

May 2, 2017

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VIA EMAIL

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5 Columbus Circle, Suite 1501
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Re: *Tantaros v. Fox News Network, LLC, et al.*, No. 1:17-cv-02958 (S.D.N.Y.) (JGK)

Dear Mr. Burstein:

We write on behalf of defendants Fox News Network, LLC, William Shine and Irena Briganti to advise you of our intent to seek sanctions against you and your client under Fed. R. Civ. P. 11 for filing the Complaint in this matter. The Complaint asserts that the Defendants “have sought and are continuing to emotionally torture Ms. Tantaros into giving up her claims that she was sexually harassed . . . through illegal electronic surveillance in violation of 18 U.S.C. § 2511, the hacking of her personal computer in violation of 18 U.S.C. § 2701, and the use of ‘sockpuppet’ social media accounts to stalk Ms. Tantaros in violation of 18 U.S.C. § 2261A.” Comp. ¶ 4. These allegations have no factual or legal basis; the Complaint was brought with the intent to smear the Defendants’ reputations by pleading, without a shred of actual evidence, that they hacked Ms. Tantaros’ computer and surveilled her phone conversations. Sanctions are warranted for many reasons, including:

1. The “stalking” allegations are based on certain tweets from the Twitter account of Daniel Wayne Block, an account that the Complaint repeatedly terms a “sockpuppet” account that “operate[s] under a fictitious identity.” Comp. ¶¶ 11; 38 (at page 15). In fact, Mr. Block is a real person living in Gainesville, Florida, a fact that could have been ascertained in a few minutes of research. This is just one of the many unfounded and irresponsible factual allegations in the Complaint.
2. Wholly apart from the lack of factual allegations connecting the alleged surveillance and computer hacking to any of the Defendants, there is no legal basis for a claim under 18 U.S.C. 2511. Simply put, the *only* basis for your alleged claim that Ms. Tantaros’ phone was tapped is your unfounded conjecture that Mr. Block somehow responded to her private conversations and that he did so at the behest of Fox. Once again, even a cursory investigation of the facts would have proved this conjecture to be false. Similarly, there is no legal basis for a claim under 18 U.S.C. § 2701, which applies only to illegal hacking of computer “facilities,” a term that does not encompass Ms. Tantaros’ personal computer. Nor is there a private right of action under 18 U.S.C. § 2661A.
3. Your statements prior to bringing this lawsuit, coupled with these fundamental factual and legal defects, make it evident that the Complaint is not presented for any legitimate purpose. Rather, the Complaint was filed to harass defendants, to cause them to incur unnecessary legal costs, and to portray them in an adverse public light to try to extract a settlement of Ms. Tantaros’ claims of

purported sexual harassment, which she has been directed to bring in a confidential arbitration forum.

Unfounded Factual Allegations

Any reasonable pre-filing inquiry would have made clear that many of the allegations included in the Complaint are patently false or otherwise lack evidentiary support. A non-exhaustive list of inaccuracies includes:

- The Complaint alleges that a Twitter account in the name of Daniel Wayne Block is a “sockpuppet” account, defined as an account that “operate[s] under a fictitious identity.” Comp. ¶ 38. This allegation is demonstrably false because the account is in fact owned by Daniel Wayne Block, a real person and retired transportation manager living in Gainesville, Florida. Even the most basic investigation of easily available Internet resources would have revealed Mr. Block’s name, address and telephone number.
- The Complaint alleges that tweets of anodyne images from the Block Twitter account—a bunny, an elk, children posing with Mickey Mouse, Egyptian pyramids, or fighter jets—were a kind of code directed at Ms. Tantaros in order to tell her that she was under surveillance. *Id.* ¶¶ 46-63. In fact, a review of the contemporaneous tweets from the Block Twitter account negates any allegation that the selected images were tweeted to harass Ms. Tantaros or to send her coded messages:
 - The Complaint alleges that a tweet of a photo of the “Blue Angels” flight squadron on June 13, 2016 was intended to communicate knowledge of Ms. Tantaros’ telephone conversation with a friend about the “Blue Angels” flight squadron on June 12, 2016. But Mr. Block tweeted similar images of the “Blue Angels” flight squadron on April 26, May 29 and June 4, 2016, *before* the allegedly monitored telephone conversation.
 - The Complaint alleges that, on June 23, 2013, one day after Ms. Tantaros talked to her brother’s children while they were at Disneyland, there was a tweet from the Block account showing two children being hugged by Mickey Mouse with the message: “Mickey Mouse and ‘new friends’...” *Id.* ¶ 8(c); ¶ 61 and Ex. D. But Mr. Block tweeted the exact same image on May 24, 2016, almost a month *before* the allegedly monitored telephone conversation. Other Disney-related images were tweeted on other dates, including on April 16, June 15, June 18, and June 22, 2016.
 - The Complaint alleges that on July 27, 2016, Mr. Block tweeted “a message that included the words ‘Be strong and courageous.’” Comp. ¶ 63. The Complaint does not mention that these words were part of a photo of a lion, and that Mr. Block tweeted quite a few images of lions, some of which included other inspirational sayings.
 - The Block Twitter account shows multiple tweets about cult science fiction films, such as “The Black Scorpion.”
 - Mr. Block was an avowed fan of Ms. Tantaros. He sent many tweets describing her as “beautiful” and his “favorite” host on Outnumbered.

- The Complaint alleges that Ms. Tantaros received a copy of her book in the mail, and alleges that “[t]here is no possible way that [the sender] could have known Ms. Tantaros’s home address.” Compl. ¶ 48. However, a simple Internet search retrieves plaintiff’s home address, as well as various phone numbers, email addresses and other personal information, indicating that this information is public and easily discoverable. *See* Spokeo Name Report for Andrea Tantaros, attached. Even worse, the Complaint is deliberately misleading on this point insofar as it erroneously says that it was Mr. Block who had sent a book to Ms. Tantaros’ home address, when his May 21, 2016 tweet referred only to sending her a “bookplate.” Comp. ¶¶ 47-48 and Ex. Z. On May 22, 2016, Mr. Block sent another tweet saying that he had “just received” his hardcover copy of Ms. Tantaros’ book and “am now waiting for Andrea to sign my bookplate,” which he had sent to her care of Fox News and not to her home address.
- The Complaint alleges that Fox News relied upon Peter A. Snyder and Disruptor, Inc. in furtherance of a purported scheme to harass the plaintiff during 2014 to 2017. Comp. ¶ 80. Neither Peter A. Snyder nor Disruptor, Inc. have performed any services for Fox News Network, LLC or its affiliates since December 2012, more than two years before the facts alleged in the Complaint. Counsel for Mr. Snyder alerted you to this fact at least a week before you filed the Complaint.

You do not have the excuse that your bogus allegations of electronic surveillance were made in haste and could not properly be investigated, for you had ample time to look for factual support. Back in August 2016, you told Eric Wemple of the *Washington Post* that you were looking into possible violations of “federal criminal laws” concerning electronic surveillance conducted on the “fourteenth floor” of Fox News’s offices.¹ At that time, you said that you expected to complete your investigation within “the next few weeks.” *Id.* Eight months elapsed from the time of that interview to the filing of the Complaint, more than enough time to identify the factual errors that we were able to find within hours or days. Sanctions may be imposed where, as here, counsel has failed to conduct a reasonable factual investigation.²

¹ *See* Erik Wemple, *Tantaros’ lawyer: Sexual harassment suit was ‘only the beginning,’* THE WASHINGTON POST, Aug. 25, 2016, https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/08/25/tantaros-lawyer-sexual-harassment-suit-was-only-the-beginning/?utm_term=.3122df5aaf51.

² *See, e.g., Gambello v. Time Warner Commc’ns, Inc.*, 186 F. Supp. 2d 209, 229 (E.D.N.Y. 2002) (sanctions imposed on counsel where reasonable inquiry prior to filing would have shown that allegations lacked evidentiary support and were pursued despite contradictory sworn testimony); *Saltz v. City of N.Y.*, 129 F. Supp. 2d 642, 646-47 (S.D.N.Y. 2001) (sanctions awarded where counsel failed to investigate client’s claims for a year before filing and pursued them despite lack of evidentiary support); *Abner Realty, Inc. v. Adm’r of Gen. Serv. Admin.*, No. 97 Civ. 3075, 1998 WL 410958, at *3-8 (S.D.N.Y. July 22, 1998) (sanctions imposed for pursuing claims not warranted under existing law, lacking the minimum required supporting factual allegations, and after failing to make a reasonable inquiry—including conducting basic research on legal databases and the Internet that would have revealed the inaccuracies—giving rise to the inference that the action was filed for improper purposes); *Galasso v. Eisman, Zucker, Klein & Ruttenberg*, 310 F. Supp. 2d 569, 577 (S.D.N.Y. 2004) (sanctions imposed on counsel for asserting claims that were statutorily barred and that were completely lacking factual support).

Legally Meritless Claims

None of the Complaint's claims for relief, under 18 U.S.C. § 2511, 18 U.S.C. § 2701, and 18 U.S.C. § 2661A, state a claim upon which relief may be granted. While this fact will be elaborated upon at greater length in the Defendants' anticipated motion to dismiss the Complaint—should you not choose to avail yourself of the safe harbor provided to you by this letter to withdraw it—there are four respects in which the claims are so grossly defective as to warrant sanctions under Fed. R. Civ. P. 11.

First, under the Federal Wiretap Act (“FWA”), a plaintiff must allege that a wire, oral or electronic communication was “intentionally intercepted” or used or disclosed, and during its use or disclosure, the defendant must “know[] or hav[e] reason to know that the information was obtained through interception.”³ The plaintiff must provide a sufficient factual basis to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Ms. Tantaros' claim under the FWA is predicated entirely on purported surveillance of her personal telephone conversations. *Id.* ¶ 82. However, there are *no* facts alleged to support this claim; it is based entirely on the surmise that Mr. Block was referencing Ms. Tantaros' private phone conversations in his tweets and that he did so on behalf of Fox. As discussed above, even the most rudimentary review of Mr. Block's Twitter account would have revealed these paranoid claims to be baseless.⁴

Second, the Stored Communications Act (“SCA”) applies only to communications storage facilities such as service providers and third-party services that maintain stored information, and not to individuals' computers and devices. This limitation has been recognized by four federal Courts of Appeals as well as by the United States District Court for the Southern District of New York.⁵ The Complaint therefore fails to state an SCA claim because it only alleges access to plaintiff's personal devices—namely, her personal computer and Blackberry—and not a third-party “facility.” Compl. ¶ 45. Nor does the Complaint plead a single fact to support its conclusory allegation that Fox directed an unidentified person to hack Ms. Tantaros' personal computer and gain access to a single private email. Compl. ¶ 87.

³ *Molefe v. Verizon N.Y., Inc.*, No. 14-CV-1835, 2015 WL 1312262, at *3-4 (S.D.N.Y. Mar. 24, 2015).

⁴ Conclusory allegations that there was some kind of surveillance virus on Ms. Tantaros' computer are irrelevant to her claim that her phone was being tapped. Most fundamentally, nowhere does the Complaint allege that the purported surveillance virus actually intercepted any communications, let alone that defendants were responsible for any such interception.

⁵ See *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 277 (3d Cir. 2016) (personal computing devices are not protected facilities under the statute), *cert. denied sub nom.*, *C. A. F. v. Viacom Inc.*, 137 S. Ct. 624 (2017); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 147 (3d Cir. 2015) (“facility” is a term of art denoting where network service providers store private communications, and does not include home computers), *cert. denied sub nom.*, *Gourley v. Google, Inc.*, 137 S. Ct. 36 (2016); *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1108-09 (9th Cir. 2014) (SCA covers access to electronic information stored in “third party computers”); *Garcia v. City of Laredo*, 702 F.3d 788, 790 (5th Cir. 2012) (“[SCA] . . . does not apply to data stored in a personal cell phone”); *United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003) (“the SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS)” – it “does not appear to apply to the [the plaintiff's personal] computer . . . because there is no evidence that [the] computer maintained any ‘electronic communication service’”); see also *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 512 (S.D.N.Y. 2001).

Third, 18 U.S.C. § 2661A is a criminal statute with no private right of action.⁶ Accordingly, plaintiff's claim for "intentional infliction of emotional distress" based upon this statute is untenable as a matter of law.

Fourth, even if the claims themselves were colorable, they would be subject to arbitration under the terms of plaintiff's employment agreement, as you are well aware given the history of litigation between the parties. In *Tantaros v. Fox News Network, LLC et al.*, No. 157054/16, the New York County Supreme Court specifically held that claims of "harassment and retaliation" fell "within the terms of the parties['] broad arbitration provision," because "those claims arose within the scope of plaintiff's employment." Feb. 15, 2017 Hrg. Tr. at 36-37. The purported surveillance, hacking and cyberstalking described in the Complaint were purportedly designed to "torture [her] into giving up her claims that she was sexually harassed." Compl. ¶¶ 2, 4, 8. Retaliation claims are arbitrable, as Justice Cohen has held.

These patent legal errors are additional grounds for sanctions under Fed. R. Civ. P. 11.⁷

Improper Purpose

The Complaint was not filed for legitimate purposes, but rather as part of your ongoing campaign to smear Defendants' reputations in violation of Ms. Tantaros' contractual commitments and your obligations under the ethical rules and Fed. R. Civ. P. 11. The chronology lays this improper purpose bare:

- In May 2016, when you were first engaged in settlement discussions with the Epstein Becker firm, you threatened to create a "media event" to promote sales of Ms. Tantaros' book by sending her phony allegations of sexual harassment to a reporter. This extortionate threat violated your professional obligations.
- In early August 2016, you gave an interview to Gabe Sherman of New York magazine about Ms. Tantaros' allegations of sexual harassment. You told Mr. Sherman that the interview likely breached the terms of Ms. Tantaros' Employment Agreement, which required that Ms. Tantaros

⁶ See, e.g., *Cain v. Christine Valmy Int'l Sch. of Esthetics, Skin Care, and Makeup*, No. 16-cv-170, 2016 WL 6127514, at *5 (S.D.N.Y. Oct. 20, 2016) ("Case law is . . . unanimous that no private right of action is available under § 2261A.").

⁷ See, e.g., *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390-93 (2d Cir. 1989) (upholding sanctions where any reasonable inquiry into current law would have precluded argument); *Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243, 254 (2d Cir. 1985) ("where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated"), *superseded by amendment as stated in Ipcan Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63 (2d Cir. 2012) (1993 amendment to Rule 11 made sanctions discretionary rather than mandatory); *Galasso*, 310 F. Supp. 2d at 577 (sanctions imposed for filing claims "without merit on their face;" and holding that "[t]here can be no excuse for filing claims that are statutorily barred . . . counsel is charged with doing a modicum of legal research before bringing a lawsuit."); *Knipe v. Skinner*, 146 F.R.D. 58, 61 (N.D.N.Y. 1993) (sanctions imposed for complaint based on legal arguments soundly rejected by various courts of appeal where attorney did not attempt to distinguish those authorities or advance an argument for modification or reversal of the law).

maintain the confidentiality of her allegations against Fox News.⁸ Justice Cohen has since held that you, as well as your client, did in fact breach the Employment Agreement by speaking to the press.

- On August 22, 2016, you filed a lawsuit on Ms. Tantaros' behalf in Supreme Court, New York County. The lawsuit willfully ignored the Employment Agreement's confidential arbitration clause and instead used a publicly filed complaint as a vehicle for the "media event" you had previously threatened. Indeed, on the day of the hearing of Fox News's successful motion to compel arbitration, you told reporters just outside the courtroom, in the hearing of an associate of this firm, that you had not expected the case to remain in court.
- On February 15, 2017, during the oral argument of the Defendants' successful motion to compel arbitration, skeptical questioning from Justice Cohen signaled that the Court was likely to compel arbitration of Ms. Tantaros' claims. You then stated that you "would like the opportunity to amend based upon new information," and informed the Court, based on "confidential sources,"⁹ that Fox News had electronically surveilled Ms. Tantaros' private communications in violation of a federal criminal statute. The Complaint does not purport to rely upon any "confidential sources" notwithstanding its liberal use of pleading "on information and belief."
- Most recently, on March 3, 2017, after Ms. Tantaros had lost her bid to avoid the contractually mandated confidential arbitration forum, you continued to threaten that you had "compelling evidence of Fox News's illegal electronic surveillance of [your] client" that you expected to file "in the SDNY within the next two weeks," absent an "eight-figure" settlement offer.

When combined with the bogus claims asserted in the Complaint, this chronology shows that the purpose of this lawsuit was to generate more adverse publicity for the Defendants and to smear their reputations. That improper purpose is yet another ground for imposing sanctions under Fed. R. Civ. P. 11.¹⁰

⁸ Gabriel Sherman, *Fox News Host Andrea Tantaros Says She Was Taken Off the Air After Making Sexual-Harassment Claims Against Roger Ailes*, N.Y. MAG., Aug 8, 2016, <http://nymag.com/daily/intelligencer/2016/08/andrea-tantaros-made-harassment-claims-against-roger-ailes.html>.

⁹ Feb. 15, 2017 Hrg. Tr. at 27-28.

¹⁰ See, e.g., *Fox v. Boucher*, 794 F.2d 34, 36-38 (2d Cir. 1986) (affirming sanctions for complaint that was "entirely frivolous, and the record shows that it was made as part of a conscious effort to harass appellee" in retaliation); *Galonsky v. Williams*, No. 96 Civ. 6207, 1997 WL 759445, at *4-6 (S.D.N.Y. Dec. 10, 1997) (imposing sanctions for filing claims against talk show host that lacked support in the law and the "baseless claims [were filed] as part of a public relations campaign in order to embarrass the defendants and thereby coerce a settlement," as evidenced, in part, by a press conference held by counsel).

This letter, along with the attached copy of defendants' Notice of Motion, notifies you that we will seek sanctions against you and your client pursuant to Fed. R. Civ. P. 11(c)(1) if the Complaint is not withdrawn within twenty-one (21) days.

Very truly yours,



Andrew J. Levander

Enclosures

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREA TANTAROS,

Plaintiff,

-against-

FOX NEWS NETWORK, LLC, ROGER AILES,
WILLIAM SHINE, IRENA BRIGANTI, PETER A.
SNYDER, DISRUPTOR, INC., and JOHN DOES 1-
50.

Defendants.

17 CIV. 2958 (JGK)

NOTICE OF MOTION

ECF CASE

NOTICE OF MOTION BY DEFENDANTS FOX NEWS NETWORK, LLC, WILLIAM SHINE AND IRENA BRIGANTI FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11(C)

PLEASE TAKE NOTICE that, upon the Complaint, the Memorandum of Law in Support of the Motion by Defendants Fox News Network, LLC, William Shine and Irena Briganti's for Rule 11 Sanctions, the accompanying documentary evidence, and upon all other oral or documentary evidence as may be received, Defendants Fox News Network, LLC, William Shine and Irena Briganti, through their undersigned attorneys, will move before this Court, Hon. John G. Koeltl, District Judge at the United States Courthouse, 500 Pearl Street, Courtroom 12B, New York, New York, for an Order granting Defendants Fox News Network, LLC, William Shine and Irena Briganti's Motion for Sanctions Against Plaintiff Pursuant to Fed. R. Civ. P. 11(c), and such other and further relief as the Court deems just and proper.

The grounds for this Motion are that Plaintiff and her counsel have violated their duties of representations to the Court pursuant to Fed. R. Civ. P. 11(b) because:

1. The Complaint includes factual contentions that are false, or otherwise lack any evidentiary support, which could have been determined with investigation before filing;
2. The Complaint lacks legal foundation for making any claims pursuant to 18 U.S.C. § 2511, 18 U.S.C. § 2701 and 18 U.S.C. § 2661A; and
3. Based on Plaintiff's counsel's statements prior to filing the Complaint, coupled with the fundamental factual and legal defects noted above, it is evident that the Complaint is not presented for any legitimate purpose, but rather was filed to harass defendants, to cause them to incur unnecessary legal costs, and to portray them in an adverse public light in order to extort a settlement of Ms. Tantaros' claims of purported sexual harassment, which she has been directed to bring in a confidential arbitration forum.

Dated: New York, New York
May [*], 2017

DECHERT LLP

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Briganti*

TO:

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New York, New York 10019

Counsel for Plaintiff Andrea Tantaros

NAME REPORT FOR

Andrea Tantaros

Basic Info

GENDER & AGE: Female | 38 years old

PHONE NUMBER: (646) 692-8423

EMAIL ADDRESS: atantaros@gmail.com

BIRTHDAY: December 1978

CURRENT ADDRESS: 16 W Joan Rd

CITY & STATE: Beach Haven, NJ 08008

FAMILY MEMBERS: 4 Relatives Found

PROPERTY VALUE: *unknown*

MARITAL STATUS: Single

OCCUPATION: *unknown*

EDUCATION: *unknown*

ETHNICITY: Other

Contact Info

HOME PHONE: (646) 692-8423

HOME PHONE: (203) 689-9746

HOME PHONE: (610) 966-7926

HOME PHONE: (610) 419-0355

EMAIL ADDRESS: atantaros@gmail.com

EMAIL ADDRESS: daniels@oldhickorybats.com

EMAIL ADDRESS: atantaros@hotmail.com

EMAIL ADDRESS: atantaros@att.net

Current Address

ADDRESS: 16 W Joan Rd, Beach Haven, NJ 08008

HOME VALUE: *unknown*

YEAR BUILT:

BEDROOMS: *unknown*

BATHROOMS: *unknown*

SIZE: *unknown*

Location History

1. 16 W Joan Rd Beach Haven, NJ 08008
2. 154 W 70th St New York, NY 10023

3. 4200 Indian Creek Rd Emmaus, PA 18049
4. 523 E 5th St Bethlehem, PA 18015
5. 1469 A St NE Washington, DC 20002
6. 3500 Catherine Ave Allentown, PA 18103
7. 4030 Chestnut St Emmaus, PA 18049

Family Members

MALE: Konstantinos Tantaros, 72

FEMALE: Barbara Tantaros, 30

MALE: Daniel Tantaros, 44

MALE: Harry Tantaros, 58

Social Profiles

Social Profiles for Andrea Tantaros



TWITTER

<https://twitter.com/andreatantaros1>

Personal Details

MARITAL STATUS: Single

BIRTHDAY: December 1978

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