

SPIRO | HARRISON

June 27, 2017

Via First Class Mail and Email

Douglas Wigdor
Wigdor LLP
85 Fifth Avenue, Fifth Fl.
New York, NY 10003

**Confidential Settlement Communication
Rule of Evidence 408**

Re: Draft Complaint by Rod Wheeler

Dear Mr. Wigdor:

I am writing in response to your June 23, 2017 letter to our client Ed Butowsky, and to the draft complaint which I viewed in your offices on June 26, 2017. As I said prior to reviewing your complaint, and I want stress even more after having reviewed it, Mr. Wheeler's claims against Mr. Butowsky are false, and utterly groundless. We have conducted a thorough review of the record, and provide in detail below the reasons for our conclusion that there is absolutely no basis for this complaint. Please review it carefully. Mr. Wheeler cannot pursue a defamation claim against a party that did not publish the purportedly false statements. He also cannot pursue a defamation claim for statements that he authorized. The record is clear that Mr. Butowsky did not publish nor have any role in drafting the purported defamatory statements. Further, Mr. Wheeler's public and private statements clearly demonstrate that Mr. Wheeler authorized the publication of the allegedly false statements. Finally, as leaked by Mr. Wheeler himself to another media outlet, the information in the quotations attributed to Mr. Wheeler were already made public prior to the publishing of Ms. Zimmerman's article – the damage had been done. Under these circumstances, there plainly cannot be a basis for filing your lawsuit.

Because the claim has neither a factual nor a legal basis, it is frivolous, and you are hereby put on notice that Mr. Butowsky intends to seek sanctions and counterclaims against Mr. Wheeler and your law firm if you file the complaint. Indeed, there can be no interpretation of the inflammatory allegations made against our client as having any other purpose but to intimidate and harass him into paying off Mr. Wheeler before they become public. Mr. Butowsky will not be extorted. He will seek all sanctions available to him under the law against Mr. Wheeler and your firm, including all attorney's fees and costs associated with defending these illegitimate claims.

Furthermore, Mr. Butowsky will pursue any and all counterclaims available under the law for the damages caused by Mr. Wheeler's campaign to harm his business interests and Mr. Butowsky personally. Again, there is no reasonable interpretation of Mr. Wheeler's recent

conduct with respect to our client, nor the sensationalistic nature of the allegations, other than to do substantial damage to him. We fully intend to aggressively pursue these damages against Mr. Wheeler if he files a complaint against Mr. Butowsky. There can be no doubt that while we contend that this lawsuit will do serious, irreparable harm to our client, it will also substantial damage yours. We suggest that you reconsider, and provide the basis for such reconsideration below.¹

Legal and Factual Deficiencies of a Defamation Claim Against Butowsky

In order to prove defamation, Mr. Wheeler must demonstrate “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.” *Salvatore v Kumar*, 845 NYS2d 384 (2007) (quoting *Dillon v City of New York*, 704 NYS2d 1 (1999)). Furthermore, as the Supreme Court has famously held, “the U.S. Constitution’s First Amendment bars a public figure from recovering damages in a libel action unless clear and convincing evidence proves that a false and defamatory statement was published with ‘actual malice’--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 353 (N.Y. Apr. 30, 2009) (citing *New York Times Co. v Sullivan*, 376 US 254 (1964)). As routinely recognized by courts, actual malice is a very difficult standard to meet. See e.g. *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 277 (S.D.N.Y. 2013). As noted below, Mr. Wheeler’s draft complaint falls woefully short of the negligence standard, let alone the actual malice standard which shall apply here.

The draft complaint sets forth two factual assertions, which Mr. Wheeler claims are false in a Fox News story written by Malia Zimmerman on May 16, 2017 that was later retracted. The article written by Ms. Zimmerman was entitled: “Seth Rich, slain DNC staffer, had contact with WikiLeaks, say multiple sources.” The draft complaint asserts that the article wrongfully attributed the following two quotes to Mr. Wheeler:

- “My investigation up to this point shows there was some degree of email exchange between Seth Rich and WikiLeaks. I do believe that the answers to who murdered Seth Rich sits on his computer on a shelf at the DC police or FBI headquarters.”
- “My investigation shows someone within the D.C. government, Democratic National Committee or Clinton team is blocking the murder investigation from going forward. That is unfortunate. Seth Rich’s murder is unsolved as a result of that.”

As explained in more detail below, Mr. Wheeler not only authorized these statements in the article, but he is repeatedly on record *actually making them*. Accordingly, if the statements in the article are false, it is Mr. Wheeler not Mr. Butowsky or Fox News who is responsible for causing them to be published.²

¹ Mr. Butowsky provides this letter in the interest of resolving this matter, without waiving his right to modify or add to these claims as this firm’s investigation and analysis continues.

² We note, for your information, that Mr. Wheeler has significant credibility issues, which are well known, and include a history of distorting and misrepresenting facts to such an extent that he was terminated from the D.C.

A. The Complaint Fails to Allege that Ed Butowsky Made or Published Any False Statements

As stated above, the first element of a defamation claim is the publishing of a false statement by the Defendant. The draft complaint does not make a single allegation that Mr. Butowsky published any false statements. Rather, it claims that Ms. Zimmerman and Fox News published the statements in question, which Mr. Wheeler alleges were falsely attributed to him. Assuming all facts as true, there is no claim against Mr. Butowsky because he did not publish the statements – they were published by a third-party. *See Stern v. News Corp.*, 2010 U.S. Dist. LEXIS 133119, *13 (S.D.N.Y. Oct. 14, 2010) (“Under New York law, a defendant cannot be held liable for defamatory statements published by a third party.”) (*citing Schoepflin v. Coffey*, 162 N.Y. 12, 56 N.E. 502 (1900); *Scally v. Kovac*, 374 N.Y.S.2d 54 (N.Y. App. Div. 1975); *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422 (1981) (authors of a hardcover book were not liable for the paperback edition when they had no role in republication); *Lunney v. Prodigy Services Co.*, 683 N.Y.S.2d 557, 562-63 (N.Y. App. Div. 1998) (online service company was not liable for defamatory misuse of its services by a third party)).

Simply put, Mr. Butowsky cannot defame someone if he did not publish anything. Indeed, as Mr. Wheeler has admitted, Mr. Butowsky had no involvement with the drafting of the article. The law is clear - Mr. Butowsky cannot be held liable for false statements made or published by third parties. It is also worth noting that Mr. Butowsky does not have the professional obligation to evaluate the veracity of an article published by a major news organization. Accordingly, this is not a claim that should involve Mr. Butowsky, if it should be asserted at all.

B. Mr. Wheeler Authorized the Story and the Quotes Multiple Times with Malia Zimmerman

Defamation claims also require that the purported false statements were made without the authority of the Plaintiff. Contrary to your draft complaint, Mr. Wheeler repeatedly approved of and authorized the quotes contained in the article.

On multiple occasions leading up to the publish date of March 16, 2017, Mr. Wheeler was sent copies of the article with the quotes, including three times on March 15, 2017 at 12:58 pm (subject: “please read carefully”), 1:20 pm (subject: “please read carefully”) and 3:47 pm (subject: “draft turned in”). On no occasion did Mr. Wheeler dispute the accuracy of the quotes attributed to him. In fact, he added to them.

On March 15, Mr. Wheeler had the following conversation via text message with Ms. Zimmerman:

Zimmerman: Can you read the story now?

police. We also note that Mr. Wheeler recently repeatedly sought Mr. Butowsky’s assistance in procuring a position within the Administration. We believe that Mr. Wheeler’s inability to obtain such a position through Mr. Butowsky may serve as motivation for this malicious campaign against our client.

Wheeler: Yes

Zimmerman: Get back to me as soon as you can so I can turn it in. Thanks!

Wheeler: Reading it now.

Wheeler: Malia you can add that I do strongly believe that the answers to who murdered Seth sits on his computer on a shelf at the D.C. Police or FBI headquarters!

Zimmerman: Ok. I'll add it.

Mr. Wheeler also confirmed verbally to Ms. Zimmerman that the article accurately depicted his statements, and expressed his support for the story. These statements occurred on conference calls several days leading up to the story, including March 10 (10:30 am), March 11 (9:52 am and 10:12 am), March 15 (11:22 am and 1:13 am). Mr. Wheeler also confirmed verbally to Mr. Butowsky that he had independently formed the belief, before publication, that there were email communications between Seth Rich and Wikileaks.

Further, on the evening of March 15, 2017, Mr. Wheeler claimed to have had a conversation with the father of Seth Rich, Joel Rich, in which he discussed the article at length. He described the conversation as positive, and again, did not dispute the accuracy of the quotes attributed to him.

Mr. Wheeler's conduct demonstrates unequivocally that he approved and authorized the quotations attributed to him. Furthermore, he was provided ample opportunity to refute the statements, but he declined to do so. The assertion that he did not authorize these quotations is plainly false.

C. Mr. Wheeler Confirmed the Story the Day Before Publication to Fox 5 DC Reporter

On March 15, 2017, prior to publication, Mr. Wheeler separately confirmed the story and the accuracy of the attribution by leaking the story to Fox 5 DC reporter, Marina Marraco. Shortly after Ms. Marraco printed the story, Mr. Wheeler understandably received substantial backlash from Ms. Zimmerman who had been working on her own story for months. Mr. Wheeler admitted to leaking the story, and to being duped into disclosing the information that would later be revealed in Ms. Zimmerman's piece to Ms. Marraco. Notably, after Mr. Wheeler recanted his version of events and began to publicly state that he was misquoted by Ms. Marraco and Ms. Zimmerman, Fox 5 DC ran the following update on March 17, 2017:

In an interview Monday, Wheeler told Fox 5 DC he had sources at the FBI confirming there was evidence of communication between Seth Rich and Wikileaks. This is the verbatim exchange:

Fox 5 DC: "You have sources at the FBI saying that there is information..."

Wheeler: "For sure."

Fox 5 DC: "...that could link Seth Rich to Wikileaks."

Wheeler: "Absolutely. That's confirmed."

Accordingly, the day before the Malia Zimmerman piece ran, Wheeler confirmed that he personally had a source within the FBI that confirmed the connection between Seth Rich and Wikileaks to Ms. Marraco. Yet, in the draft complaint, it is claimed that he never made similar statements about links between Seth Rich and Wikileaks to Ms. Zimmerman. This is simply not credible.

Even more importantly, Fox 5 DC's earlier reporting of the story, and its attribution of the information to Mr. Wheeler, makes any damages theory implausible. By March 16, 2017, Fox 5 DC had already reported that Rod Wheeler suggested that there was "tangible evidence on Rich's laptop that confirms was communicating with Wikileaks prior to his death." Any damage to Mr. Wheeler's reputation had already been done by the publication of this story, which relates directly to the statements he claims were falsely attributed to him by Ms. Zimmerman. Without a legitimate damages theory, Mr. Wheeler has no defamation claim.

D. Mr. Wheeler Confirmed the Story After Publication on Fox News with Sean Hannity

On March 16, 2017, Mr. Wheeler appeared on Fox News for an interview with Sean Hannity. During that interview, after the story had been published, Mr. Wheeler made the following statements:

- "Actually, I was hired by the family, Joel and Mary Rich. They signed the contract. Now the financial benefit, if there were any financial benefit, and by the way there wasn't much. That was actually paid for by a third party that I have had very little communication with at all."
- "Now, where did this information [about communications between Seth Rich and Wikileaks] come from in terms of knowing or **believing I should say that Seth Rich could have been in communications with Wikileaks? There was a federal investigator that was involved on the inside of the case, a person that's very credible.** And let me tell you this Sean, I don't like to suggest things without saying the person's name, but I can't say the person's name because that person will be thrown under the bus. And I can't do that, but, this person, **we checked him out, very credible,** he said he laid eyes on the computer and he laid eyes on the case file ... **When you look at that with the totality of everything else I have found in this case, it's very consistent for a person with my experience to begin to think well perhaps there were some email communications between Seth and Wikileaks.**"
- "The only reason that the FBI would be involved [in the investigation], just so the viewers understand, is if this has some degree of national exposure. **Meaning, because, maybe it is related to the DNC.**"

- “Here’s one other thing that’s gonna be startling, and I’m just gonna say this right now. I reached out to the police department way back in March when the family first hired me to get involved. I didn’t hear anything from the police department for 2-3 days. Guess what I learned yesterday from the family of Seth Rich, **the police department did not call me back because someone, a high-ranking official at the DNC, check this out, a high-ranking official at the DNC, when I called the police department, they got that information and called the Rich family, wanting to know why was I snooping around.**”
- **Connect the dots here. It’s all starting to come together** I don’t know for sure, as a matter of fact, if the emails went out to the Wikileaks or anybody else, **but it sure appears that way.**

Mr. Wheeler’s appearance on Sean Hannity’s show, on the day that the article was published, confirms many of the statements by Mr. Wheeler, and specifically those in question, included in the article by Ms. Zimmerman. The notion that Mr. Wheeler would even consider a claim of defamation against Mr. Butowsky after having made these private and public statements contradicting the claim defies reason. The allegations are meritless on their face, and frankly, completely illogical.

E. Mr. Wheeler Confirmed the Quotes Regarding the DNC by Text Message to Malia Zimmerman

On multiple occasions, including the day before publication, Mr. Wheeler sent text messages to Malia Zimmerman confirming the story, including the purportedly misattributed quotes. For example, in a series of text messages on March 15, 2017, Mr. Wheeler sent Ms. Zimmerman additional information for the story, including the following:

- “Joe said that when I called the police department, right after that Donna Brazil called him and was asking him why I was snooping around asking questions about death of Seth and his working relationships at the DNC. **I was startled to learn that Donna Brazil even knew that I reached out to the police department.** So basically when I called the police department that information was automatically given to Donna Brazil and she caught (sic) Joe wanting to know why I was inquiring about Seth relationships at the DNC. **As a police investigator that automatically makes me think that Donna Brazil is in a category of persons of interest as it relates to the death of Seth Rich.** I also spoke with another source who informed me that not only was Donna Brazil snooping around wanting to know what I was learning with regards to the DNC and Seth Rich but also **I was told that Debbie Wasserman Schultz was snooping around wanting to know how much it was I (sic) learning.**”
- “I just read the email you sent. Joel [Rich] informed me that Donna Brazil called him not the police department asking why I was snooping around. My question is how did she know I called the detective so quick.”

Thus, Mr. Wheeler confirmed in text messages that he believed the DNC was “snooping” around the murder investigation, and even concluded that Donna Brazil, interim Chairperson of the DNC, was a person of interest in the investigation. Yet, he now claims that Ms. Zimmerman’s quote attribution to Mr. Wheeler about the DNC seeking to block the investigation was false.

F. Rod Wheeler is a Public Figure

Finally, as you are probably aware, Mr. Wheeler has been a Fox News contributor for several years, and has been on television and in the print media throughout that time period. He also voluntarily appeared on several news shows in connection with the Seth Rich story, including on Fox News as well as CNN. Mr. Wheeler, under Supreme Court law, will be treated as a “limited purpose public figure.” According to the Supreme Court, these individuals “have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved.” *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974). Mr. Wheeler falls squarely within this category, and will thus, have to prove actual malice in order to be successful on his defamation claim.

Given Mr. Wheeler’s repeated public and private statements which are directly consistent with the quotations in the article, along with his tacit approval and authorization prior to publication, this will be an impossible standard to meet. Mr. Wheeler must show that Ms. Zimmerman and Fox News published the statements with knowledge that they were false. There is absolutely no chance that Mr. Wheeler can meet this standard given the record laid out in this letter.

Counterclaims by Butowsky Against Wheeler

Mr. Butowsky is evaluating any and all counterclaims to bring against Mr. Wheeler for Mr. Wheeler’s recent campaign to harm our client and the filing of this false complaint. Leading up to today, Mr. Wheeler has engaged in certain hostile acts, which have already caused substantial harm to Mr. Butowsky personally. He now threatens to file a complaint, which is false in its entirety, and so inflammatory, that it can only be construed as being used to threaten, harass, and intimidate Mr. Butowsky into paying off Mr. Wheeler.

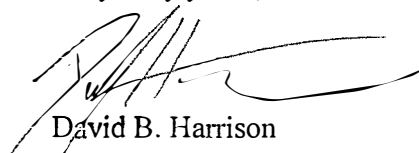
Mr. Butowsky’s counterclaims will include tortious interference with Mr. Butowsky’s business relationships, intentional/negligent infliction of emotional distress, and any other claims for the direct harm to Mr. Butowsky’s business interests and to him personally. The damages for these claims will include any lost profits from the filing of the frivolous complaint which is clearly an attempt to extort money from Mr. Butowsky and Fox News. The damages will also include all harm caused to Mr. Butowsky personally, including direct harm to his physical, emotional, and psychological well-being. To be clear, we estimate that the damages that Mr. Wheeler has already caused Mr. Butowsky are substantial, and those damages will increase significantly if Mr. Wheeler files the complaint.

We are aware that you are in possession today, prior to receiving this letter, of information which contradicts the allegations in the complaint. It is your ethical duty to correct

those inaccuracies, and/or refrain from filing the complaint because it is frivolous.³ We strongly suggest that you and Mr. Wheeler reevaluate your determination to file a claim against Mr. Butowsky. Not only is he the wrong party in the case because he never published any statements about Mr. Wheeler, but the vast majority of the allegations are either factually inaccurate or patently untrue, as we have shown. Mr. Butowsky has absolutely no intention of paying off Mr. Wheeler and he will react swiftly and aggressively if the complaint is filed. That being said, we invite further discussion with your firm regarding these claims as it may help shed some light on the basis for the lawsuit, and the resolution you are seeking from Mr. Butowsky.

Please feel free to contact me if you wish to discuss this further.

Very truly yours,



David B. Harrison

³ Importantly, the factual inaccuracies in your complaint extend well beyond the statements made by Mr. Wheeler, which contradict his claims of wrongful attribution. For example, the entire narrative regarding Mr. Butowsky's connection to the Administration, particularly the President, is false. Mr. Butowsky has never spoken to the President, nor has he claimed to have spoken to the President. Further, it is Mr. Wheeler who requested a meeting with Sean Spicer regarding the status of the investigation, not Mr. Butowsky, as shown in text correspondence between Mr. Wheeler and Mr. Butowsky on May 11, 2016. Your reckless and irresponsible portrayal of this false narrative is highly unethical, and in violation of your obligations to the standards of the profession. It is clearly an effort to intimidate and harass Mr. Butowsky, and it has failed.