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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **NOTICE OF MOTION TO DISMISS**

PLEASE TAKE NOTICE that upon the Affirmation of Chetan Patil, dated July 20, 2011, and the exhibits annexed thereto, the Affidavit of Keith L. Alexander dated July 15, 2011, the Affidavit of Jennifer Jenkins dated July 18, 2011, the Affidavit of Nicole M. Maddrey dated July 14, 2011, the Affidavit of James A. McLaughlin dated July, 15, 2011, and the accompanying Memorandum of Law, Defendants The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins will move this Court at the New York Supreme Court 60 Centre Street, New York, New York, Motion Submission Part, Room 130, on August 17, 2011 at 9:30 am, or as soon thereafter as counsel may be heard, for an order:

(a) pursuant to CPLR § 3211(a)(1) and (7), dismissing the Amended Complaint with prejudice as against Defendants The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins on the grounds that a defense is founded upon documentary evidence and that the pleading fails to state a cause of action;

(b) Pursuant to CPLR 3211(a)(8), dismissing the Amended Complaint with prejudice against Defendants Keith L. Alexander and Jennifer Jenkins, because the court has not jurisdiction of the person of the defendant; and

(c) granting such other, further and different relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE THAT pursuant to CPLR 2214(b), answering papers, if any, shall be served at least seven (7) days before the return date of this motion.

Dated: Washington, D.C.
July 20, 2011

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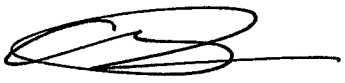
By: 
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Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman

MEMORANDUM OF LAW IN SUPPORT OF THE WASHINGTON POST COMPANY, KEITH L. ALEXANDER, AND JENNIFER JENKINS'S MOTION TO DISMISS THE AMENDED COMPLAINT

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July 20, 2011

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Defendants The Washington Post Company (the "Post Company"), Keith L. Alexander, and Jennifer Jenkins (collectively with the Post Company, the "Post defendants") respectfully submit this memorandum of law in support of their motion to dismiss the complaint of Joseph Rakofsky and the Rakofsky Law Firm, P.C., pursuant to C.P.L.R. §§ 3211(a)(1), (a)(7), and (a)(8).

INTRODUCTION

Plaintiffs, a lawyer and his single-lawyer law firm, brought this suit against the Post defendants and some 78 other defendants, asserting claims for defamation, intentional infliction of emotional distress, intentional interference with a contract, and improper use of Rakofsky's name for the purposes of trade. The claims against the Post defendants are premised on two articles that appeared in *The Washington Post* newspaper and on the *Post*'s website in April 2011. Patil Aff., Ex. B, C. The articles reported on Rakofsky's representation of Dontrell Deaner, a District of Columbia resident, who was tried in D.C. Superior Court for felony murder in connection with a fatal shooting in Washington, D.C. In particular, the articles reported—as reflected clearly in the court transcripts referenced in the complaint—that the presiding judge granted Deaner's request for new counsel in the middle of trial because Rakofsky lacked a "good grasp of legal procedures" and because "his performance in the trial was below what any reasonable person could expect in a murder trial." Patil Aff., Ex. B at 2 (internal quotation marks omitted). The Post defendants move to dismiss all of plaintiffs' claims.

First, the complaint fails to state a claim. Plaintiffs' defamation claim fails because the statements they identify as defamatory are fair and true reports of the statements made by a judge on the record during a court proceeding, and are thus protected from defamation claims by New York's statutory fair report privilege. Moreover, plaintiffs have sued the wrong entity—the Post

Company is a holding company and is not the company that owns, operates, and publishes *The Washington Post*. As for plaintiffs' claims of intentional infliction of emotional distress and intentional interference with a contract, they are merely derivative of the defamation claim and fail for the same reasons, and in any case, plaintiffs have failed to allege even the most basic elements of such claims. Finally, plaintiffs' claim for the improper use of Rakofsky's name for the purposes of trade also fails, because the proceedings in a murder trial are undoubtedly newsworthy.

Second, plaintiffs' allegations do not support the exercise of personal jurisdiction over Keith Alexander and Jennifer Jenkins. Alexander and Jenkins—a reporter and researcher for *The Washington Post*, respectively—are not New York residents and conduct no business in New York. Plaintiffs have not and cannot allege any facts particular to these defendants that establish personal jurisdiction, under either New York's long-arm statute or the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

For all these reasons, the Amended Complaint should be dismissed.

BACKGROUND

On April 1, 2011, just three days into a felony murder trial, D.C. Superior Court Judge William Jackson, the presiding judge in *United States v. Deaner*, declared a mistrial and granted Dontrell Deaner's request for new counsel. Deaner made his request a day earlier, after his lawyer—Plaintiff Joseph Rakofsky—had informed Judge Jackson of the existence of a disagreement between him and Deaner regarding the cross-examination of witnesses. Judge Jackson announced his ruling in open Court and publicly criticized Rakofsky's performance in the trial, stating that he lacked a "good grasp of legal procedures," Patil Aff., Ex. D at 4:11–12, that his performance was below "what any reasonable person would expect in a murder trial," *id.*

at 4:24–5:1,that his performance was "not up to par under any reasonable standard of competence under the Sixth Amendment," *id.* at 5:17–19, and that had Deaner been convicted, he would have ordered a new trial, *id.* at 4:15–17. In addition, Judge Jackson voiced concerns over "ethical issues" raised by an e-mail, filed with the court, which had been sent by Rakofsky to his former investigator (the "trick e-mail"). *Id.* at 7:13.[1]

That same day, *The Washington Post* published on its website an article—authored by Alexander, with research assistance from Jenkins—entitled "D.C. Superior Court judge declares mistrial over attorney's competence in murder case" (the "April 1 article").[2] Patil Aff., Ex. B. Relying extensively on the statements made by Judge Jackson on the record in open court, the article reported that Judge Jackson declared a mistrial and allowed Deaner to terminate Rakofsky's representation. *Id.* at 1. Specifically, the article reported that Judge Jackson identified numerous examples of Rakofsky's inexperience and incompetence, including reporting that he "told Rakofsky that his performance in the trial was 'below what any reasonable person would expect in a murder trial,'" that "[t]here was not a good grasp of legal procedures . . . to the detriment of Mr. Deaner," and that he was "astonished someone would represent someone in a murder case who has never tried a case before." *Id.* at 2 (internal quotation marks omitted). In addition, the article reported that Rakofsky's e-mail to his former investigator told the

[1] This court may take judicial notice of, and consider on this motion, the record from *United States v. Deaner*, including the transcript and the trick e-mail, which was filed with the court, as well as the two articles. First, courts are permitted to take judicial notice of matters of public record. *See Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667 (2d Dep't 1989). Second, the amended complaint itself extensively references the official record, *e.g.*, Am. Compl. ¶ 116, the trick e-mail, *e.g.*, Am. Compl. ¶ 120, and the articles, *e.g.*, Am. Compl. ¶¶ 137, 141. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153–54 (2d Cir. 2002) (recognizing that courts may take judicial notice of documents that are referenced or relied upon in a complaint). Finally, in a defamation action, courts compare the allegedly defamatory statement with the "precise truth," *see Cholowsky v. Civiletti*, 69 A.D.3d 110, 115 (2d Dep't 2009), and evaluate truthfulness in the context of the entire article, *see Miller v. Journal-News*, 211 A.D.2d 626, 627 (2d Dep't 1995). This necessarily requires reference to the record of the judicial proceedings and the underlying article. *Cf. Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, 74 A.D.3d 613, 614 (1st Dep't 2010) (rejecting a defamation claim by referring to an e-mail sent by the plaintiff to a partner of the defendant firm).

[2] The article appeared online on April 1, 2011. It was published in the local, or "Metro," section of *The Washington Post* newspaper on April 2, 2011 under the headline "Mistrial declared in '08 D.C. murder case."

investigator to "trick" an individual into stating that she did not witness the shooting or provide information to lawyers about the shooting. *Id.* at 1.

On April 9, 2011, *The Washington Post* website published a second article in the local section, again authored by Alexander, entitled "Woman pays $7,700 to grandson's attorney who was later removed for inexperience" (the "April 9 article").[3] Patil Aff., Ex. C. The article described how Rakofsky solicited Deaner's grandmother to hire him to represent her grandson—including telling her that he had worked on prior criminal cases despite the fact that he had never tried a case before—and reported that the court had "declared a mistrial, citing the lawyer's lack of competence." *Id.* at 1. *The Washington Post*, and Alexander in particular, sought comment from Rakofsky, but he refused. *Id.* at 2; Patil Aff., Ex. B at 1; Alexander Aff. ¶ 6.

Although all of the events took place in Washington, D.C., including the publication of the articles in question, plaintiffs brought this lawsuit in New York, alleging claims for defamation and improper use of Rakofsky's name. The complaint was subsequently amended to add a number of new defendants, as well as new claims for intentional infliction of emotional distress and intentional interference with a contract. All four claims are asserted against the Post defendants,[4] and all four claims should be dismissed for the reasons set forth below.

ARGUMENT

New York Civil Practice Law and Rules § 3211 authorizes this Court to grant motions to dismiss where a defense is established by documentary evidence, where the complaint fails to state a cause of action, or where the Court lacks personal jurisdiction over the defendant. §§ 3211(a)(1), (7), (8). In evaluating a motion to dismiss, the court must determine whether the

[3] The article was published in the Metro section of *The Washington Post* newspaper on April 10, 2011 under the headline "Attorney's inexperience gives grandmother $7,700 headache."

[4] The Post defendants have not been served with the Amended Complaint but have retrieved a copy from the Court's file. This motion addresses the allegations of the Amended Complaint.

complaint adequately states a viable cause of action. *See Harris v. IG Greenpoint Corp.*, 72 A.D.3d 608, 608–09 (1st Dep't 2010). Where the factual allegations of a complaint are contradicted by documentary evidence, the court looks to whether the plaintiff's claims remain viable, not whether the plaintiff has stated a claim. *See Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001). Furthermore, on a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of establishing that jurisdiction exists. *See Marist College v. Brady*, 84 A.D.3d 1322, 1322–23 (2d Dep't 2011).

New York Courts have long recognized that defending defamation claims places an onerous financial burden on defendants and chills the dissemination of news. *See Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of New York*, 101 A.D.2d 175, 181 (1st Dep't 1984). Thus, courts routinely dismiss meritless defamation claims at an early stage. *See, e.g., Saleh v. N.Y. Post*, 78 A.D.3d 1149, 1152–52 (2d Dep't 2010); *Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, 74 A.D.3d 613, 614 (1st Dep't 2010).

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A. Plaintiffs' Defamation Claim Must Be Dismissed Because the Allegedly Defamatory Statements Are Protected by the Fair Report Privilege.

Under New York law, a defamation action "*cannot be maintained* . . . for the publication of a fair and true report of any judicial proceeding." N.Y. Civ. Rights Law § 74 (emphasis added).[5] The fair report privilege is a liberal standard and is intended to provide broad protection for news reports of judicial proceedings. *See Becher v. Troy Publ'g Co.*, 183 A.D.2d 230, 233 (3d Dep't 1992). A report is fair and true—and thus within the ambit of the statute's protection—so long as it is substantially accurate; literal accuracy is not the standard. *See, e.g.*,

[5] Section 74 provides in full that "[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, or for any heading of the report which is a fair and true headnote of the statement published."

McDonald v. E. Hampton Star, 10 A.D.3d 639, 640 (2d Dep't 2004); *Freeze Right*, 101 A.D.2d at 183; *cf. Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." (internal quotation marks omitted)). In particular, the statute does not require that judicial proceedings be reported "with a lexicographer's precision"; it is enough that the news article be a fair and substantially accurate summary of the proceedings. *See Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 68 (1979) (stating that a fair report of an official proceeding "should not be dissected and analyzed with a lexicographer's precision" or "parsed and dissected on the basis of precise denotative meanings"); Restatement (Second) of Torts § 611, cmt. f ("It is not necessary that [the report] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting."). The touchstone of substantial accuracy is whether a report containing the precise truth would have produced a different effect upon a reader from the report containing the statements that were (allegedly) technically inaccurate. *See Cholowsky v. Civiletti*, 69 A.D.3d 110, 115 (2d Dep't 2009); *Sassower v. N.Y. Times Co.*, 48 A.D.3d 440, 441 (2d Dep't 2008). The applicability of § 74, including the question of whether an article constitutes a fair and true report of a judicial proceeding, is a question of law for the court to decide. *Holy Spirit*, 49 N.Y.2d at 67–68. In doing so, "it is almost always preferable to err on the side of free expression." *Becher*, 183 A.D.2d at 234 (internal quotation marks omitted).

Here, it is undisputed that the April 1 and April 9 articles reported on statements made during a judicial proceeding in the D.C. Superior Court. Plaintiffs contend that several statements in both articles were defamatory. However, each and every one of these statements is consistent with the official record, and thus is protected by the fair report privilege.

First, plaintiffs allege that the April 1 article "misrepresented and misquoted" the trick e-mail that was appended to a court filing and was purportedly sent from Rakofsky's e-mail account. Am. Compl. ¶ 132. One need only compare side-by-side the words of the article and those of the e-mail to dismiss plaintiffs' allegations. The April 1 article reported that the e-mail said "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting." Patil Aff., Ex. B at 1. The e-mail in fact stated "Thanks for helping. 1) Please trick [redacted] (old lady) into admitting: a) she told 2 lawyers that she did not see the shooting and b) she told 2 lawyers she did not provide the Government any information about the shooting.) [sic]." Patil Aff., Ex. E at 1. The April 1 article therefore accurately conveyed the substance of the e-mail—that Rakofsky asked his former investigator to "trick" the individual he referred to as the "old lady" into saying that she did not see the shooting or provide information about the shooting to government lawyers. Plaintiffs themselves even concede that Rakofsky "hastily typed" the e-mail and made an "unfortunate choice of the word 'trick.'"[6] Am. Compl. ¶ 120.

Second, plaintiffs claim that the Post defendants improperly implied that Rakofsky had engaged in conduct that "raises ethical issues." Am. Compl. ¶ 136. No such statement appears anywhere in either article. Notwithstanding that fact, the record clearly indicates that Judge Jackson expressly stated that "[t]here's an e-mail from you to the investigator that you may want to look at Mr. Rakofsky. *It raises ethical issues*." Patil Aff., Ex. D at 7:1–3 (emphasis added).

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[6] Despite this, plaintiffs now suggest that the Post defendants should have realized "instantly" that the e-mail was inaccurate. *See* Am. Compl. ¶ 134. Even if true, that is irrelevant, as the application of the fair report privilege does not take into account the mental state of the publisher. *See, e.g.*, *Branca v. Mayesh*, 101 A.D.2d 872, 873 (2d Dep't 1984) (noting that the privilege extends to "'any person,' whether or not he acts with malice"), *aff'd*, 63 N.Y.2d 994 (1984). Moreover, plaintiffs somehow argue later that the Post defendants could not "possibly have seen such an email" because the e-mail never existed. *See* Am. Compl. ¶ 139. Having conceded that the e-mail was Rakofsky's, Am. Compl. ¶ 135, and that he used an "unfortunate choice" of words, Am. Compl. ¶ 120, it is unclear how or why plaintiffs allege that the e-mail did not exist.

Thus, even if such a statement had appeared in the April 1 article, it would have been a substantially accurate—in fact, a *verbatim*—report of what the Judge said.

Third, plaintiffs challenge the April 1 article's headline, which reported that Judge Jackson "declare[d] [a] mistrial over attorney's competence in murder case." Am. Compl. ¶ 137. It is undisputed, however, that Judge Jackson declared a mistrial, and, in so doing, extensively criticized Rakofsky's performance. Patil Aff., Ex. D at 4:8–5:19. Judge Jackson stated that Rakofsky's performance was "*below what any reasonable person could expect in a murder trial*" and below "*any reasonable standard of competence under the Sixth Amendment*," *id.* at 4:24–5:1, 5:17–19; that Rakofsky "*lacked a good grasp of legal principles and legal procedure*," *id.* at 4:11–12; and that, had the defendant been convicted, *he would have granted a motion for a new trial*, *id.* at 4:15–17 (emphases added). The headline is a perfectly fair and accurate summary of Judge Jackson's comments regarding Rakofsky's performance, including his statement that Rakofsky's representation was below the constitutional minimum standard of competence.[7]

Moreover, Judge Jackson tied his conclusions about Rakofsky's incompetence to his rulings in the case. Specifically, Judge Jackson explicitly stated that he was granting Deaner's request for new counsel and declaring a mistrial, both based on Deaner's waiver of his rights and "*[a]lternatively*" based on a finding of "manifest necessity" because he "believe[d] that [Rakofsky's] performance was below what any reasonable person could expect in a murder trial." *Id.* at 4:22–5:1 (emphasis added). Although the article did not discuss the specific, technical reasons behind Deaner's request for new counsel—namely, the disagreement over

[7] Judge Jackson stated that he would have granted a new trial in the case of a conviction, under D.C. Official Code § 23-110. Patil Aff., Ex. D at 4:15–17. Section 23-110 provides several grounds for the granting of a new trial, including that the conviction was imposed in violation of the Constitution or the laws of the District of Columbia. *See, e.g.*, *McCrimmon v. United States*, 853 A.2d 154, 159 (D.C. 2004) (recognizing ineffective assistance of counsel as a basis for a motion for new trial under § 23-110).

questioning of witnesses—that omission is merely a matter of editorial discretion and in no way alters the fact that Judge Jackson declared a mistrial as a result of Rakofsky's lack of competence in representing Deaner. *See Sassower*, 48 A.D.3d at 441; *see also Tenney v. Press-Republican*, 75 A.D.3d 868, 869 (3d Dep't 2010) (holding that an article was privileged despite the fact that it focused on only one aspect of a lawsuit). Under the fair report privilege codified in § 74, plaintiffs cannot state a claim for defamation against the Post defendants for reporting that fact.[8]

Fourth, plaintiffs allege that the April 1 article's statement that Judge Jackson "allowed the defendant to fire his New York-based attorney" was false and defamatory. Am. Compl. ¶ 138. The record reflects, however, that Judge Jackson "grant[ed] Mr. Deaner's request for new counsel" in part because of Rakofsky's incompetent representation. Patil Aff., Ex. D at 4:22–5:1. Any difference between "grant[ing] Mr. Deaner's request for new counsel" under such circumstances and "allowing" Deaner to "fire" Rakofsky is mere semantics. *See Corporate Training Unltd., Inc. v. NBC*, 981 F. Supp. 112, 120–21 (E.D.N.Y. 1997) (finding a statement that the plaintiff was "forced to leave the military" was substantially accurate when the plaintiff had requested a discharge); *Miller v. Journal-News*, 211 A.D.2d 626, 627 (2d Dep't 1995) (finding an article substantially accurate where it reported a police officer was "suspended" when he was actually placed on administrative leave). The gist of the statement in the article is the

[8] For the same reasons, plaintiffs cannot state a claim relating to the April 9 article's headline that Rakofsky was "removed for inexperience." Am. Compl. ¶ 141; Patil Aff., Ex. C at 1. Specifically, they claim that he was never "removed," and that he withdrew only because of the disagreement between him and Deaner. Am. Compl. ¶ 141. While that may be how plaintiffs perceive it, the court record indicates that Judge Jackson made multiple references to Rakofsky's inexperience in finding him incompetent, and that Judge Jackson granted Deaner's request for new counsel in part on that basis. In particular, Judge Jackson stated that he was "astonished" that Rakofsky purported to represent a criminal defendant in a murder trial when he had never tried a case before, and that Rakofsky was incompetent under the Sixth Amendment, in part because the case "wasn't [Rakofsky's] first murder trial; it was his first trial." Patil Aff., Ex. D at 5:15–16. It is clear from the record that Judge Jackson terminated Rakofsky's representation, finding that allowing him to continue would have been a constitutional violation. Patil Aff., Ex. D at 4:15–17.

same as that of Judge Jackson's statements on the record: Judge Jackson permitted Deaner to seek new counsel to replace Rakofsky.

In summary, a fair reading of the amended complaint indicates that what plaintiffs actually complain of are the statements that Judge Jackson himself made in open court regarding Rakofsky's incompetence. In fact, the amended complaint includes numerous allegations suggesting that Judge Jackson defamed Rakofsky.[9] Plaintiffs of course cannot state a claim against Judge Jackson because statements made by a judge in a judicial proceeding are absolutely privileged. *See Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 171 (1st Dep't 2007). Unfortunately for plaintiffs, so are fair and true reports of those statements.[10]

B. Plaintiffs' Claims for Intentional Infliction of Emotional Distress and Intentional Interference With a Contract Fail Because They Are Derivative of the Defamation Claim.

Plaintiffs contend that the same statements they cite in support of their failed defamation claim also support claims for intentional infliction of emotional distress and intentional interference with a contract. It is well settled that a plaintiff cannot circumvent the limitations on defamation claims by attempting to recast a defamation claim as some other tort. *See Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) ("When additional tort

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[9] For example, plaintiffs allege that Judge Jackson "slandered Rakofsky's knowledge of courtroom procedure," Am. Compl. ¶ 117, that he made his "slanderous and defamatory" statements knowing that others would republish those words, Am. Compl. ¶ 118, that his discussion of the trick e-mail was "improper," Am. Compl. ¶ 132, and that he failed to "reasonably investigate" the truth of the trick e-mail, Am. Compl. ¶ 133. Furthermore, the amended complaint's lengthy recitation of Judge Jackson's rulings during pre-trial proceedings and during the trial appears designed to insinuate that Judge Jackson was biased against Rakofsky, including alleging that Judge Jackson was engaged in a "blatant alliance" with the prosecutor. Am. Compl. ¶ 109 (internal quotation marks omitted).

[10] Plaintiffs' defamation claim fails for other reasons as well, including the fact that the statements of which plaintiffs complain are all true. Falsity is an essential element of any defamation claim, and here, the court records from the *Deaner* case make clear that the *Post* articles were true. *See Masson*, 501 U.S. at 513; *see also, e.g., Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 297 (2d Dep't 1981). Specifically, for the same reasons the statements in the April 1 and April 9 articles constitute fair and true reports of statements made in a judicial proceeding, they constitute substantially true statements as well. Rakofsky sent the trick e-mail, and he was effectively removed as counsel, at the request of his client, because the Judge found him inexperienced and incompetent. In addition to the protections of the fair report privilege and the absence of falsity, the claims brought by the Rakofsky Law Firm fail for the independent reason that none of the statements identified as allegedly defamatory concern the Rakofsky Law Firm.

claims are aimed at controlling the same speech that is the basis of a libel claim, courts should not entertain the additional claims under less stringent standards."); *Komarov v. Advance Magazine Publ'rs, Inc.*, 691 N.Y.S.2d 298, 302 (Sup. Ct. 1999) (dismissing an intentional infliction of emotional distress claim that was based on the same speech as a defamation claim that was dismissed under the fair report privilege); *see also Aequitron Med., Inc. v. CBS, Inc.*, 964 F. Supp. 704, 710 (S.D.N.Y. 1997) (applying the "special rules" for defamation claims to a claim for tortious interference with a contract). Plaintiffs make no attempt to allege facts independent from their defamation claim, and instead incorporate those very same allegations into their other claims. Am. Compl. ¶ 195. Thus, these claims fail for the same reasons the defamation claim fails.

Furthermore, the allegations in the amended complaint do not support either claim. In order to state a claim for intentional infliction of emotional distress, a plaintiff must establish that the defendant engaged in extreme and outrageous conduct, which requires conduct "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." *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 122 (1993) (internal quotation marks omitted). Plaintiffs do not and cannot allege anything approaching that level of conduct. Furthermore, in order to state a claim for intentional interference with a contract, a plaintiff must allege the existence of a valid contract, the defendant's knowledge of that contract, its resulting breach, and damages. *See Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 228 (1st Dep't 1998). Plaintiffs allege only in conclusory terms that all defendants knew that plaintiffs relied on contracts with clients. Am. Compl. ¶¶ 209–12. They do not allege any facts indicating that the Post defendants had any knowledge of the existence of such contracts or that any such contract was breached.

C. Plaintiffs' Claim for Improper Use of Rakofsky's Name for Purposes of Trade Fails Because the Proceedings of a Murder Trial Are Newsworthy.

Next, there is plaintiffs' claim that, by publishing two articles on the conduct of a local murder trial, *The Washington Post* somehow misappropriated Rakofsky's name, in violation of N.Y. Civil Rights Law § 51. Consistent with the First Amendment, such claims are subject to an exception for newsworthy events or matters of public interest. *See, e.g., Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009). Newsworthiness is to be "broadly construed," *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441 (2000) (per curiam), and questions of newsworthiness are left to editorial discretion, *see Finger v. Omni Publ'ns Int'l*, 77 N.Y.2d 138, 143 (1990). Plaintiffs cannot reasonably argue that the proceedings of a murder trial—especially the declaring of a mistrial in such a case—are not newsworthy. Thus, their claim should be dismissed.

D. Plaintiffs' Claims Must Be Dismissed Against the Post Company Because the Post Company Does Not Publish *The Washington Post.*

Finally, there is the separate and independent reason that *all* of plaintiffs' claims against the Post Company should be dismissed. Plaintiffs' claims—whether styled as defamation, intentional infliction of emotional distress, interference with contract, or improper use of Rakofsky's name—are all based on the publication of two articles in *The Washington Post*. The problem for plaintiffs is that the Post Company, which is a holding company, is not the entity that owns, operates, and publishes *The Washington Post* newspaper and website. The newspaper and website are owned and operated by a subsidiary of the Post Company known as WP Company LLC. *See* Maddrey Aff. ¶¶ 3–4; McLaughlin Aff. ¶¶ 3–5. Plaintiffs have alleged no grounds for ignoring the separate corporate existences of these entities. Because the Post

Company played no role in the publication of the April 1 and April 9 articles, plaintiffs' claims against it must be dismissed.[11]

II. PLAINTIFFS' ALLEGATIONS DO NOT SUPPORT THE EXERCISE OF PERSONAL JURISDICTION OVER ALEXANDER AND JENKINS.

Because Alexander and Jenkins are out-of-state defendants, personal jurisdiction must be established under *both* New York's long-arm statute and the Due Process Clause of the Fourteenth Amendment. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244 (2d Cir. 2007). Because plaintiffs' allegations do not support personal jurisdiction under *either* the long-arm statute or the Due Process Clause, the claims against the Post defendants should be dismissed.

A. The New York Long-Arm Statute Does Not Confer Jurisdiction Because Alexander and Jenkins Do Not Transact Business in New York.

New York's long-arm statute explicitly restricts personal jurisdiction in defamation actions to those out-of-state defendants who transact business within the state. N.Y. C.P.L.R. § 302(a)(1); *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). In evaluating whether jurisdiction exists, court assess (1) whether the defendant has conducted sufficient "purposeful activity" to constitute the transaction of business in New York, and (2) whether there is an articulable nexus or substantial relationship between those activities and the claim asserted. *See Best Van Lines*, 490 F.3d at 246. This test is narrowly construed in the context of defamation claims. *Id.* at 248. "[M]aking 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.

Plaintiffs have alleged no facts establishing that Alexander and Jenkins are subject to personal jurisdiction in New York. Alexander and Jenkins are residents of Maryland and

[11] The Post defendants would oppose any attempt by plaintiffs to amend the complaint to include WP Company LLC as a defendant because, for the reasons set forth herein, such an amendment would be futile; the complaint does not state a valid claim for relief. *See Saferstein v. Mideast Sys., Ltd.*, 143 A.D.2d 82, 82 (2d Dep't 1988).

Virginia, respectively. Alexander Aff. ¶ 4; Jenkins Aff. ¶ 4. They do not work in New York and had no material contacts with New York in the preparation and publication of the two articles. Alexander Aff. ¶ 5; Jenkins Aff. ¶ 5. Alexander's only contact with New York consisted of three phone calls to New York residents, Alexander Aff. ¶ 6, which does not rise to a level suggesting the transaction of business in New York by an out-of-state defendant. *See American Radio Ass'n, AFL-CIO v. A.S. Abell Co.*, 296 N.Y.S.2d 21, 22–23 (Sup. Ct. 1968) (finding no jurisdiction over the author of an allegedly defamatory article despite the newspaper's advertising and syndication in New York because the author was based in Maryland and "the acts of publication, of distribution, and of circulation which underlie the alleged grievances occurred in Baltimore"); *cf. Sovik v. Healing Network*, 244 A.D.2d 985, 987 (4th Dep't 1997) (finding jurisdiction where the defendants directly targeted their distribution to the Buffalo area); *Legros v. Irving*, 38 A.D.2d 53, 56 (1st Dep't 1971) (finding jurisdiction where "virtually all" of the preparation for the publication of a book occurred in New York).

The fact that the online versions of the articles were accessible in New York does not change the analysis. Plaintiffs cannot and do not allege that the mere accessibility of *The Washington Post* website in New York confers jurisdiction over Alexander and Jenkins. As courts have recognized, "the posting of defamatory material on a website accessible in New York, does not, without more, constitute 'transact[ing] business' in New York for the purposes of New York's long-arm statute." *Best Van Lines*, 490 F.3d at 250 (alteration in original); *see also Gary Null & Assocs. v. Phillips*, 906 N.Y.S.2d 449, 452 (Supr. Ct. 2010). "Passive" websites like that of *The Washington Post*, which make information available within the forum state, are largely ignored for jurisdictional purposes. *See Best Van Lines*, 490 F.3d at 251–52 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997));

Realuyo v. Villa Abrille, No. 01 Civ.10158(JGK), 2003 WL 21537754, at *7 (S.D.N.Y. July 8, 2003) (holding that a passive website could be ignored for long-arm jurisdiction), *aff'd*, 93 F. App'x 297 (2d Cir. 2004); *Competitive Techs., Inc. v. Pross*, 14 Misc. 3d 1224(A), at *3 (Sup. Ct. 2007). Given the nature of the internet, a contrary rule would render individual defendants subject to jurisdiction anywhere in the world merely for publishing a statement on the internet.

For all of these reasons, Alexander and Jenkins are not subject to long-arm jurisdiction.

B. Plaintiffs Do Not Allege Sufficient Contacts Between Alexander and Jenkins and New York to Support Jurisdiction Under the Due Process Clause.

Because it is clear that Alexander and Jenkins are not within the reach of New York's long-arm statute, there is no reason for this Court to reach the question of whether the exercise of jurisdiction over the Post defendants would comport with the Due Process Clause. But if the Court does reach the question, it is clear that the exercise of personal jurisdiction over the Alexander and Jenkins would run afoul of the Due Process Clause, which protects a party from being forced to appear in a forum with which it has established no meaningful "contacts, ties, or relations." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). To assert jurisdiction over a non-consenting, non-resident defendant, the Due Process Clause requires that the defendant have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (internal quotation marks omitted). Personal jurisdiction must be established over each defendant by the contacts of that particular defendant to the forum state. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

Specific jurisdiction exists when a defendant has limited contacts with the forum state and the cause of action arises from those contacts. *Helicopteros*, 466 U.S. at 414 n.8.[12] Plaintiffs have made no allegations establishing any contacts between Alexander and Jenkins and New York. Nor could they allege any facts particular to Alexander and Jenkins that would support jurisdiction over them. Neither Alexander nor Jenkins is a resident of New York, and neither had any material contacts with New York in the preparation and publication of the articles. Alexander Aff. ¶¶ 4–5; Jenkins Aff. ¶¶ 4–5. The fact that Rakofsky is a New York resident is not, by itself, enough to support jurisdiction where the articles in question concerned events that occurred in Washington, D.C. and were published in the local section of *The Washington Post*. *See Young v. New Haven Advocate*, 315 F.3d 256, 262–64 (4th Cir. 2002) (finding jurisdiction in Virginia absent where the substance of the articles concerned the Connecticut effects of a transfer of Connecticut prisoners to Virginia prisons, despite the fact that the defendants were aware that the plaintiff, a prison warden, lived and worked in Virginia).

For all of these reasons, even if there were jurisdiction under the long-arm statute (and there plainly is not), the exercise of personal jurisdiction over Alexander and Jenkins would be inconsistent with the Due Process Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the Post defendants' motion to dismiss the amended complaint.

Dated: Washington, D.C.
July 20, 2011

[12] A defendant may also be subject to general jurisdiction where it has "continuous and systematic" contacts with the forum state. *Id.* at 416. Plaintiffs have not and cannot allege that Alexander and Jenkins are subject to general jurisdiction in New York.

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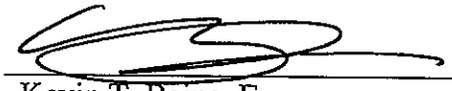
By: 

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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **AFFIDAVIT OF KEITH L. ALEXANDER**

I, Keith L. Alexander, declare under the penalty of perjury under the laws of the State of New York as follows:

1. I am a reporter for *The Washington Post* newspaper.
2. I submit this affidavit in support of the motion to dismiss of The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins. Unless otherwise indicated, all facts set forth in this affidavit are based upon my personal knowledge.
3. I authored the articles entitled "D.C. Superior Court judge declares mistrial over attorney's competence," published April 1, 2011, and "Woman pays $7,700 to grandson's attorney who was later removed for inexperience," published April 9, 2011.
4. Since 2003, I have been a resident of Maryland. I work at the offices of *The Washington Post* in Washington, DC.
5. All my work on the articles referenced in paragraph 3 of this Affidavit took place in Washington, DC. The only contacts I had with New York during the preparation of the articles were phone calls to the Bar of the State of New York, Joseph Rakofsky, and the grandmother of Dontrell Deaner.

6. In the preparation of each article, I offered Joseph Rakofsky multiple opportunities to comment. He refused to comment for either article.

Keith L. Alexander

Subscribe and sworn before me, in my presence, this 15 day of July 20 11, a Notary Public in and for the District of Columbia

Tuesday T. Bell
Notary Public

My commission expires 10/31, 20 15

TUESDAY T. BELL
NOTARY PUBLIC DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES
OCTOBER 31, 2015

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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **AFFIDAVIT OF JENNIFER JENKINS**

I, Jennifer Jenkins, declare under the penalty of perjury under the laws of the State of New York as follows:

1. I am a news researcher for *The Washington Post* newspaper.
2. I submit this affidavit in support of the motion to dismiss of The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins. Unless otherwise indicated, all facts set forth in this affidavit are based upon my personal knowledge.
3. I contributed to the article entitled "D.C. Superior Court judge declares mistrial over attorney's competence," written by Keith L. Alexander.
4. Since May 20, 2011, I have been a resident of the Commonwealth of Virginia. From May 15, 2010 until May 19, 2011, I was a resident of the District of Columbia. I work at the offices of *The Washington Post* in Washington, DC.
5. All of the research I conducted for the article in question was conducted in the District of Columbia. I had no contact with the State of New York in connection with my work on the article.

Jennifer Jenkins

District of Columbia, ss:
Subscribed and sworn to before me, in my presence,
this 18 day of July, 2011
Notary Public, DC
My commission expires 5/14/2012

SHEILA L. VELAZQUEZ
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires May 14, 2012

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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **AFFIDAVIT OF NICOLE M. MADDREY**

I, Nicole M. Maddrey, declare under the penalty of perjury under the laws of the State of New York as follows:

1. I am the Assistant Secretary and Associate General Counsel for The Washington Post Company ("the Post Company").
2. I submit this declaration in support of the motion to dismiss of The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins. Unless otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge.
3. I have read the Affidavit of James A. McLaughlin in this matter and can confirm that the facts set forth therein regarding the Post Company, including its relationship with its subsidiaries, are correct.
4. As of today (and since September 22, 2003), the company named The Washington Post Company is not the publisher of *The Washington Post* newspaper, but a holding company with a number of wholly-owned subsidiaries. One of those subsidiaries, WP Company LLC, owns and operates *The Washington Post* newspaper, as well as the www.washingtonpost.com website.

Nicole M. Maddrey

District of Columbia : SS
Subscribed and Sworn to before me
this 14 day of July, 2011

Anika A. Harden, Notary Public, D.C.
My commission expires October 31, 2013

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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **AFFIDAVIT OF JAMES A. MCLAUGHLIN**

I, James A. McLaughlin, declare under the penalty of perjury under the laws of the State of New York as follows:

1. I am Associate Counsel for WP Company LLC, which does business under the trade name The Washington Post (the "Post").
2. I submit this affidavit in support of the motion to dismiss of The Washington Post Company, Keith L. Alexander, and Jennifer Jenkins. Unless otherwise indicated, all facts set forth in this affidavit are based upon my personal knowledge.
3. Since its formation in September 2003, WP Company LLC has been the corporate entity that publishes *The Washington Post* newspaper and conducts all of its business affairs. Since January 1, 2010, WP Company LLC also owns and operates the newspaper's website (www.washingtonpost.com), which had previously been operated by a different subsidiary of The Washington Post Company. WP Company LLC is a wholly-owned subsidiary of The Washington Post Company.
4. Although WP Company LLC is a wholly-owned subsidiary of a parent company (The Washington Post Company), WP Company LLC operates in reality, not just appearance, as a

distinct and independent company. It has its own directors, officers, employees, and in-house legal staffs; it files its tax returns separately from the parent company, and has its own, separate tax ID numbers; it maintains its own financial accounts, books, and records; it enters into contracts and makes business decisions without the involvement of the parent company; and in all material respects, it conducts itself as an independent business.

5. The day-to-day operations of The Washington Post, including all editorial functions of the newspaper and its website, are not directed by The Washington Post Company. No one employed by The Washington Post Company had any role in the researching, writing, editing, approving or publishing of the articles that are the subject of this lawsuit.

James A. McLaughlin

Subscribe and sworn before me, in my presence, this 15 day of July 2011, a Notary Public in and for the District of Columbia

Tuesday T. Bell
Notary Public

My commission expires 10/31, 2015

TUESDAY T. BELL
NOTARY PUBLIC DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES
OCTOBER 31, 2015

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

Joseph Rakofsky, and Rakofsky Law Firm, P.C., Plaintiffs, v. The Washington Post Company, et al., Defendants.	Index No. 105573/11 Hon. Emily Jane Goodman **AFFIRMATION OF CHETAN PATIL**

CHETAN PATIL, an attorney duly admitted to practice in the State of New York, affirms the following under penalty of perjury:

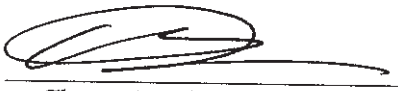
1. I am an Associate of the Firm Williams & Connolly LLP, attorneys for Defendants The Washington Post Company (the "Post Company"), Keith L. Alexander, and Jennifer Jenkins. I make this affirmation in support of their Motion to Dismiss the Amended Complaint. I am familiar with the facts and circumstances set forth herein.
2. Annexed hereto as Exhibit A is a true and correct copy of the Amended Complaint in this action.
3. Annexed hereto as Exhibit B is a true and correct copy of the article published in *The Washington Post* on April 1, 2011 entitled "D.C. Superior Court judge declares mistrial over attorney's competence in murder case."
4. Annexed hereto as Exhibit C is a true and correct copy of the article published in *The Washington Post* on April 9, 2011 entitled "Woman pays $7,700 to grandson's attorney who was later removed for inexperience."

5. Annexed hereto as Exhibit D is a true and correct copy of the transcript of the record of the April 1, 2011 proceedings in *United States v. Deaner* before the Honorable Judge William Jackson in the Superior Court of the District of Columbia, Criminal Division.

6. Annexed hereto as Exhibit E is a true and correct copy of the email sent by Rakofsky to his former investigator that was referenced on the record in the legal proceedings and in the April 1, 2011 and April 9, 2011 articles.

Dated: Washington, D.C.
July 20, 2011

WILLIAMS & CONNOLLY LLP

By: 

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