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September 11, 2009

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Donald E.J. Kilmer, Jr., Esq.
1645 Willow Street, Suite 150
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Re: Kathy Lynch, Gerald Upholt vs. Bill Wiese, Gene Hoffman, Jr., and Calguns.
Response to Your Letters

Dear Mssrs. Davis and Kilmer:

Please be advised that I now represent both Kathy Lynch and Gerald Upholt in their defamation claims. Based upon your responses to my demand letter on behalf of Ms. Lynch, I am writing to provide further information and to explore the pre-litigation resolution of defamation claims against your clients by Ms. Lynch and Mr. Upholt. If forced to litigate, my clients will seek damages as well as attorneys' fees and costs in proceeding in litigation, including their defense of your clients' threatened anti-SLAPP suit.

I have analyzed the legal authorities and positions set forth in your responses, and now respond in detail below. My clients have considered the challenge presented by the standard of proof set forth in *New York Times Co. v. Sullivan*. If your clients were merely exercising their First Amendment rights without displaying malice or recklessness in publishing their clearly harmful statements, I would not be responding here in this further attempt to explore resolution of my clients' claims. However, the false and injurious statements were made by your clients with the stated intent to damage my clients' careers, and included other vague threats to "get rid of Mr. Upholt and Lynch." As to Mr. Upholt, your clients succeeded in having him fired by his employer, CRPA. This will establish the requisite standard of malice under *New York Times*, assuming that First Amendment standards even apply to the statements.

Lynch and Upholt Claims Against Calguns Foundation, Inc.

Following response by Mr. Davis, I further investigated ownership of Calguns.net, the site upon which defamatory comments regarding my clients was published, and its relationship with Calguns Foundation, Inc. Calguns.net is registered to Paul T. Nordberg, who participates on the Calguns.net site as "Kestryll." At this time, no ownership interest in the Calguns.net site by Mr. Wiese or Mr. Hoffman has been discovered, nor have we established a direct link between The Calguns Foundation and Calguns.net other than Mr. Nordberg's position on the

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Board of Directors of the Foundation. Review of postings by "Kestryll" have not at this time revealed his direct publication of defamatory statements regarding my clients. Discovery of any such publication will immediately be grounds for claims against both Mr. Nordberg and the Calguns.net site. In the decisions cited by Mr. Davis the courts have found immunity under 47 U.S. §230 only in cases where no nexus existed between the provider and the tortious statements.

At this time, on behalf of my clients I retract the claims against Calguns Foundation, Inc. My investigation on behalf of my clients is ongoing; should I discovery any facts that appear to create liability I will tender them to Mr. Davis and provide opportunity for response prior to litigation.

Legal Standard Applicable to the Defamatory Statements by Wiese

No dispute exists here as to the holding of *New York Times v Sullivan*; that the constitutional protections for speech and press require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, 376 U.S. 254 at 279-280. While *Gertz* discusses application of the *New York Times* test to the category of "limited-purpose public figures" (*Id.* 418 U.S. 323, 335-337, 351), the court concludes that plaintiff/petitioner, attorney Elmer Gertz, is no such public figure, despite the fact of his public service and representation of the police gunshot victim at the center of the controversy. The discussion and holding in *Anderson v. Liberty Lobby* is not dispositive of whether Kathy Lynch and Gerald Upholt are properly designated "limited-purpose public figures," since in *Anderson*, respondents failed to challenge the District Court's finding in that regard (*Id.*, 477 U.S. 242, 246-247). That issue was not analyzed by the Court.

Therefore, your position that Kathy Lynch and Gerald Upholt are limited-purpose public figures, which appears to rest solely on the un-tested finding set forth in *Anderson v. Liberty Lobby*, is without merit. Even if, assuming for the sake of argument, they were, there appears to be substantial evidence, in the form of the postings and discussion below, that they could surmount the "actual malice" standard formulated in *New York Times* and as recited in *Hustler Magazine, Inc. v. Falwell*.

Actionable, False Statements Published Regarding Lynch and Upholt by Wiese on Calguns.net

The following defamatory statements published by Mr. Wiese, apparently with the express approval of Gene Hoffman, are provably false and are actionable. Together with any additional defamatory statements discovered in the course of discovery, they comprise my clients' defamation claims.

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Bill Wiese, November 15, 2008, 11:12 a.m., Calguns.net Chat Forum:

"As I wrote before, CRPA's continued association, formal or informal, with Gerry Upholt is the real progress blocker especially as Gerry has a 150lb tumor hanging from his rear end named Kathy Lynch."

.....
"I'd like to know how Gerry Upholt & Kathy Lynch and their efforts are not separable - given they seem to sleep together, and share coffee pots, staplers and file cabinets."

.....
"Remember, the 'safe handgun' Roster and SB15 (as realized in 12125PC et seq) were brought to us by these folks, whose underground support ("we can live with this") led to its passage."

.....
"When purportedly gun rights lobbyists involve themselves in 'cross-subject' entanglements, when 'trading games' can be and are played...."

.....
"AB2731 (2006, Torrico) was a mail-order ammo ban that was widely known to have Kathy's (and thus Gerry's) support too"

.....
"It's quite well-known that 'Gerry bait' has frequently been put in past gun bills - he thinks he's a smooth operator that can negotiate something away, and which instead turns out to be an item put there specifically as a giveaway so as to get his nod."

.....
"Kathy's representation with other gun-/sport-related groups (CAFR, SAAMI, etc) is undergoing severe questioning too...."

.....
"Forward progress requires CRPA get a Sacramento-based liaison who's familiar with guns, that gun rights are a 100% focus without other unrelated entanglements creating nasty 'trade-off' opportunities, that a 'unified front' without fragmentation is presented to legislators, and that the RKBA is the primary client (not just some industry subsegments)."

Bill Wiese, November 15, 2008, 11:07 a.m., Calguns.net Chat Forum:

"[SB15 'safe handgun' laws, Roster, etc.] was brought about by CRPA's Gerry Upholt and CAFR's Kathy Lynch, in cooperation with SASS lobbyist Robert Ricker (NRA turncoat).... CRPA dues helped pay ~\$70K/year to Gerry Upholt to harm us."

Bill Wiese, November 16, 2008, 2:42 p.m., Calguns.net Chat Forum:

"The 'safe handgun' laws are almost entirely due to CRPA's lobbyist (Gerry Upholt) & his girlfriend (Kathy Lynch, who runs CAFR out of same office as Gerry's).

Bill Wiese, (undated) post-November 16, 2008, 2:42 p.m., Calguns.net Chat Forum:

"Unfair? Here's [CRPA's] position:

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'We continue to hire as a lobbyist someone who doesn't believe we can win the gun fight in CA. Antigun legislation is specifically crafted to have "Gerry bait" in it so that he'll be happy if it gets thrown out, thinking he's accomplished something. He and his girlfriend, the lobbyist for CAFR, continually make compromises to dilute the unified gunnie front such that bad gun legislation can be passed - which is why your handguns now have to be Rostered, especially since that is helpful to large dealer franchises who can return guns falling off Roster to distribution (whereas the little FFL has to eat his inventory). '"

Bill Wiese, December 5, 2008 1:59 p.m., Calguns.net Chat Forum:

"It IS known:

- Gerry Upholt is still retained as Sacto lobbyist/liasion for another 2 yrs;*
- Gerry Upholt & CAFR's Kathy Lynch share office space;*
(pointed out in prior posts, downloadable from Sec. of State office)
- These folks supported antigun efforts in the past several years;*
- They're too stupid to know the damage they did (and/or don't care);*

....
[Referring to G. Upholt] "why the hell would you wanna retain an ineffectual lobbyist who also doesn't even have the support of his own side?"

....
"When we hear of prospective legislation, the worry is always "Oh no, hope Kathy & Gerry don't screw it up." We don't want another mailorder ammo bill and we KNOW Kathy danced with Torrico in 2006 on AB2731 - and wherever Kathy goes Gerry is sure to follow."

....
"The "sunshine patriots" you wrote of in your last post here several months ago are in the process (in the next week or two) of unrolling SB15, SB489 and AB1471, some of which Kathy & Gerry supported."

Bill Wiese, (undated) post-December 5, 2008 2:13 p.m., Calguns.net Chat Forum:

"Gene, I and several others, along with Leadership FFLs are gutting the 'not Unsafe Handgun Roster' and we expect activity to kick off in a week.
We have thus invalidated Kathy & Gerry's work in cooperation with Alison. "

Contrary to Mr. Kilmer's "points," the statements above are not criticism of my clients' work as lobbyists, but are misstatements of their positions on key bills. The defamatory statements are not criticism of my clients' work, but are false claims that my clients violated the law governing their profession. My clients take strong exception to the "point" that they trade the interests of any one client for that of another, because that is not only untrue, it is illegal.

Proof of Falsity of Statements Made by Wiese

Following your letters, I have reviewed evidence produced by my clients that clearly demonstrates the falsity of the statements made by Mr. Wiese. This evidence, in the form of letters of opposition to the very bills referenced in the Wiese's statements and legislative analyses for the bills, establish that Ms. Lynch and Mr. Upholt strenuously opposed SB 15 (the "safe handgun/Roster" bill), AB 2714 (mis-identified by Wiese as AB 2731, and characterized as the "ammo bill"), and the other bills referenced above by Wiese (the sole exception was the dog-tethering bill which was modified due to pressure by Lynch and Upholt into an acceptable bill their clients approved of). The false statements about their business relationship (sharing of coffee pots, staplers and file cabinets) will be proven false by testimony of numerous witnesses. The vague, but most damaging accusations by Wiese of behavior that is not only unethical but illegal (e.g. "cross-subject entanglements," "trading games," "Gerry bait," "nasty trade-off opportunities," and "compromising [client's objectives]") are malicious, and will be proven false by numerous witnesses, including Ms. Lynch's clients, who, contrary to Wiese, are not "undergoing severe questioning" regarding Ms. Lynch's commitment and effectiveness as a lobbyist.

In the spirit of forthrightness, candor, and accuracy, my clients are willing to produce documentary evidence proving the falsity of Mr. Wiese's statements in exchange for whatever evidence Mr. Kilmer has obtained constituting "a good faith factual basis" for Mr. Wiese's statements. In reality, there is no good faith factual basis for the false statements, because the statements were maliciously made with the sole motive of removing Mr. Upholt from his position. Termination of Mr. Upholt as the lobbyist for CRPA was the express motive of Mr. Hoffman and Mr. Wiese and was accomplished on June 23 based at least in part on Mr. Wiese's intentionally false statements. Threats of abusive discovery aside, my clients are interested in resolving this matter and restoring their long-standing professional reputations, which have been damaged. While they prefer to do so without litigation, they will proceed to the filing of a lawsuit unless a productive dialogue for resolution is commenced.

Malice and Recklessness Exist Here

Calguns officers made, on multiple occasions, clear threats to CRPA that it would actively encourage its members to withhold their support of CRPA until CRPA fired Mr. Upholt. For example, in response to the posting by CRPA Executive Director John Fields (who later fired Mr. Upholt), Calguns President Gene Hoffman stated the following in a Calguns Forums post dated July 29, 2008:

"CRPA's lobbyists have been and remain detrimental to the progress of freedom in this state. I personally can not in good conscience recommend that the Calguns.net community add membership to the organization that currently sponsors those lobbying activities."

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"Should that lobbying problem be taken care of, I'm quite certain that the desire to support CRPA in its important role will be expressed. Until then - ... I'd ask that people hold off on joining CRPA until the important changes are complete."

This threat was indisputably a directive that CRPA fire Mr. Upholt, CRPA's sole lobbyist, in exchange for membership support from Calguns and its members. By June 23, 2009, CRPA capitulated to the demands of Calguns' Hoffman and Wiese, and fired Upholt, who, as pointed out in a posting by Wiese, had contracted with CRPA to retire following the 2010 legislative term. And, in *quid pro quo* fashion, Hoffman and Wiese posted their support for CRPA within two days of Mr. Upholt's firing.

"Today I have news that confirms that the last major concern with CRPA has been addressed. Gerry Upholt, who had previously announced his retirement after next legislative session, announced that he would be retiring effective June 23 for personal reasons. Tom Pedersen, who was the Chairman of the Legislative Policy Committee (of which I'm a member) will be taking over his duties. Tom started in the San Joaquin Sheriff's office, then served at CHP, and spent most of his career as an enforcement officer for The California Department of Fish and Game where he retired in 2005. Ed Worley and I have been working with him in his most recent role of providing legislative oversight for CRPA in Sacramento."

Now that this last major concern is addressed, I would implore you and your friends in the firearms community to join CRPA. There are still things to improve, but to do that, we need everyone's constructive help. It is now time to support the New CRPA with our words and our wallets."

We've come a very long way in a very short year. Please consider joining or renewing with the CRPA today."

(Calguns.net forums, Gene Hoffman, June 26, 2009, 10:01 a.m.)

Calguns' objective, clearly demonstrated in its words and actions, to stage a palace coup at CRPA, "get rid of" Mr. Upholt, and install its hand-picked lobbyist, was malicious to the extent that it spread intentionally or recklessly false statements to facilitate that objective. Actual malice may be established either by direct proof of the defendant's state of mind, or by circumstantial evidence from which the jury might infer it as a fact. *Mamou v. Trendwest Resorts* (2008) 165 Cal.App.4th 686, 729. The tenor of the statements made may also be evidence of malice, such as Wiese's reference to the "yet enduring Gerry and Kathy problem" (Wiese Calguns.net post dated 7/27/08, 4:16 p.m.). *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 798-799. The evidence here satisfies these standards.

Demand to Settle Claim

In an attempt to avoid litigation, Ms. Lynch and Mr. Upholt are willing to resolve this matter in the following manner:

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1. Calguns/Mr. Wiese agree to immediately cease and desist publishing and posting derogatory and/or false statements regarding Ms Lynch and Mr. Upholt.
2. Calguns/Mr. Wiese shall provide the persons and/or sources of the false and defamatory statements referenced above.
3. Mr. Wiese shall post a retraction and apology to Ms. Lynch on the Calguns.net forums site on which the defamatory statements were posted.
4. Neither Ms. Lynch or Mr. Upholt believe that they have ever met, talked to or corresponded with Mr. Wiese. If Mr. Wiese believes he has, we request that information; otherwise Mr. Wiese's apology should include that he does not know my clients, has not met them, and never corresponded with them.

Please respond no later than **September 18, 2009**, if your client accepts the demands of Ms. Lynch and Mr. Upholt, above. We welcome any productive discussion regarding resolving this matter shy of litigation prior to that time. If we do not hear from you by this date, the offer will be considered rejected and Ms. Lynch and Mr. Upholt will file their lawsuit.

Sincerely,
WARD & HAGEN LLP

/s/ Kirk Yake

Kirk D. Yake

cc: Robert T. Dolan, Esq.