incapable of a defamatory meaning." Tucker, 237 F.3d at 282.

Moreover, it is well settled in Pennsylvania that statements imputing character that adversely affects fitness for a person's profession, particularly in the context of an attorney, are defamatory *per se*:

> A communication which ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his business, trade or profession, is defamatory per se ... Clearly, statements to the effect that an attorney has committed improper, illegal actions within the context of his practice would tend to impugn his integrity and thereby blacken his business reputation. Pelagatti, 536 A.2d at 1345.

In Pelagatti, an attorney brought a defamation claim against a law clerk, the law clerk's attorney and attorneys for unsuccessful defendants in two multimillion dollar verdict cases, arising from press reports that, *inter alia*, (1) the plaintiff, Pelagatti, improperly colluded with the trial judge while those cases were pending, (2) Pelagatti actually authored a judicial opinion set forth by the trial judge, and (3) Pelagatti abused process, issued ex parte subpoenas, and engaged in other "improper" and "possible [sic] illegal" conduct. Addressing whether the statements were defamatory, the Pennsylvania Superior Court found that the statements were defamatory *per se*, and therefore required no further discussion of defamatory meaning. Id.

Likewise, in Capozzi v. Lucas, No. 03-811, 2004 WL 5572908, at *7 (M.D.Pa. 2004), the Middle District of Pennsylvania found that statements implying that an attorney overbilled his clients were defamatory *per se*. The plaintiff, Capozzi, represented nursing home facilities in class action litigation. Thereafter, Capozzi initiated fee collection litigation against them, arising from the nursing homes' failure to

pay certain fees received from the County under an "IGT Program." The defendant, Lucas, was an attorney who published a monthly newsletter to approximately 700 subscribers, and represented the nursing homes in the fee litigation. In his newsletter, Lucas stated "[W]e believe that if the court finds that the receipt of IGT funds by these facilities is not within the contingency set forth in the Capozzi contingent fee agreements, other facilities that have already paid Capozzi a percentage of their IGT funds would be entitled to a refund." After Capozzi sued the defendant for defamation, the defendant argued that the statement was not defamatory. The Court disagreed because the statement was defamatory *per se*, as it suggested business misconduct:

> The statement suggests that Plaintiffs improperly billed their clients. Certainly a reasonable person reading the Letter might determine that Plaintiffs' conduct with respect to improper billing was unethical and could, on that basis, decide not to seek legal representation from Capozzi and Associates. As such, we conclude that the Letter is capable of a defamatory meaning. In light of the fact that the Letter charges Plaintiffs with improper billing of their clients within the scope of their business, we conclude that the relevant statement is defamatory *per se*. Id.

See also Muirhead v. Zucker, 726 F.Supp. 613, 617 (W.D.Pa. 1989) ("[T]he news release contains allegations of criminal activity and fraud which would be defamatory *per se* under Pennsylvania law"); Gutman v. TICO Insurance Co., No. 97-5694, 1998 WL 306502, at *5 (E.D.Pa. Jun. 9, 1998) (considering a statement from an insurance company to policyholders that "agent exceeded his binding authority to market the TICO program" and finding it defamatory *per se* because the "statement would suggest to a reasonable policyholder that TICO canceled her auto insurance policy because of some improper business conduct undertaken by the plaintiff in his professional capacity.").

Pelagatti and Lucas are directly on point in this case. The defamatory statement at issue suggests that Wolk unethically "sold-out" his client in the Taylor Case for personal gain: "Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in litigation?" [Complaint, Ex. "A"]. This statement plainly and unambiguously suggests that Wolk contravened his client's interests, and acted to his client's detriment, to benefit himself personally. Reasonable persons reading that statement would conclude that Wolk was unethical, and decide not to seek legal representation from Wolk. In fact, in at least one documented instance (of which Wolk is aware), this very thing occurred.

Pennsylvania law is clear that "statements to the effect that an attorney has committed improper, illegal actions within the context of his practice would tend to impugn his integrity and thereby blacken his business reputation," and are therefore defamatory *per se*. The suggestion by Frank that Wolk unethically contravened his client's interest by accepting a lesser settlement for personal gain is the very kind of statement that is defamatory *per se*. Accordingly, the Defendants' argument (without citation to authority), that the Frank Article is not defamatory, is meritless, and the Defendants' Motion to Dismiss on this point must be denied.

2. The Frank Article Is Actionable

Defendants' next argument, that the statement at issue is non-actionable opinion, is just as unavailing. As discussed above, the defamatory statement at issue suggests that Wolk "sold-out" his client in the Taylor case for personal gain: "Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in litigation?" [Complaint, Ex. "A"]. This statement does not constitute a mere

"opinion," but instead, is a direct **accusation** that Wolk acted to his client's detriment for his own personal gain, which is not afforded protection as "opinion." Moreover, the statement is not opinion because its suggestion – that Wolk forced his client to accept an inadequate settlement for personal gain – is provable as false. Also, even if the statement could be considered opinion, which it cannot, the statement implies that it draws upon unstated facts for its basis, and even to the extent that facts are stated to support the statement, those facts are incorrect and incomplete, and the assessment of them erroneous. Therefore, the statement is actionable as a matter of law.

First, the statement at issue is actionable because it constitutes a direct accusation, rather than an opinion. Valjet, 2007 WL 4323377, at *8. In Valjet, a Wal-Mart employee was accused by a supervisor, Cordray, of stealing documents that did not belong to her. After the plaintiff was terminated, the plaintiff brought a defamation against Cordray and others, arising from Cordray's statements. Cordray contended that he could not be liable for defamation because he was merely expressing an opinion that a document was his, and not the plaintiff's. Judge Buckwalter of this Court disagreed, finding that an **accusation** of misconduct was different in kind from an opinion, and the former is actionable as a matter of law:

> The Court, in this case, deems Defendant's argument unmeritorious. Mr. Cordray's statements could not reasonably be interpreted as an expression of his opinion, as they constituted a direct accusation of the Plaintiff. Id.

Valjet is directly on point here. The statement at issue accuses Wolk of selling out his clients by accepting a lesser settlement for Wolk's own personal benefit. This cannot reasonably be interpreted as an expression of opinion, as the statement is a **direct**

accusation of Wolk impugning his professional integrity. Therefore, following Valjet, the Defendants' accusation is not protected "opinion."

Second, the statement cannot be considered opinion because it suggests something that is "provable as false," and even if it could be considered "opinion," the opinion would still be defamatory and actionable. "It is true that opinion, without more, does not create a cause of action in libel." Id. This, however, does not mean that there is "a wholesale defamation exemption for anything that might be labeled 'opinion.'" Petula v. Mellody, 588 A.2d 103, (Pa.Cmwlth. 1991) (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990)). "Expressions of 'opinion' may often imply an assertion of objective fact." Id. "A defamatory communication may thus consist of a statement in the form of an opinion and is actionable if it implies an allegation of undisclosed defamatory facts as the basis therefore." Id. In this regard, the Third Circuit explained:

> Although there may be no such thing as a false opinion, an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis [therefor] ... If the disclosed facts are true and the opinion is defamatory, a listener may choose to accept or reject [the proffered opinion] on the basis of an independent evaluation of the facts. However, if the opinion is stated in a manner that implies that it draws upon unstated facts for its basis, the listener is unable to make an evaluation of the soundness of the opinion. Redco v. CBS, Inc., 758 F.2d 970, 972 (3d Cir. 1985), cert. den., 474 U.S. 843 (1985).

Further, as described by the United States Supreme Court:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the

> statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' " It is worthy of note that at common law, even the privilege of fair comment did not extend to a false statement of fact, whether it was expressly stated or implied from an expression of opinion. Milkovich v. Lorain Journal Co., 497 U.S. at 18-19.

In Milkovich, the United States Supreme Court clarified the "protected opinion" standard, and boiled down the "protected opinion" inquiry into one simple question: whether the statement at issue expresses or implies a fact such that it is "provable as false." Id. For example, the statement "John Jones is a liar" is actionable (if false) because it implies a verifiable fact – that John Jones does not tell the truth. Id. By contrast, an assertion that a person is "ignorant" would be opinion, because it could not be verified by objective inquiry and proven to be false. Id. Milkovich involved the aftermath of a brawl at a high school wrestling meet. Following the brawl, the coach of the team testified before the State Sports Board regarding whether the team should be suspended. After the testimony, a local reporter wrote that the coach's testimony was wholly at odds with the reporter's recollection of events, and therefore stated:

> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

Thereafter, the coach filed a defamation lawsuit against the reporter. The reporter claimed that her assertions constituted a non-actionable opinion. The Supreme Court disagreed. Applying the analysis described above, the court found that even if the reporter stated the facts on which her opinion was based – i.e., that she was at the brawl,

saw what happened, and knew that the coach was lying, and even if her assertion was couched as an "opinion" that the coach was lying, the implication that the coach was a liar was provable as false, and therefore, was not constitutionally protected "opinion." Id. The Supreme Court concluded: "We ... think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false." Id.

Milkovich is directly on point in this matter. Whether or not Wolk violated his professional duty by forcing his client to accept a "lesser settlement" to serve Wolk's own ends is "sufficiently factual to be susceptible of being proved true or false," and therefore, is not constitutionally protected opinion. Quite simply, the statement implies that Wolk sold out his client for his own personal gain – possibly the worst accusation that could ever be hurled at a lawyer. Merely because the Defendants phrased it as a question does not cause it to be non-actionable. Because the issue of whether or not Wolk acted unethically can be proven false, the Defendants' Motion to Dismiss cannot be granted on "opinion" grounds.

Moreover, the Defendants cannot avoid liability merely because they hurled this false accusation in the context of discussing Judge Carnes' opinion. Indeed, Judge Carnes' opinion **never** once accuses Wolk of accepting a lesser settlement to benefit himself. Further, while Judge Carnes did state that at one point she was concerned about a **conflict of interest** (but not that a lesser settlement was accepted), the Judge, in her opinion, stated that she satisfied herself that there was, in fact, no conflict of interest. **Disagreeing** with that assessment, and relying on undisclosed facts and their own asserted superior knowledge and legal acumen, the Defendants suggested that **despite** Judge Carnes' opinion, Wolk had acted improperly. This clearly suggests reliance on

undisclosed facts and knowledge beyond that described in Judge Carnes' opinion. In short, there is no way for the reader to determine, from the content of the Frank Article, just how false, baseless, misleading and malicious the accusations in the article were.

Moreover, the **primary undisclosed fact** that is not addressed in the Frank Article (but simply assumed therein), not discussed or reflected in Judge Carnes' opinion, and upon which the Frank Article predicated the defamatory statement, is the actual size of the settlement and the assertion that **the settlement itself was inadequate**. As discussed in the Complaint, and as must be taken as true for purposes of this Motion, the settlement itself was more than "adequate" -- it constituted an excellent result for the client that far exceeded the value of the case placed upon it by a federal magistrate. Thus, the statements in the Frank Article relating to the value of the settlement plainly imply "an allegation of undisclosed defamatory facts as the basis therefore," and are actionable, even if they could be considered opinion.

Further, the facts that were disclosed in the Frank Article were inaccurate, incomplete and misleading. For example, the Frank Article asserts that Wolk settled the Taylor case "on the condition" that the discovery order be vacated, but fails to mention that when settlement discussions began in that case, Wolk had already filed a Motion to Vacate the order that was pending and ripe for determination that the time the issue of settlement was raised. Furthermore, the Frank Article never once mentions that all of the attorneys in the Taylor case agreed that Wolk did not commit any unethical conduct. In fact, the Frank Article never once mentions that the discovery violations that were initially at issue in the Taylor case were committed by an associate, and Wolk had no involvement with the supervision of the associate at the time the alleged conduct was

committed. In all, the Frank Article is a one-sided "hatchet-job" that wholly misrepresents the Taylor case. Therefore, even if the accusation that Wolk sold out his client for his own gain was made in the context of the Taylor opinion, and in addition to the fact that the subject assertion is not "opinion" at all, the disclosed facts are both "incorrect and incomplete," and the Defendants assessment of those facts was erroneous.

Finally, it must be noted that this issue, like the other issues discussed above, is an issue that must be left to the jury. In Pennsylvania, "in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury." Green, 692 A.2d at 169. In this case, at the very least, there are two separate interpretations of the subject statement which would require determination by a jury. For this reason as well, the Defendants' Motion to Dismiss must be denied.

3. The Statement Is False

Finally, the Defendants' make the bald and unsupported assertion that Wolk's Complaint must be dismissed because the statement suggesting that Wolk forced his client to accept a lesser settlement to further Wolk's own ends is "true." This argument is almost not worthy of a response. Wolk has alleged that the statement is false. [Complaint, ¶ 43]. This assertion must be taken as true for purposes of this motion. Phillips, 515 F.3d at 231. Moreover, the statement is objectively, verifiably, and outrageously false as a factual matter, as Wolk's client did not in any way "suffer from a reduced settlement." At the very least, the truth or falsity of the statement is a disputed issue of fact that is a question for the jury. Merkle v. Upper Dublin School District, 211 F.3d 782, 797 (3d. Cir. 2000). Accordingly, this argument is wholly meritless as well.

IV. CONCLUSION

For any and all of the foregoing reasons, as set forth more fully above, Plaintiff Arthur Alan Wolk respectfully requests that this Court deny the Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12 (b) (6) in its entirety, and grant such other and further relief as the Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on September 22, 2009, I sent a copy of Plaintiff's Opposition to Motion to Dismiss, to the following via .ecf and U.S. mail.

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