

SUSMAN GODFREY L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
32ND FLOOR
1301 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6023
(212) 336-8330
FAX (212) 336-8340
WWW.SUSMANGODFREY.COM

SUITE 5100
1000 LOUISIANA STREET
HOUSTON, TEXAS 77002-5096
(713) 651-9366

SUITE 1400
1900 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067-6029
(310) 789-3100

SUITE 3800
1201 THIRD AVENUE
SEATTLE, WASHINGTON 98101-3000
(206) 516-3880

ARUN SUBRAMANIAN
DIRECT DIAL (212) 471-8346

E-MAIL ASUBRAMANIAN@SUSMANGODFREY.COM

August 13, 2020

VIA ECF

The Hon. Sarah Netburn
United States Magistrate Judge
Thurgood Marshall Courthouse
40 Foley Square, Room 430
New York, NY 10007

Re: *Rich v. Fox News Network LLC, et al.*, No. 18-cv-2223 – Re. Motion to
Withdraw Dkt. No. 183

Dear Judge Netburn:

Yesterday, per your July 29, 2020 order, Plaintiffs filed with the Court a group of letters and exhibits that the parties agreed could be publicly filed. Plaintiffs believed that the parties had agreed to publicly file Plaintiffs' July 20, 2020 Letter (Dkt. No. 183) without redaction. However, last night, Defendant Fox indicated that it wished for the letter to be filed in redacted form pending your ruling on their forthcoming application for sealing Ex. D to that letter.

We therefore ask that you withdraw Docket No. 183 and replace with the attached redacted version of the letter.

Respectfully,

s/ Arun Subramanian
Arun Subramanian

SUSMAN GODFREY L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
32ND FLOOR
1301 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6023
(212) 336-8330
FAX (212) 336-8340
WWW.SUSMANGODFREY.COM

SUITE 5100
1000 LOUISIANA STREET
HOUSTON, TEXAS 77002-5096
(713) 651-9366

SUITE 1400
1900 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067-6029
(310) 789-3100

SUITE 3800
1201 THIRD AVENUE
SEATTLE, WASHINGTON 98101-3000
(206) 516-3880

ELISHA BARRON
DIRECT DIAL (212) 729-2013

E-MAIL EBARRON@SUSMANGODFREY.COM

July 20, 2020

Via E-Mail and ECF

The Honorable Sarah Netburn
United States Magistrate Judge
Thurgood Marshall Courthouse
40 Foley Square, Room 430
New York, NY 10007

Re: *Rich v. Fox News Network LLC et al.*, No. 18-cv-2223

Dear Judge Netburn:

In response to the Court's order last week, Fox agreed to produce a subset of the documents Fox withheld, which they now concede are not privileged.¹ Fox also produced a document-by-document log of 615 documents, for which it continues to assert a claim of privilege, in the custodial files for Malia Zimmerman, Adam Housley, and Greg Wilson.

Plaintiffs appreciate the Court's assistance in obtaining certain documents and a log for three custodians confirming Plaintiffs' allegation that Fox and Butowsky collaborated extensively on a shared political agenda. Plaintiffs at this time seek limited further relief: (1) that Fox either produce, or furnish a document-by-document log for the remaining documents raised by Plaintiffs' letter motion to compel; (2) that Fox produce 16 of the 615 withheld documents because they relate directly to Rich/Wikileaks newsgathering (*see* Ex. A); and (3) that Fox produce documents reflecting Wheeler's appearances on Fox (including 19 documents reflected on Fox's log), because they are highly relevant and not protected newsgathering (*see* Ex. B). This limited relief is fair and necessary to preserve

¹ Fox included these documents in a production of over 3,500 documents produced a few hours before the filing of this letter, and declined to segregate or identify the documents relevant to this motion to compel. Therefore, Plaintiffs do not know how many documents there are or any other details about the documents.

July 20, 2020

Page 2

Plaintiffs' right to seek, at the appropriate time, any remedies relating to Fox's improper use of the privilege as a both a sword and a shield.

A. The Court Should Order Fox to Produce or Log the Remaining Documents at Issue on Plaintiffs' Motion

Plaintiffs respectfully request that Fox be ordered to produce or log the remainder of the documents it has withheld, and which were presented in Plaintiffs' prior letter motion.² Consistent with this Court's ruling, and as Fox's log of the Zimmerman, Housley, and Wilson documents confirms, the documents are relevant because they address Fox's interactions with Wheeler and Butowsky during the precise time period Fox and Butowsky collaborated on the Seth Rich articles. The documents have already been collected based on agreed custodians and agreed search terms; and there are far fewer than 2,000 documents remaining in the set. There is no basis under Rule 26 for Fox not to produce or log the remaining documents. Without a log of these documents, Plaintiffs will be unable to challenge any improperly withheld documents, or to ensure that Fox does not make arguments to which the withheld documents would be relevant.

There is a reason Fox attempted to avoid producing a document-by-document log of even the Zimmerman, Housley, and Wilson documents. Fox's limited log shows what Plaintiffs have always alleged: Reporters and editors at Fox worked extensively with Wheeler and Butowsky to fuel a number of politically motivated conspiracy theories before and during the time Fox published the Seth Rich articles. These include claims that the State Department was responsible for the consulate attack in Benghazi and alleged Clinton foundation theft, as well as the Seth Rich/Wikileaks conspiracy.³ Far from an aberration, this was Fox's *modus operandi*. In fact, as the unredacted document attached to Plaintiffs' June 23, 2020 letter already shows, these different theories were part of a unitary political agenda shared by Butowsky and Fox. 6/23 Letter, Ex. H (filed under seal). Fox's letter confirms that it will "vigorously dispute" that it worked with Wheeler and Butowsky on "politically motivated" stories, 7/15/20 Fox Letter at 3 (Dkt. 162), but the privilege log itself lays that argument to rest.

These other stories cannot be neatly quarantined from the Seth Rich story. For example, Wheeler testified that at his first in-person meeting with Zimmerman and Butowsky about Seth Rich on February 28, 2017, also present was "a former military guy. I think he had something to do with Benghazi." Wheeler Deposition Tr. 11-18-19 at 73-74 (Ex. C). Fox's redactions of produced documents confirm that Butowsky and Zimmerman worked together extensively in 2016-2017 on an agenda of which Seth Rich was one part. For example, FoxNews0003935 is a February 14, 2017 email from Zimmerman to Butowsky about [REDACTED]

² These remaining documents hit on the terms "Butowsky" and "Wheeler" in the custody of the agreed custodians other than Zimmerman, Housley, and Wilson.

³ For example: 111 entries reference Benghazi or the related "Blue Mountain, 23 entries reference "HRC" (Hillary R. Clinton), and 43 entries reference "Clinton."

July 20, 2020

Page 3

[REDACTED] (Ex. D). FoxNews0004049 is a March 4, 2017 email from Butowsky to Zimmerman with a redacted subject line, where the **only** text is “Good Morning. So so so much going on related to Seth rich. Please call me.” (Ex. E). Exhibit H to Plaintiffs’ June 23 pre-motion reply, showing Butowsky providing Housley a laundry list of political agenda items, is another example.

Plaintiffs are mindful of the newsgathering privilege, but remain concerned that Fox intends to improperly use the privilege as both a sword and shield. Fox should not be allowed to raise defenses regarding the legitimacy of its newsgathering or the breadth of its interactions with Wheeler and Butowsky while withholding documents that would rebut these arguments. *See Sharon v. Time, Inc.*, 599 F. Supp. 538, 582 (S.D.N.Y. 1984) (“[S]ection 79–h is a shield, and no more.”). Witness may not “insulate his reliance on sources from further inquiry merely by claiming that he has often used a source in the past and that the information he received was always reliable.”); *Greenberg v. CBS Inc.*, 69 A.D.2d 693, 709 (1979) (“At trial, if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility. On the other hand, if they choose to fully disclose their investigation, no limitation of the defense will occur.”). At this time, Plaintiffs simply request production of whatever documents Fox now concedes are not privileged, and a full log of the documents withheld, so Plaintiffs may consider how to address these issues as they arise in the future.

B. Sixteen Documents Were Improperly Withheld And Are Directly Relevant to the Seth Rich Articles

Plaintiffs seek production of 16 documents (out of 615) that are directly relevant. Fox already agreed to produce documents to Plaintiffs that go to the newsgathering techniques used for the Seth Rich articles. *See* 3/10 Tr. at 6-7 (Fox is producing certain newsgathering materials because it “would expect that [Plaintiffs] would have argument that many of the documents they are seeking are central to the claims.”). The 16 documents described below do not relate to *other* news stories at all – they are directly relevant to the sourcing for the Seth Rich articles and Fox’s retraction. These documents have already been collected, reviewed, and logged. There is no burden on Fox, and the documents can be produced highly confidential. A list of the bates numbers for these documents is attached as Exhibit A.

Wikileaks: FoxNews_Priv_273 is an email from Zimmerman to Butowsky and Housley re: “dirt on [Bernie] [S]anders from Hillary Clinton team on **wikileaks**” dated April 14, 2017, just one month before the publication of the Seth Rich articles. FoxNews_Priv_510 is an October 10, 2016 email from Zimmerman to Butowsky re: “Fw: thought you might want this – from **Wikileaks**” and attaching a “State Department Document.” These documents should be produced as they hit on the term Wikileaks as well as Butowsky.

July 20, 2020

Page 4

Nunes: Twelve entries on the log reflect correspondence in the relevant timeframe between Zimmerman, Butowsky, and Housley about Congressman Devin Nunes. Documents that have already been produced in this case show the relevance of Nunes, and his staffer Kash Patel (known as D-O), to the Seth Rich articles. On March 13, 2017, for example, Butowsky sent Zimmerman and Wheeler a video that prompted Zimmerman to respond, “That’s why Devin Nunes needs to **help us or get his guy to. . .**” Wheeler0000216 (Ex. F). Butowsky responded, “**I will get very aggressive with Devin over the weekend.**” *Id.* Wheeler testified that the discussion was about “the Russian narrative or the hacking narrative.” Wheeler Tr. 209–10 (Ex. C).

Plaintiffs requested (and even raised with the Court) that Fox include the terms “Nunes,” “Kash,” “Patel” and “Dee O” in its searches of Zimmerman, Butowsky, and Housley’s files. *See* 2/27/20 Letter at 3 (Ex. G). Fox refused. *See id.* Worse, after refusing, Fox **redacted** as a “confidential source” the name “D-O” on documents it produced showing that Patel was scheduled to meet with Wheeler and Detective DellaCamera just 4 days before the Zimmerman article was published. *Compare* FoxNews0004022 (Ex. H) (excerpted below) *with* Wheeler00000577 (Ex. I) (showing that the redacted name is “D-O”).

From: Rod wheeler [rod@rodwheeler.com]
Sent: 5/12/2017 3:29:26 PM
To: Zimmerman, Malia McLaughlin [Malia.Zimmerman@FOXNEWS.COM]
CC: Rod wheeler [rod@rodwheeler.com]
Subject: Late call from Det. DellaCamera

Hi Malia. Thanks for sharing the draft of the article.

I actually received a call yesterday afternoon late, (after you and I spoke on the phone) from Det. DellaCamera. He is willing to meet with [redacted] and myself again on Monday. I explained to him that the House Intelligence Investigators may can assist him with the investigation of Seth's death, but he need to be forthright in informing them of what he has regarding case details and especially the emails. He said he will meet with them and me on Monday.

I have reached out to ED and [redacted] to confirm a time for Monday but I haven't heard back yet from [redacted] I think we are on the verge of a breakthrough with getting the specific information we need.

Fox should not be allowed to unilaterally decide, over Plaintiffs’ protest, that Nunes is not relevant, redact information showing otherwise, and withhold as “unrelated” documents that contradict its position.

Fox’s Knowledge of Butowsky’s Role: Greg Wilson was a Fox editor who worked on the Seth Rich articles and their retraction. Fox argued that it is not responsible for Butowsky’s conduct, and asserted that Mr. Wilson, “**did not even know who Butowsky was** until after the article was published” and “ignor[ed]” Butowsky’s post-retraction outreach. 5/11 Letter at 2-3 (Ex. J) (emphasis in original). But FoxNews_Priv_0235 reflects a May 12, 2017 email from Wilson to Zimmerman, which hits on the term “Butowsky.” This communication, 4 days before the article was published, directly rebuts Fox’s claim that Wilson did not know who Butowsky was. It should be produced as should any other Wilson document relating to Butowsky. *See also* BUTOWSKY0003142 (June 9, 2017 email from Wilson to Butowsky post-retraction stating, “I still believe **we** will be vindicated.”) (Ex. K).

July 20, 2020

Page 5

C. Documents Reflecting Wheeler's Fox Appearances Should Be Produced as Published News Not Subject to the Privilege.

Nineteen log entries are from Greg Wilson's file and reflect appearances by Wheeler on the Fox network. *See* Ex. B. Topics include: "Wheeler rips anti-police sentiment at DNC as 'disappointing'" and "Eric Shawn reports: Insanity or radical Islamic terrorism". Most notably, 3 of the entries occurred over 2 months *after* Wheeler's role in the exploitation of Joel and Mary Rich was publicly revealed. *See id.* (FoxNews_Priv_0247, 248, 480). Plaintiffs have repeatedly requested, including most recently on June 30, 2020, documents sufficient to show Wheeler's appearances of Fox. Fox has refused – stating that it will only provide "total payments per calendar year." Nothing in the log shows that these entries involve newsgathering at all – they appear to reflect the **fact** of appearances. At the very least, Fox should be required to produce evidence regarding each Rod Wheeler appearance on Fox News, regardless of custodian, so that Plaintiffs may question Mr. Wheeler about those appearances.

Conclusion

Plaintiffs have every reason to be wary that Fox will use the newsgathering privilege as both a shield and a sword. Fox first attempted to avoid wholesale producing or logging 2060 documents, by arguing that even if they were relevant, they were protected by a blanket assertion of newsgathering privilege. Only after the Court held that the documents satisfy Rule 26(b)'s relevance threshold did Fox admit that a subset of these documents are not privileged at all and produce a late-breaking affidavit admitting that Zimmerman relied on Butowsky, who by his own admission "ha[d] no credibility" as a source. FoxNews0006066 (Butowsky: "I'm actually the one who's been putting this together but as you know I keep my name out of things because I have no credibility.") (Ex. L). The log Fox produced confirmed exactly what Plaintiffs claimed: Fox and Butowsky collaborated extensively on "politically motivated" stories including the Seth Rich story. Yet Fox intends to "vigorously contest" this, while withholding the evidence that refutes Fox's position.

At this time, all Plaintiffs seek is a complete picture of what Fox is withholding in the form of a document by document log and production of a handful of specific documents. Based on the positions Fox takes in this case, Plaintiffs respectfully reserve the right to seek production of further documents on Fox's log or move to preclude Fox's defenses relating to these documents.

Respectfully,



Elisha Barron

Counsel for Joel & Mary Rich

EXHIBIT E

From: ed butowsky [edbutowsky@icloud.com]
Sent: 3/4/2017 3:08:30 PM
To: Zimmerman, Malia McLaughlin [Malia.Zimmerman@FOXNEWS.COM]
Subject: Unrelated News Coverage

Good morning. So so so much going on related to Seth rich. Please call me

EXHIBIT H

From: Rod wheeler [rod@rodwheeler.com]
Sent: 5/12/2017 3:29:26 PM
To: Zimmerman, Malia McLaughlin [Malia.Zimmerman@FOXNEWS.COM]
CC: Rod wheeler [rod@rodwheeler.com]
Subject: Late call from Det. DellaCamera

Hi Malia. Thanks for sharing the draft of the article.

I actually received a call yesterday afternoon late, (after you and I spoke on the phone) from Det. DellaCamera. He is willing to meet with [REDACTED] and myself again on Monday. I explained to him that the House Intelligence Investigators may can assist him with the investigation of Seth's death, but he need to be forthright in informing them of what he has regarding case details and especially the emails. He said he will meet with them and me on Monday.

I have reached out to ED and [REDACTED] to confirm a time for Monday but I haven't heard back yet from [REDACTED] I think we are on the verge of a breakthrough with getting the specific information we need.

On another note, would you mind if I share with Suzanne at FNC-NY the fact that we are working together on an investigation? (I plan to use Adam as a reference as well.....if this is okay with you guys) Im thinking it may help my chance to come aboard permanently with Fox. Let me know if okay.

Just FYI!!

Rod

EXHIBIT K

Re: story

From: ed butowsky <ebutowsky@gmail.com>
To: Greg Wilson <gregtwilson@optimum.net>

Fri, Jun 9, 2017 at 4:01 PM CDT (GMT-05:00)

Thank you and I agree.

On 6/9/17, 3:27 PM, "Greg Wilson" <gregtwilson@optimum.net> wrote:

>Ed, this is the last version before we altered it to lead with the
>family's reaction. This has been purged from our system, but I still had
>it in an email.

>
>
>I hope all is well, and am sorry about how things worked out. I still
>believe we will be vindicated.

>
>
>-----

>
>
>
>
>The Democratic National Committee staffer who was gunned down on July 10
>on a Washington, D.C., street just steps from his home had leaked
>thousands of internal emails to WikiLeaks, investigative sources told
>Fox News.

>
>
>
>A federal investigator who reviewed an FBI forensic report -- generated
>within 96 hours after DNC staffer Seth Rich's murder and detailing the
>contents Rich's computer -- said he made contact with WikiLeaks through
>Gavin MacFadyen, a now-deceased American investigative reporter,
>documentary filmmaker, and director of WikiLeaks who was living in
>London at the time.

>
>
>
>"I have seen and read the emails between Seth Rich and WikiLeaks," the
>federal investigator told Fox News, confirming the MacFadyen connection.
>He said the emails are in possession of the FBI, while the stalled case
>is in the hands of the Washington Police Department.

>
>
>
>The revelation is consistent with the findings of Rod Wheeler, a former
>DC homicide detective and Fox News contributor and whose private
>investigation firm was hired by Rich's family to probe the case. Rich
>was shot from behind in the wee hours, but was not robbed.

>
>
>
>"My investigation up to this point shows there was some degree of email
>exchange between Seth Rich and WikiLeaks," Wheeler said. "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."

>
>
>
>The federal investigator, who requested anonymity, said 44,053 emails
>and 17,761 attachments between Democratic National Committee leaders,
>spanning from January 2015 through late May 2016, were transferred from
>Rich to MacFadyen before May 21.

>
>
>
>On July 22, just 12 days after Rich was killed, WikiLeaks published
>internal DNC emails that appeared to show top party officials conspired
>to stop Sen. Bernie Sanders of Vermont from becoming the party's
>presidential nominee. That controversy resulted in Debbie Wasserman
>Schultz resigning as DNC chairperson. A number of Sanders supporters
>refused to back party nominee Hillary Clinton, and some subsequently
>formed groups to work against Clinton and the party.

>
>
>
>WikiLeaks leader Julian Assange has stopped short of identifying Rich as
>the source of the emails, but has taken a keen interest in the case, and
>has not denied working with Rich.

>
>
>
>"WikiLeaks has decided to issue a US\$20k reward for information leading
>to conviction for the murder of DNC staffer Seth Rich," the organization
>announced.

>
>
>
>Washington's Metropolitan Police Department has no suspects and no
>substantial leads as to who the killer or killers may be, sources close
>to the investigation said. Metropolitan Police, including the police
>chief, have refused to discuss the case, despite requests from Fox News
>dating back 10 months. The FBI's national office declined to comment,
>but sources said the bureau provided cyber expertise to examine Rich's
>computer.

>
>
>
>Wheeler believes powerful forces are preventing the case from a thorough
>investigation.

>
>
>
>"My investigation shows someone within the D.C. government, Democratic
>National Committee or Clinton team is blocking the murder investigation
>from going forward," Wheeler told Fox News. "That is unfortunate. Seth
>Rich's murder is unsolved as a result of that."

>
>
>
>A spokesman for the Rich family said Wheeler was not authorized to speak
>for the family and called assertions Seth Rich sent emails to WikiLeaks
>"unsubstantiated." Brad Bauman said even if purported emails were to
>surface, it would not necessarily mean Rich had helped WikiLeaks.

>
>
>
>"Even if tomorrow, an email was found, it is not a high enough bar of
>evidence to prove any interactions as emails can be altered and we've

>seen that those interested in pushing conspiracies will stop at nothing
>to do so," Bauman said. "We are a family who is committed to facts, not
>fake evidence that surfaces every few months to fill the void and
>distract law enforcement and the general public from finding Seth's
>murderers."

>
>
>
>Whatever Rich's possible activities prior to his murder, the case
>remains a mystery.

>
>
>
>Two assailants caught on a grainy video tape from a camera posted
>outside a grocery mart, shot Rich twice in his back, but did not take
>his wallet, cell phone, keys, watch or necklace worth about \$2,000.
>
>Police should consider all angles, Wheeler said, especially in light of
>Assange's statements to a Dutch television reporter who asked about
>Rich.

>
>
>
>"I am suggesting," Assange told the Dutch reporter, "that our sources
>take risks, and they, they become concerned to see things occurring like
>that."

>
>
>
>On Twitter, WikiLeaks announced the reward but said Assange's statement
>"should not be taken to imply that Seth Rich was a source for WikiLeaks
>or to imply that his murder is connected to our publications" because
>WikiLeaks has a policy not to release the names of its sources, even
>after their death. In subsequent appearances on Fox News Channel,
>Assange confirmed, "We're interested in anything that might be a threat
>to alleged WikiLeaks sources."

>
>
>
>Assange has not returned a series of recent emails from Fox News about
>Rich. MacFadyen, who was considered a mentor by Assange, died of lung
>cancer on Oct. 22 at age 76.

>
>
>
>D.C. police have announced a \$25,000 reward for information leading to
>the conviction of Rich's killer. Republican lobbyist Jack Burkman has
>offered a separate \$130,000 reward.

>
>
>
>Rich had been at Lou's City Bar a couple of miles from his home until
>about 1:15 a.m. He walked home, calling several people along the way. He
>called his father, Joel Rich, who he missed because he had gone to
>sleep. He talked with a fraternity brother and his girlfriend, Kelsey
>Mulka. Around 4:17 a.m., Rich was about a block from his home when
>Mulka, still on the phone with him, heard voices in the background. Rich
>reassured her that he was steps away from being at his front door and
>hung up.

>
>
>
>Two minutes later, Rich was shot twice. Police were on the scene within

>three minutes. Rich sustained bruising on his hands and face. He
>remained conscious, but died at a nearby hospital less than two hours
>later. Police detectives will not say whether Rich provided them with
>any clues about the identity of his attackers or their motivation,
>Wheeler said. However, Wheeler believes Rich could have provided
>information prior to his death of who was responsible for carrying out
>his murder.
>
>
>
>Police also have refused to release security footage from a market on
>the corner of the crosswalk where Rich was killed. The footage, sources
>told Fox News, shows two people following Rich across the tiny crosswalk
>just moments before he was attacked. The camera captured grainy footage
>of the assailants' legs and Rich as he fell backward into the street
>after being shot.
