PRELIMINARY STATEMENT

As with Plaintiff Rod Wheeler's original pleading that is the subject of the instant application for sanctions under Fed. R. Civ. P. 11, Wheeler's opposition to Defendant Butowsky's motion places irrelevant, distorted facts before this Court to disguise Wheeler's baseless claims. According to a recent New York Times expose on Wheeler's counsel, Douglas Wigdor, this is Wigdor's modus operandi—use the media by crafting allegations about Defendants that are "sensational and embarrassing but not necessarily legally relevant."[1] And here we are.

The record before the Court speaks for itself. Wheeler filed a Complaint after Butowsky's counsel repeatedly warned Wigdor that the facts did not support the claims, and the Complaint itself did not make certain basic, threshold allegations to survive a motion to dismiss. Notably, the Complaint failed to allege a single jurisdictional fact—not one—that would support Defendant Ed Butowsky being sued in this Court. Those facts don't exist. Moreover, Wheeler intentionally omitted critical facts that eviscerate Wheeler's claim. Under these circumstances, the Complaint should have been withdrawn, or at the very least corrected, in accordance with Rule 11's 21-day notice period.

Rather, Wheeler and Wigdor chose to stick with a defective, sensationalized Complaint, promoting the allegations on dozens of television and radio shows that focused on a salacious conspiracy that has nothing to do with Wheeler's claim. As this post-filing media campaign unfolded, the New York Times revealed that Douglas Wigdor represented over 20 clients suing Fox News for an array of disparate claims, and sought, through mediation, to globally settle them

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[1] Douglas Wigdor participated extensively with the New York Times piece and posted it on the firm's Twitter account after it was published. Available at: https://www.nytimes.com/2017/09/22/nyregion/douglas-wigdor-fox-news.html?smid=tw-share

all, including Mr. Wheeler's unfiled claims in this case. Just one week after Wigdor's global mediation strategy failed, Wheeler and Wigdor filed this frivolous lawsuit. Defendant Butowsky's Rule 11 motion asserts that this baseless Complaint improperly swept him up in Wigdor's campaign against Fox News for the purpose of harassment.

Wheeler's opposition to this motion for sanctions attempts to shift this Court's attention from his failure to timely correct obvious pleading deficiencies by making misleading and incomplete averments about prelitigation correspondence between counsel and oddly emphasizing the time Wigdor spent in advance of the Complaint's filing in developing a settlement strategy against Fox. Those details only serve to further support Wheeler's Rule 11 motion for sanctions with respect to Wigdor's ill-conceived claims against Mr. Butowsky.

Rule 11's test is whether, after a reasonable inquiry, a competent attorney could form a *reasonable belief* that the complaint is well-grounded. To be clear, no competent attorney could form the belief that the original complaint had merit. Wigdor's conduct and time spent pre-filing reveal his true purpose was settlement by harassment. Wigdor first contacted Butowsky, in June 2017, demanding a settlement of Wheeler's claims, without providing a basis or explanation of claims. His undisguised purpose was that the threat of claims against Fox, not the merits of his claims against Mr. Butowsky, would drive his settlement demand. His sensational, meritless Complaint further demonstrated that purpose by needlessly making Mr. Butowsky a defendant in a New York lawsuit.

Wheeler's Amended Complaint, filed after the expiration of Rule 11's safe harbor, acknowledges at least two substantial deficiencies in the initial complaint that should have been corrected pre-filing or during the Rule 11 safe harbor. The initial complaint failed to allege facts to support specific or general jurisdictional over Defendant Butowsky, a Texas resident, but the

Amended Complaint now alleges numerous purported facts about Butowsky's connections with New York under a theory of general jurisdiction. While that jurisdictional theory is obviously meritless – the standard for general jurisdiction is quite high and clearly not met by Mr. Butowsky's contacts with New York – Wheeler's failure to even attempt to add those facts during the Rule 11 safe harbor *is fatal* as a matter of law. Similarly, Wheeler's attempt to now allege defamation per quod claims to salvage his defamation per se count (a deficiency clearly identified in Butowsky's Rule 11 motion) strongly supports a Rule 11 sanction for failing to correct that obvious deficiency in the first instance, during the safe harbor period.

As Wigdor was fully aware, the original complaint had no merit; it could not survive a motion to dismiss. Wheeler and Wigdor *chose*, however, to file an irrelevant, sensationalized complaint to inflame a media frenzy, and *chose* not to correct that complaint during the Rule 11 safe harbor to maintain that media frenzy. That overzealous, media driven advocacy caused Butowsky to spend significant time and money on filing motions with the Court to pull himself out from under Wigdor's global strategy of pursuing dozens of lawsuits against Fox in New York. His Amended Complaint is no more meritorious, but Wheeler and Wigdor should be sanctioned for this harassing conduct now. The sanctionable event has already occurred. All facts necessary to make that assessment are before the Court. The Court should issue sanctions against Wheeler and Wigdor for the amount of attorneys' fees expended on filing Butowsky's motion to dismiss the initial complaint and the instant application for sanctions.[2]

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[2] At the Court's request, counsel will provide detailed statements of Butowsky's attorneys' fees related to the motions.

BACKGROUND

A. Plaintiff and His Counsel Were Repeatedly Warned about the Irredeemable Claim

On Friday, June 23, 2017, Wigdor emailed Mr. Butowsky a vacuous letter threatening to file a lawsuit by "early next week" if an "amicable resolution was not reached by then."[3] Ex. 1.[4] Wigdor's letter did not describe the nature of the claim. It did not describe the factual basis for the claim. It did not propose a resolution. It did not even provide the alleged defamatory statement. Yet, in four days or less, two of which were during a weekend, Wigdor demanded that Mr. Butowsky resolve an unknown claim that apparently involved communications with the President of the United States, Sean Spicer, and Steve Bannon. This was not a serious attempt at resolving a legitimate claim; it was a shakedown.

Wheeler's counsel responded by email, stating that the stunning lack of detail in the threatened letter left him befuddled as to what Mr. Butowsky was "resolving." Ex. 2. Given the preliminary, but compelling information that he had at the time surrounding Plaintiff's limited involvement in Ms. Zimmerman's publication, counsel for Butowsky insisted that *if* a frivolous complaint were filed, it would be met with an application for sanctions. *Id.*

Wigdor responded by offering to show counsel for Butowsky a draft complaint, but only on the condition that he submit to a series of unusual conditions. Wigdor required confidentiality

[3] Wheeler's opposition provides the Court with a completely one-sided account of the prelitigation correspondence between counsel taken out of context. These counsel exchanges have very limited relevance, except, in full, they show that Plaintiff had ample opportunity to correct his pleading deficiencies pre-filing, but chose instead to pursue a frivolous complaint to support a campaign of media harassment. Butowsky provides a full account here to give the Court a complete picture of the events leading up to the filing of this frivolous lawsuit.

[4] All exhibit notations reference those attached to the accompanying Declaration of David B. Harrison, or reference other exhibits accompanying the original Harrison Declaration. (ECF No. 45.)

and a release of any preemptive lawsuits. He also required that counsel for Butowsky come to his offices, turn over his phone, and sit in a conference by himself to read the draft complaint. Confronted with this unusual charade, counsel repeated that he was not aware of any defamatory statements published by Mr. Butowsky about Wheeler, and any complaint that alleges that he had published defamatory statements would be met with a motion for sanctions. Ex. 3. He agreed to the conditions, however, and reviewed the complaint.

B. Counsel Reviews the Complaint Confirming The Reality That Plaintiff's Putative Lawsuit Has No Basis In Fact Or Law

After reviewing the putative complaint, Mr. Butowsky's counsel served on Wigdor a letter setting forth in great detail why the proposed pleading was devoid of any factual or legal merit – making almost identical arguments to those raised in Butowsky's motion for sanctions and motion to dismiss. (ECF No. 45-1.) He also aptly identified Wigdor's prelitigation tactics as a shakedown, and explained that Mr. Butowsky would not be extorted. Among the plain deficiencies noted by counsel for Mr. Butowsky:

- Wheeler could not pursue a defamation claim because Mr. Butowsky did not publish the statements he claimed to be defamatory;
- Wheeler could not pursue a defamation claim because Wheeler himself authorized and consented to the publication of the statements at issue;
- Wheeler could not pursue a defamation claim because the statements at issue attributed to Wheeler were identical to others *made by Wheeler prior to and after publication of the article*, and thus could not be materially false for purposes of defamation;[5] and
- Wheeler could not pursue a defamation claim because as a limited purpose public figure, he'd have to show actual malice, and he couldn't possibly make even a *prima facie*

[5] Wheeler's distinction between him having a "source" and the quotation involving "his investigation show[ed]" is a makeweight, a distinction without any meaningful difference. The two are not mutually exclusive and, in any event, the record evidence demonstrates that Plaintiff indicated to Maria Marracco that the source was "very credible," strongly suggesting that *he independently* vetted the source.

showing of it given that Zimmerman sent him the article multiple times with the quotes prior to publication.[6]

Defendant again advised Plaintiff and his counsel, now having reviewed the frivolous complaint, that a complaint based on these facts would be met with a motion for sanctions under Rule 11.

C. Plaintiff Pursues Frivolous Litigation Despite Repeated Warnings

On June 27, 2017, Wigdor notified counsel for Butowsky that Fox News was interested in mediating Plaintiff's claims, "shifting" the three to four-day timeline laid out in the June 23, 2017 letter. Ex. 4 ("June 27th Letter"). Butowsky was not invited to participate in the mediation of claims against him, and Wigdor did not inform him that the preplanned mediation included not just Wheeler's case, but over 20 other cases Wigdor had pending against Fox. Indeed, the implication in their correspondence was that Wheeler's claim was the only claim being mediated. Counsel for Butowsky requested a meeting with Wigdor to discuss the threatened claims and the mediation, but Wigdor declined in light of the pending global mediation with Fox to which Butowsky was not invited.

According to the New York Times, the mediation was held, and failed, in part because Douglas Wigdor demanded $60 million to globally settle all claims. He apparently intended to distribute to each of his clients a portion of the settlement after he collected his percentage as attorneys' fees. Just days later, Wheeler filed the Complaint, which contained the same erroneous factual and legal assertions contained in the draft reviewed by Wheeler weeks before. On that same day, NPR published an extensive report about the lawsuit, making clear that

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[6] Wheeler's argument on consent is frivolous on its face. The record amply reflects that Defendant Zimmerman pleaded with Plaintiff to "please read [the draft article] carefully" (ECF No. 45-13) and "can you read the story now," (ECF No. 45-14) each time providing Plaintiff with the quotations he now complains about.

Douglas Wigdor had provided its reporter, David Folkenflik,[7] with an advanced copy of the "confidential" complaint before he filed it. As the record is clear, Wheeler and Wigdor proceeded on a media tour, doing dozens of television and radio shows promoting the lawsuit over the next several days. While the overwhelming focus by Wheeler and Wigdor was on the conspiracy between Fox News and the President, Wheeler and Wigdor acknowledged that they were not actually sure whether a conspiracy took place, and even conceded that these allegations were not necessary to prove the defamation claim. The allegations also directly contradicted Wheeler's own public statements about the political motivations of Butowsky and Wheeler's investigation—"We never talk about politics," Wheeler said. "The only thing I talk to Ed about is finding the murderer." https://www.dallasnews.com/news/dallas/2017/05/19/dallas-financier-got-tangled-conspiracy-theories-slaying-dnc-staffer-seth-rich (last visited October 25, 2017).

* * *

Instead of litigating this case on the merits, Wheeler has created a series of strawmen—the *straightforward* issue before the Court on this Rule 11 motion is whether *Plaintiff's original complaint* is frivolous under Rule 11. Wheeler's filing of an amended complaint, well after the expiration of Rule 11's safe harbor, essentially concedes his Rule 11 deficiency. Wheeler misstates the standard on Rule 11 and the law on defamation. Moreover, he cannot explain why he named Mr. Butowsky in this lawsuit against a Texas resident, venued in New York, where it is clear that this Court does not have jurisdiction over him.

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[7] The selection of Mr. Folkenflik for leaking the Complaint was no coincidence. Wigdor understood that Folkenflik has been a vocal critic of Fox News for years, even writing a book about the network and its Chairman Rupert Murdoch, "Murdoch's World: The Last of the Old Media Empires."

ARGUMENT

I. Plaintiff Misstates the Standard Under Rule 11

Wheeler failed to allege threshold allegations required to support his claim, and misled the Court by omitting critical facts fatal to this lawsuit long in his possession and further revealed to him prior to filing the Complaint. In his defense of these obvious deficiencies, Wigdor asserts that "countless hours" were spent investigating the claim and drafting the complaint. Wheeler and Wigdor misconstrue the standard for Rule 11.

A law firm's purported efforts, no matter how exhaustive, do not relieve them of sanctions under Rule 11. Whether counsel "undertook a reasonable inquiry" is merely the threshold question; sanctions will be imposed, however, if, after a "reasonable inquiry" a "competent attorney could not form a *reasonable belief* that the pleading is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Abdelhamid v. Altria Group, Inc.*, 515 F. Supp. 2d 384, 391 (S.D.N.Y. 2007). The fact that Wigdor's reasonable inquiry could only have led to the *objective* conclusion that Wheeler's claims were meritless, and yet Wigdor filed the complaint anyway, and failed to withdraw or amend it during the Rule 11 safe harbor period, is fatal to his defense under Rule 11.

A. Time Spent Is Not An Adequate Defense under Rule 11

In opposition, Wheeler and Wigdor focus exclusively on counsel's inquiry and Wigdor's ***own subjective*** belief that the complaint has merit. Indeed, Wheeler states "First, to avoid sanctions, Wigdor must establish only that it performed a reasonable inquiry into the allegations prior to filing the litigation." (Wheeler Br. at 3). That is not the law.

"Rule 11 sanctions are judged under an objective reasonableness standard and are appropriate when it is patently clear that a pleading had no chance of success." *Gold v. The Last*

Experience, 97-1459, 1999 U.S. Dist. LEXIS 3266, at *9 (S.D.N.Y. Mar. 22, 1999) (citations omitted). Thus, Rule 11 "establishes an ***objective standard*** intended to eliminate any empty-head-pure-heart justification for patently frivolous arguments." *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 156, 166 (2d Cir. 1999) (emphasis added) (internal quotation marks omitted); *accord Weinraub v. Glen Rauch Sec., Inc.*, 419 F. Supp. 2d 507, 512 (S.D.N.Y. 2005) ("In determining whether a Rule 11 violation has occurred, a court applies an objective standard of reasonableness."). Even if Wigdor *subjectively* believed that this lawsuit had any merit whatsoever, this does not protect the law firm from the *objective* fact that Plaintiff's complaint utterly fails to state a claim for relief which could be granted, and utterly fails to plead how New York has personal jurisdiction over Mr. Butowsky. *See Steele v. Polymer Research Corp.*, No. 85-5563, 1987 U.S. Dist. LEXIS 5270, at *4-5 (S.D.N.Y. June 18, 1987) ("An attorney's subjective good faith will not suffice to protect a meritless or frivolous claim from Rule 11 censure. As a result of defendant's manifest failure to investigate the facts *and* the law, Rule 11 sanctions are appropriate.") (citing *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-254 (2d Cir. 1985)). (emphasis in the original).

Wigdor emphasizes the "countless hours" it spent "reviewing emails, voicemails, text messages, media reports and other documents related to Mr. Wheeler's claims." (Wheeler Br. at 12.) Wigdor misses the point. It is of no moment how many hours a firm spent investigating a case if the sole, objective conclusion reached after that investigation is that the pleading is frivolous. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("Extended research alone will not save a claim that is without legal or factual permit from the penalty of sanctions."). Here, Wigdor's inquiry apparently missed or ignored the following:

- Wheeler has been making outlandish claims about conspiracy theories for years, and has publicly retracted several, putting his credibility and reputation deeply in question;
- Wheeler is on the record stating that he and Butowsky "rarely" spoke during the investigation, and also on the record stating that they never spoke about politics;
- Wheeler revealed to another news outlet, prior to the Fox News publication, that he had sources who confirmed that Seth Rich had provided the stolen DNC emails to Wikileaks, and that the DNC had something to do with his murder;
- Numerous text messages to Malia Zimmerman prior to the publication are almost identical to the quotes in the Fox News piece in question;
- Zimmerman pleaded with Wheeler to read and approve the allegedly misattributed quotes, one of which he added to, yet claims he never read it; and,
- Wheeler made several substantively identical statements to other cable and radio news outlets.
- There are no jurisdictional facts that support a claim against Ed Butowsky in New York.

Wigdor cannot have it both ways – either he intentionally omitted these exculpatory claims that render this entire action invalid, or he missed these facts in his haste to put together a salacious, headline-grabbing lawsuit. One of these two things must be true, and either would justify sanctions under Rule 11.

B. A Competent Attorney Could Not Form A Reasonable Belief that the Complaint Had Merit

Based on the record of evidence, and the facts alleged, an objectively reasonable attorney could not form a reasonable belief that the original pleading is well-grounded. Critically, Wheeler's original Complaint pleaded absolutely *no* basis for this Court to assert personal jurisdiction over Mr. Butowsky. And the facts surrounding Wheeler's participation in the article, and his documented public and private comments about the subject matter, show that he could never prove defamation for the alleged misattribution. Indeed, Wheeler's Complaint "displays

astonishing ignorance of applicable substantive law, [and] cavalier indifference to jurisdictional questions . . . ." *Ganoe v. Lummis*, 662 F. Supp. 718, 725 (S.D.N.Y. 1987) (finding no personal jurisdiction and setting a hearing for sanctions as a result of the failure to show any hint of personal jurisdiction). For this, sanctions should be imposed.

1. Plaintiff Failed to Assert Any Facts that Would Support Jurisdiction in this Court

As an initial matter, Wheeler failed to allege a single fact supporting jurisdiction over Butowsky in this Court. In defense of this glaring deficiency, Wheeler points to allegations in the Amended Complaint, as if those new allegations have any bearing on the frivolousness of his original complaint. They don't—indeed, the new, extensive allegations, stretched and contorted to give the appearance of plausibility to personal jurisdiction, actually expose the frivolousness of the original complaint.

Leaving the legal significance of these new allegations of general jurisdiction in New York over a Texas resident for another day, courts do not hesitate—nor should this Court—to impose Rule 11 sanctions when a complaint is completely bereft of jurisdictional allegations needed to hail the Defendant before a court. *See, e.g.*, *Philos Techs., Inc. v. Philos & D, Inc.*, 943 F. Supp. 2d 880, 887-88 (N.D. Ill. 2013) (awarding sanctions where plaintiff fabricated facts in support of personal jurisdiction); *Rogers v. Nacchio*, No. 05-60667, 2006 U.S. Dist. LEXIS 101855, at *56-58 (S.D. Fla. June 5, 2006) (awarding Rule 11 sanctions where plaintiffs' claim that defendant was subject to personal jurisdiction in Florida was frivolous; moreover, "Plaintiffs[] were or reasonably should have been aware that their claim was frivolous given [defendant's] earlier motion to dismiss."); *Pares v. Gordon*, No. 91-1344, 1992 U.S. Dist. LEXIS 15202, at *8-9 (S.D.N.Y. Oct. 5, 1992) (awarding Rule 11 sanctions where plaintiff's

counsel was on notice that there was no jurisdictional basis to hail defendant into a New York court).

Here, Wheeler failed to allege a single jurisdictional fact connecting Mr. Butowsky to New York, rendering the Complaint meritless on its face. Wheeler clearly recognized this deficiency by adding several allegations to the Amended Complaint to belatedly attempt to fix it. The failure by Wheeler and Wigdor to correct this deficiency within the Rule 11 safe harbor was a strategic choice that renders the original complaint sanctionable.

2. Plaintiff Could Not Allege Defamation Per Se for the Misattribution

Equally frivolous is Wheeler's defamation *per se* claim. To establish defamation per se, the alleged defamatory words must "impute the defamatory character per se, no innuendo—no allegation or proof of extrinsic facts—is necessary." *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 441 (2007)[8]; *Wineholt v. Westinghouse Electric Corp.,* 59 Md. App. 443, 446 (1984) ("A defamation actionable by itself (*i.e.*, per se) needs no explanation. Its injurious character is a fact of common knowledge."). Misattribution cannot be defamation per se because it requires a supervening act, *i.e.*, the retraction, for the purported defamation to be complete.

Wheeler doesn't address this point. Instead, he cites several media reports following his public retraction as evidence of his tarnished reputation. First, Wheeler completely misunderstands the meaning of defamation per se. The entire point is that the statement itself is so injurious in nature, that extrinsic proof of injury is not needed to prove defamation. Yet, Wheeler introduces extrinsic proof to show he was defamed. Nobody reading the statements

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[8] Wheeler incorrectly asserts that New York law applies, but there is no distinction in the law of the two jurisdictions on this point. Indeed, Wheeler cites *Geraci v. Probst*, 61 A.D.3d 717, 718 (2d Dep't 2009), which provides virtually the same standard as Maryland, and applies equally to Wheeler's misattribution claim.

themselves would know they were false unless Wheeler retracted them. Thus, on their face, by definition, they do not "impute the defamatory character per se." *Brodie*, 407 Md. at 441.

Second, all of the publications cited by Wheeler as purported proof of defamation *per se* refer to the Fox 5 DC report, published prior to the Fox News publication. Wheeler incredibly makes Butowsky's argument for him – the reputational harm to Wheeler, if any, occurred before the Fox News article was published when Wheeler retracted almost identical statements from Fox 5 DC. This case should be dismissed on that basis alone.

Wheeler revealed the futility of his defamation *per se* claim by adding defamation per quod to the Amended Complaint (which suffers from its own deficiencies). For the purpose of this Rule 11 motion, the alleged misattribution cannot be defamation *per se*.

3. Plaintiff Cannot Prove Actual Malice

As a limited purpose public figure (a designation conceded by Plaintiff), Wheeler must show that the misquotation was a "deliberate or reckless" falsification. *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991). Wheeler does not attempt to plausibly allege such deliberate falsification, as he cannot—Wheeler made the same statements on multiple occasions prior to and after publication (making the quotations insufficiently false under the law), and Zimmerman sought his approval of the quotations repeatedly before Fox News published the article. Rather than address this fatal deficiency, Wheeler descends into a summary of his salacious conspiracy allegations, which he himself has discredited, and then recounts the proceedings involving unrelated allegations about Bill O'Reilly and Fox News, as if they have some relevance to Ed Butowsky.

This strategy has been employed by Wheeler over and over again in this case alone. Whether it is a conspiracy with the President (that wasn't), a purported extortion attempt of

journalist Sy Hersh, or Wigdor's interference in the pending Fox News merger with British television network Sky TV, Plaintiff has repeatedly injected legally irrelevant stories in this case to sensationalize the lawsuit and to embarrass the defendants. Now, Wheeler describes in detail the conduct of Fox News as it relates to recent disclosures about Bill O'Reilly sexual harassment allegations from several years ago in defense of his frivolous claims against Ed Butowsky. The use of these irrelevant allegations in this context is completely improper and self-defeating.

The truth is that making a claim of actual malice is objectively impossible here. As is detailed in the opening brief, Zimmerman repeatedly sought Plaintiff's approval for the story and Wheeler objectively appeared to approve his quotes. It simply defies reason that a court, or a competent attorney for that matter, would find that Zimmerman intentionally or recklessly misattributed the quotes when she sought Wheeler's approval for them repeatedly, or that Butowsky had actual malice based on his observation of Zimmerman's efforts to receive approval. Further, the quotes are nearly identical to things that Wheeler said repeatedly in text messages to Zimmerman, on camera with Fox 5 DC, on camera with Sean Hannity, and to several others over the course of three months.

Plaintiff tellingly does not make a legally cognizable argument in favor of finding actual malice. For this reason, as well as several others, the case should be dismissed and sanctions should be awarded.

4. Plaintiff Fails to Cite Any Authority Showing that the Tweets Are Defamatory

Wheeler does not address Butowsky's arguments regarding the invalidating context of the twitter posts by Butowsky regarding Wheeler's retraction of his quotes in the Fox News story. Instead, he claims the facts of this case are identical to those recited in a 1977 Second Circuit decision, *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 117 (2d Cir. 1977). Plaintiff

mischaracterizes the holding in that case, in which the Second Circuit *reversed* the district court, finding that the New York Times *could not* be held liable for defamation because it reported controversial statements by a third party accurately. *Id*. at 122.

Plaintiff misleadingly states that quoted language from a footnote represented the holding in the case. But, even assuming that the *dicta* had some persuasive value, it describes statements in which scientists and professors were labeled "paid liars." *Id*. at 122 n. 5. Butowsky's Twitter hyperbole and innuendo does not come close to such a direct characterization. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 336 (N.Y. Sup. Ct. 2017) (holding that "[l]oose, figurative or hyperbolic statements, are not actionable" with respect to allegedly defamatory statements made on Twitter). Butowsky's statements are not statements of fact, and thus, cannot be defamatory.

Once again, Wheeler's misplaced arguments expose the weakness of his claims. The twitter comments do not rise to defamation, and the continued, improper pursuit of these claims is sanctionable.

II. Plaintiff Filed This Lawsuit For An Improper Purpose

There is no need to speculate about the motives of Plaintiff and his counsel in filing this complaint. The facts speak for themselves with the array of specious, irrelevant allegations included in the Complaint to embarrass Mr. Butowsky and his co-defendants, and with the media campaign started by Wigdor when he provided a preview of the complaint to David Folkenflik. After mediation of all of his Fox News cases failed, Wigdor sought to apply pressure on Fox News by waging a media campaign to highlight a fabricated conspiracy, and by publicly injecting himself in the regulatory review of Fox News' pending merger with a UK television network. The use of the media in this way in the pursuit of meritless claims is exactly the kind of intimidation strategies intended to pressure and embarrass that Rule 11 seeks to prevent. Fed.

R. Civ. P. 11(b)(1) (by signing a pleading, an attorney represents to the Court that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."); *see also Lipin v. Nat'l Union Fire Ins. Co.*, 202 F. Supp. 2d 126, 140 (S.D.N.Y. 2002) (awarding Rule 11 sanctions in defamation action when filing of the amended complaint was asserted "for an improper purpose—*to harass* . . . .") (emphasis added); *Hall v. Tressic*, 381 F. Supp. 2d 101, 108 (N.D.N.Y 2005) (awarding sanctions where "[t]he extensive and colorful portrayal of the social and political backdrop to defendants' alleged conduct is essentially irrelevant to the facts of this case[.]").

Wigdor attempts to disclaim responsibility for the media frenzy by asserting that the media was naturally drawn to the "serious allegations," and Butowsky is just complaining. If this were true, then why did he provide David Folkenflik with an exclusive preview of the allegations? Why did he and Wheeler do numerous television and radio shows after the filing of the Complaint and speak almost exclusively about the conspiracy between the President and Fox News? Why does he continue to insert allegations about Fox News that have absolutely nothing to do with Butowsky? Why did he fly all the way to London to try to discourage regulators from approving a settlement of a merger with a UK television company? Why did he prevent Butowsky from participating in the mediation?

The answer to each of these questions has nothing to do with Mr. Butowsky—Wigdor is attempting to increase the pressure on Fox News to obtain a global settlement of his 20-plus cases against the Network. Mr. Butowsky should not be in this case in the first place, and he certainly should not be a pawn in Wigdor's media-driven chess match with Fox News.

III. Maryland Law Governs This Action

Second Circuit precedent makes clear that Maryland, not New York law, governs this action. In defamation actions, "New York assumes that the state of the plaintiff's domicile will usually have the most significant interest in the case and that its law therefore should govern." *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 175 (2d Cir. 2000) (quoting *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999)). The *presumptive* rule in cases where statements are published over the Internet, is that "the law of plaintiff's domicile applies." *Broadspring, Inc. v. Congoo, LLC*, No. 13-1866, 2014 U.S. Dist. LEXIS 116070, at *17 (S.D.N.Y. Aug. 20, 2014) ("In such cases, there is a presumptive rule that the law of the plaintiff's domicile applies.").

This is not only the law of this Circuit; it is the law universally. *See, e.g.*, *Franklin Prescriptions, Inc. v. New York Times Co.*, 267 F. Supp. 2d 425, 432 (E.D. Pa. 2003) (observing that "it does not strain logic 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.") (internal quotation marks and citation omitted); *Haywood v. St. Michael's College*, No. 12-164, 2012 U.S. Dist. LEXIS 177468, at *22 (D. Vt. Dec. 14, 2012) ("[T]he majority of courts confronted with [aggregate communication] choice of law question[s] have found that the plaintiff's domicile should control since this is the forum with the greater interest." (quoting *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 471 (E.D. Pa. 2010))). This has also been black letter law for decades. *E.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS §

150(2) (1971) ("[T]he state of most significant relationship will usually be the state where the person was domiciled at the time . . . ."). The Maryland law of defamation governs this action.[9]

CONCLUSION

Wheeler's Complaint against Mr. Butowsky lacks any basis in fact and in law. Wigdor brought the lawsuit anyway, knowing that its investigation was lacking and that none of the allegations in the Complaint were either legally or factually sound. Wigdor and his firm participated in a news story stating that he injects irrelevant information into his cases for the purpose of harassing and embarrassing defendants. That is Wigdor's clear strategy in this case. For the foregoing reasons, and for the reasons set forth in Mr. Butowsky's opening brief, Wigdor's filing of the original complaint warrants the imposition of Rule 11 sanctions.

Accordingly, Defendant's motion for Rule 11 sanctions should be granted in its entirety.

[9] As noted above, even assuming, *arguendo*, that New York law does govern this action, Plaintiff falls well-short of defamation per se or any plausibly claim against Mr. Butowsky.