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

--- X

JOSEPH RAKOFSKY and RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,

Index No. 105573/2011

-against-

Motion Seq. 6

THE WASHINGTON POST COMPANY, et al.,

Defendants.

--- X

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION
BY REUTERS AMERICA, LLC AND DAN SLATER
TO DISMISS THE COMPLAINT AND
IN OPPOSITION TO PLAINTIFFS' CROSS MOTION
TO SERVE AN AMENDED COMPLAINT

HERZFELD & RUBIN, P.C.
125 Broad Street
New York, New York 10004
Telephone: (212) 471-8500
Facsimile: (212) 344-3333

Attorneys for Defendants
Reuters America, LLC and Dan Slater

June 7, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 2

ARGUMENT 4

I. The Reuters Report Is Absolutely Privileged Under the New York Fair Report Statute 4

II. Reuters Was Entitled To Rely On and Republish a Summary of The Washington Post Report 9

III. The Complaint Fails to State a Claim for Commercial Misappropriation 11

IV. The Reuters Report Was Not "Of and Concerning" Rakofsky Law Firm, P.C. 12

V. Reuters Was Not Served with the Amended Complaint and Did Not Receive Notice of Rakofsky's Claims for Intentional Infliction of Emotional Distress and Tortious Interference with Contract Prior to Service of its Motion to Dismiss 12

VI. Plaintiffs' Motion to Serve an Amended Complaint Should be Denied 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Bement v. N.Y.P. Holdings, 307 A.D. 2d 86 (1st Dep't 2003) 11, 16

Burns Jackson Miller Summit & Spitzer v Lindner, 59 N.Y.2d 314 (1983) 18

Carvel Corp. v Noonan, 3 N.Y. 3d 182 (2004) 15, 18

Chapadeuau v. Utica Observer Dispatch, 38 N.Y.2d 196 (1975) 10, 15

Downtown Women's Center, Inc. v. Carron, 237 A.D.2d 209 (1st Dep't 1997) 17

Emergency Enclosures, Inc. v. National Fire Adj Co., Inc., 68 A.D.3d 1658 (4th Dep't 2009) 18, 19

Freihofer v. Hearst Corp., 65 N.Y.2d 135 (1985) 15, 18

Glendora v. Gannett Suburban Newspapers, 201 A.D. 2d 620 (2d Dep't 1994) 8

Gunduz v. New York Post Co., Inc., 188 A.D.2d 294 (1st Dep't 1992) 7

Gurda v. Orange County Publications Divisions of Ottaway Newspapers, Inc., 56 N.Y.2d 705 (1982) 6

Henkin v. News Syndicate Co., Inc., 27 Misc. 2d 987 (Sup. Ct. N.Y. County 1960) (citing Drug Research Corp. v. Curtis Pub. Co., 7 N.Y.2d 435 (1960)) 18

Hirschfeld v. Daily News, L.P., 269 A.D.2d 248 (1st Dep't 2000) 15

Holy Spirit Assoc. for the Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63 (1979) 5, 6

Howell v. New York Post Co., 81 N.Y.2d 115 (1993) 16

Idema v. Wager, 120 F. Supp. 2d 361 (S.D.N.Y. 2000) 15

Jacobs v. Continuum Health Partners, Inc., 7, A.D.3d 312 (1st Dep't 2004) 18

Jebran v. LaSalle Bus. Credit, LLC, 33 A.D.3d 424 (1st Dep't 2006) 19

Kaplansky v. Kaplansky, 212 A.D.2d 667 (2d Dep't 1995) 14

Karaduman v. Newsday, 51 N.Y.2d 530 (1980) 9, 10

Klig v. Harper's Magazine Foundation, No. 60089/10, 2011 WL 1768878 7

Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250 (S.D.N.Y. 1995) 17

Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 (1996) 17

Lincoln First Bank v. Siegel, 60 A.D.2d 270 (4th Dep't 1977) 19

Messenger v. Gruner Jahr Printing & Publishing, 94 N.Y. 2d 436 (2000) 11

Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293 (1983). 16

Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, No. 107847/09, 2010 NY Slip Op 51093U, 2010 WL 2519631 (Sup. Ct. N.Y. County May 28, 2010) 15, 19

Rappaport v. VV Publishing Corp., 223 A.D.2d 515 (1st Dep't 1996) 14

Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437 (1906) 18

Rivera v. NYP Holdings, Inc., No. 114858/06, 2007 WL 2284607 (Sup. Ct. N.Y. Co. Aug. 2, 2007) 9, 10

Saleh v. New York Post, 78 A.D. 3d 1149 (2d Dep't 2010) 8

Sarwer v. Conde Nast Publications, Inc., 237 A.D.2d 191 (1st Dep't 1997) 16

Sermidi v. Battistotti, 273 A.D.2d 66 (1st Dep't 2000) 15

Stern v. Burkle, No. 103916/07, 2008 NY Slip Op 51183U, 36 Media L. Rep. 2205, 2008 WL 2420907 (Sup. Ct. N.Y. County June 16, 2008) 15, 19

Test Masters Educational Services, Inc. v. NYP Holdings, Inc. 603 F. Supp. 2d 584 (S.D.N.Y 2009) 7

Themed Rests., Inc. v. Zagat Survey, LLC, 21 A.D.3d 826 (1st Dep't 2005) 15

Triano v. Gannett Satellite Information Network, Inc., 2010 WL 3932334, *6 (S.D.N.Y. Sep. 29, 2010) 16

Winner Intern. v. Kryptonite Corp.,1996 WL 84476, *4 (S.D.N.Y Feb. 27, 1996) 18

Statutes

C.P.L.R. 3025(b) 14

C.P.L.R. 3211(a)(1) 2

C.P.L.R. 3211(a)(7) 2

C.P.L.R. 5704(a) 13

New York Civil Rights Law, Section 50 11

New York Civil Rights Law, Section 51 11

New York Civil Rights Law, Section 74 .... 3, 4, 5, 6, 7, 8, 15

U.S. Constitution, First Amendment 6, 15

U.S. Constitution, Sixth Amendment 5

Other Authorities

N.Y. Civ. Rights § 74 (McKinney's 2011) 7

Defendants Reuters America, LLC and Dan Slater (collectively herein, "Reuters"), by their attorneys, Herzfeld & Rubin P.C., hereby submit this reply memorandum of law in further support of their motion pursuant to C.P.L.R. 3211(a)(1) and (7) to dismiss the Complaint in its entirety as against Reuters, and in opposition to the cross-motion by Plaintiffs Joseph Rakofsky and Rakofsky Law Firm, P.C. ("collectively, "Rakofsky" or "Plaintiffs") to serve the second amended complaint.

PRELIMINARY STATEMENT

Plaintiffs' opposition to Reuters' motion to dismiss only confirms that all of Rakofsky's claims against Reuters should be dismissed. In his opposition, Rakofsky attempts to lump all defendants together in the hopes of creating the false appearance that there is an inkling of evidence that Reuters played some role in a purported alleged concerted effort to attack or injure him. Yet, the allegations in the Complaint, as well as in the proposed amended complaint, reveal clearly that all of Rakofsky's claims against Reuters are based solely on Reuters' publication, on April 4, 2011, of a single, succinct summary of the events which occurred on April 1, 2011 in the murder trial of Mr. Deaner — a summary based exclusively on reporting from the Washington Post. There are no facts alleged in the Complaint or in the proposed amended complaint that suggest anything other than the fact that Reuters had prepared a fair and substantially accurate news report, in the normal course of its reporting business, concerning the proceedings of a Washington D.C. murder trial, an item of indisputable public interest.

In an attempt to rescue his deficient claims against Reuters, Rakofsky nitpicks about alleged minor inaccuracies in Reuters' report, and argues about the technical meaning of the words used by Judge Jackson in the DC proceedings, and by Reuters in the headline and the body of the piece. However, as the authorities cited in Reuters' initial moving papers make

clear, the law simply does not require the type of precision that Rakofsky would hope to impose upon news reporters. The absolute protection given by Section 74 of New York Civil Rights Law requires only that a report be "substantially accurate." Rakofsky offers utterly no response to these authorities in his opposition papers. Nor does Rakofsky even attempt to respond to the Affidavit submitted by the Reuters' reporter Dan Slater, which made clear that the Reuters Report was based exclusively on the Washington Post reporting and is, therefore, protected under New York's common law "wire service defense." In short, Rakofsky's claims against Reuters should be dismissed.

In addition, Rakofsky's cross motion to serve an amended pleading and to assert additional claims against Reuters should be denied, and his claims dismissed with prejudice. Amendment of the complaint is futile because all of the proposed new claims rest upon Reuters' publication of the same, single news report, seek redress for the same reputational damages, and are equally as deficient, as Rakofsky's defamation claim. Moreover, while filled with conclusory allegations of wrongdoing and generalities, the proposed amended complaint alleges no facts concerning Reuters from which it may be inferred that Rakofsky has any cause of action against Reuters. Nor does Rakofsky adequately allege special damages.

For these reasons, and for the additional reasons set forth below, the complaint should be dismissed, with prejudice, as against Reuters and Rakofsky's cross motion to amend the complaint should be denied.

ARGUMENT

I.

The Reuters Report Is Absolutely Privileged Under the New York Fair Report Statute

In its moving papers, Reuters demonstrated that the Reuters Report is absolutely privileged under Section 74 of New York Civil Rights Law ("Section 74") as a "fair and true" report on a judicial proceeding. (Reuters Memo at 12 to 23).[1] As demonstrated in Reuters' moving papers, the Reuters Report was "substantially accurate" in spite of alleged minor errors, and that is all that is required for Reuters to be immune from liability under Section 74. Notably, in his opposition papers, Rakofsky does not cite a single legal authority in support of his position that the Reuters Reports is not protected by Section 74 (Opp. 40 -53) and makes no effort whatsoever to address or distinguish the numerous authorities cited by Reuters in its moving papers (Reuters Memo at 12 to 22).

Rakofsky asserts that his defamation claim against Reuters is limited to two parts of the Reuters Report. First, Rakofsky claims that Reuters' statement that Judge Jackson "declared a mistrial in [the Deaner] case on Friday, April 1, 2011 after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience" is not protected by Section 74. (Opp. at 40). Reuters, however, demonstrated in its initial moving papers why this statement specifically is protected by Section 74 and is otherwise not actionable. <u>See</u> Reuters Memo at 19 to 22.

Rather than addressing the clear legal authorities cited by Reuters, Rakofsky instead nitpicks about minor inaccuracies in the report and argues about the technical meanings of the words used by Judge Jackson and by Reuters. Rakofsky first quibbles with term "mistrial"

---

[1] Reuters' Memorandum of Law in Support of its Motion to Dismiss is cited to herein as "Reuters Memo at __." "Plaintiff's Memorandum of Law in Opposition to the Motion of Defendants Reuters America, LLC and Dan Slater to Dismiss the Complaint" is cited to herein as "Opp. at __." The exhibits attached to that Memorandum of Law (and/or to Mr. Rakofsky's May 15, 2012 affidavit accompanying same) will be cited to as "Opp. Ex. __."

claiming it was never actually used by Judge Jackson (Opp. at 43) even though Judge Jackson "did state on the record that he was granting a motion for a new trial." (Opp. at 43.) Rakofsky then disputes that he was literally "thrown off the case" citing to his claim that the supposed impetus for Judge Jackson's ruling was Rakofsky's motion to withdraw along with Mr. Deaner's consent, and not Judge Jackson's supposedly "hypothetical" statement that Mr. Rakofsky's performance fell below that which is expected under the Sixth Amendment.[2] (Opp. at 45-52). Rakofsky also quarrels with the word "inexperience," itself, claiming that it could not be the basis for a mistrial under the Sixth Amendment. (Opp. at 46).

Reuters denies that there were any inaccuracies in the report. But, even if the report did contain the minor inaccuracies identified by Rakofsky, none of those inaccuracies change the substance or gist of the report, nor the alleged defamatory "sting." As shown in Reuters' moving papers, to be protected by Section 74, the report need only be "substantially accurate." Moreover, the level of precision demanded by Rakofsky here cannot be reconciled with the New York Court of Appeal's liberal construction of Section 74 in Holy Spirit Assoc. for the Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 67 (1979), which held:

> [w]hen determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and

[2] Rakofsky implausibly speculates that Judge Jackson's critical remarks about Mr. Rakofsky's performance might have been directed not to him, but to his local counsel, Mr. Grisby even though Mr. Rakofsky was lead defense counsel at trial. (Opp. at 48). Rakofsky's position cannot be reconciled with the words used by Judge Jackson at the April 1, 2011 proceeding: "*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." (Weissman Aff., Ex. B) (emphasis added). Judge Jackson's critical remarks were clearly referring to Rakofsky, and directed to Mr. Grisby only to the extent he was "complicit."

> dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used.

Holy Spirit, 49 N.Y.2d at 68. See also Gurda v. Orange County Publications Divisions of Ottaway Newspapers, Inc., 56 N.Y.2d 705 (1982) (Under Section 74 and First Amendment principles, news reporters cannot be held to a standard of strict accountability for the use of legal terms of art in a way that is not precisely or technically correct by every possible definition.) Therefore, Plaintiffs cannot state a claim for defamation based on the statement that Judge Jackson "threw Rakofsky off the case for inexperience."

Second, Rakofsky claims in his opposition that the headline "Young and unethical" should not be protected by Section 74 (Opp. at 41-42). It should be noted that, although Plaintiffs identified the headline "Young and Unethical" in their Complaint (¶ 177), Plaintiffs did not plead that the headline itself is false or libelous. Even in Plaintiffs' proposed second amended complaint, Plaintiffs do not claim that the headline "Young and Unethical" is false and libelous. (See "Twenty-Fifth Cause of Action," in proposed SAC ¶¶ 424-433). Rakofsky challenges the headline of the Reuters Report for the first and only time in his opposition to Reuters' motion to dismiss. Rakofsky's position is not only inconsistent with his Complaint and proposed second amended complaint, but is also inconsistent with position taken by Rakofsky in this action. For example, Rakofsky specifically asserts that this action is not a "battle for the Court's determination of either [Mr. Rakofsky's] ethics or competence." (See Rakofsky's Opposition to Turkewitz Motion at 44-45). Rakofsky essentially admits that the term "unethical" is incapable of being proven false. Yet, the falsity of the term "unethical" as applied to Mr. Rakofsky is precisely what Plaintiffs would have to prove in order to have a viable claim against Reuters for this headline.

Even if Plaintiffs had alleged that the headline of the Reuters Report was defamatory, the headline is nonetheless absolutely privileged under Section 74, along with the article which it precedes. Section 74 specifically provides 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*." N.Y. Civ. Rights § 74 (McKinney's 2011) (emphasis added). To be privileged under Section 74, an article's headline need only be a "fair index" of the material included in the article. See N.Y. Civ. Rights L. § 74; Test Masters Educational Services, Inc. v. NYP Holdings, Inc. 603 F. Supp. 2d 584, 589 (S.D.N.Y 2009) (use of word "scam" in headline was fair index of "substantially accurate" report on official investigation by consumer protections board); Gunduz v. New York Post Co., Inc., 188 A.D.2d 294, 294 (1st Dep't 1992) (use of headline "public enemy No. 1" a fair index of article stating that plaintiff had received more summonses and violations than any other cab driver in the city); See also Klig v. Harper's Magazine Foundation, No. 60089/10, 2011 WL 1768878.

Moreover, a publisher "need not choose the most delicate word available in constructing its headline; it is permitted some drama in *grabbing its reader's attention*, so long as the headline remains a fair index of what is accurately reported below." Test Masters, 603 F. Supp. 2d at 589 (emphasis added). Thus, despite Plaintiffs complaints about the supposed "attention-grabbing" language used by Reuters in the headline (Opp. at 30-31), this type of "attention-grabbing" headline by news publishers such as Reuters is precisely what the law permits. Id.

Here, the headline: "Young and Unethical" is a fair index of the information about Mr. Rakofsky contained in the report, as well as Judge Jackson's on-the-record statements that were

summarized within the Reuters Report. The suggestion that Mr. Rakofsky is "unethical," is a fair index of the statement in the Reuters Report that Judge Jackson was angered by Rakofsky's "alleged disregard of ethics" and, as specifically demonstrated in Reuters initial moving papers (Reuters Memo 18 to 19), is itself a substantially accurate account of the proceedings before Judge Jackson on April 1, 2011. Judge Jackson specifically used the phrase "ethical issues" in addressing to Mr. Rakofsky, the email from Mr. Rakofsky to his investigator in which Rakofsky suggests "tricking" a witness. Rakofsky does not deny using the word "trick," nor can he. Whether Mr. Rakofsky is actually "unethical" is irrelevant since Judge Jackson used those words "ethical issues" and Mr. Rakofsky used the word "trick" referred to in the Reuters report. Therefore, under Section 74, there can be no claim for libel based on the headline.

Rakofsky further insists in his opposition that he is not a public figure. (Opp. at 36-37). This argument is baffling, however since Reuters did not argue that Mr. Rakofsky is a public figure, nor did it need to for the purposes of its motion to dismiss. The unqualified immunity provided under Section 74 applies to any fair and substantially accurate report on any judicial proceeding, regardless of whether the subject is a public or private figure. Indeed, the privilege afforded by Section 74 is "absolute" and "is not defeated by the presence of malice or bad faith." Glendora v. Gannett Suburban Newspapers, 201 A.D. 2d 620, 620 (2d Dep't 1994); see also Saleh v. New York Post, 78 A.D. 3d 1149, 1151 (2d Dep't 2010). Rakofsky's suggestion that Reuters somehow had an improper motivation to "sell papers" is thus also irrelevant. Similarly, the "wire service" defense does not depend on the status of the plaintiff as a public or private figure. The claims against Reuters should be dismissed regardless of Mr. Rakofsky's status.

II.

<u>Reuters Was Entitled To Rely On and Republish a Summary of The Washington Post Report</u>

In its opening papers, Reuters demonstrated that Reuters was entitled to rely on, and could not be liable for publishing a summary of, the Washington Post article under <u>Karaduman</u> and its progeny, because there is no allegation or evidence that Reuters had a reason to doubt the veracity of the Washington Post's reporting. In their opposition to Reuters' motion, Plaintiffs barely address Reuters' "wire service" defense at all, making mention it only in the "Summary of Argument" section of their 56-page memorandum of law. (Plaintiffs Opp. at 33-35). Significantly, Plaintiffs cite to, but make no effort to distinguish, the cases cited by Reuters, including the <u>Rivera</u> case which, as Reuters demonstrated, is "on all fours" with this case. <u>See</u> <u>Rivera v. NYP Holdings, Inc.</u>, No. 114858/06, 2007 WL 2284607 (Sup. Ct. N.Y. Co. Aug. 2, 2007). Furthermore, Plaintiffs do not dispute that determination of the applicability of the wire service defense is appropriate on a motion to dismiss based on the pleadings.

In addition, Plaintiffs offer utterly no response to the affidavit submitted by the former Reuters reporter, Dan Slater, who stated unequivocally that he relied exclusively on the Washington Post's reporting in preparing the Reuters Report, had no reason to doubt the veracity of such reporting, and that he bore Plaintiffs no personal malice or ill-will. Thus, there is no factual allegation nor evidence in the record contradicting Mr. Slater's sworn statement. Moreover, in Plaintiffs' opposition to the motions by other defendants, Plaintiffs specifically concede that the Washington Post is an established, reputable news agency upon which other reporters are entitled to rely. <u>See, e.g.,</u> Plaintiffs' Memo of Law in Opposition to ABA Motion to Dismiss at 29 ("plaintiffs realize that the reputation enjoyed by the [Washington] Post over a long period of time may have given the ABA a basis for reliance upon its reporting reliability, as

that of the New York Post did in *Rivera v. NYP Holdings., Inc. . . . .*") Under Karaduman v. Newsday, 51 N.Y.2d 530, 550 (1980) and First Amendment principles as applied by New York courts, See Chapadeuau v. Utica Observer Dispatch, 38 N.Y.2d 196, 199 (1975)[3], the fact that the Washington Post's story may have contained inaccuracies is irrelevant unless Plaintiffs can show that Reuters and Slater, themselves had or should have had substantial reasons to question the accuracy of the Washington Post reporting. Plaintiffs do not and cannot make such a showing.

Plaintiffs' only response to Reuters' wire service defense is Plaintiffs' claim that the Reuters Report was an "embellishment" rather than a summary of the Washington Post story – a claim that is belied by the obvious brevity of the Reuters Report and especially when viewed in the context of the other stories published alongside the Reuters Report on its news-aggregator webpage. Indeed, Plaintiffs can point to no element of the Reuters Report that cannot readily be linked to the original Washington Post story. Furthermore, to the extent, as Plaintiffs suggest, the Reuters Report contained "hyperbolic" language or minor errors in detail, the language used to summarize the Washington Post story did not alter the substance or meaning of the Reuters Report, nor the alleged defamatory sting. Thus, under the principles set forth in Karaduman and its progeny, neither Reuters nor Slater can be held liable for summarizing the contents of the Washington Post news report. The libel claims against Reuters and Slater should therefore be dismissed.

[3] Under New York law, a party cannot be held liable for publication of a news story "of legitimate public interest and concern" unless it is shown, at a minimum, that the party "acted in a *grossly irresponsible* manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeuau, 38 N.Y.2d at 199 (emphasis added).

III.

The Complaint Fails to State a Claim for Commercial Misappropriation

In its moving papers, Reuters demonstrated that Rakofsky could not state a claim against Reuters for commercial misappropriation under Sections 50 and 51 of the New York Civil Rights Law based on the Reuters news report because Sections 50 and 51 "do not apply to reports of news-worthy events or matters of public interest." Messenger v. Gruner Jahr Printing & Publishing, 94 N.Y. 2d 436, 441 (2000) (Reuters Memo at 26 to 28). As shown, whether an item is newsworthy depends "solely on the content of the article" – it is irrelevant to Sections 50 and 51 that a publisher had motivation to increase circulation and to increase profits. Messenger, 94 N.Y. at 442. Where a plaintiff's likeness is used in a "newsworthy" article, no claim lies under Sections 50 and 51 unless there is no "real relationship between the article and the [likeness]" or the article is merely an "advertisement in disguise." Messenger, 94 N.Y. at 444; Bement v. N.Y.P. Holdings, 307 A.D. 2d 86, 90 (1st Dep't 2003).

In Rakofsky's opposition, he admits that the Reuters Report is newsworthy, stating "to be sure, the events that led to the mistrial of Mr. Deaner are plainly matters of public interest." (Opp. at 54). Rakofsky questions vaguely the newsworthiness of "details of life of a young and newly-admitted lawyer" and "photographs of members of his family on his Facebook or MySpace social networking page," but there are no allegations that Reuters posted any details about Mr. Rakofsky's life, nor used or published photographs. Since Rakofsky admits that the Reuters Report is newsworthy, and cannot allege that there is no "real relationship" between his name and the Reuters Report, and cannot allege that the Reuters Report is an "advertisement in disguise," Rakofsky's claims against Reuters under Section 50 and 51 should be dismissed, with prejudice and without leave to replead.

IV.

The Reuters Report Was Not "Of and Concerning" Rakofsky Law Firm, P.C.

In its initial moving papers, Reuters demonstrated that the Complaint failed to allege that the Reuters Report was "of and concerning" Plaintiff Rakofsky Law Firm, P.C. ("RLF"). (Reuters Memo at 28). In their opposition papers, Plaintiffs offer no response. Moreover, even Plaintiffs' proposed Second Amended Complaint does not (because it cannot) allege that the Reuters Report was "of and concerning" RLF. Therefore, all of RLF's claims against Reuters should be dismissed.

V.

Reuters Was Not Served with the Amended Complaint and Did Not Receive Notice of Rakofsky's Claims for Intentional Infliction of Emotional Distress and Tortious Interference with Contract Prior to Service of its Motion to Dismiss

In his opposition, Rakofsky argues that Reuters failed to respond to, and thereby "admitted" Rakofsky's entitlement to relief as to the additional causes of action for "Intentional Infliction of Emotional Distress" and "Tortious Interference with Business Contracts" that were apparently asserted in Rakofsky's "Amended Complaint." (Opp. at 35) This claim is disingenuous since Rakofsky is well-aware that he never served Reuters with the "Amended Complaint" nor even made Reuters aware of its existence until after Reuters served its motion to dismiss. According to Rakofsky, the Amended Complaint was dated, and filed on, May 16, 2011. (Opp. at 29). On or about May 12, 2011, a process server delivered a package containing the summons and ***original*** complaint in this action, to a receptionist at Reuters' offices at Three Times Square.[4] On June 22, 2011, after having stipulated with Rakofsky's counsel to a brief extension of time to respond to the complaint, Reuters served its motion to dismiss the claims in the original Complaint completely unaware (and uninformed by Rakofsky) that an Amended

[4] Dan Slater was never served with the original complaint, let alone the amended complaint.

Complaint had even been filed. Indeed, the Affidavit of Service, upon which Rakofsky relies (Rakofsky Aff, Ex. 38) purporting to show service on Reuters of amended pleadings, is false on its face. As noted, the "Amended Complaint" did not exist until May 16, 2011. Yet, the affidavit of service states that the affiant served Reuters with an "Amended Summons" and "Amended Complaint" on May 12, 2011, which is impossible, since the Amended Complaint did not yet exist.

Even more startling is that Rakofsky was made expressly aware of this fact no later than January 27, 2012, when Reuters raised the issue in its opposition to Rakofsky's CPLR 5704(a) Application in the Appellate Division. Now, while fully aware that the affidavit of service was materially false, and fully aware that he never, in fact, served Reuters with any Amended Complaint (even to this day), he now disingenuously argues that Reuters somehow failed to oppose his additional causes of action in the Amended Complaint, and ***relies*** on that very same false affidavit of service. It is one thing for Rakofsky to play fast and loose with procedures and rules, it is quite another to then attempt to use his own noncompliance as a sword against his adversaries. Respectfully, this court should reject these practices just as Judge Jackson did in the Deaner trial. In any event, since Rakofsky has now moved to amend his complaint, Reuters addresses further below, in its opposition to Rakofsky's cross motion, all of Rakofsky's new proposed causes of action against Reuters, including Rakofsky's claim for Intentional Infliction of Emotional Distress and Tortious Interference. As will be shown, all of Rakofsky's additional proposed claims against Reuters are deficient and, therefore, any amendment of the complaint would be futile.

VI.

Plaintiffs' Motion to Serve an Amended Complaint Should be Denied

Plaintiffs' cross motion to serve a "second amended complaint" ("SAC") should be denied because Rakofsky's claims are completely devoid of merit as a matter of law, and any amendment of the complaint is futile. Plaintiffs do not and cannot state any cause of action against Reuters and Plaintiffs failed adequately to plead the elements of Plaintiffs' proposed new claims. As noted *supra* Reuters was not served with any "amended complaint." Thus, the new claims asserted in the proposed second amended complaint against Reuters consist of: intentional infliction of emotional distress (SAC ¶514), tortious interference with a contract (SAC ¶¶535-549) tortious interference with prospective economic advantage (SAC ¶¶562-576), injurious falsehood (SAC ¶¶ 961-976), "Negligence" (SAC ¶¶ 1189-1201) and Prima Facie Tort (SAC ¶¶1202-1218).

While leave to amend under CPLR 3025(b) "shall be freely given upon such terms as may be just," leave should be denied if the proposed amendment is "patently lacking in merit" or its lack of merit is "clear and free from doubt." Kaplansky v. Kaplansky, 212 A.D.2d 667, 667-68 (2d Dep't 1995); see also Rappaport v. VV Publishing Corp., 223 A.D.2d 515, 516 (1st Dep't 1996) (where challenged statements in defamation case are not actionable as a matter of law, "repleading would be futile.")

Here, all of the claims against Reuters in the proposed second amended complaint are patently lacking in merit. First, all of Plaintiffs' proposed new claims against Reuters are grounded in exactly the same facts, and seek redress for the same alleged injury to reputation, as Plaintiffs' claim against Reuters for defamation – namely, the publication by Reuters of the April 4, 2011 summary report concerning the mistrial in the Deaner case, on Reuters' "News and

Insights" website. As shown, this publication is absolutely protected by Section 74 of New York Civil Rights Law which precludes "a civil action" based on such publication, not merely a claim for "defamation. N.Y. Civ. Rights L. § 74. All of the proposed claims in the SAC are duplicative of the deficient defamation claims and are inactionable for the same reasons.[5] See, e.g. Idema v. Wager, 120 F. Supp. 2d 361, 370-371 (S.D.N.Y. 2000) ("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."); Themed Rests., Inc. v. Zagat Survey, LLC, 21 A.D.3d 826, 827 (1st Dep't 2005) (negligence claim based upon same factual allegations underlying defamation claim and, seeking redress for injury to reputation was properly dismissed as duplicative); Hirschfeld v. Daily News, L.P., 269 A.D.2d 248, 249 (1st Dep't 2000) (claims of emotional distress properly dismissed as duplicative of defamation claims); Sermidi v. Battistotti, 273 A.D.2d 66, 67 (1st Dep't 2000) (leave to replead properly denied where all of the dismissed causes of action arose out of the same objectionable broadcast and thus there is no reason to suppose that any of them can be supported with good grounds); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985) (no claim for prima facie tort based on publication of "newsworthy" articles which constituted sufficient justification for its publication); Stern v. Burkle, No. 103916/07, 2008 NY Slip Op 51183U, 36 Media L. Rep. 2205, 2008 WL 2420907 (Sup. Ct. N.Y. County June 16, 2008) (dismissing as duplicative, plaintiff's claims for intentional infliction of emotional distress, tortious interference, injurious falsehood, and conspiracy"); Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, No. 107847/09, 2010

[5] Because the Reuters Report is indisputably a news story of legitimate public interest, Plaintiffs cannot avoid their burden, under New York law and First Amendment principles, to plead facts which tend to show that Reuters "acted in a *grossly irresponsible* manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" by casting their claims as "negligence" rather than libel. Chapadeuau, 38 N.Y.2d at 199 (emphasis added). All of Plaintiffs' proposed claims are essentially libel under different names.

NY Slip Op 51093U, 2010 WL 2519631 (Sup. Ct. N.Y. County May 28, 2010) (dismissing as duplicative, claims for tortious interference with contract and tortious interference with prospective business relations based on same disparaging statements as defamation claim)

Plaintiffs' proposed claim against Reuters for "Intentional Infliction of Emotion Distress" fails as a matter of law for the additional reason that the SAC does not allege against Reuters any facts which would establish the element of "extreme and outrageous conduct" required to state a claim for intentional infliction of emotional distress. Liability 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).[6] Here, the publication by Reuters of an unflattering article about Mr. Rakofsky does not rise to the level of extreme and outrageous conduct. See Bement v. N.Y.P. Holdings, Inc., 307 A.D.2d 86, 92 (1st Dep't 2003) ("[I]t 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 (1st Dep't 1997) ("even if defendants knew that publication of article would embarrass and distress plaintiff, the act of publication was privileged conduct, and cannot therefore support cause of action"); Triano v. Gannett Satellite Information Network, Inc., 2010 WL 3932334, *6 (S.D.N.Y. Sep. 29, 2010) (publication of news story that erroneously reported

[6] Given this high bar to an IIED claim, courts have found it "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., 2010 WL 3932334, *6 (S.D.N.Y. Sep. 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).

that plaintiff had died was not "outrageous" conduct sufficient to support claim for intentional infliction of emotional distress)[7].

Plaintiffs' proposed claim against Reuters for tortious interference with contract (SAC ¶¶535-549) fails as a matter of law for the additional reason that the proposed complaint does not identify any specific contract with a third party that was breached by that third party. Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, 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); Downtown Women's Center, Inc. v. Carron, 237 A.D.2d 209, 210 (1st Dep't 1997) (actual breach is "necessary to any cause of action for tortious interference with contract"). In their proposed second amended complaint, Plaintiffs fail to plead any facts that would tend to show (i) a single valid contract between Plaintiffs and a third party, (ii) that Reuters had knowledge of such a contract, (iii) that Reuters intentionally and improperly acted to procure the breach of such a contract, and (iv) any damages caused by such breach. Plaintiffs' claim for tortious interference with contract has patently no merit.

Plaintiffs' proposed claim against Reuters for tortious interference with prospective "economic advantage" (SAC ¶¶562-576) fails as a matter of law for the additional reason that the proposed second amended complaint fails to meet the heightened pleading burden to sustain such a claim. The proposed second amended complaint fails to specify, as it must to state a claim for interference with prospective business relations, "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

[7] Plaintiffs do not point to a single case where a defendant was held liable for intentional infliction of emotional distress for the mere publication of a news story about plaintiff. (Opp. at 39-40).

to dismiss where complaint referred only generally to potential contracts); see also Winner Intern. v. Kryptonite Corp.,1996 WL 84476, *4 (S.D.N.Y Feb. 27, 1996) (complaint dismissed where plaintiff failed to allege that defendant's conducted interfered with its business relationship with a specific third party.)

In addition, Plaintiffs' claims for both "prima face tort" and "tortious interference with prospective business relations" fail for the additional reason that Plaintiffs do not (and cannot), as they must, allege any facts as to Reuters which tend to show that malevolence or intent to injure Plaintiffs was the "*sole purpose*" for Reuters' otherwise lawful act of publication of a news article. Burns Jackson Miller Summit & Spitzer v Lindner, 59 N.Y.2d 314, 333 (1983); Carvel Corp. v Noonan, 3 N.Y. 3d 182, 190 (2004); Jacobs v. Continuum Health Partners, Inc., 7, A.D.3d 312, 313 (1st Dep't 2004); See also Freihofer, 65 N.Y.2d at 143 (publication of newsworthy article was justified).

Plaintiffs' claims against Reuters for "injurious falsehood," and "prima facie tort" fail as a matter of law for the additional reason that Plaintiffs have not adequately alleged "special damages" which is an essential element of each cause of action. See Emergency Enclosures, Inc. v. National Fire Adj Co., Inc., 68 A.D.3d 1658, 1660 (4th Dep't 2009); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985) ("A critical element of the cause of action [for prima facie tort] is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages"). Special damages must be pled with particularity, including "itemizing specific business lost" and, "where the loss of customers or associates is claimed, such customers or associates must be named." Henkin v. News Syndicate Co., Inc., 27 Misc. 2d 987, 988 (Sup. Ct. N.Y. County 1960) (citing Drug Research Corp. v. Curtis Pub. Co., 7 N.Y.2d 435, 440-441 (1960)); see also Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437,

442 (1906); Emergency Enclosures, Inc. v. National Fire Adj Co., Inc., 68 A.D.3d at 1660 (4th Dep't 2009); Lincoln First Bank v. Siegel, 60 A.D.2d 270, 280 (4th Dep't 1977) (Special damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts); Pitcock, 2010 WL 2519631. Plaintiffs' conclusory and general allegations of "loss of income from clients that terminated contracts" and "clients that sought reimbursement" and other costs and expenses (SAC ¶¶ 969, 972, 1211, 1214), without itemizing such amounts of loss nor identifying the alleged lost clients, is insufficient to plead special damages. The proposed second amended complaint therefore fails to state claims for injurious falsehood or prima facie tort. In addition, to the extent Plaintiffs intend to state a cause of action for "conspiracy" (SAC ¶ 1204; Opp. at 35), New York does not recognize an independent civil cause of action for conspiracy. See Jebran v. LaSalle Bus. Credit, LLC, 33 A.D.3d 424, 425 (1st Dep't 2006); Stern, 2008 WL 2420907, at *5.

Plaintiffs' proposed claims in the SAC against Reuters for defamation and misappropriation of name and likeness are also devoid of merit for all the same reasons set forth above and in Reuters' initial moving papers. Thus, Plaintiffs' cross motion to serve a second amended complaint should be denied.

Plaintiffs' motion to amend the complaint should be denied for the further reason that Defendant Dan Slater will be prejudiced by service of the second amended complaint. As noted *supra*, and in Reuters' initial moving papers, Mr. Slater, who is a natural person, was never served with process in this action. Mr. Slater waived his jurisdictional defenses based on claims in the original complaint which contained only two deficient causes of action against Slater for defamation and misappropriation of Rakofsky's name. Mr. Slater would likely have asserted his jurisdictional defenses if originally served with the proposed amended pleading containing new

(albeit deficient) claims against Mr. Slater for alleged various intentional torts, and seeking punitive damages. Thus, permitting Plaintiffs to amend their complaint a year later to add these additional claims against Mr. Slater and seeking additional damages is manifestly unfair to Mr. Slater and is prejudicial to him.

Lastly, in Paragraph 58 of the proposed second amended complaint, Plaintiffs allege that Dan Slater "was and is the owner, partner and/or other person having control of Thomson Reuters." This allegation, which was also contained in the original complaint, is false and nonsensical since the record is clear that Mr. Slater was a reporter employed by Reuters America, LLC and not an "owner, partner and/or other person having control." These facts were confirmed by Mr. Slater's uncontradicted affidavit submitted along Reuters initial moving papers almost a year ago. In addition, Plaintiffs were aware since at least as early as June 2011 when Reuters moved to dismiss, that there is no legal entity called "Thomson Reuters." Plaintiffs cannot sue "Thomson Reuters" any more than Rakofsky can "sue the Internet." Thus, Plaintiffs lack a good faith basis for these allegations and they should be stricken. Moreover, to the extent Plaintiffs' claims against Mr. Slater (including the new claims in the proposed second amended complaint) depend on Mr. Slater's alleged position as "owner, partner and/or other person having control of Thomson Reuters," all of Plaintiffs claims against Mr. Slater should be dismissed for this additional reason.

CONCLUSION

For each of the foregoing reasons, and the for the reasons set for in Reuters initial moving papers, the Court should dismiss the Complaint in its entirety as against Defendants Reuters and

Slater, deny Plaintiffs' cross motion to serve the second amended complaint, together with such further and other relief as the Court deems appropriate.

Dated: New York, New York
June 7, 2012

HERZFELD & RUBIN, P.C.

By:______________________________

Mark A. Weissman
125 Broad Street
New York, New York 10004
Tel: (212) 471-8500
Fax: (212) 344-3333
E-mail: mweissman@herzfeld-rubin.com

Attorneys for Defendants
Reuters America, LLC and Dan Slater