

Jacob P. Goldstein
LEVINE SULLIVAN KOCH & SCHULZ, LLP
321 W. 44th Street, Suite 510
New York, NY 10036
Tel: (212) 850-6100; Fax: (212) 850-6299

*Attorneys for Defendants
Allbritton Communications Co. and TBD.com*

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

----- X
: JOSEPH RAKOFSKY, *et ano.*, :
: :
: Plaintiff, : Index No. 105573/2011
: :
: - against - : **DEFENDANTS**
: **ALLBRITTON**
: **COMMUNICATIONS**
: **COMPANY AND**
: THE WASHINGTON POST COMPANY, *et al.* : **TBD.COM'S REPLY IN**
: **SUPPORT OF THEIR**
: Defendants. : **MOTION TO DISMISS**
: :
----- X

**DEFENDANTS ALLBRITTON COMMUNICATIONS COMPANY AND
TBD.COM'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

Defendants ALLBRITTON COMMUNICATIONS COMPANY (“Allbritton”) and
TBD.COM, by their attorneys Levine Sullivan Koch & Schulz, LLP, respectfully submit a reply
memorandum of law in support of their motion to dismiss, pursuant to CPLR 3211(a)(8), for
improper service and lack of personal jurisdiction, as follows:

1. Plaintiffs consent to the dismissal of TBD.com on the basis that it is not an entity
subject to suit. Plaintiffs’ Memorandum of Law In Opposition to the Motion of Defendants
Allbritton Communications Company and TBD.com to Dismiss the Amended Complaint
(“Opp.”) at 25-26.

2. Plaintiffs do not dispute that service of process on Allbritton was improper. *See* Opp. at 72. As explained more fully in the Memorandum of Law in Support of Allbritton Communications Company and TBD.com’s Motion to Dismiss for Improper Service & Lack of Personal Jurisdiction (“Allbritton’s Opening Brief”), plaintiffs’ attempted service by mail was ineffective because it lacked an acknowledgement of service. *See* Allbritton’s Opening Brief at 2-3. Similarly, plaintiffs’ attempt at personal service was defective because the Allbritton employee who was served was not an “authorized agent” within the meaning of CPLR 311. *See* Allbritton’s Opening Brief at 3-4.

3. Plaintiffs also essentially concede that the Court does not have personal jurisdiction over Allbritton pursuant to CPLR 301 (general jurisdiction) or under sections 2 or 3 of the state’s long-arm statute, CPLR 302(a)(2) and (3), relying solely on CPLR 302(a)(1) for their jurisdictional claim. Under CPLR 302(a)(1), “jurisdiction over a nondomiciliary exists where (i) a defendant transacted business within the state and (ii) the cause of action arose from the transaction of business.” *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005).¹

4. As plaintiffs acknowledge, jurisdiction pursuant to CPLR 302(a)(1) requires a nexus between the alleged tortious conduct and the defendant’s transaction of business within the State. Opp. at 66-67. Thus, contrary to plaintiffs’ contention, *id.* at 26, Allbritton’s minimal New York business activities described in paragraph 14 of the Affidavit of Jerald Fritz (“occasional and incidental contacts with a small number of vendors, programmers and other

¹To protect against the chilling of free speech, “New York courts construe transact[ing] any business within the state more narrowly in defamation cases than they do in the context of other sorts of litigation.” *SPCA of Upstate New York, Inc. v. Am. Working Collie Ass’n*, 18 N.Y.3d 400, 405 (2012) (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 248 (2d Cir. 2007)).

third parties who are New York residents”) are irrelevant to the jurisdictional analysis since they are unrelated to the alleged defamation.

5. None of Allbritton’s business activities related to the challenged conduct occurred in New York. *See* Allbritton’s Opening Brief at 8-9 & Affidavit of Jason Karp (“Karp Aff.”) ¶¶ 3-6 (article was researched, written, edited, and posted in Virginia).

6. Plaintiffs seek to assert personal jurisdiction over Allbritton, and all of the defendants, based on its posting of the allegedly defamatory article on an internet website accessible, *inter alia*, in New York. Recognizing that posting of defamatory material about a New York resident, without more, does not constitute “transacting business” for purposes of CPLR 302(a)(1), plaintiffs resort to conjecture and creative theories, constructing an alleged conspiracy among the defendants in an attempt to satisfy the “posting plus more” standard. Thus, for example, plaintiffs contend that defendants “built links for each other and visited and then re-visited the websites in the Link Network, all the while posting comments for each other ... [and] copied their respective articles and re-published them on related websites.” *Opp.* at 68. But plaintiffs present no evidence, and there is none, that Allbritton participated in this alleged conspiracy.

7. In analyzing long-arm jurisdiction pursuant to CPLR 302(a)(1) in the internet context, courts assess (1) the extent to which the website’s activities are targeted at New York residents; *see, e.g., SPCA of Upstate NY, Inc. v. Am. Working Collie Ass’n*, 18 N.Y.3d 400, 405 (2012) (no jurisdiction where defamatory statements posted on a website were not directed to New York); and (2) “the level of interactivity and commercial nature of the exchange of information that occurs on the website.” *Grimaldi v. Guinn*, 895 N.Y.S.2d 156, 165 (2d Dep’t 2010) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa.

1997)). A recent decision by this Court is illustrative: in *Deer Consumer Prods. Inc. v. Little*, 938 N.Y.2d 767 (Sup. Ct. N.Y. Cnty. 2012), there was no evidence that the internet postings at issue were “expressly targeted at anyone in New York,” *id.* at 778. The challenged website permitted interaction with its users “via responses to email, questions and comments, while also allowing users to post comments in reply to [defendant’s] published articles and contribute their own articles to the website blog,” *id.* This level of interaction, the Court found, was “insufficient to support a necessary finding that [defendant] purposefully and knowingly interacted with New York residents or otherwise targeted New York, and thus did not constitute the “transaction of business” required by CPLR 302(a)(1). *Id.*

8. Similarly, in the present case, Allbritton’s website reports about activities in the Washington, D.C. area, and is in no manner targeted at New York. *See* Karp Aff. ¶ 3 (describing TBD.com as a “local news website”); <http://www.TBD.com>. And while the website provides for some interactive features similar to those available on most contemporary news sites, *see* <http://www.TBD.com>, these interactions are not the kind of commercial transactions that can potentially give rise to jurisdiction pursuant to CPLR 302(a)(1). *See, e.g., ISI Brands, Inc. v. KCC Int’l, Inc.*, 458 F. Supp. 2d 81, 86 (E.D.N.Y. 2006) (“Internet websites that are not of a commercial nature and do not permit the purchase of products on-line are not sufficient to confer personal jurisdiction pursuant to section 302 (a)(1)”); *Rescuecom Corp. v. Hyams*, 477 F. Supp. 2d 522, 529-30 (N.D.N.Y. 2006) (no section 302(a)(1) jurisdiction where “visitors could register and receive login names and passwords ... could post messages to each other in the message forum [and] could send private communications to each other” because “[t]here is no allegation or showing that the[se] interaction[s] ... had any commercial content or purpose. The website offered nothing for sale.”); *see generally Grimaldi*, 895 N.Y.S.2d at 165-66. Moreover, even if

the interactive features of Allbritton's website could somehow constitute "transact[ing] business within the state," CPLR 302(a)(1), plaintiffs' claims do not "arise from" these interactive features, and therefore cannot meet the statute's nexus requirement. *See Best Van Lines*, 490 F.3d at 253-54.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Allbritton's Opening Brief, plaintiffs' claims against Allbritton and TBD.com should be dismissed.

Dated: June 8, 2012

Respectfully submitted,
LEVINE SULLIVAN KOCH & SCHULZ, LLP


By: Jacob P. Goldstein

321 West 44th Street, Suite 510
New York, New York 10036
(212) 850-6100

*Attorney for Defendants
Allbritton Communications Company and TBD.com*

TO:

Via Email and Fedex:

Matthew H. Goldsmith
Goldsmith & Associates, PLLC
350 Broadway, 10th Floor
New York, NY 10013
(212) 217-1594
mhgoldsmith@mgaplaw.com

Attorneys for Plaintiffs Joseph Rakofsky and Rakofsky Law Firm

Via email, on consent:

Mark A. Weissman
Herzfeld & Rubin, P.C.
125 Broad Street
New York, NY 10014
(212) 471-8500
MWeissman@herzfeld-rubin.com

Attorneys for Defendants Reuters America, LLC and Dan Slater

Eric Turkewitz
The Turkewitz Law Firm
228 East 45th Street, 17th Floor
New York, NY 10017
(212) 983-5900
Eric@TurkewitzLaw.com

Pro se and Attorney for Defendants Scott Greenfield, Simple Justice NY, LLC, blog.simplejustice.us, Kravet & Vogel, LLP, Carolyn Elefant, MyShingle.com, Mark Bennett, Bennett And Bennett, Eric L. Mayer, Eric L. Mayer, Attorney-at-Law, Nathaniel Burney, The Burney Law Firm, LLC, Josh King, Avvo, Inc., Jeff Gamso, George M. Wallace, Wallace, Brown & Schwartz, "Tarrant84", Banned Ventures, Banni, Brian L. Tannebaum, Tannebaum Weiss, Colin Samuels, Accela, Inc., Crime and Federalism, John Doe #1, Antonin I. Pribetic, Steinberg Morton, Elie Mystel, AboveTheLaw.com, Breaking Media, LLC

David Brickman
1664 Western Avenue
Albany, NY 12203
(518) 464-6464
davidbrickman@verizon.net

Attorney for Defendants Koehler Law, Jaimson Koehler, Maxwell S. Kennerly, The Beasley Firm, LLC, and Mirriam Seddiq

Thomas A. Catalano
Lester Schwab Katz & Dwyer, LLP
120 Broadway, 38th Floor
New York, NY 10271
(212) 964-6611
tcatalano@lskdnylaw.com

Attorneys for Defendants Law Offices of Michael T. Doudna and Michael T. Doudna

Chetan Patil
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5811
cpatil@wc.com

Attorneys for Defendants The Washington Post Company, Keith Alexander, and Jennifer Jenkins

John H. Teschner
Attorney at Law
132 Nassau Street, Suite 900
New York, NY 10038
(212) 964-8822
jhtesq@yahoo.com

Attorneys for Defendants Mace J. Yampolsky and Mace J. Yampolsky Ltd.

Jennifer L. Jones
Proskauer
Eleven Times Square
New York, NY 10036-8299
(212) 969-3704
jljones@proskauer.com

Attorneys for Defendants American Bar Association, ABAJournal.com, Debra Cassens Weiss, and Sarah Randag

James Rosenfeld
Davis Wright Tremaine LLP
1633 Broadway, 27th Floor
New York, NY 10019
(212) 603-6455
JamesRosenfeld@dwt.com

Attorney for Defendants The Law Office of Jeanne O'Halleran, LLC and Jeanne O'Halleran

Robert Balin
Davis Wright Tremaine, LLP
1633 Broadway, 27th Floor
New York, NY 10019
(212) 603-6440
robbalin@dwt.com

Attorney for Defendants Creative Loafing Media, Washington City Paper and Rend Smith

Edward F. Westfield
Edward F. Westfield, P.C.
274 Madison Avenue, Suite 161
New York, NY 10016
(212) 532-6625
efw@efwpc.com

Attorney for Gamso, Helmick & Hoolahan