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

JOSEPH RAKOFSKY, *et ano.*,	:	
Plaintiff,	:	Index No. 105573/2011
– against –	:	
THE WASHINGTON POST COMPANY, *et al.*	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF ALLBRITTON COMMUNICATIONS COMPANY AND TBD.COM'S MOTION TO DISMISS FOR IMPROPER SERVICE & LACK OF PERSONAL JURISDICTION

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Defendants ALLBRITTON COMMUNICATIONS COMPANY ("Allbritton") and TBD.COM (collectively "ACC"), by their attorneys Levine Sullivan Koch & Schulz, LLP, respectfully submit this memorandum of law in support of ACC's motion to dismiss, pursuant to CPLR 3211(a)(8), for improper service and lack of personal jurisdiction.

BACKGROUND

Plaintiffs, a lawyer, Joseph Rakofsky, and his single lawyer law firm, Rakofsky Law Firm, P.C., brought this suit against ACC and approximately 80 other defendants, asserting claims for defamation, intentional infliction of emotional distress, and improper use of Rakofsky's name for the purposes of trade. The claims against ACC are premised on a short aggregated article that appeared on Allbritton's website TBD.com, dated April 2, 2011, and titled "Joseph Rakofsky, lawyer, declared incompetent in D.C. murder mistrial" ("ACC Aggregated Article"). *See* Affidavit of Justin Karp ("Karp Aff.") Ex. 1. The ACC Aggregated Article reports from an article that appeared on *The Washington Post* website concerning Rakofsky's representation of Dontrell Deaner, an individual who was tried in the District of Columbia Superior Court for felony murder in connection with a fatal shooting in Washington D.C. *See* Karp Aff. ¶¶ 4,5 & 7, Ex. 1. Based on *The Washington Post* article, the ACC Aggregated Article reports that the presiding judge "declared a mistrial," noting that "defendant's lawyer did not know simple trial procedures." Karp. Aff. Ex. 1.

ACC moves to dismiss all of plaintiffs' claims. Plaintiffs' attempts to serve process on ACC are invalid, and therefore, personal jurisdiction over ACC was never obtained. In addition, this Court does not have personal jurisdiction over ACC because (1) TBD.com is an unincorporated website not subject to suit, and (2) plaintiffs have not and cannot allege any facts

that establish personal jurisdiction over Allbritton under either New York's "doing business" standard or its long-arm statute.

ARGUMENT

I. IMPROPER SERVICE OF PROCESS

A. Attempted Service of Process on ACC

On or about May 19, 2011, plaintiffs attempted to effect service of process by U.S. certified mail. However, plaintiffs mailed only a copy of the Summons, Amended Summons and Amended Complaint, but failed to include the required acknowledgement of receipt. *See* Affidavit of Jerald Fritz ("Fritz Aff.) ¶ 3. At no time did ACC provide to plaintiffs a signed acknowledgement of receipt. *Id.* ¶ 4.

Also on or about May 19, 2011, on behalf of plaintiffs, a process server from Flashpoint Investigations, Inc. ("Flashpoint") purportedly served the Summons, Amended Summons and Amended Complaint by hand on "Jackie Robinson," identified as a "mail clerk" for Allbritton, at Allbritton's corporate offices in Arlington, Virginia. *See* Fritz Aff. Ex. A (Affidavits of Process Server by Flashpoint dated May 24, 2011).[1]

B. Neither of Plaintiffs' Attempts to Serve ACC with Process Were Valid

Both plaintiffs' attempted service by mail and by personal service were improper. First, CPLR 312-a(a) provides for service by "mail and acknowledgment," which requires that a plaintiff send "by first class mail, postage prepaid, a copy of the summons and complaint ... together with two copies of a statement of service by mail and acknowledgement of receipt," in the prescribed form "with a return envelope, postage prepaid, addressed to the sender." In order

[1] Although plaintiffs purportedly served ACC on or about May 19, 2011, plaintiffs did not file the affidavits of service until Fall 2011.

for such service to be effected, a defendant "must complete the acknowledgement of receipt and mail or deliver one copy of it within thirty (30) days from the date of receipt." CPLR 312-a(b). Failure to enclose the forms precludes effective service under CPLR 312-a. *See Nagy v. John Heuss House Drop in Shelter for* the *Homeless*, 198 A.D.2d 115, 115 (1st Dep't 1993) (where plaintiff failed to enclose requisite statements of service, acknowledgement and postage prepaid return envelope, "[s]ervice was never completed and the action was never properly commenced"). Moreover, a defendant is under no obligation to acknowledge such service. *See, e.g., Patterson v. Balaquiot,* 188 A.D.2d 275, 275 (1st Dep't 1992), and service is not complete unless and until the defendant returns a signed acknowledgement form. *See* CPLR 312-a(b)(1); *Shenko Elec., Inc. v. Hartnett*, 161 A.D.2d 1212, 1213 (4th Dep't 1990) ("[t]he mailing of process pursuant to CPLR 312–a does not effect personal service.... If the acknowledgment of receipt is not mailed or returned to the sender, the sender is required to effect personal service in another manner."); *Ananda Capital Partners, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430 (1st Dep't 2003) (same).

Accordingly, because plaintiffs failed to provide ACC with the acknowledgment of service as required by CPLR 312-a, Fritz Aff. ¶ 3, and because ACC did not return a signed copy of any acknowledgment of service to plaintiffs, *id.* ¶ 4, plaintiffs' attempted service by mail was ineffective.

Plaintiffs' purported attempt at personal service upon ACC was similarly defective. CPLR 311 provides for personal service upon 'any domestic or foreign corporation' by delivering the summons 'to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.' In May 2011, Jacquelyn Robinson was a receptionist for Allbritton, Affidavit of Jacquelyn Robinson

("Robinson Aff.") ¶ 3; Fritz Aff. ¶ 5, and was not an 'authorized agent' within the meaning of CPLR 311. Robinson was not an agent authorized by appointment to receive service, Robinson Aff. ¶ 4; Fritz Aff. ¶ 5, and she would not have informed any person, including a process server, that she was authorized to receive service, Robinson Aff. ¶ 5.

Absent authorization as an agent or an express representation of the same by Robinson, the purported service did not comply with CPLR 311, and the Court lacks personal jurisdiction over ACC. *See, e.g., Estate of Baratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333, 335-36 (W.D.N.Y. 1992) (service on part-time receptionist improper under New York law where receptionist not authorized to accept service for employer and did not tell process server that she was authorized); *Albilia v. Hillcrest Gen. Hosp.*, 124 A.D.2d 499, 499 (1st Dep't 1986) (no personal jurisdiction over corporation because employee on whom summons and complaint served was not "an officer, director, managing or general agent, or cashier or assistant cashier or any other agent authorized by appointment or by law to receive service."); *Colbert v. Int'l Sec. Bureau, Inc.*, 79 A.D.2d 448 (2d Dep't 1981) (defamation plaintiffs did not obtain in personam jurisdiction over corporate defendant by serving clerk employee without supervisory duties or any administrative power to act on behalf of corporation); *Hoffman v. Petrizzi*, 144 A.D.2d 437, 438-39 (2d Dep't 1988) (personal service on corporation insufficient where receptionist merely stated "I will take them," and no evidence she accepted service of process for corporation in past); *Foster v. Piasecki*, 259 A.D.2d 804, 805-06 (3d Dep't 1999) (service upon corporate defendant's receptionist improper where receptionist not authorized to receive process on behalf of corporation, and did not give appearance that she was so authorized); *Gleizer v. Am. Airlines, Inc.*, 30 A.D.3d 376, 376 (2d Dep't 2006) (same).

II. TBD.COM CANNOT BE SUED

TBD.com is an unincorporated website owned and published by Allbritton, and is not a separate legal entity that is subject to suit. Fritz Aff. ¶ 7. As a trade name without any independent legal existence, TBD.com cannot be sued independently of its owner. *See, e.g.*, *Provosty v. Lydia E. Hall Hosp.*, 91 A.D.2d 658, 659 (2d Dep't 1982) (trade name cannot be defendant because it "has no separate jural existence" from its owner), *aff'd*, 59 N.Y. 2d 812 (1983); *Little Shoppe Around the Corner v. Carl*, 80 Misc. 2d 717, 719 (Rockland Cnty. Ct. 1975) ("No action may be brought by, nor may any suit be maintained against, a trade name as an entity. Any such proceeding is a nullity.") (citations omitted). As such, this Court lacks jurisdiction over TBD.com as a defendant. *See Leser v. KarenKooper.com*, 2008 WL 192099, at *2 (Sup. Ct. N.Y. Cnty. Jan. 14, 2008) (dismissing website as defendant because plaintiff alleged no facts showing the site name was "anything but a trade name" and observing that "it is well settled" that a trade name cannot be sued). Accordingly, the claims against TBD.com should be dismissed.

III. NO PERSONAL JURISDICTION OVER ALLBRITTON

Plaintiffs bear the burden of demonstrating the existence of personal jurisdiction. *Sanchez v. Major*, 289 A.D.2d 320, 321 (2d Dep't 2001). Here, the facts are clear that Allbritton's contacts with the State of New York satisfy neither the test for general personal jurisdiction under CPLR 301, nor for long-arm jurisdiction pursuant to CPLR 302.

Under CPLR 301, a foreign corporation is amenable to suit in New York courts only if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted. *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 33-34 (1990). 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.'" *Id.* (citation omitted). "The 'doing-business' rule ... imposes a stringent standard since a corporation which is found amenable to suit thereunder may be sued on causes of action wholly unrelated to acts done in New York." *Bossey ex rel. Bossey v. Camelback Ski Corp.*, 2008 WL 4615680, at *2 (Sup. Ct. Suffolk Cnty. Oct. 20, 2008); *Ball v. Metallurgie Hoboken–Overspelt, S.A.*, 902 F.2d 194, 198-99 (2d Cir. 1990) (same).

Allbritton is a corporation incorporated under the laws of Delaware. Fritz Aff. ¶ 8. Allbritton is not authorized to do business in the State of New York, *id.* ¶ 9, does not own any bank accounts, real property, or other assets in the State of New York, *id.* ¶ 10, does not have any offices or employees in the State of New York, *id.* ¶ 11, and does not pay taxes to the State of New York, *id.* ¶ 12. Allbritton owns and operates seven broadcast television stations -- in Washington, D.C., Harrisburg, Pennsylvania, Lynchburg, Virginia, Charleston, South Carolina, Little Rock, Arkansas, Tulsa, Oklahoma, and Birmingham, Alabama, as well as a cable station in Washington, D.C. None of Allbritton's stations can be viewed in New York. *Id.* ¶ 13. In May 2011 through the present, the *only* business that Allbritton has conducted related in any manner to New York are occasional and incidental contacts with a small number of vendors, programmers, or other third-parties who are New York residents. *Id.* ¶ 14. Accordingly, plaintiffs cannot meet their burden of establishing personal jurisdiction over Allbritton pursuant to CPLR 301. *Landoil*, 77 N.Y.2d at 33-34; *Bossey,* 2008 WL 4615680, at *2 ("Engagement in occasional or casual business in New York does not suffice under CPLR 301.").

Similarly, there is no jurisdiction over Allbritton pursuant to New York's long-arm statute, CPLR 302. As a matter of public policy, New York precludes its courts from exercising long-arm jurisdiction in litigating defamation-based claims against out-of-state defendants. *See, e.g., Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 507 n.5 (2007) (these limitations reflect a

legislative intent to protect the speech rights of nondomiciliaries). The New York legislature thus has specifically declined to authorize long-arm jurisdiction over out-of-state defendants in defamation cases under CPLR 302(a)(2) and (3). These sections authorize a court to exercise personal jurisdiction over a non-domiciliary who, with respect to the specific transaction at issue in the lawsuit:

> 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 act 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.*

CPLR 302(a) (emphases added); *see, e.g.*, *Pontarelli v. Shapero*, 231 A.D.2d 407, 410 (1st Dep't 1996) (jurisdiction over nondomiciliary defendants barred by the "specific language" of CPLR 302(a)(2) & (3)); *Strelsin v. Barrett*, 36 A.D.2d 923, 923 (1st Dep't 1971) (same); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244-45 (2d Cir. 2007).

These CPLR sections also exclude plaintiffs' ancillary claims -- for Intentional Infliction of Emotional Harm, Intentional Interference with a Contract, and Violation of Sections 50 and 51 of the New York Civil Rights laws -- because they are based upon the same allegedly false statements giving rise to the defamation claim. *See, e.g.*, *Cantor Fitzgerald, L.P., v. Peaslee*, 88 F.3d 152, 157 (2d Cir. 1996) (plaintiff's "claims of injurious falsehood and tortious interference with prospective economic advantage" did "not independently establish personal jurisdiction . . . because the entire complaint sounds in defamation"); *Am. Radio Ass'n v. A.S. Abell Co.*, 296 N.Y.S.2d 21, 23 (Sup. Ct. N.Y. Cnty. 1968) ("plaintiffs' attempt to convert the [dismissed claim of] defamation to something else must be rejected as spurious").[2]

[2] Plaintiffs cannot state a claim for intentional infliction of emotional distress for the additional reason that such claims are prohibited where, as here, they are duplicative of a defamation claim. *See, e.g.*,

Nor does jurisdiction over Allbritton exist under CPLR 302(a)(1). To establish jurisdiction under this section, a plaintiff must demonstrate that the defendant transacts "purposeful [business] activities" in New York, and that there is a "substantial relationship" between those transactions and the tort claims alleged. *See Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829 (1988) (finding no jurisdiction where there was no "nexus" between defendants' "purposeful activities" in New York and the defamation action at issue); *Copp v. Ramirez,* 62 A.D.3d 23, 29 (1st Dep't 2009) (no jurisdiction where "the alleged nexus between the out-of-state statements and defendants' activities in New York is too attenuated for the purpose of long-arm jurisdiction"); *Kim v. Dvorak*, 230 A.D.2d 286, 290 (3d Dep't 1997) (dismissing defamation action where defendant had not engaged in purposeful business activities within New York).[3]

Plaintiff does not claim that any of Allbritton's alleged wrongful activity – the reporting and publishing of the ACC Aggregated Article -- occurred in New York, *see* Amended Complaint ¶ 163, and in fact none of Allbritton's actions had any relationship with this State. In April 2011, the reporter who wrote the ACC Aggregated Article, Justin Karp, worked at Allbritton's offices in Arlington, Virginia. Karp Aff. ¶ 3. On or about April 2, 2011, while reviewing local news coverage for stories to aggregate on TBD.com, Karp found on the internet a *Washington Post* article concerning plaintiff Rakofsky. *Id.* ¶ 4. At his desk in Allbritton's Arlington, Virginia offices, Karp read the *Washington Post* article and wrote the ACC

Idema v. Wager, 120 F. Supp. 2d 361, 370-371 (S.D.N.Y. 2000), *aff'd*, 29 F. App'x 676 (2d Cir. 2002); *Ghaly v. Mardiros*, 204 A.D.2d 272, 273 (2d Dep't 1994).

[3] While CPLR 302(a)(1) "does not exclude defamation from its coverage, New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." *Best Van Lines*, 490 F.3d at 248; *see, e.g., SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n,*, 2012 WL 399810, at *5 (N.Y. Feb. 9, 2012) (same).

Aggregated Article with a link to the *Post* article. *Id.* ¶ 5. The ACC Aggregated Article was reviewed by Karp's editors in Arlington, Virginia, then posted on TBD.com from Virginia onto Allbritton's computer server located in Virginia. *Id.* ¶ 6. The ACC Aggregated Article relates to plaintiff Rakofsky, who is identified as a New Jersey-licensed attorney, and his role as defense counsel in a murder mistrial in the District of Columbia Superior Court. *See* Karp Aff. Ex. 1. Thus, none of Allbritton's alleged wrongful conduct occurred in, or had any relation to, New York.

Nor does the fact that ACC's Aggregated Article was published on the internet, and was therefore accessible in New York, provide any basis for jurisdiction here. Internet presence has repeatedly been rejected by New York courts as a basis for jurisdiction over claims for defamation. *See, e.g.*, *SPCA of Upstate N.Y., Inc. v. American Working Collie Ass'n*, 2012 WL 399810, at *4-5 (N.Y. Feb. 9, 2012) (no transaction of business in New York where allegedly defamatory statements posted on a website "were not written in or directed to New York" and "were equally accessible in any other jurisdiction"); *Best Van Lines*, 490 F.3d 239 (no jurisdiction over Iowa resident based on allegedly defamatory statements posted on website concerning New York resident); *Gary Null & Assocs. v. Phillips*, 29 Misc. 3d 245, 248-50 (Sup. Ct. N.Y. Cnty. 2010) (no transaction of business based on "posting of defamatory material on a website accessible in New York" and other alleged conduct); *Henderson v. Phillips*, 2010 WL 2754080 (Sup. Ct. N.Y. Cnty. June 28, 2010) (no personal jurisdiction under CPLR ¶ 302(a)(1) over Virginia resident who posted on website allegedly defamatory statements about New York resident).

Accordingly, this Court cannot exercise personal jurisdiction over defendant Allbritton.

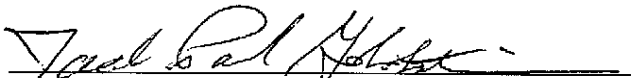
CONCLUSION

For the foregoing reasons, ACC respectfully request an order pursuant to CPLR 3211(a)(8) dismissing the action against defendants Allbritton Communications Company and TBD.com.

Dated: New York, New York
March 13, 2012

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP



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