SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.	:	Index No. 105573/11
Plaintiffs,	:	
- against -	:	
THE WASHINGTON POST, et al.,	:	Justice Emily Goodman IAS Part 17
Defendants.	:	

MEMORANDUM OF LAW
IN SUPPORT OF CITY PAPER DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT

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STATUTES AND OTHER AUTHORITIES

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Defendants CL Washington, Inc. ("CL Washington"), as publisher of *The Washington City Paper*, Creative Loafing, Inc. ("Creative Loafing") and Rend Smith (collectively, the "City Paper Defendants") respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(1), (a)(7) and (a)(8), to dismiss the Amended Complaint in its entirety as to them for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

This lawsuit is a misguided attempt by plaintiff Joseph Rakofsky to salvage his reputation after his inexperienced and inept handling of the murder trial of a client, Dontrell Deaner, led to a mistrial in Washington, D.C. Superior Court. In filing a libel suit against 81 defendants, Rakofsky lashes out against seemingly every publication or person who has ever described his role in the Deaner trial, from *The Washington City Paper*'s news report on the mistrial to every stray comment by a law blogger. Mr. Rakofsky's claims against the non-domiciliary City Paper Defendants based on an accurate article about the Deaner trial violates bedrock principles of jurisdiction, free speech and New York tort law, and should be promptly dismissed.

Initially, there is no need for this Court to even address the merits of Mr. Rakofsky's claims, given the obvious lack of personal jurisdiction over the City Paper Defendants, all of whom are non-residents. The *Washington City Paper* is published in Washington D.C., concerns D.C.-area events and is targeted to a Washington D.C. audience; and under well-settled New York law, the mere fact that the article in suit was published on the newspaper's Internet website does not constitute a sufficient basis for personal jurisdiction over the City Paper Defendants.

Moreover, even if the Court were to reach the merits, Rakofsky's Amended Complaint fails to state any cognizable claim. First, the *Washington City Paper* article is a fair and accurate report of judicial proceedings and, as such, is absolutely privileged under New York Civil Rights Law Section 74. Nor can Mr. Rakofsky dress up his defective defamation claim in the garb of

other torts. Rakofsky has alleged no "outrageous" conduct to sustain an intentional infliction of emotional distress claim, no contract or business relationship on which to base a tortious interference claim and no use of Rakofsky's name for "advertising" or "trade" purposes as required to state a commercial misappropriation claim under Sections 50 and 51 of the Civil Rights Law. The City Paper Defendants therefore request that the Court dismiss each of Plaintiffs' claims against them with prejudice.

STATEMENT OF FACTS

A. The Parties

Plaintiff Rakofsky is a member of the New Jersey Bar who graduated from Touro Law Center in 2009. Cplt. ¶¶ 85-86.[1] Rakofsky practices law through his law New Jersey law firm, Plaintiff Rakofsky Law Firm ("RLF"). Cplt. ¶ 87. Rakofsky alleges that he is a resident of New York. Cplt. ¶ 1.

Defendant Creative Loafing is a Florida corporation with its principal place of business in Tampa, Florida. Cplt. ¶ 6; Affidavit of Talmudge U Bailey ("Bailey Aff.') ¶ 2. Creative Loafing has five wholly-owned subsidiaries, each of which owns and publishes a different newspaper. Bailey Aff. ¶ 3. The subsidiary known as CL Washington owns and publishes *The Washington City Paper* and its website washingtoncitypaper.com (collectively, "WCP"), the publication at issue in this motion. Bailey Aff. ¶ 4. Creative Loafing does not own or publish WCP. Bailey Aff. ¶ 5. Creative Loafing does not engage in the preparation of content published in WCP, and it did not play any role in preparing, editing or publishing the WCP article sued upon in this action. Bailey Aff. ¶ 7. Creative Loafing is not registered to do business in the State of New York, it does not have any offices, employees or other corporate presence in New York, and it does not

[1] A copy of the Amended Complaint (hereinafter, "Cplt.") is annexed as Exhibit A to the accompanying Affirmation of Robert D. Balin, dated July 21, 2011 (hereinafter, "Balin Aff.").

own any property, maintain any bank accounts, or pay any taxes in New York. Bailey Aff. ¶ 8.

Defendant CL Washington is a Florida corporation with its principal place of business in Washington, D.C. Cplt. ¶ 7; Affidavit of Amy Austin ("Austin Aff.") ¶ 2. CL Washington owns and publishes WCP, which is a free, controlled-circulation weekly newspaper. About 73,000 print copies of the paper are distributed each week to D.C. metro area[2] residents via news-racks and brick-and-mortar locations in the District of Columbia and the surrounding suburbs of Maryland and Virginia. An online edition of WCP is published at washingtoncitypaper.com. Austin Aff. ¶¶ 2, 4. WCP, in both its print and online edition, concerns D.C.-area events and is targeted to a Washington D.C. audience. Austin Aff. ¶ 5. CL Washington is not registered to do business in New York. It does not does not have any offices, employees or other corporate presence in New York. Nor does it own any property, maintain any bank accounts, or pay any taxes in New York. *Id.* ¶ 11.

Defendant Rend Smith is a news reporter for WCP and an employee of CL Washington. Cplt. ¶ 8; Affidavit of Rend Smith ("Smith Aff.") ¶ 3. He resides in Falls Church, Virginia, and he works at CL Washington's office in Washington, D.C. Smith Aff. ¶¶ 2, 5. Mr. Smith does not maintain an office in New York and does not own or lease any real property in New York. He does not maintain any banking or investment accounts in New York, pay taxes in New York or have a New York driver's license, and he is not registered to vote in New York. Smith Aff. ¶¶ 11-12, 14-17.

B. The Deaner Criminal Trial

In this libel action, Rakofsky and RLF sue 79 named defendants and two "John Does" for reporting on events that transpired on the record in open court on April 1, 2011, in a hearing

[2] By "D.C. metro area," the City Paper Defendants mean Washington D.C. and its surrounding suburbs in northern Virginia and southern Maryland.

before Judge William Jackson of the Superior Court of the District of Columbia.

The dispute arises out of Mr. Rakofsky's representation of Dontrell Deaner, a criminal defendant who was prosecuted for felony murder in D.C. Superior Court. Cplt. ¶ 88. Mr. Rakofsky took on the representation of Mr. Deaner approximately one year after graduating from law school and despite having never tried a case, much less a serious felony criminal case. Cplt. ¶¶ 88-89. Because Mr. Rakofsky was not licensed to practice law in the District of Columbia, he sought admission *pro hac vice* for the Deaner case and "associated himself" with Sherlock Grigsby, who was admitted to practice in D.C. Cplt. ¶ 93. Mr. Rakofsky also hired an investigator, Adrian Bean, to assist him in connection with the Deaner trial. Cplt. ¶ 90.

The Deaner case went to trial before Judge William Jackson. Judge Jackson appears to have been concerned about Mr. Rakofsky's competence to represent Mr. Deaner from very early on in the case. Following Rakofsky's opening statement, Judge Jackson summoned Mr. Deaner to the bench and "inquired of the defendant whether he wished to continue to be represented by Rakofsky as his lead counsel." Cplt. ¶ 104. "On a subsequent occasion the following day, Judge Jackson repeated the question to the client." Cplt. ¶ 104.

On March 31, 2011, during the testimony of a prosecution witness, a disagreement allegedly arose between Mr. Rakofsky and Mr. Deaner. Cplt. ¶ 108. According to the Amended Complaint, Mr. Deaner passed notes to Mr. Rakofsky suggesting questions he wanted Rakofsky to ask the witness, which Mr. Rakofsky thought would be bad for trial strategy. Cplt. ¶ 108. The Amended Complaint alleges that Mr. Rakofsky "determined that the conflict with the client . . . required him to seek to withdraw as lead counsel for the client." Cplt. ¶ 109. Rakofsky also allegedly viewed this as a tactical opportunity for his client because a mistrial would help break the "blatant 'alliance' between Judge Jackson and the AUSA [sic]" and give subsequent defense

counsel an upper hand in a second trial. Cplt. ¶ 109.

On March 31, Mr. Rakofsky orally requested permission from Judge Jackson to withdraw from the case on grounds of the alleged "conflict" between himself and Mr. Deaner. Cplt. ¶ 112. Judge Jackson resisted this request, stating, "We're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial." Cplt. ¶ 112. Nevertheless, Judge Jackson summoned Mr. Deaner to the bench, and the Amended Complaint alleges that Deaner "signified his agreement with Rakofsky's withdrawal." Cplt. ¶ 112. During Judge Jackson's exchange with Mr. Deaner, Judge Jackson explained to Mr. Deaner that his request for new counsel would require granting a mistrial, waiver of his rights under the Double Jeopardy clause, and his continued detention until the new trial. See Balin Aff., Ex. B, at 11. During the March 31 hearing, Judge Jackson took note of the claimed conflict between Mr. Rakofsky and his client, but emphasized that the conflict was not itself a matter of manifest necessity requiring a mistrial (Cplt. ¶ 112) and deferred any ruling. Balin Aff. Ex. B, at 12.

The following day, Judge Jackson ruled on whether to grant a mistrial. As set forth in the Transcript from the April 1, 2011 hearing, Judge Jackson began the hearing by inquiring of Mr. Deaner whether he "wanted a new lawyer." Balin Aff., Ex. C, at 2-3. After receiving an affirmative response, Judge Jackson stated on the record, in open court, his reasons for granting a mistrial and allowing Mr. Deaner to obtain a new lawyer:

> I must say that even when I acquired [sic] of Mr. Deaner, I – as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some length for over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky – put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.
>
> It appeared to the court that there were theories out there – defense theories out there, but the inability to execute those theories. It was

> apparent to the Court that there was a – not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think to the detriment of Mr. Deaner. And had there been – if there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.[3]
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity [sic]. I believe that the performance was below what any reasonable person could expect in a murder trial.
>
> So I am going to grant the motion for new trial. **And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an email in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation that by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.**
>
> So that's where we are. And I'll figure out what to do about that case. But it just seems to me that – so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the – As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.
>
> So I'm going to grant the motion.

Balin Aff., Ex. C, at 3-5 (emphasis added). Judge Jackson then addressed Rakofsky directly about the email attached to the investigator's motion: "There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ***ethical issues***." Balin Aff., Ex. C. at 7 (emphasis added).

The investigator's motion referred to by Judge Jackson is attached as Exhibit D to the Balin Affirmation. In it, Mr. Rakofsky's former investigator, Mr. Bean, accuses Rakofsky of

[3] D.C. Code § 23-110 provides a prisoner in custody with the right to move to vacate, set aside, or correct a sentence imposed "in violation of the Constitution of the United States or the laws of the District of Columbia." In this case, Judge Jackson was presumably referring to a violation of the Sixth Amendment based on ineffective assistance of counsel.

unethical behavior and attaches an email in which Mr. Rakofsky asked Mr. Bean to "trick" a government witness. The motion also contains an investigative report from Mr. Bean to Messrs. Rakofsky and Grigsby, which states in relevant part:

> In an E-mail dated October 6, 2010, I was instructed by Mr. Rakofsky to perform the following services in connection with the case:
>
> **(A) "Trick Leigh (Old Lady)" Into Making Certain Admissions.** I was asked to get this prospective witness to say that she told two attorneys that: (1) she did not see the shooting; and (2) she did not provide the Government any information about the shooting. I respectfully decline to perform this assignment for several reasons: **(1) I do not know what the term, 'trick", means in this context; (2) I am in the investigative business, not the trickery business; (3) I will not risk exposing myself to obstruction of justice or conspiracy charges; and (4) the implication of such a request appear to [be] inherently unethical.**

Balin Aff., Ex. D, at 11 (emphasis in original). The Amended Complaint admits that Rakofsky wrote this email and that his choice of the word "trick" was "unfortunate." Cplt. ¶ 120.

Keith Alexander, a reporter for *The Washington Post*, was present in Judge Jackson's courtroom on April 1. Cplt. ¶ 118. That same day, *The Washington Post* published an article entitled "D.C. Superior Court Judge declares mistrial over attorney's competence in murder case." *See* Balin Aff., Ex. E. The story described Judge Jackson's rationale for granting the mistrial and reported a number of Judge Jackson's critical statements about Mr. Rakofsky's inexperience and incompetence. The *Washington Post* article also reported that "[w]hat angered Jackson even more was a filing he received early Friday from an investigator hired by Rakofsky in which the attorney told the investigator via an attached email to 'trick' a government witness." Balin Aff., Ex. E.

C. The WCP Article in Suit and the Amended Complaint

On April 4, 2010, WCP reporter Rend Smith wrote an article about the Deaner mistrial (the "Article") entitled "N.J. Lawyer Doesn't Care What D.C. Thinks of Him." *See* Cplt. ¶ 142.

(A copy of the Article is annexed as Exhibit F to the Balin Aff.). The Article was published on the WCP website, but not in the print edition of the paper. Austin Aff. ¶ 8. The WCP Article recounts the same facts as the *Washington Post* article and similarly reports that Judge Jackson "said Rakofsky lacked the knowledge and experience to continue" as Deaner's attorney. Balin Aff., Ex. F. In researching the article, Mr. Smith also spoke with Mr. Rakofsky on the telephone by calling him at a D.C. telephone number that was provided on his law firm's now-defunct website, *see* Smith Aff. ¶ 10, and obtained several quotes from Rakofsky about his side of the story. Mr. Smith's Article includes Mr. Rakofsky's claim that the mistrial was a tactical victory for his client, and quotes Rakofsky's unhappiness over Judge Jackson's on-the-record criticism of him. Balin Aff., Ex. F. Mr. Smith's Article also described investigator Bean's motion, indicating that the investigator "lambasted Rakofsky for requesting that he 'trick' a witness into saying she didn't see the shooting." Balin Aff. Ex. F.

The Amended Complaint challenges only a single statement that appeared in the WCP Article—specifically, that "*A Friday hearing fell apart when Judge William Jackson declared a mistrial, partially because Rakofsky's investigator filed a motion accusing the lawyer of encouraging him to 'trick' a witness.* The Judge said Rakofsky lacked the knowledge and experience to continue." Balin Aff., Ex. F (emphasis added); Cplt. ¶ 142. The Amended Complaint alleges that the italicized portion of this statement is false—asserting that "RAKOFSKY moved to withdraw as lead counsel for his client because a conflict existed between him and his client" and that "Judge Jackson never 'declared a mistrial,' even in part, because 'Rakofsky's investigator filed a motion accusing the lawyer of encouraging him to 'trick' a witness.'" Cplt. ¶ 142.

In their Amended Complaint, Rakofsky and RLF assert a defamation claim, as well as

tag-along claims for intentional infliction of emotional distress, tortious interference with contract, and violation of Civil Rights Law Sections 50 and 51. Cplt. ¶¶ 195-216.

ARGUMENT

I.

THIS COURT HAS NO PERSONAL JURISDICTION OVER THE CITY PAPER DEFENDANTS

As a threshold matter, the City Paper Defendants must be dismissed from this action because there is clearly no personal jurisdiction over any of them in New York. There is no general jurisdiction over the City Paper Defendants because they are all non-residents and none of them have continuous and systematic ties to New York. Further, under well-settled law, WCP's mere publication of an allegedly defamatory article on a D.C.-based website does not remotely permit long-arm jurisdiction under New York's narrowly circumscribed long-arm statute.

A. CPLR 301 Does Not Confer General Jurisdiction Over the City Paper Defendants

CPLR 301, New York's general jurisdiction provision, empowers a court to "exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." Under Section 301, general jurisdiction over a non-domiciliary is permitted only if the non-domiciliary is so regularly "doing business" in New York that it can fairly be said to be "present" in New York for all purposes. *ABKCO Indus., Inc. v. Lennon*, 52 A.D.2d 435, 440, 384 N.Y.S.2d 781, 784 (1st Dep't 1976). This high threshold requires that the non-domiciliary defendant be "engaged in such a continuous and systematic course of 'doing business'" so as to "warrant a finding of its 'presence' in this jurisdiction." *Landoil Resources Corp. v. Alexander & Alexander Servs. Inc.*, 77 N.Y.2d 28, 33 (1990) (quoting *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10, (1982)). In other words, the "court must be able to say from the facts that the

corporation is 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Landoil Resources Corp,* 77 N.Y.2d at 33-34; *see also Laufer*, 55 N.Y.2d at 310.

Plaintiffs have utterly failed to allege that any of the City Paper Defendants conduct any business in New York, let alone engage in continuous and systematic business in this state "with a fair measure of permanence and continuity," as required for general jurisdiction. As the affidavits submitted by the City Paper Defendants conclusively demonstrate, none of the City Paper Defendants maintain an office, residence, agent, employee, mailing address, or even bank account in New York. *See* Smith Aff. ¶¶ 11-17; Bailey Aff. ¶ 8; Austin Aff. ¶ 11.[4] There is therefore no basis for asserting general jurisdiction over the City Paper Defendants under CPLR 301.

B. CPLR 302 Does Not Confer Long-Arm Jurisdiction Over the City Paper Defendants

CPLR 302 extends long-arm jurisdiction to non-residents only when they have engaged in some purposeful activity in New York in connection with the "'matter in suit.'" *Murdock v. Arenson Int'l USA, Inc.*, 157 A.D.2d 110, 113, 554 N.Y.S.2d 887, 889 (1st Dep't 1990). As shown below, the City Paper Defendants have not engaged in any suit-related activity in New York that would permit long-arm jurisdiction.

As a threshold matter, Section 302 narrowly limits the scope of personal jurisdiction in defamation actions against out-of-state publishers like the defendants here. Thus, Section 302 expressly provides:

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[4] While CL Washington occasionally sells advertising to a few businesses that have offices in New York, Austin Aff. ¶ 6, as a matter of law these isolated contacts are not sufficient to make it "present" in New York for purposes of Section 301. *See Realuyo v. Villa Abrille*, 01 Civ. 10158 (JGK), 2003 WL 21537754, at *4 (S.D.N.Y. July 8, 2003) (applying New York law) (refusing to base CPLR 301 jurisdiction on foreign newspaper's business relationships with two businesses that maintain offices in New York); *Arbitron Co. E.W. Stripps, Inc.*, 559 F. Supp. 400, 402-03 (S.D.N.Y. 1983) (finding that newspaper's parent corporation purchasing of computer and advertising services in New York insufficient to constitute "doing business" under Section 301).

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, *except as to a cause of action for defamation of character arising from the act*; or
>
> 3. commits a tortious action without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character arising from the act*, if he
>
> (i) regularly does or solicits business, or engages in any other persistent courts of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the states, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

N.Y. CPLR § 302(a) (emphasis added).

Sections 302(a)(2) and (3) expressly exempt causes of action for defamation from their jurisdictional scope, regardless of whether such jurisdiction would be otherwise consistent with due process. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244-45 (2d Cir. 2007) (applying New York law). This defamation exception is aimed at protecting out-of-state publishers like CL Washington from lawsuits exactly like this one:

> [T]he Advisory Committee intended to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them. It did not wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests, as the New York Times was forced to do in Alabama.

Legros v. Irving, 38 A.D.2d 53, 55, 327 N.Y.S.2d 371, 373 (1st Dep't 1971).

Plaintiffs therefore may only proceed under Section 302(a)(1), which requires the Court

to decide (1) whether the defendant "transacts any business" in New York and, if so, (2) whether the plaintiff's cause of action "aris[es] from" such business transaction. *Walker*, 490 F.3d at 246. Under prong one, courts look to the "'totality of the defendant's activities within the forum' to determine whether a defendant has 'transact[ed] business in such a way that it constitutes 'purposeful activity'" in the state. *Epstein v. Thompson*, No. 09 Civ. 8696, 2010 WL 3199838, at * 3 (S.D.N.Y. Aug. 12, 2010) (applying New York law) (quoting *Walker*, 490 F.3d at 246). While in some contexts proof of a single act or transaction may be sufficient to invoke long-arm jurisdiction under Section 302(a)(1), "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in ... other sorts of litigation." *Walker*, 490 F.3d at 248; *accord SPCA of Upstate New York v. Amer. Working Collie Ass'n*, 74 A.D.3d 1464 1465, 903 N.Y.S.2d 562, 564 (1st Dep't 2010).

Under prong two of Section 302(a)(1), New York courts require an "articulable nexus" or "substantial relationship" between the defendant's in-state activities and the cause of action asserted. *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981). *See also Lancaster v. Colonial Motor Freight Line*, 177 A.D.2d 152, 158, 581 N.Y.S.2d 283, 287 (1st Dep't 1992) ("crucial to the maintenance of a suit against a nondomiciliary under § 302(a)(1) is the establishing of a substantial relationship or nexus between the business transacted by defendant in this state and the plaintiff's cause of action.").

With particular relevance to this case, "New York courts do not interpret 'transacting business' to include mere defamatory utterances sent into the state." *Walker*, 490 F.3d at 248. "In other words, when the defamatory publication itself constitutes the alleged 'transaction of business' for purposes of section 302(a)(1), more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it."

Id. Accord Kim v. Dvorak, 230 A.D.2d 286, 658 N.Y.S.2d 502 (3d Dep't 1997) (sending of four allegedly defamatory letters into the state did not constitute transaction of business); *Pontarelli v. Shapero*, 231 A.D.2d 407, 647 N.Y.S.2d 185 (1st Dep't 1996) (sending two allegedly defamatory letters and one facsimile into New York did not constitute transaction of business for purposes of Section 302(a)(1)); *Strelsin v. Barrett*, 36 A.D.2d 923, 320 N.Y.S.2d 885 (1st Dep't 1971) (no personal jurisdiction over newscaster who made allegedly defamatory statements in broadcast in California that was subsequently broadcast in New York).

In the Internet context, the law could not be more clear: "the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transacting business' in New York for the purposes of CPLR 302(a)(1), and an out-of-state resident does not subject himself to jurisdiction in New York by simply maintaining a website visited by New Yorkers." *Henderson v. Phillips*, 2010 NY Slip Op 31654 at *8 (Sup. Ct. N.Y. Co., June 28, 2010) (finding no personal jurisdiction under CPLR 302(a)(1) over Virginia resident who had posted allegedly defamatory statements about a New York resident on a website in Virginia). Thus, in one of many on-point examples, the Second Circuit Court of Appeals held that Section 302(a)(1) did not confer jurisdiction over an Iowa resident who allegedly posted defamatory statements about a New York moving company on his Iowa-based website. *Walker*, 490 F.3d at 253-55. The court explained: "New York case law establishes that making defamatory statements outside of New York about New York residents does not, without more, provide a basis for jurisdiction, even when those statements are published in media accessible to New York readers." *Id.* at 253.[5] In addition, the court emphasized that "the nature of Walker's comments

[5]*See also Knight-McConnell v. Cummins*, 03 Civ. 5035, 2005 WL 1398590, at *3 (S.D.N.Y. June 13, 2005) (applying New York law) ("The mere fact that the allegedly defamatory postings may be viewed in New York is ... insufficient to sustain a finding of jurisdiction.") (internal quotation marks omitted); *Realuyo*, 2003 WL 21537754, at *6 (no jurisdiction under CPLR 302(a)(1) where defamatory article by foreign newspaper was posted on website

does not suggest that they were purposefully directed to New Yorkers rather than a nationwide audience," even though the plaintiff was identified as a New York company in one of the defendant's postings. *Id.*

More recently, in *SPCA of Upstate New York, Inc.* 74 A.D.3d 1464, 903 N.Y.S.2d 562 , a New York organization sued a Vermont resident and non-profit organization over allegedly defamatory statements posted to the organization's website in Vermont. The trial court denied the defendants' motion to dismiss for lack of personal jurisdiction, finding that the plaintiff had established long-arm jurisdiction under CPLR 302(a)(1). The Third Department reversed. *Id.* at 1465-66, 903 N.Y.S.2d at 564. Agreeing with *Walker*, the appellate court emphasized that "[t]he comments about which plaintiffs complain were not made in this state but were made in Vermont," and that the statements were placed on the defendant's website "with no effort to direct the comments toward a New York audience." *Id.* at 1466, 903 N.Y.S.2d at 564. Notably, the court found no personal jurisdiction over the individual defendant even though she made two short visits to New York to meet with the plaintiff before posting the allegedly defamatory statements. *Id.*

Here, it is hard to imagine a less compelling case for asserting personal jurisdiction over the City Paper Defendants under CPLR 302(a)(1). The challenged Article was entirely researched, written, edited, and uploaded to the Internet in Washington D.C. *See* Smith Aff. ¶¶ 6-9; Austin Aff. ¶¶ 7-8. It was published on a D.C.-based website that targets a D.C. metro area audience, not a New York audience. Austin Aff. ¶ 5. Nothing about the website, its advertising, or the content of its articles suggests any focus on New York, nor any attempt to

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which users "in New York or throughout the world could view and download"); *Starmedia Network, Inc. v. Star Media, Inc.*, 00 Civ. 4647, 2001 WL 417118, at *3 (S.D.N.Y. Apr. 23, 2001) (applying New York law) ("it is now well established that one does not subject himself to jurisdiction of the courts in another state simply because he maintains a website which residents of that state visit") (citation and quotation marks omitted).

appeal to New York residents. *See* Austin Aff. ¶¶ 4-6. Moreover, the contents of the Article in suit have no connection to New York. The events related in the article—Judge Jackson's granting of a mistrial—all took place in a Washington D.C., and Mr. Smith's Article expressly refers to Mr. Rakofsky as a New Jersey lawyer. Indeed, at the time the article was published, neither Mr. Smith nor anyone else at CL Washington even knew that Mr. Rakofsky was a New York resident. Smith Aff. ¶ 10; Austin Aff. ¶ 10.

While Defendants Smith and CL Washington have had limited and sporadic contacts with New York, none of these contacts bear any relationship to the challenged Article or to Rakofsky's causes of action. As such, they are insufficient to establish jurisdiction under CPLR 302(a)(1). *See McGowan*, 52 N.Y.2d at 272. *See also American Radio Ass'n, AFL-CIO v. A. S. Abell Co.*, 58 Misc.2d 483, 485, 296 N.Y.S.2d 21, 25 (Sup. Ct. N.Y. Co. 1968) (no personal jurisdiction over *Baltimore Sun* and columnist when contacts with New York were not substantially related to the plaintiff's cause of action); *Realuyo*, 2003 WL 21537754, at *6-8 (defendants' contacts with New York could not support jurisdiction under CPLR 302(a)(1) when they were not related to the publication and distribution of the article in question).[6]

Plaintiffs' defamation claim therefore must be dismissed for lack of personal jurisdiction over the City Paper Defendants because the requirements of CPLR 302(a)(1) have not been (and cannot be) met. Plaintiffs' remaining causes of action simply repackage their defamation claim under different tort labels and likewise must be dismissed for failing to meet the requirements of the New York long-arm statute. *See, e.g., American Radio Ass'n*, 58 Misc.2d at 485, 296 N.Y.S.2d at 23 (after dismissing libel action on jurisdictional grounds, ruling that "plaintiffs'

[6] Similarly, any nexus between Creative Loafing and the claims in this lawsuit are simply non-existent. Indeed, Creative Loafing is not involved at all in publishing *The Washington City Paper* or its website and played no role in preparing, editing or publishing the Article in suit. *See* Bailey Aff. ¶ 7; Austin Aff. ¶ 15. As explained in Point III, *infra*, because Creative Loafing played no role in the preparation, editing, or publication of the Article, it is not even a proper defendant in this lawsuit.

attempt to convert the alleged tort from defamation to something else must be rejected as spurious"); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 (2d Cir. 1996) (applying New York law) (tortious interference with prospective economic advantage and injurious falsehood claims could not provide independent basis for jurisdiction because "the entire complaint sounds in defamation"); *Jolivet v. Crocker*, 859 F. Supp. 62, 65 (E.D.N.Y. 1994) (applying New York law) (tortious interference claim with contact based on same facts as defamation claim cannot provide independent basis for jurisdiction under CPLR 302(a)(3)); *Epstein*, 2010 WL 3199838, at * 4 (holding that where "the entire complaint sounds in defamation," additional causes of action "do not independently establish personal jurisdiction"). "[T]o rule otherwise would provide a facile means for plaintiffs ... to evade the defamation exception in § 302(a)(3)," *Jolivet*, 859 F. Supp. at 65, thereby frustrating the New York legislature's intent to "avoid unnecessary inhibitions on freedom of speech or the press." *Legros*, 38 A.D.2d at 55, 327 N.Y.S.2d at 373.

Lastly, not only do Plaintiffs utterly fail to establish any credible basis for asserting jurisdiction over the City Paper Defendants under New York's narrow long-arm statute, any such assertion of jurisdiction would also violate due process under the Fourteenth Amendment of the United States Constitution because the City Paper Defendants have not purposely targeted their statements to a New York audience and have done nothing more than publish an article on the Internet that is equally accessible in every state in the nation and every country in the world. *See Young v. New Haven Advocate*, 315 F.3d 256, 262-64 (4th 2002)(holding that personal jurisdiction over Connecticut newspapers based on website articles about Virginia prison warden did not comport with due process when locally-oriented newspapers did not target their stories to a Virginia audience; mere accessibility of the articles in Virginia, as in every other state, was

insufficient to satisfy due process); *Revell v. Lidov*, 317 F.3d 467, 473-476 (5th Cir. 2002) (holding that personal jurisdiction in a Texas court over Columbia University and Massachusetts professor who posted an article on a Columbia University message board did not comport with due process when neither website nor professor expressly targeted a Texas audience and author was unaware that plaintiff resided in Texas).

II.

ALL OF PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW

Even if this Court did have personal jurisdiction over the City Paper Defendants (which it plainly does not), Plaintiffs' claims against them also patently fail to state a cognizable cause of action. The defamation claim is barred by the absolute privilege of Section 74 of the New York Civil Rights Law because the Article is a fair and true report of the April 1 proceedings before Judge Jackson. Furthermore, Plaintiffs do not—and cannot—allege extreme and outrageous conduct sufficient to support an intentional infliction of emotional distress claim; they do not identify any third-party breach of contract sufficient to support a tortious interference with contract claim; and they do not—and cannot—allege that the City Paper Defendants' mere use of Rakofsky's name in a news article constitutes "advertising" or "trade" as required to support a commercial misappropriation claim under Section 51 of the New York Civil Rights law.

A. The Statement at Issue is a Fair and True Report of a Judicial Proceeding and Thus Absolutely Privileged Under Section 74

Under the law of this State,

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding . . . .

NY Civil Rights Law § 74. The absolute privilege of Section 74 "rests upon First Amendment guarantees to the press," *Oliner v. Crain Communications, Inc.*, 14 Med. L. Rep. 1495, 1496

(Sup. Ct. N.Y. Co. 1987); *Gurda v. Orange County Publs. Div.*, 81 A.D.2d 120, 131, 439 N.Y.S.2d 417, 434 (2d Dep't 1981), and furthers "the public interest in having proceedings of courts of justice public, not secret," *rev'd on concurring and dissenting op. below*, 56 N.Y.2d 705 (1982); *Lee v. Brooklyn Union Pub. Co.*, 209 N.Y. 245, 248 (1913). A publication reporting a presiding judge's rulings, statements, and opinions falls squarely within the absolute privilege. *See Hanft v. Heller*, 64 Misc. 2d 947, 949, 316 N.Y.S.2d 255, 257 (Sup. Ct. N.Y. Co. 1970) ("Publication of [the judge's] opinion itself is the fairest and truest possible report of a judicial proceeding that can be made."). Further, the privilege covers news reports concerning the contents of motions, affidavits and other papers submitted to a court in connection with a proceeding, such as investigator Bean's motion accusing Rakofsky of unethical conduct. *See Komarov v. Advance Magazine Publishers, Inc.*, 180 Misc.2d 658, 660, 691 N.Y.S.2d 298, 300 (Sup. Ct. N.Y. Co. 1999) ("The privilege established by the Civil Rights Law applies not only to a transcript of the judicial proceeding itself, but also to any pleading made within the course of the proceeding ... and by extension, should also apply to affidavits submitted in the proceedings.") (internal quotation marks omitted); *Posato v. Oken*, 24 Med. L. Rptr. 1285, 1286-87 (Sup. Ct. Monroe Co. 1995) (holding that fair report privilege covers reports based in part on affidavits).

Whether a statement is privileged under Section 74 presents a threshold question of law for the court to determine at the pleading stage, and courts routinely grant pre-answer motions dismissing libel actions on basis of this absolute statutory privilege. *See, e.g., Saleh v. New York Times*, 78 A.D. 3d 1149, 1151, 915 N.Y.S.2d 571, 574 (2d Dep't 2010) (affirming dismissal of libel claim against newspaper under CPLR § 3211(a)(1) and (7) based on fair report privilege).[7]

[7] *See also Klig v. Harper's Magazine Foundation*, No. 60089/10, 2011 N.Y. Slip Op. 31173(U), 2011 WL 1768878 (Sup. Ct. Nassau Cty. Apr. 26, 2011); *Corso v. NYP Holdings, Inc.*, No. 109820/2005, 2007 WL 2815284 (Sup. Ct N.Y. Co. Aug. 30, 2007); *Sprecher v. Dow Jones & Co.*, 88 A.D.2d 550, 551-52, 450 N.Y.S.2d 330, 331-32 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 862, 460 N.Y.S.2d 527 (1983); *Leder v. Feldman*, 173 A.D.2d 317, 569 N.Y.S.2d 702 (1st

The absolute privilege of Section 74 is intended to protect (and foster) news reporting on the charges made in official proceedings regardless of whether those underlying allegations are in fact true or false. Legal and other official proceedings are by their very nature often typified by conflicting charges and countercharges; and if the press were required to verify the truth of the allegations of parties to such proceedings, the very purpose of the fair report privilege — to promptly inform the public about official proceedings—would be eviscerated. *See, e.g., Glantz v. Cook United, Inc.*, 499 F. Supp. 710, 715 (E.D.N.Y. 1979) ("[e]ncompassed within the privilege [of Section 74] is the right to publish a 'fair and true' report which contains information that is 'false' as a matter of fact"); *Schneph v. New York Times Co.*, 32 Misc.2d 237, 240, 223 N.Y.S.2d 90, 94 (Sup. Ct. Bronx. Co. 1961) ("the purpose of the statute is to protect absolutely from liability for libel one who, without concerning himself in the slightest with the truth of the defamatory statements made ... in the course of official proceedings, publishes a fair report of that proceeding including the libelous matter"). Accordingly, as long as the report accurately conveys the allegations or charges in an official proceeding, the report is absolutely privileged irrespective of the truth of the underlying allegations.

Moreover, to fall within the protective ambit of Section 74's privilege, a news report of a judicial proceeding need only be "substantially" accurate. *Leder*, 173 A.D.2d at 318, 569 N.Y.S.2d at 703. As the New York Court of Appeals has held:

> For a report to be characterized as "fair and true" within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate. ... When determining whether an article constitutes a "fair and true" report, the language used therein *should not be dissected and analyzed*

Dep't 1991); *Palmieri v. Thomas*, 29 A.D.3d 658, 659, 814 N.Y.S.2d 717, 718 (2d Dep't 2006); *Every Drop Equal Nutrition, L.L.C. v. ABC, Inc.*, 5 A.D.3d 536, 537, 772 N.Y.S.2d 865 (2d Dep't 2004); *Branca v. Mayesh*, 101 A.D.2d 872, 476 N.Y.S.2d 187 (Sup. Ct. N.Y. Co. 1984); *Liebgold v. Hofstra Univ.*, 245 A.D.2d 272, 664 N.Y.S.2d 831 (2d Dep't 1997); *Hughes Training, Inc. v. Pegasus Real-Time, Inc.*, 255 A.D.2d 729, 680 N.Y.S.2d 721 (3d Dep't 1998); *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 608 N.Y.S.2d 239 (2d Dep't 1994).

with a lexicographer's precision.

Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co., 49 N.Y.2d 63, 67-68 (1979) (citations omitted) (emphasis added); *accord, e.g., Posner v. N.Y. Law Publ'g Co.*, 228 A.D.2d 318, 318, 644 N.Y.S.2d 227, 227 (1st Dep't 1996) (that substantially accurate article about a court decision contained some inaccuracies did not remove it from the protection of the privilege accorded by Section 74); *Becher v. Troy Publ'g Co.*, 183 A.D.2d 230, 233, 589 N.Y.S.2d 644, 646 (3d Dep't 1992) ("The case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings.").

Accordingly, New York courts consistently hold that a report is privileged under Section 74 where the language used in the report, despite inaccuracies, does "'not produce a different effect on the reader than would a report of the precise truth.'" *Klig*, 2011 N.Y. Slip Op. 31173(U) (quoting *Silver v. Kuehbeck*, No. 05 Civ. 35, 2005 WL 2290642, at *16 (S.D.N.Y. Nov. 7, 2005) (applying New York law)). For example, in *Holy Spirit Ass'n*, the Court of Appeals found the articles at issue to be protected from liability even though they described damaging information contained in intelligence documents as "fact" and as "confirmed" when the documents themselves stated that the information was "unevaluated" and unverified. As the Court explained, "the gravamen of plaintiff's allegations is that these articles, by failing to characterize properly the nature of the intelligence reports, distorted the import of these documents to the detriment of plaintiff." 49 N.Y.2d at 65-66. The Court found that the defendant's "use of the phrases 'stated as fact' and 'confirmed and elaborated' may denote to some degree, a sense of legitimacy which, in hindsight, could be characterized as imprudent." Nonetheless, it ruled that these flaws "[did] not ... render the newspaper articles unfair" for

purposes of the Section 74 privilege, and dismissed the case. *Id.* at 68.[8]

Here, the challenged statement—that "[a] Friday hearing fell apart when Judge William Jackson declared a mistrial, partially because Rakofsky's investigator filed a motion accusing the lawyer of encouraging him to 'trick' a witness"—is indisputably a substantially accurate account of what transpired in open court on April 1. Indeed, Judge Jackson specifically mentioned the motion filed by Rakofsky's investigator as one of the several reasons motivating his decision to declare a mistrial. As noted above, the transcript states in relevant part:

> So I am going to grant the motion for new trial. ***And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an email in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation that by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.***
>
> So that's where we are. And I'll figure out what to do about that case. But it just seems to me that – so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the – As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.
>
> ***So I'm going to grant the motion.***

Balin Aff., Ex. C, at 5 (emphasis added). Judge Jackson then addressed Rakofsky directly about

[8] *Accord, e.g., Misek-Falkoff v. Am. Law. Media*, 300 A.D.2d 215, 216, 752 N.Y.S.2d 647, 649 (1st Dep't 2002) (article's misstatement that plaintiff had sued for discrimination based on a "mental disability" when, in fact, she sued based on a "neurological disorder" was "not serious enough to remove defendants' reportage from the protection" of § 74); *Becher*, 183 A.D.2d at 233-37, 589 N.Y.S.2d at 646-48 (newspaper articles and headlines held privileged even though they suggested that plaintiff had been indicted on felony charge of bribing a witness, when in fact he had been charged with misdemeanors); *Komarov*, 180 Misc.2d at 661, 691 N.Y.S.2d at 301 (article reporting that FBI "asserts that [plaintiff] is [a gangster's] main money launderer and extortionist of émigré businessmen" held protected by Section 74, even though documents relied upon actually stated that FBI had "been advised" that plaintiff laundered money and that plaintiff "reportedly control[led]" extortions of Russian émigré businessmen, and did not state that plaintiff was the gangster's "main" money launderer); *Grab v. Poughkeepsie Newspapers, Inc.*, 91 Misc.2d 1003, 1003-05, 399 N.Y.S.2d 97, 97-98 (Sup. Ct. Dutchess Co. 1977) (newspaper article protected by absolute privilege of § 74 even though it inaccurately implied that plaintiff had been convicted of a crime, when in reality he pled guilty, and inaccurately stated that plaintiff had been sentenced to state prison, when in fact he had received youthful offender status).

the email attached to the investigator's motion: "There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ***ethical issues***." Balin Aff. Ex. C at 7. (emphasis added).

The Amended Complaint tries to avoid Section 74's absolute immunity with a bit of sophistry, maintaining that the day before Mr. Rakofsky had moved to withdraw as counsel because of a conflict with his client, and that the Court supposedly granted his motion for this reason alone. Cplt. ¶ 142. This ploy suffers from two fatal defects.

First, Judge Jackson's statements on the record unmistakably refute Plaintiffs' claim that the alleged conflict between Mr. Rakofsky and his client was even an important animating factor—let alone the sole reason—behind Judge Jackson's decision. Indeed, Judge Jackson gave a list of more pressing reasons for his decision, including that Mr. Rakofsky "had never tried a case before," that he failed to grasp "legal principles and legal procedure [to the] detriment of Mr. Deaner," and that his performance was "not up to par under any reasonable standard of competence under the Sixth Amendment." And, as noted above, Judge Jackson specifically mentioned investigator Bean's motion accusing Mr. Rakofsky of unethical conduct in this same list of reasons for his grant of a mistrial. Although Mr. Smith's Article did not report that Rakofsky had the day before requested withdrawal based on an alleged conflict with his client, this does not alter the substantially accurate character of the report on Judge Jackson's ruling. *See Glendora*, 201 A.D.2d at 620; 608 N.Y.S.2d at 239 (affirming dismissal based on Section 74; "the accuracy of the report was not altered merely because the article did not contain the plaintiff's 'side of the Judge's decision'"); *McDonald v. East Hampton Star*, 10 A.D.3d 639, 640, 781 N.Y.S.2d 694, 695 (2nd Dep't 2004) (holding that newspaper article containing condensed but accurate description of judicial decision dismissing federal lawsuit and the court's

rationale for doing so was fair and accurate report; "Although the article failed to report that the federal court's decision granted the plaintiff leave to file an amended complaint, and that he thereafter filed an amended complaint, those omissions did not alter the substantially accurate character of the article.").

Second, accepting *arguendo* Mr. Rakofsky tendentious contention that Judge Jackson did not grant the mistrial because of investigator Bean's motion — even in part — but only discussed that motion in the course of his decision-making process on the record, this type of hair-splitting is insufficient to strip a statement of the absolute privilege afforded by Section 74. *See Holy Spirit Ass'n*, 49 N.Y.2d at 67 (reports of judicial proceedings "should not be dissected and analyzed with a lexicographer's precision"). It is beyond dispute that, in the course of the judicial proceedings, investigator Bean submitted a motion accusing Rakofsky of acting unethically by encouraging the investigator to trick a witness. Balin Aff., Ex. D. Notably, Mr. Rakofsky does not—and cannot—challenge as false the statement in Mr. Smith's Article that investigator Bean's motion "lambasted Rakofsky for requesting that he 'trick' a witness into saying she didn't see the shooting." Balin Aff., Ex. F. It is equally beyond dispute that Judge Jackson discussed the investigator's motion on the record as he was granting a mistrial. Balin Aff., Ex. C, at 5-7. Even assuming *arguendo* that Mr. Smith's Article was technically incorrect in attributing a partial causal connection between the investigator's motion and Judge Jackson's decision to grant a mistrial, this slight mistake would "not produce a different effect on the reader" than a hypothetically precise report, *Klig*, 2011 N.Y. Slip Op. 31173(U)(1), because it is the accusation of alleged unethical conduct by Mr. Rakofsky that would matter to the reasonable reader, and it is indisputable from the record that this allegation of unethical conduct was indeed raised in open court.

In short, Mr. Smith's Article is a substantially fair and accurate report that is absolutely privileged by Section 74. Plaintiffs' defamation claim must be dismissed as a matter of law.

B. Plaintiffs' Intentional Infliction of Emotional Harm Claim Fails as a Matter of Law

The Amended Complaint does not remotely allege the element of "extreme and outrageous conduct" required to state a claim of intentional infliction of emotional distress under New York law. Indeed, "[l]iability [for intentional infliction of emotional distress] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983). Given these stringent pleading requirements, "[i]t is nearly impossible in New York for a plaintiff to state a viable claim for intentional infliction of emotional distress." *Triano v. Gannett Satellite Information Network, Inc.*, Nos. 09-CV-2497, 09-CV-2533, 2010 WL 3932334 at *6 (S.D.N.Y. Sept. 29, 2010) (internal quotation marks omitted). As the Court of Appeals has noted, "of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993).

Here, Defendants' mere publication of an unflattering article about Mr. Rakofsky does not, as a matter of law, rise to the level of extreme and outrageous conduct. *See, e.g., Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92, 760 N.Y.S.2d 133, 138 (1st Dep't 2003) (statements that plaintiff slept with and was raped by foreign government officials on whom she spied while working for CIA not sufficiently outrageous, even if false: "it is long settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute extreme and outrageous conduct as a matter of law"); *Sarwer v. Conde Nast Publications, Inc.*, 237 A.D.2d 191, 192, 654 N.Y.S.2d 768, 769 (1st Dep't 1997) ("even if defendants knew that publication of

the article would embarrass and otherwise distress plaintiff, the act of publication was privileged conduct, and therefore cannot support a cause of action for intentional infliction of emotional distress"); (citations omitted) *Triano*, 2010 WL 3932334, at *6 (publishing news story that mistakenly reported that plaintiff had died was not "outrageous" conduct sufficient to support claim for intentional infliction of emotional distress).

Moreover, "New York courts have consistently held that a plaintiff may not maintain a separate claim for intentional infliction of emotional distress grounded in the same facts as a claim for libel." *Idema v. Wager*, 120 F. Supp. 2d 361, 370-371 (S.D.N.Y. 2000), *aff'd*, 29 Fed. Appx. 676 (2d Cir. 2002). *See also Copp. v. Ramirez*, 2007 WL 6139779, 2007 N.Y. Sip. Op. 34404(U) (N.Y. Sup. Ct. Oct. 9, 2007) (dismissing intentional infliction of emotional distress claim that was "largely duplicative" of defective defamation claim arising out of same allegedly defamatory news program), *aff'd on other grounds*, 62 A.D.3d 23, 27, 874 N.Y.S.2d 52, 56 (1st Dep't 2009), *appeal denied,* 21 N.Y.3d 711 (2009); *Ghaly v. Mardiros*, 204 A.D.2d 272, 273, 611 N.Y.S.2d 582, 583 (2d Dep't 1994) (dismissing intentional infliction of emotional distress claim as duplicative of defamation claim); *Komarov,* 180 Misc.2d at 662-63, 691 N.Y.S.2d at 302 (same).[9] Here, because Plaintiffs' emotional distress claim merely duplicates their libel claim, it must be dismissed on this ground as well.

C. Plaintiffs' Tortious Interference Claim Fails as a Matter of Law

Plaintiffs' style their tortious interference claim as "intentional interference with contract," but the Amended Complaint does not identify any specific contract with a third party that was breached by that third party. This shortcoming is fatal to Plaintiffs' claim. Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party,

[9] *See also Durepo v. Flower City Television Corp.*, 147 A.D.2d 934, 935, 537 N.Y.S.2d 391, 392 (4th Dep't 1989); *Sweeney v. Prisoners' Legal Servs. of New York,* 146 A.D.2d 1, 7, 538 N.Y.S.2d 370, 373-74 (3d Dep't 1989); *Manno v. Hembrooke,* 120 A.D.2d 818, 820, 501 N.Y.S.2d 933, 936 (3d Dep't 1986).

defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of contract without justification, actual breach and damages. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). The New York Court of Appeals has stressed that "[e]ver since tortious interference with contractual relations made its first cautious appearance in the New York Reports ... breach of contract has repeatedly been listed among the elements of a claim of tortious interference with contractual relations." *NBT Bancorp, Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 620-21 (1996); *see also Downtown Women's Center, Inc. v. Carron*, 237 A.D.2d 209, 210, 655 N.Y.S.2d 479, 480 (1st Dep't 1997) (actual breach is "necessary to any cause of action for tortious interference with contract").

Here, Plaintiffs' do not allege that any identifiable third party breached a contract with them, only that "RAKOFSKY and RLF had valid business contracts with existing clients," and that the City Paper Defendants' allegedly defamatory statements "interfered with their ability to satisfy the terms of such contracts and with RAKOFSKY's and RLF's establishment of contractual relations with other clients." Cplt. ¶ 209. Because Plaintiffs plainly fail to allege any actual breach of contract by any actual, identifiable client, their tortious interference with contract claim must be dismissed.

Plaintiffs may mistakenly be attempting to invoke a tortious interference with prospective business relations claim, but any such claim is equally doomed under New York law. A claim for interference with prospective business relations must meet heightened pleading requirements more demanding than those for interference with the performance of an existing contract. *See Fine v. Dudley D. Doernberg & Co.*, 203 A.D.2d 419, 610 N.Y.S.2d 566, 567 (2d Dep't 1994). "Under New York law, the elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third party; (2) the defendant's interference

with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used criminal or tortious means; and (4) injury to the business relationship." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000).

At a minimum , "a claim for interference with advantageous business relationships must specify some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious behavior." *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995) (granting motion to dismiss where complaint referred only generally to potential contracts); *see also Winner Intern. v. Kryptonite Corp.*, No. 95 Civ. 247 (KMW), 1996 WL 84476 at *4 (S.D.N.Y., Feb. 27, 1996) (granting motion to dismiss claim for tortious interference with prospective economic advantage where plaintiff failed to allege that defendant's conduct interfered with its business relationship with any specific third party). Here, as noted above, Plaintiffs have not identified *any* existing relationship through which they would have done business but for the allegedly tortious behavior of the defendants. Plaintiffs' vague allegations wholly fail to meet the strict requirement of pleading an identified existing business relationship that was harmed.

In addition, Plaintiffs have not satisfied the third element. "To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313, 776 N.Y.S.2d 279, 280 (1st Dep't 2004) (emphasis added). "Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel*

Corp. v. Noonan, 3 N.Y.3d 182, 190 (2004). Here, CL Washington, as a newspaper publisher, obviously had a lawful interest in reporting the news of Mr. Deaner's mistrial to the public. Thus, Plaintiffs do not and cannot plead that City Paper Defendants acted for the sole purpose of harming them.

For all these reasons, Plaintiffs' claim of tortious interference must be dismissed.

D. Plaintiffs' Commercial Misappropriation Claim under Section 51 of the New York Civil Rights Law Fails as a Matter of Law

Plaintiff's fourth cause of action patently fails to state a claim for commercial misappropriation under NY Civil Rights Law Sections 50 and 51. While Section 51 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent, the New York Court of Appeals has repeatedly made clear that the use of a person's name or likeness in news reporting is not a use for advertising or trade purposes. *Messenger v. Grunder + Jahr*, 94 N.Y.2d 436, 441 (2000); *Howell,* 81 N.Y.2d at 123.[10] Moreover, "the fact that a publication may have used a person's name or likeness 'solely or primarily to increase the circulation' of a newsworthy article—and thus to increase profits—does not mean that the name or likeness has been used for trade purposes within the meaning of the statute." *Messenger*, 94 N.Y.2d at 442.

"Newsworthiness" is broadly construed and includes "articles concerning political happenings, social trends or any subject of public interest." *Messenger*, 94 N.Y.2d at 442. Here, Mr. Smith's Article obviously addressed a newsworthy topic of legitimate public interest. Not only was the Article reporting on a felony murder trial, but Mr. Rakofsky's representation of Mr.

[10] *See also Delan v. CBS, Inc.*, 91 A.D.2d 255, 259, 458 N.Y.S.2d 608, 613 (2d Dep't 1983) ("The reporting of matters of public information or of legitimate public interest ... is a matter of privilege and not within the ambit of the term 'purposes of trade' as used in the Civil Rights Law ... notwithstanding the inclusion of commercials."); *Bement*, 307 A.D.2d at 90, 760 N.Y.S.2d at 136 (Section 51 is "inapplicable where the use occurs in the context of a report of newsworthy events or matters of public interest, since in such instance the use 'is not deemed produced for the purposes of advertising or trade' and also as a matter of deference to the constitutional right to free speech").

Deaner and subsequent withdrawal from the case raised important issues about the quality of justice in our nation's courts, a matter of the utmost importance to the public. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.").[11]

Because Rakofsky's name was used in connection with a patently newsworthy article, Plaintiffs' commercial misappropriation claim must be dismissed as a matter of law.

III.

CREATIVE LOAFING IS AN IMPROPER DEFENDANT

Last, Creative Loafing is not a proper defendant in this action because it does not publish WCP and cannot be held liable for the alleged tortious acts of a subsidiary. Under New York law, a defendant cannot be held liable for defamatory statements published by a third party. *See Schoepflin v. Coffey*, 162 N.Y. 12 (1900); *Scally v. Kovac*, 49 A.D.2d 953, 374 N.Y.S.2d 54 (2d Dep't 1975); *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 434-45 (1981) (authors of hardcover book were not liable for the paperback edition when they had no role in republication). New York law also holds that a parent corporation cannot be held liable for a subsidiary's torts, unless it is proven that the subsidiary is wholly dominated and controlled by the parent corporation such that piercing the corporate veil is justified. *See, e.g., Billy v. Cons. Mach. Corp.*, 51 N.Y.2d 152, 162-64 (1980).

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[11] Indeed, New York courts have found much less weighty subjects to be newsworthy matters of public interest and, thus, outside the scope of Section 51. *See, e.g., Stephano v. News Group Publs.*, 64 N.Y.2d 174 179-186 (1984) (picture of plaintiff wearing leather bomber jacket in column about "new and unusual products and services"); *Abdelrazig v. Essence Communications*, 225 A.D. 2d 498, 639 N.Y.S.2d 811(1st Dep't 1996), (picture of plaintiff in "African garb" concerned "newsworthy fashion trends in the Black community"), *Creel v. Crown Publs. Inc.*, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dep't 1985) (picture of plaintiffs illustrating guide to nude beaches); *Lopez v. Triangle Communications*, 70 A.D.2d 359, 360, 421 N.Y.S.2d 57 (1st Dep't 1979) ("make-over" pictures in Seventeen magazine).

Here, it is Creative Loafing's wholly-owned subsidiary, CL Washington, that owns and publishes WCP, and it is CL Washington that makes all decisions regarding the preparing, editing and publishing of articles, including the Article at issue in this action. Bailey Aff. ¶¶ 5-7; Austin Aff. ¶¶ 13, 15. CL Washington is adequately capitalized, maintains separate corporate books from Creative Loafing, and maintains its own office space and equipment. Bailey Aff. ¶ 6; Austin Aff. ¶ 14. Creative Loafing does not engage in the preparation of content published in WCP, and it did not have any role in preparing, editing or publishing the Article in suit. Bailey Aff. ¶ 7. Therefore, Creative Loafing is not a proper party defendant in this lawsuit. *See Stern v. News Corp.*, No. 08 Civ. 7624, 2010 WL 5158635, at *4 (S.D.N.Y. Oct. 14, 2010), *report and recommendation adopted by* 2010 WL 5158637 (S.D.N.Y. Dec 16, 2010).

CONCLUSION

For the foregoing reasons, the Amended Complaint against the City Paper Defendants should be dismissed in its entirety with prejudice.

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Respectfully submitted,

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