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

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

Plaintiffs,

Index No. 105573/2011

-against-

THE WASHINGTON POST COMPANY, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY REUTERS AMERICA, LLC AND DAN SLATER TO DISMISS THE COMPLAINT

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June 22, 2011

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Defendants Reuters America, LLC ("Reuters")[1] and Dan Slater ("Slater"), by their attorneys, Herzfeld & Rubin P.C., hereby submit this memorandum of law in 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 Slater.

PRELIMINARY STATEMENT

This lawsuit is an affront to the principles of free speech and press and may become a lesson for future young lawyers on how not to conduct themselves. Plaintiff Joseph Rakofsky, a young, New Jersey-licensed attorney who had only graduated from law school in 2009 and who had admittedly never tried a case before, undertook to represent a client in a matter that was manifestly beyond his legal experience and abilities: representing a criminal defendant facing a felony murder charge in a Washington D.C. court.

The representation did not end well for Rakofsky. In the middle of the trial, Rakofsky, along with his client, abruptly sought leave from the presiding judge, Judge William Jackson, to relieve Mr. Rakofsky as defense counsel. This was following an alleged dispute between Mr. Rakofsky and his client over defense strategy during cross examination and after receiving unfavorable rulings from an apparently frustrated judge.

Judge Jackson, while considering relieving Mr. Rakofsky and ordering a new trial, held a proceeding in open court on April 1, 2011 to ensure that the criminal defendant understood the consequences of the mistrial. After so confirming, Judge Jackson ordered a new trial. During that proceeding, Judge Jackson made, on the record and in open, public court, several

[1] Reuters is incorrectly identified in the Complaint as "Thomson Reuters." There is no legal entity with the name "Thomson Reuters." Reuters conducts news-related activities throughout the United States under different brands including "Thomson Reuters." Although Defendant Dan Slater has not been served with a summons and complaint, he joins in this motion in the interest of expediency since all of Reuters' arguments apply equally to him.

unflattering statements about Mr. Rakofsky's competence and abilities with respect to his performance as defense counsel. Among other pointed statements, Judge Jackson stated that he believed Mr. Rakofsky's "performance was below what any reasonable person could expect in a murder trial" and that his "performance was not up to par under any reasonable standard of competence under the Sixth Amendment." Judge Jackson specifically found "manifest necessity" for a new trial based on Mr. Rakofsky's poor performance. Judge Jackson also informed Rakofsky, in open court during the same proceeding, that Rakofsky's dealings with his private investigator had raised "ethical issues."

A news reporter from the Washington Post was in the courtroom covering this proceeding. Later that day, the Washington Post published an article on its Internet webpage describing the April 1 proceedings before Judge Jackson, and including direct quotations of Judge Jackson's specific, unflattering comments regarding Rakofsky's performance as well as the "ethical issues." A multitude of reports and commentaries about the proceedings followed from various news organizations and legal "blog" publishers reporting on Judge Jackson's statements and, with some, portraying the news story as an important lesson for young lawyers. Among the articles covering the mistrial, Defendant Reuters and, its reporter, Defendant Slater, published a summary of the Washington Post article, providing a succinct account of the proceedings, including Judge Jackson's statements. The report was published by Reuters on its "News & Insight" webpage, on a page called "Summary Judgments" which is a dedicated, legal-news "aggregator."

Perhaps demonstrating the very lack of experience and judgment which Rakofsky here denies, Rakofsky and his New Jersey firm, Rakofsky Law Firm, P.C., set out to silence the many voices in the press and on the Internet by bringing this action for libel and commercial

misappropriation against Reuters and Slater, among the other news agencies, reporters and "blogs." The gravamen of Rakofsky's claims is that Reuters, along with these other media organizations and publishers, libeled him by portraying him as inexperienced, incompetent and unethical in connection with his conduct as a defense attorney in a murder case. Rakofsky also claims that defendants used his name and likeness for commercial purposes. Rakofsky objects to the use of his name and seeks a breathtaking order enjoining, across the Internet, the publication of the allegedly offending news reports, in violation of long-established First Amendment principles that Rakofsky should have learned in his first-year Constitutional Law class.

As will be shown further below, Rakofsky's claims against Reuters and Slater are unsupported by any facts alleged in the complaint, are utterly refuted by the transcript of Judge Jackson's statements along with the news reports themselves, and are barred by well-established New York law as well as the First Amendment. Rakofsky's libel claim cannot withstand the application of New York Civil Rights Law Section 74, which completely immunizes Reuters' publication of a "fair report" concerning the criminal proceedings before Judge Jackson in D.C. Superior Court. The fair report privilege is liberally applied and covers even alleged inaccuracies that do not alter the defamatory "sting" of a report. Reuters' substantially accurate account of this proceeding, including "on-the-record" statements in open court by the sitting judge, falls squarely within the protections contemplated by Section 74, and cannot form the basis of a libel claim as a matter of law. Rakofsky's libel claim fails for the further reason that it cannot withstand well-settled First Amendment principles and New York precedent that permitted Reuters and Slater to rely upon and summarize a news report by another long-established, reputable news agency, the Washington Post. Rakofsky does not and cannot allege any facts, as he must, that would support an inference that Slater or Reuters doubted or had

reason to doubt the veracity of the Washington Post reporting. Rakofsky's commercial misappropriation claim under Section 50 and 51 of the Civil Rights Law fails because the Reuters report was newsworthy and the report did not use Rakofsky's name or likeness in connection with advertising. In sum, Rakofsky and his firm have no valid claims against Reuters or Slater. The Complaint as against Defendants Reuters and Slater should be dismissed with prejudice.

ALLEGATIONS AND BACKGROUND

Plaintiff Joseph Rakofsky, a New York County resident, is a 2009 graduate of Touro Law Center. (Compl. ¶¶1, 78).[2] He is a member of the bar of New Jersey and is licensed to practice law there. (Compl. ¶79). Rakofsky does not allege he is licensed to practice law in any other jurisdiction, though he alleges he was admitted *pro hac vice* in the criminal case at issue here. (Compl. ¶86). Rakofsky alleges that he practices law through his firm, Plaintiff Rakofsky Law Firm, P.C., ("RLF") a professional corporation organized under the laws of New Jersey of which Rakofsky is the sole shareholder. (Compl. ¶ 80).

According to the Complaint, in May 2010, about a year out of law school, Rakofsky undertook to represent Dontrell Deaner who had been indicted by grand jury in the District of Columbia and was awaiting trial for first degree felony murder, as well as other serious felony charges including attempted armed robbery and conspiracy. (Compl. ¶81). Prior to his representation of Deaner, Rakofsky had not tried any case, let alone a felony criminal case. (Compl. ¶ 82). Rakofsky alleges that, for the purposes of the Deaner trial, he associated himself with Sherlock Grisby, an attorney licensed in Washington D.C. who had criminal defense experience (Compl. ¶86). Rakofsky also alleges that he engaged Adrian Bean as an investigator

[2] The facts alleged in the complaint are assumed true for the purposes of this motion to dismiss. In this motion, Defendants do not intend to, and do not, admit any of the allegations in the complaint.

to perform services in connection with Deaner trial. (Compl. ¶83).

Approximately one week before the trial date, the Deaner trial was reassigned from Judge Leibovitz to Judge William Jackson of the Superior Court of the District of Columbia. (Compl. ¶ 92). Rakofsky alleges that Judge Jackson made several rulings unfavorable to his Deaner's defense including granting a government motion to suppress a toxicology report essential to the defense, (Compl. ¶93) and denying Rakofsky's motion to exclude inflammatory photographs. (Compl. ¶94). Rakofsky also alleges that Judge Jackson "interrupted" him repeatedly during his opening statement, erroneously taking issue with references to the toxicology report among other things (Compl. ¶95). Rakofsky alleges that Judge Jackson privately advised that his opening statement was "skillful." (Compl. ¶96), Nevertheless an apparently skeptical Judge Jackson inquired several times of Mr. Deaner whether he wished to continue to be represented by Rakofsky. (Compl. ¶ 97).

On March 31, 2011, in the middle of the trial and during the testimony of a government witness, a dispute allegedly arose between Rakofsky and his client. During the witness' testimony, Mr. Deaner allegedly passed some written notes to Rakofsky concerning questions that Deaner wanted Rakofsky to ask of the witness. (Compl. ¶ 101). Rakofsky believed that asking the questions requested by his client would be detrimental to the defense. (Compl. ¶101). Therefore, he alleges, he made the decision to seek to withdraw from representation on the basis of conflict. (Compl. ¶102). He claims he believed his application to withdraw would result in a mistrial (Compl. ¶102) which would benefit Deaner because Deaner's defense had been "gutted" by the court's rulings. (Compl. ¶¶ 102, 108). A new lawyer in a new trial, he claims, would have the benefit of access to the government's strategy (Compl. ¶¶ 102, 108).

Later that day, after allegedly meeting with Deaner, Rakofsky moved the court for leave

to withdraw as counsel for Deaner. (Compl. ¶¶104, 105). Judge Jackson resisted, saying to Rakofsky "[w]e're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial." (Compl. ¶ 105). Following this exchange, Judge Jackson summoned Deaner to the bench and Deaner "signified his agreement with Rakofsky's withdrawal." (Compl. ¶105). At that point, Judge Jackson stated, "there appears to be a conflict that has arisen between counsel and defendant . . . this is not an issue of manifest necessity..." (Compl. ¶105). The judge reserved decision until the following day. (Compl. ¶107).

On the following day, April 1, 2011, Judge Jackson announced "in open court" that Rakofsky had "asked to withdraw midtrial," granted the withdrawal motion and ordered a new trial. (Compl. ¶109). Rakofsky alleges that Judge Jackson "uttered several statements in open court that slandered Rakofsky's knowledge of courtroom procedure. The statements slandered Rakofsky because they were plainly irrelevant to the trial and Rakofsky's motion to withdraw as lead counsel." (Compl. ¶110). In his Complaint, Rakofsky does not set forth which statements he alleges "slandered" him, but a full transcript of the April 1, 2001 proceeding is attached to this Motion as Exhibit B to the Weissman Affirmation.[3] The most relevant portions of Judge Jackson's statement are excerpted and highlighted below:

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

[3] References to the June 22, 2011 Affirmation of Mark A. Weissman and Exhibits are cited as "Weissman Aff. __." References to the June 21, 2011 Affidavit of Daniel Slater are referred to as "Slater Aff. __.")

> theories out there, but the *inability to execute* those theories. It was apparent to the Court that there was a – *not a good grasp of legal principles and legal procedure* of what was admissible and what was not admissible that inured, I think to the *detriment* of Mr. Deaner. And had there been – if there had been a conviction in this case, based on what I had seen so far, *I would have granted a motion for a new trial* under 23.110.
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial *manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder trial.*
>
> So I'm going to grant the motion for new trial . . . .
>
> ...But, it just seems to me that – so, I believe that based on my observations and, as I said, *not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial.* And, I think that the – as I said, it became readily apparent that *the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.*

(Weissman Aff. Ex. B) (emphasis added).

In the same proceeding, Judge Jackson addressed a motion by Rakofsky's investigator stating:

> .... And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an email in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an *allegation by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.*

(Weissman Aff. Ex. B) (emphasis added) (Compl. ¶112). Judge Jackson addressed Rakofsky directly referring to the email attached to the investigator's motion:

> There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises *ethical issues.*

(Weissman Aff. Ex. B) (emphasis added).

Significantly, Rakofsky admits in his Complaint that he sent the email to his investigator, Adrian Bean, and admits using "an unfortunate choice of the word 'trick'" when instructing the investigator on how to deal with a woman, who had allegedly previously stated that she had not seen the murder (and to whom Rakofsky now disingenuously refers as a "non-witness.") (Compl. ¶¶113, 122). Rakofsky alleges that the email, including the "unfortunate" word "trick," referred to "Rakofsky's suggestion to Bean to understate the fact that [Bean] was employed by the defense while endeavoring to get the non-witness to repeat for a second time something she had already admitted . . . previously to Rakofsky . . . and not with respect to anything concerning the substance of her statements." (Compl. ¶113). Although Rakofsky does not deny sending this email to Bean, Rakofsky alleges that Bean filed the motion as part of a "persistent course of action to blackmail Rakofsky and RLF with the baseless allegations contained in his 'motion'" (Compl. ¶115, 119). Rakofsky alleges that Bean's motion had "merely been provided to Judge Leibovitz who provided it to Judge Jackson" but had not "been formally filed in the case against the defendant." (Compl. ¶121). Rakofsky further alleges that Judge Jackson "was operating completely outside the scope of his judicial duties and function" in his handling of Bean's motion. (Compl. ¶126).

According to the Complaint, Washington Post reporter, Keith Alexander, was present in the courtroom to hear Judge Jackson's statements. (Compl. ¶ 123). Mr. Alexander allegedly approached Rakofsky for comment, but Rakofsky declined. (Compl. ¶123). The Washington Post, thereafter "obtained a copy of the 'investigator's' 'motion.'" (Compl. ¶125).

On April 1, 2011, the Washington Post published an article entitled "D.C. Superior Court judge declares mistrial over attorney's competence in murder case." (Compl. ¶ 130). A copy of the full Washington Post article is attached the Weissman Affirmation as Exhibit C. The

Washington Post article identified Mr. Rakofsky by name as well as his age and the fact that he received a law degree in 2009 from "Touro College." The article then went on to describe the proceedings before Judge Jackson and to report Judge Jackson's unflattering statements that Rakofsky's "performance was below what any reasonable person would expect in a murder trial." The Washington Post article also reported Judge Jackson was "angered" by a "filing he received early Friday from an investigator hired by Rakofsky in which the attorney told the investigator via an attached e-mail to 'trick' a government witness into testifying in court that she did not see his client at the murder scene." (Weissman Aff. Ex. C).

Subsequent to the April 1 Washington Post article, several other parties, including newspapers, law journals, lawyers, and legal Internet "blogs" published reports or commentary concerning Rakofsky and the April 1, 2011 proceeding before Judge Jackson. (Compl. ¶¶ 135-176, 178-184).

On April 4, 2011, Reuters published the following summary of the April 1, 2011 Washington Post report, among a collection of other summaries on its news-aggregator webpage called "News & Insight" under the heading Summary Judgments: Our daily legal-news aggregator for April 4, 2011:

> **Young and unethical**: Washington D.C. Superior Court Judge William Jackson declared a mistrial in a murder case on Friday after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience. Rakofsky, a recent law graduate, performed "below what any reasonable person would expect," the judge said. Jackson was also angered by Rakofsky's alleged disregard of ethics, the Washington Post reports. An investigator claimed Rakofsky instructed him to "trick" a government witness into testifying that she did not see his client at the murder scene. Rakofsky declined to comment.

(Weissman Aff., Ex. D; Compl. ¶ 177) (the "Reuters Report" or the "Report"). The Report contained a "hyperlink" to the April 1, 2011 Washington Post article, upon which the summary

is based. The webpage on which the Reuters Report appeared contained similar summaries of other legal news stories from various sources including the New York Times, the Sacramento Bee, the BBC, Corporate Counsel and Courthouse News, all of which were attributed on the webpage to "Dan Slater." (Weissman Aff., Ex. D). In an affidavit attached to this motion, Slater states that he relied exclusively on the information published by the Washington Post when preparing his summary of the article and had no reason to doubt the truthfulness of the Washington Post article. (Slater Aff. ¶ 7). Rakofsky does not allege any facts that suggest Reuters or Slater had any reason to doubt the veracity of the Washington Post article.

Rakofsky alleges, in the only paragraph in the Complaint directed at the conduct of Reuters and Slater, that the phrase "after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience" was false and defamatory because, Rakofsky alleges, he was not literally "thrown off" the case. (Compl. ¶ 177). Rakofsky alleges that the Reuters Report was published "with malice and hate, in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties, in reckless disregard for the truth." (Compl. ¶ 177). Rakofsky does not allege any facts to support these conclusory allegations.

ARGUMENT

I.

Courts Routinely Dismiss Unwarranted Libel Actions.

Dismissal of a complaint is appropriate pursuant to CPLR 3211(a)(7) if, accepting all the allegations of the complaint as true and according plaintiff the benefit of every possible favorable inference, the facts alleged in the complaint fail to state a cognizable legal theory. See Rivera v. NYP Holdings, Inc., No. 114858/06, 2007 WL 2284607, at *3 (Sup Ct. N.Y. Co. Aug. 2, 2007).[4] Where allegations "consist of bare legal conclusions devoid of the required factual predicate, the court is constrained to dismiss." Id. Moreover, a motion to dismiss pursuant to CPLR 3211(a)(1) is appropriately granted where "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Saleh v. New York Post, 78 A.D. 3d 1149, 1151 (2d Dep't 2010).

Courts repeatedly recognize that early adjudication of defamation claims is necessary under the First Amendment to protect "free flow of information" from the "chilling" effect of unwarranted claims. Karaduman v. Newsday, Inc., 51 N.Y. 2d 531, 549 (1980) ("The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself"); Dillon v. City of New York, 261 A.D. 2d 34, 39 (1st Dep't 1999) (whether a claim of defamation may be actionable presents "in the first instance, an issue of law for judicial determination."). Courts recognize that, "to unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." Immuno A.G. v. Moor-Jankowski, 145 A.D. 2d 114, 128 (1st Dep't), aff'd 74 N.Y.2d 548 (1989), vacated, 497 U.S. 1021 (1990), aff'd, 77 N.Y.2d 235

[4] Unpublished cases cited herein are annexed as an appendix to this Memorandum of Law.

(1991), cert. denied, 500 U.S. 954 (1991). Consequently, New York courts routinely grant motions to dismiss on the pleadings based on exactly the threshold legal questions presented here. See, e.g., Saleh v. New York Post, 78 A.D. 3d 1149, 1151 (2d Dep't 2010) (affirming dismissal of libel complaint against newspaper pursuant to CPLR 3211(a)(1) and (7) where news report was substantially accurate account of official proceeding); Mills v. Raycom Media, Inc., 34 A.D. 3d 1352, 1353 (4th Dep't 2006) (affirming dismissal of libel action against media defendant pursuant to CPLR 3211(a)(1) and (7)); Dillon, 261 A.D. 2d at 42 (dismissing complaint where allegedly defamatory statements were substantially true); Glendora v. Gannett Suburban Newspapers, 201 A.D. 2d 620, 620 (2d Dep't 1994) (affirming dismissal on pleadings where article was substantially accurate report of judicial proceedings); Leder v. Feldman, 173 A.D. 2d 317, 318 (1st Dep't 1991) (affirming dismissal under CPLR 3211(a)(1) and (7)); Corso v. NYP Holdings, Inc., No. 109820/2005, 2007 WL 2815284 (Sup. Ct. N.Y. Co. August 30, 2007) (dismissing complaint under "fair report" statute); Rivera, 2007 WL 2284607, at *3 (plaintiff failed to state a claim where defendant summarized publication by reputable New York City daily newspaper); Valeriano v. Rome Sentinel Co., 43 A.D. 3d 1357, 1357-58 (4th Dep't 2007) (dismissing claims under Sections 50 and 51 of New York Civil Rights Law because challenged newspaper story was newsworthy).

II.

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

A. Section 74 of New York Civil Rights Law Protects Publications That Are a "Fair and True" Report on a Judicial Proceeding.

New York has codified the common law "fair report" privilege in Section 74 of the New York Civil Rights Law ("Section 74"). Section 74 provides in part:

> 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).

The purpose of Section 74 "is the protection of reports of judicial proceedings which are made in the public interest." Williams v. Williams, 23 N.Y. 2d 592, 599 (1969). This privilege furthers the public interest by informing the public about judicial, legislative or otherwise official proceedings and by "having proceedings of courts of justice public, not secret." Gurda v Orange County Publs. Div. of Ottaway Newspapers, 81 A.D. 2d 120, 133 (2d Dep't 1981) (Mollen, P. J., and Titone, J., concurring in part and dissenting in part), rev'd on concurring and dissenting opn below, 56 NY2d 705, 708 (1982). Thus, 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). Moreover, as discussed *supra*, whether a statement is privileged under Section 74 presents a threshold question of law for the court to determine at the pleadings stage. See, e.g., Klig v. Harper's Magazine Foundation, No. 60089/10, 2011 N.Y. Slip Op. 31173(U), 2011 WL 1768878, annexed, at p. 5; See also Palmieri v. Thomas, 29 A.D.3d 658, 659 (2d Dep't 2006).

The immunity provided by Section 74 applies where (i) the publication "is a comment on a judicial, legislative or other official proceeding" Saleh v. New York Post, 78 A.D. 3d at 1151, and (ii) it is "fair and true." Id. A publication reporting on a statement made on the record and in open court by a presiding judge in a criminal case falls squarely within the type of statement absolutely protected by Section 74. See Hanft v. Heller, 64 Misc.2d 947, 316 N.Y.S.2d 255, 257 (Sup. Ct. N.Y. Co. 1970) (publication of judicial opinion is "the fairest and truest possible report

of a judicial proceeding that can be made."). Moreover, the fair report privilege encompasses reports concerning the contents of motions, affidavits and other papers submitted to a court in connection with the proceeding. See Komarov v. Advance Magazine Publishers, Inc., 180 Misc.2d 658, 660 (Sup. Ct. N.Y. Co. 1999) ("The privilege established by the Civil Rights Law applies not only to a transcript of the judicial proceeding itself, "but also to any pleading made within the course of the proceeding . . . . and by extension, should also apply to affidavits submitted in the proceeding."); Lacher v. Engel, 33 A.D. 3d 10, 17 ("Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege.").

The Court of Appeals has held that "for a report to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be *substantially accurate.*" Holy Spirit Assoc. for the Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 67 (1979) (emphasis added). Recognizing that "newspaper accounts of legislative or other official proceedings must be accorded some degree of liberality, " Id. at 68, the Court 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 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.

Thus, "[t]he case law has established a liberal interpretation of the 'fair and true report' standard of Section 74 so as to provide broad protection to news accounts of judicial or other

official proceedings." Becher v. Troy Publ. Co, 183 A.D.2d 230, 233 (3d Dep't 1992) This is consistent both with the with the common law of libel, which "'overlooks minor inaccuracies and concentrates upon *substantial truth,*" Shulman v. Hunderfund, 12 N.Y. 3d 143, 150 (2009) (quoting Masson v. New Yorker Magazine, Inc., 501 US 496, 516 (1991)) (emphasis added), as well as with First Amendment principles and New York's strong public policy favoring free speech. See Karaduman, 51 N.Y. 2d at 549 ("the individual must occasionally bear the risk of injury to reputation arising from false and defamatory statements so that those who would disseminate facts and ideas are not unreasonably deterred."); Gurda v. Orange County Publs. Div. of Ottaway Newspapers, 81 A.D. 2d 120, 133 (2d Dep't 1981) (Mollen, P. J., and Titone, J., concurring in part and dissenting in part), rev'd on concurring and dissenting opn below, 56 N.Y. 2d 705, 708 (1982) ("Hence, in areas of doubt and conflicting considerations, it is almost always preferable to err on the side of free expression.").

It has long been held that a statement is "substantially true" if the statement would not "have a different effect on the mind of the reader from that which the pleaded truth would have produced." See Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1934); Sharon v. Time, 609 F. Supp. 1291, 1294 (S.D.N.Y. 1984) (Defendant is permitted to prove the substantial truth of this statement by establishing any other proposition that has the same "gist" or "sting" as the original libel, that is, the same effect on the mind of the reader). Similarly, courts hold that a report is privileged under Section 74 where the language used, despite minor inaccuracies, does "not produce a different effect on the reader than would a report of the precise truth." Klig v. Harper's Magazine Foundation, No. 60089/10, 2011 N.Y. Slip Op. 31173(U), 2011 WL 1768878, annexed at p. 5 (citing Silver v. Kuehbeck, No. 05 Civ. 35 (RPP), 2005 WL 2290642, *16 (S.D.N.Y. Nov. 7, 2005)). Thus, where inaccurate statements are found within a report

about an official proceeding but those statements do not alter the defamatory gist or "sting" of the otherwise accurate report, such statements are "substantially accurate," within the "fair report" privilege and cannot constitute an independent basis for actionable libel. See Lacher v. Engel, 33 A.D. 3d 10, 17 (1st Dep't 2006) (statement made by lawyer in NYLJ article that his client was "poorly served" by the client's former counsel was substantially accurate characterization of client's malpractice claim against plaintiff); Misek-Falkoff v. American Lawyer Media, Inc., 300 A.D.2d 215, 216 (1st Dep't 2002) (news article stating that plaintiff had "filed a lawsuit alleging that she was discriminated against because of her mental disability" was substantially true even though plaintiff's claim was based on a "neurological disorder."); Discussion, *infra*, Section I-C.

B. The Reuters Report is Absolutely Privileged under Section 74

Applying these principles, the Reuters Report is absolutely privileged as a fair and true report of the proceedings held on April 1, 2011 in the District of Columbia Superior Court before Judge William Jackson. The full text of the Reuters report is as follows:

> **Young and unethical**: Washington D.C. Superior Court Judge William Jackson declared a mistrial in a murder case on Friday after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience. Rakofsky, a recent law graduate, performed "below what any reasonable person would expect," the judge said. Jackson was also angered by Rakofsky's alleged disregard of ethics, the Washington Post reports. An investigator claimed Rakofsky instructed him to "trick" a government witness into testifying that she did not see his client at the murder scene. Rakofsky declined to comment.

The gravamen of Rakofsky's libel claim with respect to this publication is that Reuters reported that Rakofsky was inexperienced, incompetent and unethical in connection with his performance as a defense attorney in a murder trial. However, these alleged assertions are absolutely privileged and inactionable because they constitute a fair and substantially accurate

report of a judicial proceeding. The Reuters Report is a fair and true account of both the statements made by Judge Jackson in the proceeding in open court on April 1, 2011 and the motion filed by the investigator, Bean.

First, statements that Rakofsky is "inexperienced," "incompetent" and "unethical" are a substantially accurate (if not precisely accurate) account of the statements made by Judge Jackson in open court and on the record on April 1, 2011, as readily confirmed by review of the transcript of the day's proceedings. (Weissman Aff., Ex. B). At the April 1, 2011 proceeding, Judge Jackson, after informing Deaner of the consequences of a mistrial, made the following statements about Rakofsky's inexperience and lack of ability in connection with the Judge's decision to order a new trial:

> I must say that even when I acquired [SIC] of Mr. Deaner, I – as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some length for over hour, that *Mr. Rakofsky had never tried a case before.* And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky – put it this way: *I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.*
>
> It appeared to the court that there were theories out there – defense theories out there, but *the inability to execute those theories.* It was apparent to the Court that there was a – *not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think to the detriment of Mr. Deaner.* And had there been – *if there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial* under 23.110.
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial *manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder trial.*

> So I'm going to grant the motion for new trial . . . .
>
> ...But, it just seems to me that – so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. *It wasn't his first murder trial; it was his first trial. And, I think that the – as I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.*

(Weissman Aff., Ex. B) (emphasis added).

With respect to a statement that Rakofsky is "unethical," Judge Jackson specifically used the phrase "ethical issues" in addressing the motion submitted to the court by investigator Bean stating:

> .... And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an email in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.

(Weissman Aff., Ex. B, at 5:03). Shortly thereafter in the proceeding, Judge Jackson told Rakofsky with respect to the email attached to Bean's motion:

> There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises *ethical issues*.

(Weissman Aff., Ex. B, at 7:01) (emphasis added).

Significantly, Rakofsky does not deny that Judge Jackson made these statements during the proceeding and, indeed, readily admits in his Complaint that it was Judge Jackson who caused his alleged injuries by "slandering" him. (Compl. ¶ 110). Furthermore, Rakofsky admits that he used the word "trick" in his email to the investigator in reference to his instruction to the investigator on how to deal with the so-called "non-witness" and Rakofsky admits that his use of the word was "unfortunate." (Compl. ¶¶113, 122). See Klig, 2011 WL 1768878 at p. 7 (plaintiff cannot claim libel based on characterization of him as "a mean one" where he admits he sent the

offending emails described in the news article.) Thus, the reference in the Reuters Report to Rakofsky's use of the word "trick" in relation to the statement that Rakofsky was "unethical," is a substantially accurate characterization of Judge Jackson's statement on the record and, by Rakofsky's own admissions, of the documents submitted to the court by investigator Bean.

Therefore, given Judge Jackson's statements on the record and the contents of the motion submitted by Bean, the Reuters Report, in context and when viewed as a whole, is a fair and substantially accurate account of the judicial proceedings before Judge Jackson. The Report is therefore unqualifiedly privileged. Plaintiffs' claims against Reuters and Slater for libel should therefore be dismissed with prejudice.

C. The Statement that Judge Jackson Threw Rakofsky Off the Case for Inexperience is Not Independently Actionable

In his Complaint, Rakofsky neither cites to the full text of the Reuters Report nor challenges the Reuters Report in its entirety in full context. Instead, in the single paragraph of the Complaint directed to the conduct of Reuters and Slater (Compl. ¶ 177), Rakofsky identifies one statement from the Report as the sole basis for his libel claim – namely, that Judge Jackson declared a mistrial after "throwing" Rakofsky off the case for "inexperience." (Compl. ¶ 177). Rakofsky claims this statement is inaccurate because, Rakofsky alleges, the judge did not literally throw him off the case. Rather, Rakofsky alleges, Judge Jackson granted Rakofsky's motion "solely because Rakofsky moved for his own withdrawal because a conflict existed between him and his client." (Compl. ¶ 177).

The statement that the judge "threw" Rakofsky off the case is not, itself, independently actionable because the statement itself is a substantially true account of the proceedings. In claiming that the statement is inaccurate, Rakofsky suggests that Judge Jackson had merely incidental participation in Rakofsky's withdrawal, perhaps as some passive, "rubber stamper" of

Rakofsky's defense strategy. (Compl. ¶ 177). But, Rakofsky was not permitted unilaterally to withdraw from the Deaner trial. Judicial *action* was *required.* Judge Jackson's on-the-record statements, in both substance and tone, utterly refute Rakofsky's allegation that "Judge Jackson granted Rakofsky's motion, *solely* because Rakofsky moved for his own withdrawal" as a result of a conflict. (Compl. ¶ 177). In fact, the transcript demonstrates that an obviously frustrated Judge Jackson granted the motion on several other bases including that (i) Mr. Deaner, himself, "wanted a new lawyer," that, (ii) in the alternative there was "manifest necessity" for a new trial due to Rakofsky's incompetence; and that (iii) had there been a conviction, the Judge would have granted a motion for a new trial based on Rakofsky's conduct falling below Sixth Amendment standards. Thus, to say that Rakofsky was "thrown off the case," while certainly hyperbolic and perhaps imprecise, is nonetheless a substantially truthful statement. See Dillon v. City of New York, 261 A.D. 2d 34, 39 (1st Dep't 1999) (statement that plaintiffs were "terminated" by their employer, the District Attorney, was true even though plaintiffs claimed they "resigned," because plaintiffs did not have right to resign at will; only District Attorney could terminate plaintiff's employment based on their failure to fulfill commitment period obligation); Corporate Training Unlimited, Inc. v. National Broadcasting Co., Inc., 981 F. Supp. 112, 120-121 (E.D.N.Y. 1997) (statement that plaintiff "was forced to leave the military" was substantially true even though plaintiff had, in fact, submitted a request for discharge rather than face the possibility of a court martial for financial improprieties). Thus, the statement that Judge Jackson "threw" Rakofsky off the case is substantially accurate and not independently actionable.

Moreover, even if the statement that Rakofsky was "thrown off the case" is itself, not accurate, it nevertheless cannot be an independent legal basis for a libel claim here. The defamatory "gist" or "sting" of the Reuters Report – which, as shown above, is fully protected

under Section 74, is that Rakofsky was inexperienced, incompetent and unethical in connection with his performance as a defense attorney in the murder trial. The statement that Rakofsky was "thrown off the case" for "inexperience," even if not technically or precisely accurate, does not alter the defamatory "sting" of the full report – namely, that Rakofsky was too inexperienced for the murder trial, as Judge Jackson stated. As noted *supra*, inaccuracies that do not alter the defamatory sting of an inactionable "fair report" are not themselves actionable. See Lacher v. Engel, 33 A.D. 3d 10, 17 (1st Dep't 2006) (statement made by lawyer in NYLJ article that his client was "poorly served" by the client's former counsel was substantially accurate characterization of client's malpractice claim against plaintiff); Misek-Falkoff v. American Lawyer Media, Inc., 300 A.D.2d 215, 216 (1st Dep't 2002) (news article stating that plaintiff had "filed a lawsuit alleging that she was discriminated against because of her mental disability" was substantially true even though plaintiff's claim was based on a "neurological disorder."); Miller v. Journal-News, 211 A.D. 2d 626, 627 (2d Dep't 1995) (newspaper report stating that police officer was "suspended" in connection with police department action was substantially true even though plaintiff alleged he was not suspended but place on "administrative leave."); Glendora v. Gannett Suburban Newspapers, 201 A.D. 2d 620, 620 (2d Dep't 1994) (newspaper report stating that plaintiff "could not be reached for comment" was not actionable, even if untrue, as a separate and independent of the privileged report of the judicial proceeding."); Ford v. Levinson, 90 A.D. 2d 464, 465 (1st Dep't 1982) (defendant's statement that plaintiffs' modeling company "had been created as a vehicle for getting models away from [a competitor]" was within the fair report privilege of other statements made by defendants concerning a lawsuit against plaintiffs, even though the statement was not itself in the complaint); Grab v. Poughkeepsie Newspapers, Inc., 91 Misc. 2d 1003, 1004 (Sup. Ct. Dtchs. Co. 1977) (defendant's statement in a newspaper

article was substantially true report even though defendant erroneously published that plaintiff was sent to a "state prison" when, in fact, he was sentenced as a youthful offender and not sent to a "state prison").

Put another way, the statement that the judge "threw" Rakofsky off the case due to "inexperience," even if untrue, makes no difference in the mind of a reasonable reader than a report of the literal truth – that the judge, in fact, found Rakofsky too inexperienced to handle the murder trial. Klig v. Harper's Magazine Foundation, No. 60089/10, 2011 WL 1768878, at p. 5; Silver v. Kuehbeck, 2005 WL 2290642 (S.D.N.Y. 2005); see also Picard v. Brennan, 307 A.2d 833, 836 (Me. 1973) (statement that plaintiff was dismissed from employment when he had, in fact, resigned is not actionable because the "slanderous sting lies in the reason charged for dismissal and not in the mere fact of discharge"). The content of Judge Jackson's unflattering statements is what allegedly injured Rakofsky, not that he was "thrown" off the case. Indeed, the literal truth – that the judge found Rakofsky's competence to be so severely lacking that there was "manifest necessity" for a new trial – is *more* injurious to Rakofsky's reputation than what Reuters reported – that Rakofsky was thrown off the case for "*inexperience*." See Lacher, 33 A.D. 3d at 17 (statement made by lawyer in NYLJ article that his client was "poorly served" by the client's former counsel was substantially accurate account of client's malpractice claim where statements were "a tame characterization" of what was actually alleged in the underlying malpractice action). Thus, the statement that Judge Jackson "threw" Rakofsky off the case is substantially accurate, fully protected by Section 74 and is not independently actionable.

Since the Reuters Report is a fair and substantially accurate account of the proceedings before Judge Jackson and the motion submitted to the court in connection therewith, the Report is absolutely privileged by Section 74 and the libel claim against Reuters and Slater should be

dismissed with prejudice.

III.

Reuters and Slater Were Entitled To Rely On and Republish a Summary of The Washington Post Report

It is well-settled under New York law that a republisher of allegedly false and libelous statements is entitled to "place its reliance upon the research of the original publisher" and is not responsible for the libelous publication "absent a showing that [it] 'had or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of [the] reporter.'" Karaduman v. Newsday, inc., 51 N.Y. 2d 531, 530 (1980) (quoting Rinaldi v. Holt, Rinehart & Winston, 42 N.Y. 2d 369, 383 (1977)). Sometimes called the "wire service defense" in the common law, this is a well-recognized and, in New York, a more broadly applied exception to the common law rule that a republisher is responsible for repeating defamatory statements made by another.[5]

New York Courts apply this exception in cases where, as here, one news agency republishes the content of a news story that was originally disseminated by another, reputable news agency or source – not necessarily a "wire service." Zetes v. Richman, 86 A.D. 2d 746, 747 (4th Dep't 1982) (defendant immune from liability for republishing story originally disseminated by United Press International); Rivera v. NYP Holdings, Inc., No. 114858/06, 2007 WL 2284607 (Sup. Ct. N.Y. Co. Aug. 2, 2007) (defendant entitled to rely upon and broadcast content of news item originally distributed by New York Post); Bryks v. Canadian Broadcasting

[5] See Layne v. Tribune Co., 108 Fla. 177, 184 (Fla. 1933). The "wire service defense", as applied by modern New York courts, is derived from First Amendment principles and well-established New York precedent, which holds that 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." Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 199 (1975); Bryks v. Canadian Broadcasting Co, 928 F. Supp. 381, 383 (S.D.N.Y. 1996); Karaduman v. Newsday, inc., 51 N.Y. 2d 531, 550-51 (1980).

Corp., 928 F. Supp. 381, 383-84 (S.D.N.Y. 1996) (CNN's Headline News Network was entitled to rely on and broadcast a news story originally broadcast by the Canadian Broadcasting Company); Rust Communications Group., Inc. v. 70 State Street Travel Service, Ltd., 122 A.D. 2d 584, 584 (4th Dep't 1986) (defendant entitled to rely upon and republish news item distributed by U.P.I. wire service). Moreover, courts have applied this exception based on the pleadings where a plaintiff fails to allege any facts which would support the required showing that the republisher had or should have had substantial reasons to question the accuracy of the original publication.[6] See Zetes, 86 A.D. 2d at 747 (defendant immune from liability for republishing story originally disseminated by United Press International); Rivera v. NYP Holdings, Inc., No. 114858/06, 2007 WL 2284607 (Sup. Ct. N.Y. Co. Aug. 2, 2007) (dismissing claim against Time Warner for summarizing an article originally published in the New York Post).

The Rivera case is directly on point. In Rivera, Time Warner Cable was sued for libel for its broadcasting, during the "In the Papers" feature on its NY1 television station, a summary of various articles appearing in the newspapers that day including an allegedly defamatory report published by the New York Post. Dismissing the claims against Time Warner, the court followed the reasoning of Karaduman holding:

> The . . . causes of action [against Time Warner] must be dismissed for the additional reason that Time Warner merely summarized what the Post had published, attributing what it was saying to the Post and not endorsing what the newspaper had said. The very nature of the "In The Papers" feature seems to be to alert its audience of the existence of the newspaper article without vouching for its veracity, quality of research, or the bona fides of the reporters.

Rivera, 2007 WL 2284607, at *4 (citations omitted). The court concluded that plaintiff had "not

[6] To the extent the libel claims against Reuters and Slater are not dismissed in their entirety under Section 74, as they should be, and to the extent the Court deems the "wire service defense" unsuitable for determination under CPLR 3211(a)(1) and (7), Reuters and Slater request that Court convert this portion of the motion into a motion for Summary Judgment pursuant to CPLR §§ 3211(c), 3212.

identified any valid basis that creates a substantial reason for Time Warner to question the accuracy of the articles or the bona fides of the reporters." Id. at *5.

This reasoning also applies here. On its face, the Reuters Report is based on the April 1, 2011 story originally published by the Washington Post. The content of the Reuters Report was expressly attributed to the Washington Post within the Report and an Internet "hyperlink" linked directly to the online version of the April 1, 2011 Washington Post report. Moreover, when the Reuters Report is viewed in the context of the "News & Insight" webpage in which it appeared, it is clear that Reuters webpage was a "news aggregator" – summarizing legal news stories from various sources including the New York Times, the Sacramento Bee, the BBC, Corporate Counsel and Courthouse News, and inviting readers to link to the full articles. It is clear that, like the "In the Papers" Time Warner broadcast in the Rivera case, the Reuters Report was merely summarizing a report from another reputable news organization and not "vouching for its veracity." Rivera, 2007 WL 2284607, at *5.

Rakofsky fails to allege any facts, as he must, that would raise an inference that Reuters or Slater had reason to doubt the veracity of the Washington Post report. Nor can Rakofsky allege, as he must, that the Washington Post is anything but a long-established, reputable news agency, upon which other news agencies reasonably may rely for news items. See Bryks, 928 F. Supp. at 385 (CBC is a reputable news agency notwithstanding that it occasionally gets sued for libel). Slater makes clear, in his affidavit accompanying this motion, that he relied exclusively on the April 1, 2011 Washington Post article in preparing the Reuters Report, and had no reason to doubt the *bona fides* of the Washington Post or its reporting. (Slater Aff. ¶ 7). Slater makes further clear that he bore no hatred or malice toward Rakofsky. (Slater Aff. ¶ 8). 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.

IV.

The Complaint Fails to State a Claim for Commercial Misappropriation

Rakofsky's second cause of action under Sections 50 and 51 of the New York Civil Rights Law for commercial misappropriation (Compl. ¶¶ 185, 186, 187) should be dismissed because he fails to state a claim against Reuters and Slater based on the Reuters news report.

Section 50 of the New York Civil Rights Law provides that "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person[7] without having first obtained the written consent of such persons, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." Section 51 provides in relevant part:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided (See § 50) may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. . .

N.Y. Civ. R. L. § 51 (McKinney's 2011). Rakofsky claims that Reuters and Slater violated these provisions by using "for advertising purposes, or the purposes of trade, the name, portrait or picture of plaintiff a living person without first having obtained the written consent of plaintiff." (Compl. ¶186).

[7] Plaintiff Rakofsky Law Firm, P.C. is not a "living person" and is therefore not protected by the commercial misappropriation statutes and has no standing to sue thereunder.

Rakofsky's claim under Sections 50 and 51 must fail. New York Courts have consistently made clear that "these sections 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). As the Court of Appeals reasoned in Messenger:

> This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect "constitutional values in the area of free speech."

Messenger, 94 N.Y. 2d at 441 (citations omitted).

Newsworthiness is to be "broadly construed" and "includes not only descriptions of actual events but also articles concerning political happenings, social trends or any subject of public interest." Messenger, 94 N.Y. at 441-42 (internal citations omitted). Moreover, 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).

Applying this standard, the Reuters Report is inactionable under Sections 50 and 51. First, the content of the Report is plainly "newsworthy" and there can be no claim otherwise. The Report, based on the newsgathering and reporting of the Washington Post, describes the events which occurred when a mistrial was declared in a felony murder trial and where a judge commented on the record about the inexperience and ethics of trial counsel. These events are of obvious public interest (especially, in hindsight, given the number of defendants named in this lawsuit.) Moreover, there is clearly a "real relationship" between the Reuters Report and Rakofsky's name because Rakofsky is the subject of the Report which is about his role in the

murder case mistrial. See Bement, 307 A.D. 2d at 90 ("Despite the alleged factual errors, the subject of the article is plaintiff's purported exploits during her reign as Miss Universe 1960, therefore use of her name and of a contemporaneous photo of her clad in a swimsuit clearly relate to the text of the article."). Furthermore, there is no allegation (nor can there be) that the Reuters Report is an "advertisement in disguise" as there is nothing promoted in the content of the Report. See Bement, 307 A.D.2d at 90 (no indication that newspaper had financial interest in promoting pageant or was attempting to promote the pageant). The claim against Reuters and Slater under Sections 50 and 51 should therefore be dismissed for failure to state a claim.

V.

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

To state a claim for libel, a plaintiff must plead and prove that the allegedly libelous article is "of and concerning" the plaintiff. See Rivera, 2007 WL 2284607, at *2 (dismissing claims where publication did not mention plaintiff by name). Although Plaintiff Rakofsky Law Firm, P.C. ("RLF") alleges conclusorily that its reputation has been damaged by the Reuters Report (Compl. ¶ 188), RLF does not allege anywhere in the Complaint that the Reuters Report was "of and concerning" RLF. Nor could it so allege since the full text of the Report makes clear that it is not "of and concerning" RLF. (Weissman Aff., Ex. D). The subject of the Report was Mr. Rakofsky. The Report does not mention the "Rakofsky Law Firm, P.C." by name nor does it offer any identifying facts about RLF, other than the identity of Mr. Rakofsky. Therefore, all of RLF's claims against Reuters and Slater should be dismissed in their entirety for failure to state a claim.

CONCLUSION

For each of the foregoing reasons, the Court should dismiss the Complaint in its entirety as against Defendants Reuters and Slater and award such further and other relief as the Court deems appropriate.

Dated: New York, New York
June 22, 2011

HERZFELD & RUBIN, P.C.

By: _____

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APPENDIX

Supreme Court, New York.
New York County
Krys CORSO and Michael Chodkowski, Plaintiffs,
v.
NYP HOLDINGS, INC., Murray Weiss, John Doyle, and John Does 1-5, Defendants.
No. 0109820/2005.
August 30, 2007.

West Headnotes
Libel and Slander 237 ⟹42(1)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k42 Reports
237k42(1) k. Judicial Proceedings. Most Cited Cases

Statements in newspaper article reporting on rape and identifying the two suspects were on a subject of legitimate public concern and not made in "grossly irresponsible manner," and thus, the statements, which were essentially true, were privileged from suspects' libel and libel per se claims against newspaper and reporter, where reporter called the district attorney's office and the police department to obtain a copy of the criminal complaint and obtain additional information about the suspects' arrests. McKinney's Civil Rights Law § 74.

Motion Seq. No. 003

Decision/Order

[This opinion is uncorrected and not selected for official publication.]

Barbara R. Kapnick, J.

DISMISS

The following papers, numbered 1 to _____ were read on this motion to/for _

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	_
Answering Affidavits - Exhibits _	_
Replying Affidavits _	_

Cross-Motion: [] Yes X No

Upon the foregoing papers, It Is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8/30/07

<<signature>>

J.S.C.

BARBARA R. KAPNICK, J.:

In this action, plaintiffs Krys Corso a and Michael Chodkowski seek to recover compensatory and punitive damages against defendants NYP Holdings, Inc., the publisher of the New York Post, its Criminal Justice Editor, Murray Weiss and a reporter, John Doyle for libel (first cause of action), libel per se (second cause of action), negligent infliction of emotional distress (third cause of action), intentional infliction of emotional distress (fourth cause of action) and negligence (fifth cause of action), based on false and defamatory statements allegedly made about plaintiffs in an article which was printed in the New York Post on July 20, 2004.

The "Exclusive" article, written by defendant Weiss along with defendant Doyle and others, reported on plaintiffs' arrest following an alleged incident at the BLVD nightclub, under the headline,

NIGHT CLUB RAPE

Waitress' Ordeal at new hot spot

The article read, in relevant part, as follows:
A cocktail waitress at one of Manhattan's hottest new nightspots was viciously raped by two men in a backstage VIP lounge after allegedly being drugged, The Post has learned.
A security guard at BLVD grabbed one suspect - a 6-foot-2, 225-pound man - after he and his accomplice allegedly attacked a helpless server and left her naked and unconscious in a private room.
The man was identified as Michael Chodkowski, 36, a Hicksville, L.I. contractor, who sources say has three prior arrests - one for grand larceny and two for driving under the influence, one in Nassau County, the other in Florida.
The other suspect was identified as Krys Corso, 39, of Park Ridge, N.J.

Police say the 23-year-old, blond-haired, blue-eyed victim was raped in a private lounge reserved exclusively for artists and musicians who perform there and friends of the owners and managers, sources say.
According to a criminal complaint filed by the Manhattan district attorney, the woman, who is married, was initially pinned down by the men and sexually mauled as she tried to push them "away while saying, 'No.' "
She then fell "unconscious" and was raped by Corso as "Chodkowski held the door to the room closed," the complaint says.
A fourth unidentified person was in the room during the attacks before Chodkowski allegedly ordered the witness "to leave."

Both suspects were charged with first-degree rape and first-degree sexual abuse.
The suspects were arraigned at 1 a.m. yesterday morning and released on bail. They are due back in court Thursday.
Their lawyer, Nicholas Massimo, denied the allegations.

In September 2005, plaintiffs were acquitted, after trial, of the charges.
Plaintiffs' Complaint in this action alleges that

72. Defendants' reporting of the arrests of plaintiffs Corso and Chodkowski present a mixture of statements intended to make plaintiffs the objects of ridicule and to bring them public and personal humiliation. The large number of factual errors, incorrect speculations, innuendo, and out-and-out false statements contained in said publication indicate that defendants and those who republished defendants' statements failed to investigate the facts prior to publishing, and shows a reckless disregard or concern for the truth of said statements.

74. The above-mentioned statements were published and republished maliciously with the specific intent to harm the plaintiffs, by virtue of the defendants having adopted, espoused and speculated upon the allegations against plaintiffs, and with the specific intent of portraying such allegations to readers in the light least favorable to plaintiffs, and least consistent with a presumption of their innocence.

77. By virtue of the above-referenced conduct of said defendants, defendants, individually and collectively, acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

Defendants now move for an order pursuant to CPLR §§ 3211(a)(7) and/or 3211(c) and/or 3212(b) dismissing the Complaint in the above-captioned action in its entirety, together with costs.

The motion is granted without opposition to the extent of dismissing the third, fourth and fifth causes of action.

Defendants argue that plaintiffs' first and second causes of action for libel and libel per se must also be dismissed on the grounds that: (i) the article is a fair and true report of a judicial proceeding and therefore absolutely privileged pursuant to Civil Rights Law § 74; (ii) the complained-of article is substantially true; and (iii) the defendants were not grossly irresponsible in publishing the article.
Whenever a libel action is brought against a newspaper, the courts are called upon to strike a balance between the individual's right to protect his good name and the guarantees of the First Amendment which safeguard the people's right to an active, thriving and untrammeled press, an indispensable component of any free and democratic society (citation omitted).

Gurda v. Orange County Publications Division of Ottaway Newspapers. Inc., 81 A.D.2d 120, 130, 439 N.Y.S.2d 417 (2nd Dep't 1981), opinion dissenting in part, concurring in part, adopted by the Court of Appeals, 56 N.Y.2d 705, 451 N.Y.S.2d 724, 436 N.E.2d 1326 (1982).

"Among the most significant functions served by the First Amendment is to protect the right of free access to information concerning the workings of our public institutions." *Gurda, supra* at 131, 439 N.Y.S.2d 417.

In recognition of the importance of this purpose, the State has enacted Civil Rights Law § 74 which provides, in relevant part, as follows:
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.

"For a report to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate." *Holy Spirit Assoc. for the Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165, 399 N.E.2d 1185 (1979). *See also, Misek-Falkoff v. American Lawyer Media, Inc.*, 300 A.D. 2d 215, 752 N.Y.S. 2d 647 (1st Dep't 2002),

lv. to app. den., 100 N.Y.2d 508, 764 N.Y.S.2d 385, 796 N.E.2d 477 (2003), *rear. den.*, 100 N.Y.2d 616, 767 N.Y.S.2d 398, 799 N.E.2d 621 (2003), *cert. den.*, 541 U.S. 939, 124 S.Ct. 1693, 158 L.Ed.2d 360 (2004).
When 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.

Holy Spirit Assoc., supra at 68, 424 N.Y.S.2d 165, 399 N.E.2d 1185.

Defendants argue that the statements contained in the article are privileged because they constitute a fair and true report of the criminal proceedings brought against plaintiffs; i.e., the substance of the article was a "substantially accurate" rendering of the claims contained in the criminal complaint.

Plaintiffs argue that defendants are not immune from a civil suit for libel because the article, and specifically the headline, did not merely report on those judicial proceedings, but falsely represented without including the word, "allegedly", that a heinous and despicable crime occurred,[FN1] and included material which was not contained in the criminal complaint.

> FN1. Plaintiffs cite to critical postings on one website, *www.rhythmism.com,* which republished the report and which plaintiffs claim demonstrates that the allegations of the New York Post article were interpreted by readers as true.

However, the headline of the article "must be read and evaluated in conjunction with the text it precedes (citations omitted). If the headline is a fair index of an accurate article, it does not give rise to a cause of action (*see, e.g., Gunduz v. New York Post Co.,* 188 A.D.2d 294 [1st Dep't 1992])." *Von Gerichten v. Long Island Advance,* 202 A.D.2d 495, 496, 609 N.Y.S.2d 246 (2nd Dep't 1994). *See also, Kamalian v. Reader's Digest Assoc., Inc.,* 29 A.D.3d 527, 814 N.Y.S.2d 261 (2nd Dep't 2006).

Moreover, where, as here, "the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the party defamed may recover only if he is able to "establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.,* 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975). *See also, Weiner v. Doubleday & Co., Inc.,* 74 N.Y.2d 586, 550 N.Y.S.2d 251, 549 N.E.2d 453 (1990), *cert. denied,* 495 U.S. 930, 110 S.Ct. 2168, 109 L.Ed.2d 498 (1990); *Morsette v. "The Final Call",* 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dep't 2003), *app. dism'd,* 5 N.Y.3d 756, 801 N.Y.S.2d 248, 834 N.E.2d 1258 (2005).

Defendants contend that plaintiffs cannot meet their burden of showing by a preponderance of the evidence that they acted in a "grossly irresponsible manner", since defendant Weiss has detailed in a sworn affidavit his efforts to gather and verify information prior to the publication of the article which included (i) calling the Public Information Office for the New York County District Attorney's Office ("the DA's Office") on or about July 18 or 19, 2004 to obtain details of the arrest and to obtain a copy of the criminal complaint, and (ii) contacting the Press Office for the New York City Police Department ("NYPD") to obtain additional information regarding the plaintiffs' arrests and to confirm the information which he received from the DA's Office.[FN2]

> FN2. Weiss further resents that. "As best as I can recall, I also spoke with an individual in the Sex Crimes Unit of the DA's Office regarding the charges against Messrs. Corso and Chodkowski.

Although plaintiffs argue that there are triable issues of fact as to whether The Post acted in a grossly irresponsible manner, (*see, e.g., Hawks v. Record Printing & Pub. Co.*, 109 A.D.2d 972, 486 N.Y.S.2d 463 [3rd Dep't 1985]), plaintiffs have not submitted any evidence to refute defendant Weiss' affidavit.

Accordingly, based on the papers submitted and the oral argument held on the record on January 31, 2007, this Court finds that the statements contained in the article in question do not give rise to an actionable claim for libel or libel per se.

Defendants' motion is, therefore, granted. The Clerk may enter judgment dismissing plaintiffs' Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: August 30 2007

<<signature>>

BARBARA R. KAPNICK

J.S.C.

Corso v. NYP Holdings, Inc.
2007 WL 2815284 (N.Y.Sup.) (Trial Order)

END OF DOCUMENT

Supreme Court, New York.
Nassau County
Steven E. KLIG, Plaintiff,
v.
HARPER'S MAGAZINE FOUNDATION, an Illinois corporation and John Doe, Defendants.
No. 600899/10.
April 26, 2011.

Short Form Order

Steven E. Klig, Plaintiff Pro Se, 52A Cedar Drive, Great Neck, NY 11021.Davis Wright Termaine LLP, Attorneys for Defendant, 1633 Broadway, 27th Floor, New York, NY 10019.
[This opinion is uncorrected and not selected for official publication.]

Present: Hon. Ute W. Lally, Justice.
Motion Sequence #1, #2

Submitted January 18, 2011

The following papers were read on these motions to compel discovery and to dismiss:

Notice of Motion and Affs.	1-3
Second Notice of Motion and Affs.	4-6
Memoranda of Law.	7-10a

Upon the foregoing papers, it is ordered that this motion by plaintiff, Steven E. Klig ("Klig"), *pro se,* for an order, *inter alia,* pursuant to CPLR 3120, directing the defendant, Harper's Magazine Foundation, an Illinois Corporation, to comply with his Notice to Produce all documents, records and any other information in the possession of said defendant, relating to the identification of the author of the article titled *"You're a Mean One, Mr. Klig"* which appeared in the "Readings" section of the December 2009 edition of the *Harper's Magazine* is denied.

This second motion by defendant, Harper's Magazine Foundation ("Harper's) for an order pursuant to CPLR 3211 (a)1. and 7. dismissing the plaintiff's Amended Complaint in its entirety and granting sanctions of costs and attorneys' fees pursuant to CPLR Rule 8303-a is granted in part and denied in part.

This libel action arises out of a column published in the December, 2009 issue of Harper's Magazine (the "Column") that consisted almost entirely of excerpts of a letter and all but two emails that were quoted in full in the criminal complaint filed against the plaintiff herein, Steven E. Klig. The Court, as best as can be determined from the papers submitted herein, finds the undisputed facts are as follows:

Defendant Harper's is a not-for-profit corporation, which publishes *Harper's Magazine.* Its "Readings" section is comprised of excerpts of found documents, ranging in length from a few lines to thousands of words. The "Readings" are taken from a variety of sources, including complaints, affidavits, transcripts, essays, poems and interviews. Harper's presents the excerpts with only the minimal information necessary to understand what the excerpts are, and where they

derive from. Accordingly, the excerpts do not contain any bylines, as the "authors" of the excerpts are the individuals who wrote the underlying found documents.

By a complaint dated January 5, 2009, the United States Attorneys' Office for the Southern District of New York filed said complaint against Steven E. Klig charging him with "extortion and stalking under 18 U.S.C. §§875(d) and 2261(A)" (hereinafter referred to as the "Criminal Complaint"). The Criminal Complaint charged Klig with transmitting communications containing threats in interstate commerce and cyber-stalking. In the Criminal Complaint, FBI Special Agent Gallo states that in late 2008, the FBI learned that a woman (the "Victim") was receiving threatening correspondence from someone who claimed to have bad sexual relations with her some time in the past. Agent Gallo further states that "despite his efforts to conceal his identify [sic] by, among other things, using an alias and publicly available Internet connections, STEVEN KLIG a/k/a 'robertgibbons 1967,' the defendant, has been identified as the person who sent the correspondence" to the Victim. Agent Gallo states in the Criminal Complaint that he reviewed a letter sent to the Victim at her home, postmarked October 20, 2008, which stated in part:
I remember our past experiences together so fondly. In fact (and you may be a bit upset with me for this), I managed to record one of our sessions on DVD and it has provided me with extreme pleasure over the years...I hate asking you for this favor but was wondering if you would consider getting together with me for a one-time reunion...It would also be an opportunity for me to return the DVD to you. I suppose if you decided not to do this, I could just return the DVD. I have a few folks that I've been able to track down. I could send a copy to [Victim's husband] at his email address and perhaps [Victim's brother and sister-in-law] (are they still at [address]) and [another brother of Victim] (is he still at [address]). Just want to return the DVD to you and capture one last memory to get me through these trying times...The terms are not negotiable.

The letter was signed "Bob." The Victim did not respond.

According to the Criminal Complaint, the Victim's Husband then received an email from *robertgibbons1967@yahoo.com* on November 10, 2008, stating that the sender was an old friend trying to get in touch with the Victim and seeking a current email address for her. Although the Victim's husband did not respond, the Victim received an email on December 11, 2008, from *robertgibbons1967 @yahoo.com* stating in part:
Well I must say that I was incredibly disappointed that I never received a response from you...So just to give you a head's up. I've been doing a little editing on our video. Mostly some blurring of myself so that I won't be recognized. You, on the other hand, can be seen very clearly having the time of your life being fucked by me. I'll be sending out Christmas presents to [your family]. Strangely enough, I think everyone will be excited by the content, even your brothers. You just look so great. Thanks for the memories and very sorry to do this but you really seem not to care.

This email was signed with the name "Steve."

The Criminal Complaint states that on or about December 11, 2008, the FBI began accessing and monitoring the Victim's email account, and responded to the emails received from "robertgibbons1967" pretending to be the Victim. On December 12, 2008, the FBI sent an email from the Victim's email account to "robertgibbons 1967," stating in part "What do you want from me, I want to keep my family out of this." On December 15, the Victim received an email from *robertgibbons1967@yahoo.com* stating in part:
So I've thought long and hard and here are the two options you have. I can send the video out to [your family] next week. I've successfully edited my face so I'm not recognizable. You, on the other hand are very recognizable. Alternatively, you can help me out a little bit. I don't need money. What I really want is something new to look at. Before the beginning of each month, you can send me a few pictures in poses that I have requested. At the end of one year, I will go away and you will never hear from me again. For the first installment, I would want to see the picture by Friday of this week. Here

are the poses I would like. (1) fully clothed; (2) without your shirt; (3) without your shirt and pants (in just a bra and panties); (4) without the bra and (5) fully nude. I leave it up to you but if I do not get the pictures by Friday, the video goes out on Monday with a little note... It happened so long ago that maybe no one will care. But if you want the video kept private, you will do what I ask...Please don't respond unless you are willing to provide the pictures. I do not want to negotiate about this. Friday is my deadline. Otherwise, the video goes out Monday.

According to the Criminal Complaint, the email exchange between Klig and the FBI (pretending to be the Victim) continued through the holidays. The FBI agent stalled for some time, writing on December 22, 2008 "Can you give me till next week given that it's Christmas week?" and Klig replied, "ok...I will give you until Monday but because I am being so gracious about this, I will be very angry if you do not have the photos to me by Monday...At this point, if I do not get the photos, I will send copies to your neighbors and anyone else I can find that you have associated with, and post the video to the internet."

On December 29, 2008, the "Victim" sent an email claiming to have the photos, but indicating that she was having trouble transferring them from the camera to the computer. According to the Criminal Complaint, Klig responded on New Years day: "I understand your computer frustrations. I would recommend taking some innocent pictures (perhaps with the kids) and having your husband show you how to transfer them. Then you can go ahead and transfer the requested photos. This can work out for us...Happy New Year."

The Criminal Complaint also summarizes the FBI's investigation, which determined that Klig was the author of the emails. While some of the emails were sent from publicly available Internet connections at a fitness club and cyber-café, the FBI determined that other emails were sent from an IP address assigned to a residential cable modem in a residence in Queens. Armed with this information, the FBI obtained records from Yahoo! regarding the *"robertgibbons1967@yahoo.com"* email account; reviewed records and interviewed employees from the café and fitness club offering publicly available internet connections; reviewed records from a travel database available to the FBI to confirm that Klig had traveled to Orlando, Florida at the time that email messages were sent from a hotel in Disney World; and interviewed both the Victim and Klig, among other things. As a result, the government determined that Klig had sent the threatening emails.

In its December, 2009 "Readings" section, Harper's published verbatim excerpts of the letters and emails that were included in the Criminal Complaint. The Column was marked as "Correspondence" and titled, *"You're a Mean One, Mr. Klig."* The following brief paragraph introduced the correspondence:
From an exchange of letters and emails between Steven Klig, a Long Island attorney, and an FBI agent posing as his ex-girlfriend. In October, Klig began blackmailing the woman, whose name has been withheld, demanding she send him nude photos of herself. She contacted the FBI, and an agent began responding to Klig's emails, assuming her identity. The emails are included in a complaint filed against Klig on January 5, when he was arrested on federal extortion and harassment charges. In September, Klig pleaded not guilty.

After that the Column consists entirely of the letter and thirteen of the fifteen emails that were exchanged between Klig and the "Victim" and were quoted in full in the Criminal Complaint. The Column did not provide any further commentary on the correspondence and did not draw out other alleged damning facts from the Criminal Complaint.

On May 24, 2010 -- six months after Harper's publication -- Klig "pled guilty to accessing an unsecured network without the permission of the owner of such network" under 18 U.S.C. §1030(a)(2)(c) and 18 U.S.C. §1030(c)(2)(A).

Indeed Klig essentially admits that he sent the emails. Specifically, in support of his instant motion, Klig states that his behavior can be explained as follows:

During the criminal proceeding, it was concluded that Plaintiff suffered from a severe and extreme sleep disorder for almost eight months during 2008 and it was concluded by mental health experts that this was the result of certain undiagnosed psychological disorders. Moreover, the severe and extreme sleep disorder, which was the result of these undiagnosed psychological disorders increased the severity of those psychological disorders to the point where they led to extremely uncharacteristic and aberrational behavior.
(*Plaintiff's Opposing Brief,* pp. 6-7).

As a result, he claims that it is "very possible that a jury, if presented with all the facts, would conclude that Plaintiff did not possess the requisite specific intent to have committed the crime of extortion."

On October 22, 2010, Klig served a summons and verified complaint on Harper's naming as defendants both Harper's and the "John Doe" who "authored the article." On November 5, 2010, Klig served an amended summons and verified complaint. It contains one cause of action for libel. Klig alleges that the title of the Column, *"You're a Mean One, Mr. Klig"* and the statement in the introductory paragraph, "Klig began blackmailing the woman, whose name has been withheld," are false and have caused harm to his business reputation. The parties stipulated to extend Harper's time to respond to the Amended Complaint on December 10, 2010.

On November 2, 2010, Klig served Harper's with a request to produce "all documents, records and any other information, in the possession of said defendant, relating to the identification of the author" of the Column.

On November 24, 2010, Harper's timely served its objection to the request, on the grounds that the request (1) seeks information protected by the newsgathering privilege; (2) that the request is premature, and could lead to harassment by Klig of the "author"; and (3) that the wording of the request seeking "all documents...relating to the identification" is both overly broad and calls for the production of documents protected by the attorney-client privilege.

Upon the instant motions, plaintiff Klig seeks an Order of this Court, *inter alia,* directing the defendant, Harper's to comply with its Notice to Produce, and defendant Harper's seeks an Order, *inter alia,* dismissing the Amended Complaint in this action in its entirety.

In making this motion, plaintiff submits that he has asserted a colorable claim for defamation in his Amended Complaint and therefore, his motion to compel the information sought in the Notice to Produce should be granted. Specifically in that regard and in bringing tbis complaint, plaintiff challenges two statements from the Column as false and harmful to his business reputation: (1) the title of the Column; and (2) the statement that he "began blackmailing" his ex-girlfriend. However, in his reply brief in opposition to defendant's motion, plaintiff concedes that he cannot bring a defamation claim based on Harper's use of the word "blackmail" to describe the acts alleged against him in the Criminal Complaint filed by the United States Attorneys' Office which charged him with "extortion." Specifically, Klig admits that "blackmail" and "extortion" are synonymous, and therefore that Harper's fairly and accurately reported the crime charged in the Criminal Complaint. In addition, Klig stipulates, for purposes of this motion, that he did send the threatening emails that form the basis of the Criminal Complaint.

Thus, what is left of plaintiff's claim is his contention that the fair reporting privilege otherwise afforded to the defendant pursuant to New York Civil Rights Law §74, is lost because Harper's did not use the word "alleged" or "allegedly" when describing an arrest or the filing of charges. Klig claims that in the absence of the word "alleged," an ordinary reader could infer from the Column that he "was, in fact, convicted of blackmailing someone because the article states it so matter of factly and the title...presupposes that the author is concurring on the truth of the factual assertions set forth in the article" (*Plaintiff's Memo of Law,* p. 6). These arguments are unavailing.

New York's Civil Rights Law §74 states, in pertinent part, as follows:
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.

The purpose of Civil Rights Law § 74 "is the protection of reports of judicial proceedings which are made in the public interest" (*Williams v Williams,* 23 NY2d 592). The privilege afforded by this statute is absolute and furthers "the public interest in having proceedings of courts of justice public, not secret" (*Gurda v Orange County Publs. Div. of Ottaway Newspapers,* 56 NY2d 705; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245, 248). That is, the purpose of this "fair report" privilege is to inform the public about judicial, legislative, or otherwise official proceedings (*Glantz v Cook United, Inc.,* 499 F. Supp. 710, 715 [EDNY 1979]; *Cholowsky v Civiletti,* 69 AD3d 110, 114). This absolute privilege applies only where the publication is a comment on a judicial, legislative, or other official proceeding (*Cholowsky v Civiletti, supra* at 114-115; *Cuthbert v National Org. for Women,* 207 AD2d 624, 626; *Ramos v El Diario Publ. Co.,* 16 AD2d 915), and is a "fair and true" report of that proceeding (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.,* 49 NY2d 63, 67; *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.,* 260 NY 106, 118).

Whether a statement is privileged under Section 74 of the Civil Rights Law presents a threshold question of law for the Court to determine at the pleadings stage (*Palmieri v Thomas,* 29 AD3d 658, 659; *Every Drop Equal Nutrition, L.L.C. v ABC, Inc.,* 5 AD3d 536, 537). As to the threshold requirement that the publication purport to comment on an judicial, legislative, or other official proceeding, "[i]f the context in which the statements are made make it impossible for the ordinary viewer[,] listener [,] or reader to determine whether [the] defendant was reporting on a judicial [or other official] proceeding, the absolute privilege does not apply" (*Cholowsky v Civiletti, supra* at 114-115). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Lacher v Engel,* 33 AD3d 10, 17).

As to the requirement that the publication be a fair and true report of the official proceeding, the Court of Appeals has stated that "[f]or a report to be characterized as 'fair and true' within the meaning of [Civil Rights Law § 74], thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co., supra* at 67). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" *see also, Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs., supra* at 118). Thus, "[t]he case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings" (*Becher v Troy Publ. Co.,* 183 AD2d 230,233). This is consistent with the common law of libel, which " 'overlooks minor inaccuracies and concentrates upon substantial truth' " (*Shulman v Hunderfund,* 12 NY3d 143, 150, *quoting Masson v New Yorker Magazine, Inc.,* 501 US 496, 516). Specifically, New York courts have held that a report is privileged where the language used in the report, despite minor inaccuracies, does "not produce a different effect on the reader than would a report of the precise truth" (*Silver v Kuehbeck,* 2005 WL 2990642 [SDNY 2005] *aff'd* 217 Fed. Appx. 18 [2nd Cir. 2007]).

In this case, having admitted that almost the entire Column "quotes verbatim, the language contained in the original federal information filed against him on January 5,2009" (*Plaintiff's Memo of Law,* p. 5), plaintiff nonetheless argues that Harper's failure to use the word "alleged" or "allegedly" removes the subject Column from the ambit of protection afforded by the "fair reporting" privilege. This argument is entirely unavailing.

As stated above, New York courts have consistently determined that whether a report falls within the broad ambit of the protection under the privilege is to be determined by the substance of the report, not its precise language (*Holy Spirit*

Ass'n for Unification of World Christianity v N. Y. Times Co., supra).

Further, given that the Column's introductory paragraph explicitly states that the quoted emails were part of a criminal complaint filed against Klig, that he pled not guilty to the charges against him, and says nothing more about the case's resolution, renders plaintiff's argument that the absence of the word "alleged" could lead an ordinary reader to infer that he "was, in fact, convicted of blackmailing someone" entirely meritless (*Liebgold v Hofstra University,* 245 AD2d 272).

While Klig conclusively pleads that the statements are "false," he does not allege that Harper's misquoted the criminal complaint, let alone allege that he did not send the emails. To the contrary, he admits that, well after publication of the Column he pled guilty to a misdemeanor in connection with the charges brought against him. In this case, Harper's column made it expressly clear (1) that the emails were included in a federal complaint charging Klig with extortion and harassment; and (2) that Klig pleaded not guilty to the charges.

Klig's argument that the determination of whether the Column "would have the same effect on the reader without the defamatory statements" cannot be determined by this Court at this juncture is equally meritless. As stated above, section 74 entitles the Court to make exactly such a determination as a matter of law on a motion to dismiss (*Cholowsky v Civiletti, supra).*

With respect to plaintiff's contention that the title of the Column, *"You're a Mean One, Mr. Klig"* is false and harmful to his business reputation, again, this Court finds that, when read as a whole and in the appropriate context, the title (and the "began blackmailing" statement) are part of the privileged report of a judicial proceeding (*Liebgold v Hofstra University, supra; Becher v Troy Publ'g Co., supra).* Headlines and materials accompanying a recitation of alleged misconduct in a judicial proceeding, such as the Column's title and introductory paragraph, are regularly found by the courts to fall within the fair report privilege (*Branca v Mayesh,* 101 AD2d 872, 874; see also *Posner v N.Y. Law Publ'g Co.,* 228 AD2d 318). So long as headlines and accompanying material do not constitute a separate defamatory accusation, they are protected by the Civil Rights Law Section 74 (*Glendora v Gannett Suburban Newspapers,* 201 AD2d 620). Here, the headline suggesting Klig was mean cannot be considered a separate defamatory accusation from the accusations contained in the Criminal Complaint. Nor does Klig identify any separate defamatory accusation in the title; to the contrary, he complains that they too closely echo the Criminal Complaint and Harper's error, if any, was not to repeat that these are allegations (*Amended Complaint,* ¶¶9-11).

Furthermore, in his opposition, Klig concedes that the title of the Column, a play on the famous phrase from "How the Grinch Stole Christmas!", "would ordinarily constitute an expression of opinion" (*Plaintiff's Memo of Law,* p. 8). However, he claims that since he denies blackmailing or extorting anyone (even while admitting that he sent the emails quoted in the Column), "the author had no reasonable basis upon which to infer that he factual statements underlying the opinion were true, and therefore, had no basis for making the statement that Plaintiff is a mean one" (*Id).* This argument is also entirely meritless.

A defamation action must be based on statements of objective fact, not unverifiable expression of opinion (*Milkovich v Lorain Journal Co.,* 497 US 1,20 [1990]; *600 West 115th Street Corp. v Von Gutfield,* 80 NY2d 130,139). Whether a statement is a non-actionable expression of opinion or an actionable factual assertion is a threshold question of law to be decided by the Court (*Gross v New York Times, Co.,* 82 NY2d 146, 153; *Steinhilber v Alphonse,* 68 NY2d 283, 290). In drawing the line between fact and opinion, "the dispositive inquiry...is whether a reasonable [reader] could have concluded that [the statement at issue] convey[s] facts about the plaintiff" (*Gross v New York Times, Co., supra* at 152). Particular significance is given to context, since context typically informs the reader that the statement is not being offered as objective fact, but rather as opinion, conjecture or surmise (*Brian v Richardson,* 87 NY2d 46).

The title in this case does not contain any verifiable facts. In the context of emails threatening to send sex videos as "Christmas presents" to a woman's family and friends, and published during the holiday season in 2009, the entirely subjective view that Klig's threats were "mean" is quintessential opinion. It is "vague, ambiguous, indefinite and incapable of being objectively characterized as true or false" (*Park v Capital Cities Communications,* 181 AD2d 192, 196; *Weiner v Doubleday,* 142 AD2d 100, 105 *aff'd* 74 NY2d 586) and is therefore not actionable. Moreover, the opinion is based on the alleged facts disclosed in the Column -- that the Criminal Complaint charged Klig with having sent the letter and emails that are quoted at length in the column. The opinion that he is "a mean one" is not founded on the specific criminal charges brought against him of "extortion" or "stalking" but rather on the threats and taunts paired with the references to Christmas he was alleged to have written in the emails. Further, as Klig is "willing to stipulate that he sent the emails recited in the article" (*Plaintiff's Memo of Law,* p. 2), he simply has no claim for defamation based on the title.

Given the full recitation of Klig's emails threatening to send "Christmas presents" to a woman's family and neighbors, this Court finds that the conclusion that *"You're a Mean One, Mr. Klig,"* is fully protected opinion that his conduct was not in the traditional holiday spirit of giving.

Therefore, even affording a liberal construction of the plaintiff's amended complaint (*511 West 232nd Street Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144), this Court herewith grants defendant Harper's motion to dismiss made pursuant to CPLR 3211 (a)1. and 7. Plaintiff has failed to plead a cognizable cause of action *Well v Yeshiva Rambam,* 300 AD2d 580).

Inasmuch as defendant also seeks an Order granting it sanctions of costs and attorneys fees pursuant to CPLR 8303-a, said motion is denied. CPLR 8303-a permits the imposition of costs and reasonable attorneys' fees, not in excess of $10,000, against a plaintiff found to have brought a frivolous action (*Zysk v Kaufman, Borgeest & Ryan, LLP,* 53 AD3d 482). Although the plaintiff is an attorney, this Court cannot find any basis on these facts that the plaintiff commenced and continued this action in "bad faith." There is no evidence on this record such that this Court can find that plaintiff should have known that the action did not have any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law (CPLR 8303-a[c][1]; [ii]; *Grasso v Mathew,* 164 AD2d 476). Therefore, that part of defendant's motion is denied.

Further, in light of the fact that plaintiff's Amended Complaint is herewith dismissed, plaintiff's motion for an Order, pursuant to CPLR 3120, is denied in its entirety as moot.

Settle Judgment on Notice.

Dated: April 26, 2011

<<signature>>

UTE WOLFF LALLY, J.S.C.

TO: Steven E. Klig

Plaintiff Pro Se

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Great Neck, NY 11021

Davis Wright Tremaine LLP

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Klig v. Harper's Magazine Foundation
2011 WL 1768878 (N.Y.Sup.) (Trial Order)

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16 Misc.3d 1121(A), 847 N.Y.S.2d 904, 2007 WL 2284607 (N.Y.Sup.), 2007 N.Y. Slip Op. 51529(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 16 Misc.3d 1121(A), 2007 WL 2284607 (N.Y.Sup.))

(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, New York County, New York.
Francois RIVERA, Plaintiff,
v.
NYP HOLDINGS, INC., Zach Haberman, Jim Hinch, Time Warner Cable Inc., and John and/or Jane Does 1 & 2, Defendants.

No. 114858/06.
Aug. 2, 2007.

Richard F. Horowitz, Esq., Stuart A. Blander, Esq., Dolly Caraballo, Esq., Heller, Horowitz & Feit, P.C., New York, NY, Attorneys for Plaintiff.

Landis C. Best, Esq., Floyd Abrams, Esq., Samantha K. Sherman, Esq., New York, NY, Attorneys for the Time Warner Defendants.

Slade R. Metcalf, Esq., Katherine M. Bolger, Esq., Hogan & Hartson LLP, New York, NY, Attorneys for Defendants NYP Holdings and Jim Hinch.

ROLANDO T. ACOSTA, J.

Background [FN1]

FN1. This Decision and Order was edited for publication.

***1** The facts in these motions are fairly straight forward. NYP published three editions of the *New York Post("Post")* in October 2005: the Metro Edition; the Sports Extra Edition; and, the Late City Final Edition. In addition, its website, www.nypost.com, carried articles from the Late City Final Edition. At issue in this action are four articles that allegedly defamed plaintiff. The first article ("Article One"), published on October 20, 2005, did not appear in the Metro Edition. It was carried only in the latter two editions as well as in the website.

"Article Two," published on October 21, 2005, appeared in all three editions and the website. "Article Three" likewise appeared in all three editions and the website, but the Metro Edition did not mention plaintiff by name. "Article Four" appeared in all three editions and the website.

Time Warner owns and operates "NY1," a 24-hour cable television newschannel. NY1's morning news program includes a daily feature called "In The Papers" in which the news anchor summarizes a sample of articles appearing in New York City newspapers on that day. The October 20, 2005 broadcast of "In The Papers" mentioned Article One, entitled "PAY 50 G AND BE A JUDGE': DA puts heat on Norman" from that days's issue of the New York Post ("Post").

The anchor summarized that article as:

> Harder news here. This is a story that goes on inside. This is about prosecutors telling a former head of the Brooklyn Democratic party, Clarence Norman, that if he tells what he knows about judges suspected of buying their jobs, they will ask for a lighter sentence for his corruption conviction and easier treatment for three other indictments that he faces. And they say that one of the judges that is under investigation is suspected of paying $50,000 to become a judge.

Although plaintiff's name is not mentioned in the broadcast, the screen displays an image of the *Post* page on which the article appears, which includes a small headshot, with a small caption bearing his name underneath the photograph.

In the October 21, 2005 broadcast of "In The Papers," the anchor summarized Article Two in the *Post* dealing with the same topic as the previously mentioned article. Article Two, entitled "JUDGE SINGS: Explosive new testimony on court $candal," was summarized as:

Judge Sings' the headline here. This is more on

> what's going on in Brooklyn. They say a Brooklyn judge suspected of buying his seat has been granted immunity for telling all to a grand jury. Now the *Post* says that Supreme Court Judge Francois Rivera testified after being accused of buying his seat for fifty thousand. He could face other charges but now the Brooklyn D.A.'s office is looking at another Supreme Court Judge there and they've also given disgraced former Democratic boss Clarence Norman until Monday to tell all he knows in exchange for leniency when he is sentenced on political corruption charges.

*2 During the segment, the screen displayed an image of the article, which includes three photographs, including a small headshot of the plaintiff.

Plaintiff commenced this action against Time Warner, NYP Holdings (which, includes the *New York Post*), two *Post* reporters and several unnamed persons who provided the information to the *Post*. Only two causes of action in the complaint pertain to Time Warner, the seventeenth and eighteenth, which assert that plaintiff was defamed by Time Warner during its October 20th and October 21st broadcast, respectively.

Analysis

NYP moves to dismiss the first and ninth causes of action because plaintiff was not mentioned by the *Post* on those occasions. The first cause of action alleges that Article One appeared in the Metro Edition on October 20, 2005, but it is undisputed that Article One in fact did not appear in the Metro Edition. See Plaintiff's Memorandum of Law, p. 3 f.n. 1. It is also undisputed that Article Three did not mention plaintiff by name in the Metro Edition as alleged by plaintiff. *Id.* Accordingly, the first and ninth causes of action are dismissed. *Chicherchia v. Cleary,* 207 A.D.2d 855 (2nd dept.1994)("For there to be recovery in libel, it must be established that the defamation was of and concerning the plaintiff ").

NYP also moves to dismiss the third, fourth, sixth, seventh, eighth, eleventh, twelfth, fourteen, fifteen and sixteenth causes of action as duplicative claims because they are barred under the single publication rule. In other words, NYP claims that each article gives rise to only one cause of action notwithstanding the fact that it appeared in separate *Post* editions and the website. This position, however, is not supported by New York case law. *See Firth v. State,* 98 N.Y.2d 365, 371 (2002); *Cook v. Conners,* 215 N.Y. 175 (1915). As the the New York Court of Appeals noted in *Firth, supra,* 98 N.Y.2d at 371:

> Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely "a delayed circulation of the original edition" (*Rinaldi v. Viking Penguin,* 52 N.Y.2d [422, 435 (1981)]; Restatement [Second] of Torts § 577A, Comment d, at 210, supra). The justification for this exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience (*see Rinaldi,* 52 N.Y.2d at 433 [citing *Cook v. Conners,* 215 N.Y. 175 (1915)]; Restatement, Comment d). Thus, for example, repetition of a defamatory statement in a later edition of a book, magazine or newspaper may give rise to a new cause of action (*see Rinaldi,* 52 N.Y.2d at 433-435 [hard-cover and paperback editions of the same book]; *see also Cook v. Conners,* 215 N.Y. at 179 [morning and afternoon editions of newspapers owned and published by the same individual]).

(emphasis added). It should also be noted that the Court in Firth, in addition to citing and reaffirming Cook, also cited the codification of the "single publication' rule in Section 577A of the Restatement (Second) of Torts, which expressly states that "if the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are two causes of action." *Firth v. State, supra,* 98 N.Y.2d at 370-71.

*3 If the *Post* published 100,000 copies of the

Metro Edition on October 21, 2005, for instance, the single publication rule limits plaintiff to only one cause of action for that edition rather than 100,000 causes of action. Separate editions are separate publications, however, even if the article is identical. Notwithstanding the *Post's* invitation for this Court to create a new rule in New York, the existing rule works fine, inter alia, because separate editions of a publication are geared to reach different audiences. *Firth v. State, supra,* 98 N.Y.2d at 371. That other states may take a different approach, *see, e.g., Belli v. Robert Bros. Furs,* 49 Cal.Rptr. 625 (Cal App.1966)(decided under the Uniform Single Publication Act, which is not part of New York law), is of no moment. Similarly, the website publication is also a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.

Time Warner's motion, however, is granted in its entirety. In evaluating a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. *CBS Corp. v. Dumsday,* 268 A.D.2d 350 (1st Dept.2000) ; *see also Polonetsky v. Better Homes Depot, Inc.,* 97 N.Y.2d 46 (2001)(motion must be denied if "from [the] four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); *Weiner v. Lazard Freres & Co.,* 241 A.D.2d 114 (1st Dept 1998 ("so liberal is th[is] ... standard that the test is simply whether the pleading has a cause of action,' not even whether he has stated one' "). Notwithstanding this liberal standard, however, where allegations consist of bare legal conclusions devoid of the required factual predicate, the court is constrained to dismiss. *Ullman v. Norma Kamali, Inc.,* 207 A.D.2d 691 (1st Dept.1994).

Under New York law, the elements of a defamation claim are a false statement about the plaintiff, published to a third party, which is defamatory of the plaintiff, caused damaged to the plaintiff, and was published with the requisite level of fault. *Chapadeau v. Utica Observer-Dispatch, Inc.,* 38 N.Y.2d 196, 198-99 (1975); *Dillon v. City of New York,* 261 A.D.2d 34, 38 (1st Dept.1999). A public official has the burden of pleading that the allegedly libelous statements were published with "actual malice that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Neuschotz v. Newsday Inc.,* 12 Misc.3d 1199(A) (Sup.Ct. Kings Co.2006), citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). Reckless disregard has been defined as a high degree of awareness of probable falsity. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 332 (1974). A state judge is a public official for the purposes of defamation law. *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369 379, *cert. denied,* 434 U.S. 969 (1977); *Suozzi v. Parente,* 202 A.D.2d 94 (1st Dept.1994).

***4** A failure to plead actual malice in a complaint for defamation is grounds for dismissal of the complaint. *Mahoney v. Adirondack Publishing Co.,* 71 N.Y.2d 31, 40 (1987); *Jimenez v. United Federation of Teachers,* 239 A.D.2d 265, 266 (1st Dept.1997). "[S]pecificity in the pleading of ... actual malice is required." *Themed Restaurants, Inc. v. Zagat Survey, LLC,* 4 Misc.3d 974 (Sup.Ct. N.Y. Co.2004). Thus, "[p]roper support for constitutional malice cannot be met by pleading that defendants had an obligation to ensure the [published information] was factually true."

Moreover, "a company or concern which simply republishes a work is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of (the) reporter.' " *Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 550 (1980)(quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 383 (1977), *cert. denied,* 434 U.S. 969 (1977).

The seventeenth and eighteenth causes of ac-

tion must be dismissed because plaintiff failed to plead actual malice. Instead, he plead that "[Time Warner] acted in a grossly irresponsible manner and had, or should have had, substantial reason to question the accuracy of" the articles conveyed in the broadcasts and that [Time Warner] made no effort or attempt to verify the accuracy of the information." *See* Amended Complaint at ¶¶ 126, 131. These allegations do not spell out actual malice with sufficient specificity. *Gross v. New York Times Co.,* 281 A.D.2d 299 (1st Dept.2001)(a public official must "meet his burden of presenting evidence that could demonstrate, with convincing clarity, that [the defendant] either new that the statements were false or published them with a high degree of awareness that they were probably false"). That the allegations in the article were false is insufficient to establish liability. *Hoeston v. Bets,* 34 AD3d 143, 155 (1st Dept.2006). Contrary to plaintiff's assertion, merely amending the complaint to insert the words "actual malice" will not cure the defect since there are no allegations presented in the complaint that fall within the definition of actual malice. There is nothing magical about the bare recitation of the words "actual malice."

The seventeenth and eighteenth causes of action must be dismissed for the additional reason that Time Warner merely summarized what the Post had published, attributing what it was saying to the Post and not endorsing what the newspaper had said. *See Duane Reade Inc. v. Local 338 Retail, Wholesale, Department Store Union,* 6 Misc.3d 790, 795 (Sup.Ct. N.Y. Co.2004)(relying on the *New York Post,* a long-running New York City daily newspaper was not grossly irresponsible). The very nature of the "In The Papers" feature seems to be to alert its audience of the existence of the newspaper article without vouching for its veracity, quality of research, or the bona fides of the reporters. *Karaduman v. Newsday, Inc., supra,* 51 N.Y.2d at 550.

***5** Plaintiff asserts that two factors gave Time Warner reason to doubt the accuracy of the articles: that the Post had stated that plaintiff "had been granted immunity for telling all to a grand jury" despite the fact that any witness who testifies before a grand jury (as opposed to a trial jury) receives automatic immunity; and, that the article requires the reader to come to the incongruous conclusion that plaintiff was nevertheless permitted to continue to hear cases as a judge. As defendant notes, there is no basis to conclude that a lay person would know that different rules apply in testifying before a grand jury and before a jury trial or the procedures involved that would prohibit a judge from continuing to hear cases while a probe is pending. These "inside baseball" suppositions impute an unreasonable level of knowledge of legal processes generally, and grand jury proceedings in particular. Plaintiff simply has not identified any valid basis that creates a substantial reason for Time Warner to question the accuracy of the articles or the bona fides of the reporters. *Rinaldi, supra,* 42 N.Y.2d at 383.

Accordingly, based on the foregoing, it is

ORDERED that NYP's motion (Seq.1) is GRANTED solely to the extent that the first and ninth causes of action are dismissed; and it is further

ORDERED that NYP and defendant Jim Hinch answer the amended complaint within twenty days of this Order; and it is further

ORDERED that Time Warner's motion (Seq.3) for an order dismissing the seventeenth and eighteenth causes of action pursuant to CPLR 3211(a)(7) is GRANTED; and it is further

ORDERED that the matter is scheduled for a Preliminary Conference to be held on September 20, 2007, at 9:30 a.m. in Part 61.

This constitutes the Decision and Order of the Court.

N.Y.Sup.,2007.
Rivera v. NYP Holdings, Inc.

16 Misc.3d 1121(A), 847 N.Y.S.2d 904, 2007 WL 2284607 (N.Y.Sup.), 2007 N.Y. Slip Op. 51529(U)

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Not Reported in F.Supp.2d, 2005 WL 2990642 (S.D.N.Y.)
(Cite as: 2005 WL 2990642 (S.D.N.Y.))

United States District Court,
S.D. New York.
Jeffrey SILVER, Plaintiff,
v.
Christine KUEHBECK, Thomas Ryan, Carl Bernstein, John Does 1 Through 20, and Jonathan Abady, Defendants.

No. 05 Civ. 35(RPP).
Nov. 7, 2005.

Heller Horowitz & Feit, P.C., New York, New York, Maurice W. Heller, May Orenstein, for Plaintiff Silver.

Emery Celli Brinckerhoff & Abady LLP, New York, New York, Andrew G. Celli, Jr., O. Andrew F. Wilson, for Defendants Kuehbeck, Bernstein, and Abady.

Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, Seth D. Eichenholtz, Assistant Corporation Counsel, for Defendant Ryan.

OPINION AND ORDER

PATTERSON, J.

***1** Jeffrey Silver ("Silver") brings this civil action against Christine Kuehbeck ("Kuehbeck"), Carl Bernstein ("Bernstein"), Detective Thomas Ryan ("Detective Ryan"), John Does 1 through 20, and Jonathan Abady ("Abady"). The Verified First Amended and Supplemental Complaint (the "Complaint") asserts fourteen claims against the Defendants arising out of an alleged campaign orchestrated by Bernstein to stalk, harass, defame, and interfere with Silver's business relationships and private communications.[FN1] Kuehbeck, Bernstein, Abady, and Detective Ryan have moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims against them for failure to state a cause of action. For the reasons set forth below, the motions to dismiss are granted as to each and every claim asserted in the Complaint.

FN1. Except for the Twelfth claim for relief for violation of 42 U.S .C. § 1983, the Complaint is founded on diversity, alleging that Silver is a citizen of Nevada and that the Defendants are citizens of New York. 28 U.S.C. § 1332(a)(1). The Court will apply New York law. *See Erie R.R. v. Tompkins,* 304 U.S. 65, 78 (1938).

BACKGROUND

The Complaint alleges the following facts, which the Court must accept as true for the purpose of deciding these motions. *Conley v.. Gibson,* 355 U.S. 41 (1957).

Silver and Kuehbeck began to date in 1993, and thereafter they were close friends and sometime lovers. (Complaint "Compl." ¶¶ 21-22.) Silver and Kuehbeck were also engaged in a business relationship in which Silver provided investment advice to Kuehbeck and served as a paid consultant to the law firm that acted as plaintiffs' counsel in a securities fraud class action lawsuit conceived of and organized by Silver in which Kuehbeck was the lead plaintiff. (*Id.* ¶ 22.)

Silver's relationship with Kuehbeck is alleged to have continued even after she became romantically involved with Bernstein in the spring of 2002. (*Id.* ¶ 13, 25.) Bernstein was aware of Silver's relationship with Kuehbeck and, on or about June 19, 2002, Silver received a letter from Ira Garr, a lawyer claiming to represent Bernstein and Kuehbeck, stating that Silver was stalking and harassing them. (*Id.* ¶ 26.) When Silver allegedly confronted Kuehbeck about the letter, she denied knowing anything about it and told him that Mr. Garr did not represent her. (*Id.*) Silver replied twice to the letter but never received a response from Mr. Garr. (*Id.*)

Silver and Kuehbeck are alleged to have continued their romantic relationship during the fall of 2002 and into 2003. (*Id.* ¶ 27.) On June 12, 2003, Silver wrote a letter to Bernstein at Kuehbeck's request, which referred to the securities class action lawsuit and requested that Bernstein stay out of Silver's and Kuehbeck's legal affairs. (*Id.* ¶ 28.)

Kuehbeck told Plaintiff about a July 4, 2003 holiday weekend in Iceland but neglected to tell Plaintiff that she and Bernstein were purportedly married during that trip. (*Id.* ¶ 30.) Upon learning of the marriage, Silver alleges that he suggested to Kuehbeck that his relationship with her should end, but they continued to meet throughout late 2003 and early 2004. (*Id.*) In the months following the wedding, Bernstein heightened his surveillance of Silver and Kuehbeck. (*Id.* ¶ 31.) On January 15, 2004, at Kuehbeck's urging, Silver wrote another letter to Bernstein demanding that he stop interfering with Silver's and Kuehbeck's business affairs. (*Id.*) Silver and Kuehbeck continued to see each other regularly during this time. (*Id.* ¶ 32.)

***2** In late June 2004, a letter was hand-delivered to Silver at the apartment where he stayed while he was in New York City. (*Id.* ¶ 33.) Silver determined that the letter was from Bernstein and returned it unopened. (*Id.*) Silver later discovered that the letter contained a "Notice of Revocation of Power of Attorney," purportedly signed by Kuehbeck. (*Id.* ¶ 35.) Bernstein is alleged to have drafted the document and "compelled Kuehbeck to sign through a combination of threats and the refusal to comply with obligations of their pre-nuptial agreement." (*Id.* ¶ 35.) In addition, Silver learned from Wolf Popper LLP, the law firm handling the class action securities lawsuit brought in Kuehbeck's name, that Bernstein had begun urging the firm to ignore and cease dealing with Silver. (*Id.* ¶ 34.) As a result of the revocation of Silver's power of attorney, Silver was unable to continue serving as a consultant to Wolf Popper LLP. (*Id.* ¶ 35.)

On June 20, 2004, Silver wrote to Bernstein demanding that he "stay away from me," and warning Bernstein of possible civil and criminal consequences if he persisted in his activities. (*Id.* ¶ 37.)

On the afternoon of July 17, 2004, Silver went for a swim at a lake after Kuehbeck had advised him that she and Bernstein would be visiting the lake later that day. (*Id.* ¶ 38.) The Complaint summarizes the encounter that took place after Silver finished his swim as follows:

> [A]s [Silver] was walking back from the Lake, at approximately 1:15 p.m., he saw Kuehbeck and Bernstein walking toward him. Kuehbeck immediately ducked into the ladies room. Bernstein then approached [Silver], and said, in a threatening voice, "you and I are taking a walk." [Silver] told Bernstein that he had nothing to say to him, and kept walking. As [Silver] walked away, Bernstein turned to [Silver] and said "I'm going to have you taken care of." [Silver] felt threatened.

(*Id.*) Silver allegedly feared for his safety and filed a complaint at the New York Police Department's 19th Precinct with a Detective Morales. (*Id.* ¶ 39.)

On July 29, 2004, less than two weeks after the incident at the lake, it is alleged that Kuehbeck and Silver met at the same lake "to go swimming, which led, inevitably, to sex." (*Id.* ¶ 40.) Three days later, on August 2, 2004, Kuehbeck informed Silver that Bernstein had found out about their meeting at the lake, and Silver and Kuehbeck agreed to meet the next day to discuss the matter. (*Id.* ¶ 41.) However, on August 3, 2004, Kuehbeck failed to meet Silver at the agreed-upon time and place. (*Id.* ¶ 42.) They arranged to meet two other times that day, but Kuehbeck failed to appear both times. (*Id.* ¶ 42.)

On the following day, August 4, 2004, a police report was filed by Bernstein and Kuehbeck with the 19th Precinct in Manhattan accusing Silver of "aggravated harassment" and "stalking" against Kuehbeck. (*Id.* ¶ 43.) On the following Monday,

August 9, 2004, Detective Ryan and another detective visited Silver at an office used part-time by Silver and told the receptionist that they wanted to speak to Silver to " 'follow up on his earlier complaint." ' (*Id.* ¶ 44.) Plaintiff eventually walked downstairs and asked the two detections "what was up," and they asked Silver to accompany them to the police station. (*Id.*) At the police station, Detective Ryan told Silver that he was going to arrest him for "stalking and harassment." (*Id.*) However, after Silver explained that five days earlier he had met and had consensual sex with Kuehbeck and after he played a message Kuehbeck left on Silver's answering machine arranging their recent swim at the lake, Detective Ryan permitted him to leave without arrest. (*Id.*)

*3 On August 10, 2004, one day after Silver spoke with Detective Ryan, Silver decided to return to the 19th Precinct to offer additional evidence that Kuehbeck's complaint against him was baseless. (*Id.* ¶ 45.) The following scene is alleged to have occurred:

> Detective Ryan told [Silver] that he had called Kuehbeck and Bernstein, and Bernstein had claimed [Silver] was the subject of an arrest warrant in California, a slanderous fabrication. He then told [Silver] that Bernstein and Kuehbeck wished to press charges, and that he therefore had no choice but to arrest [Silver]. [Silver] asked the precise basis upon which he was being arrested, and Ryan answered that it was on the basis of "many threatening phone messages." [Silver], puzzled, asked Detective Ryan if he found such supposed messages threatening, and Ryan replied "not to my ears, but when a woman is involved we tend to bend over backwards." Upon information and belief, there were no such "messages." Ryan then said that "Bernstein is all over the case, and I'm going to recommend that the ADA interview her separately." He declined to delay his decision pending an investigation of the actual facts. [Silver] was placed in a detention area in the police station behind a locked door, until his release later that day.

(*Id.*; *But cf.* Compl. ¶ 121.[FN2])

> FN2. The Complaint also states inconsistently that Plaintiff was held overnight at the 19th Precinct. ¶ 129.

On August 19, 2004, Kuehbeck executed an affidavit at the Manhattan District Attorney's Office in which she swore, *inter alia*, that Silver had stalked her during the ten years after they had an only brief relationship in 1994, and that Silver had threatened her and Bernstein. (*Id.* ¶ 46.) Silver alleges that "[e]ach and every element of her sworn statement is a fabrication." (*Id.*) On August 20, 2004, Judge Anthony Ferrara issued an order of protection ordering Silver to stay away from Kuehbeck and Bernstein, which was served on Plaintiff on August 23, 2004. (*Id.* ¶ 47.)

During the next three months, Silver organized a defense, hired counsel, and investigated his situation, which resulted in a presentation of the actual facts to the District Attorney's Office that suggested that Kuehbeck had not been truthful. (*Id.* ¶ 48.) In view of the evidence presented by Silver, the District Attorney's Office confronted Kuehbeck. (*Id.* ¶ 49.) Silver alleges that he "was eventually directly told that this meeting was 'not pleasant' for Kuehbeck, and ... that they had finally realized they had 'lying woman on their hands." ' (*Id.*) The charges against Silver were then dismissed and the order of protection was vacated. (*Id.*)

On January 6, 2005, two days after Silver initiated this action by filing the original complaint in this Court, the *New York Post* published an article about Silver's filing of the complaint that included the following quotation from Defendant Jonathan Abady, an attorney retained to represent Kuehbeck and Bernstein in the action:

> This complaint is an outrageous falsehood and was filed in a clear effort to extract money from an internationally respected author and journalist

> and to slander a wonderful woman. Carl Bernstein and his wife have filed formal complaints against Mr. Silver with the NYPD and the Manhattan DA's office for making death threats against them, continual harassment and stalking, and other abusive conduct. We are anxious for the truth to be known about Mr. Silver's motivations and actions-including his record of bizarre and violent behavior against others as well.

*4 (*Id.* ¶ 138.) On February 9, 2005, Silver filed the First-Amended Complaint, which added Abady as a defendant and added a claim against him for libel and slander based on Abady's comments quoted in the newspaper article.

In sum, the Complaint asserts a total of fourteen claims for relief: (1) malicious prosecution by Kuehbeck and Bernstein; (2) abuse of process by Kuehbeck and Bernstein; (3) intentional infliction of emotional distress by Kuehbeck and Bernstein; (4) *prima facie* tort by Kuehbeck and Bernstein; (5) tortious interference with business relations by Kuehbeck and Bernstein; (6) *quantum meruit;* (7) assault by Bernstein; (8) negligence by Bernstein; (9) slander by Bernstein; (10) slander by Kuehbeck; (11) malicious prosecution and false arrest and imprisonment by Detective Ryan and John Does 1-20; (12) violation of 42 U.S.C. § 1983 by Detective Ryan and John Does 1-20; (13) conspiracy to violate 42 U.S .C. § 1983 by Kuehbeck and Bernstein; and (14) libel and slander by Abady.

DISCUSSION

I. Standard for Motion to Dismiss

A court reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Schnall v. Marine Midland Bank,* 225 F.3d 263, 266 (2d Cir.2000). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995) (internal quotation marks omitted). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Shakur v. Selsky,* 391 F.3d 106, 112 (2d Cir.2004) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). A court must limit its review to the complaint, documents attached or incorporated by reference thereto, and "documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor,* 220 F.3d 81, 88 (2d Cir.2000).

II. Kuehbeck's and Bernstein's Motion to Dismiss

For purposes of clarity, this Opinion will group Silver's claims for relief against Kuehbeck and Bernstein into three categories. The first category includes claims arising from Silver's August 2004 arrest. The second category includes claims arising from Kuehbeck's withdrawal of the power of attorney in June 2004. The third category includes other tort claims arising from Kuehbeck's and Bernstein's actions affecting Silver.

A. Claims Arising From Silver's August 2004 Arrest

1. *Malicious Prosecution*

Silver's First Claim for Relief for malicious prosecution arises Plaintiff's claim that Kuehbeck swore to a criminal complaint and an affidavit with the Manhattan District Attorney's office accusing Silver of stalking and harassment. (Compl.¶¶ 46, 52-54.) Silver claims that Kuehbeck knew that the allegations were false and intended to case Silver's arrest. (*Id.* ¶ 55). According to the Complaint, Bernstein acted in concert with Kuehbeck and determined that the false sworn complaint and affidavit would be filed. (*Id.* ¶ 56.)

*5 "Under New York law, a plaintiff suing for malicious prosecution must establish: (1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding

in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Russell v. Smith,* 68 F.3d 33, 36 (2d Cir.1995).

Kuehbeck and Bernstein dispute the sufficiency of the allegations with respect to the first element of malicious prosecution-the initiation of a "criminal proceeding" against Silver. The New York Court of Appeals discussed this element of malicious prosecution in *Broughton v. State:*

> The essence of malicious prosecution is the perversion of proper legal procedures. Thus, it has been held that some sort of prior judicial proceeding is the *sine qua non* of a cause of action in malicious prosecution. Such a judicial proceeding may be either an evaluation by a Magistrate of an affidavit supporting an arrest warrant application, or an arraignment or an indictment by a Grand Jury.

37 N.Y.2d 451, 457 (1975) (citation omitted). Thus, a malicious prosecution "may arise only after an arraignment or indictment or some other 'evaluation by a neutral body that the charges [were] warranted." ' *Stile v. City of New York,* 172 A.D.2d 743, 743, 569 N.Y.S.2d 129 (2d Dept.1991) (quoting *Broughton,* 37 N.Y.2d at 459).

Here, the Complaint does not allege that Silver was arraigned, indicted, or that an arrest warrant was evaluated by a Magistrate; it states only that "[o]n or about August 4, 2004, Defendant Kuehbeck swore to a criminal complaint." (Compl.¶ 52.) Silver contends that this allegation is sufficient to plead the first element of a malicious prosecution claim because, under Section 100.5 of the New York Criminal Procedure Law,[FN3] the filing of an accusatory instrument, such as a misdemeanor complaint, is the procedural equivalent of an indictment insofar as both commence a criminal action.

> FN3. This section of the New York Criminal Procedure Law, entitled "Commencement of action; in general," states the following:
>
> A criminal action is commenced by the filing of an accusatory instrument with a criminal court, and if more than one such instrument is filed in the course of the same criminal action, such action commences when the first of such instruments is filed. The only way in which a criminal action can be commenced in a superior court is by the filing therewith by a grand jury of an indictment against a defendant who has never been held by a local criminal court for the action of such grand jury with respect to any charge contained in such indictment. Otherwise, a criminal action can be commenced only in a local criminal court, by the filing therewith of a local criminal court accusatory instrument, namely:
>
> 1. An information; or
>
> 2. A simplified information; or
>
> 3. A prosecutor's information; or
>
> 4. A misdemeanor complaint; or
>
> 5. A felony complaint.
>
> N.Y.Crim. Proc. Law § 100.5.

Plaintiff points to no holding by any court that the first element of a civil claim for malicious prosecution is satisfied when a complaint is sworn to by the complaining party. Thus, under the New York decisions, the threshold trigger for the tort of malicious prosecution is a *judicial proceeding* where the charges against the accused are reviewed and evaluated by a neutral body. *Broughton,* 37 N.Y.2d at 459 (emphasis added). A Magistrate's evaluation of an affidavit supporting an arrest warrant application, an arraignment, and an indictment by a Grand Jury each involve some kind of "evaluation by a neutral body that the charges [were] warranted." *Stile,* 172 A.D.2d 743. The

pleading in the complaint of a sworn complaint and an affidavit against Silver are not shown to have involved any evaluation by a neutral body. Furthermore, as stated in *Broughton,* the essence of the claim for malicious prosecution is the perversion of the legal process thereafter. 37 N.Y.2d at 457.

*6 Silver argues that, as a result of the actions taken by Bernstein and Kuehbeck, he "suffered damages including, but not limited to, (i) legal fees and expenses incurred in his defense, (ii) damage to his reputation in the business community, and (iv) pain and suffering." (Compl.¶ 64.) The Second Circuit noted in *Bender v.. City of New York* that under New York law, "damages for malicious prosecution are to compensate for injuries *after* arraignment." 78 F.3d 787, 793 n. 3 (2d Cir.1996) (emphasis added) (citing *Hygh v. Jacobs,* 961 F.2d 359, 366 (2d Cir.1992); *Dabbs v. State,* 59 N.Y.2d 213, 218 (1983)). Because Silver has not pleaded that he was arraigned on the complaint in the instant case, he has not pleaded a claim for damages for malicious prosecution. Therefore, his First Claim for Relief for malicious prosecution is dismissed.

2. *Abuse of Process*

Silver's Second Claim for Relief alleges that Kuehbeck and Bernstein "used regularly issued criminal process, namely a criminal complaint and an affidavit, for the purpose of procuring [Silver's] arrest, detention, and prosecution" and that they did so "with the intent of doing harm to [Silver]" and "to obtain a collateral objective." (Compl.¶¶ 66-68.)

"Abuse of process" is defined as "the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope." *Black's Law Dictionary* 10 (7th ed.1999). Under New York law, abuse of process has three essential elements: "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Curiano v. Suozzi,* 63 N.Y.2d 113, 116 (1984). In addition, a plaintiff bringing an abuse of process claim must allege special damages. *See Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n,* 38 N.Y.2d 397, 405 (1975).

Kuehbeck and Bernstein first dispute the sufficiency of the allegations with respect to the third element of an abuse of process claim-use of process in a perverted manner to obtain a collateral objective. In *Jones v. Maples/Trump,* No. 98 Civ. 7132(SHS), 2002 U.S. Dist. LEXIS 3175 (S.D.N.Y. Feb. 26, 2002), Judge Stein explained what a Complaint must allege to plead adequately this element of an abuse of process claim.

> Not every use of process motivated by selfishness or maliciousness gives rise to an abuse of process claim. *See Curiano,* 63 N.Y.2d at 117 (citing *Hauser v. Bartow,* 273 N.Y. 370, 374, 7 N.E.2d 268 (1937) ("Every one has a right to use the machinery of the law, and bad motive does not defeat that right.")). There must be an *abuse* of process which has as its direct object an effect outside the intended scope of operation of the process employed. *Compare Curiano,* 63 N.Y.2d at 116 (no abuse of process where defendant initiated libel action with dual purpose of punishing free speech and electoral participation and inflicting expense and burden), *and Hauser,* 273 N.Y. at 374 (no abuse of process where the defendant initiated incompetency proceeding with dual purpose of damaging the alleged incompetent and enriching herself), *with Board of Educ. v. Farmingdale Classroom Teachers Ass'n,* 38 N.Y.2d 397, 404, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975) (abuse of process where the defendant subpoenaed 87 of school district's teachers to testify on the same day with purpose of inflicting economic harm on the school district) *and Dean v. Kochendorfer,* 237 N.Y. 384, 390, 143 N.E. 229 (1924) (abuse of process where magistrate issued an arrest warrant for disorderly conduct with purpose of bringing arrested person into court for an unrelated disciplinary rebuke). Thus, without an allegation that the process has been improperly perverted "after" its issuance, a claim of ab-

use of process must be dismissed, even though the defendant acted maliciously in initiating the process. *Curiano,* 63 N.Y.2d at 117.

*7 *Id.* at *23-24 (emphasis in original).

Here, the Complaint alleges that Kuehbeck and Bernstein "used" criminal process "for the purpose of procuring [Silver's] arrest, detention and prosecution"; "with the intent of doing harm to [Silver]"; and "in a perverted manner to obtain a collateral objective." (Compl.¶¶ 66-68.) The Complaint alleges that Kuehbeck and Bernstein "coldly conspired to do [Silver] grievous harm, and concocted a vicious scheme designed quite simply to destroy [Silver], his reputation, career and very life." (*Id.* ¶ 9.) These conclusory allegations are not sufficient to adequately plead a claim of abuse of process. *See Wynder v. McMahon,* 360 F.3d 73, 80 (2d Cir.2004) (observing that, regardless of the complaint's satisfaction of the generous requirements of Rule 8(a)(2), a Rule 12(b)(6) motion will "lie to permit each particular defendant to eliminate those causes of action as to which no set of facts has been identified that support a claim against him") (emphasis omitted). Since Plaintiff's pleadings have not identified how Defendants used court process after its issuance to cause grievous harm to Silver, Silver's abuse of process claim against Kuehbeck and Bernstein is dismissed.

Kuehbeck and Bernstein also dispute the sufficiency of the allegations with respect to special damages. In opposition, Silver contends that the Complaint satisfies this pleading requirement because, even though the damages attributed to Kuehbeck's and Bernstein's abuse of process is included together with eight other causes of action for a total of three million dollars ($3,000,000), this amount is "specifically identified and causally related to the allegedly tortious conduct." (Silver Opp. Mem. at 12.) As Kuehbeck and Bernstein point out, however, courts have dismissed special damages claims where, as here, a complaint "sets forth damages in round numbers." *Vigoda v. DCA Prods. Plus, Inc.,* 293 A.D.2d 265, 266, 741 N.Y.S.2d 20 (1st Dept.2002); *Ann-Margret v. High Society Magazine, Inc.,* 498 F.Supp. 401, 408 (S.D.N.Y.1980). Thus, Silver's abuse of process claim also fails with respect to his allegations of damages.

3. *Intentional Infliction of Emotional Distress*

Silver's Third Claim for Relief alleges that Kuehbeck and Bernstein intentionally inflicted emotional distress by engaging in a course of conduct that was "extreme and outrageous," with the intent or knowledge that their conduct would cause the distress and suffering of Silver. (Compl.¶ 72.)

To state a valid claim for intentional infliction of emotional distress ("IIED") under New York law, a plaintiff must show: "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." *Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir.1996); see also *Howell v. New York Post Co., Inc.,* 81 N.Y.2d 115, 121 (1993).

***8** Kuehbeck and Bernstein dispute the sufficiency of the allegations with respect to the first element of Silver's IIED claim-that the conduct complained of was "extreme and outrageous." To satisfy this element, New York law requires that their alleged conduct must have 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. American Home Prods. Corp.,* 58 N.Y.2d 293, 303 (1983). Even assuming that all of Silver's factual allegations are true, and resolving all ambiguities and drawing all inferences in Silver's favor, the conduct alleged in the Complaint does not meet this test and is insufficient to support an IIED claim. Accordingly, this claim is dismissed.

4. *Negligence*

Silver's Eighth Claim for Relief alleges that Silver suffered injuries that were proximately caused by Bernstein when he "negligently failed to

use ordinary care in investigating Kuehbeck's charges before participating in any scheme to file such complaint and affidavit and procuring [Silver's] arrest, detention and prosecution." (Com pl.¶¶ 96-97.)

In order to prevail on a negligence claim under New York law, a plaintiff must establish "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." *Akins v. Glens Falls City Sch. Dist.,* 53 N.Y.2d 325, 333 (1981). The existence of a duty of care is a "legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration." *Palka v. Servicemaster Mgmt. Servs. Corp.,* 83 N .Y.2d 579, 585 (1994). "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct of foreseeable the harm." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.,* 96 N.Y.2d 280, 289 (2001).

At issue here is whether Bernstein owed a duty of care to Silver. Silver contends that the claim against Bernstein should not be dismissed because "it is clear that as citizens of a civil society we each owe an ordinary duty of care to our fellow man not to behave in this manner and furthermore, to investigate the truthfulness of a criminal complaint before swearing one out against an innocent man." (Silver Opp. Mem. at 19.) However, Silver fails to cite any cases or other authority that establish the existence of such a duty. Silver's negligence claim therefore is dismissed.

5. *Conspiracy to Violate 42 U.S.C. § 1983*

Silver's Thirteenth Claim for Relief alleges that Kuehbeck and Bernstein conspired with Detective Ryan and John Does 1-20 to deprive Silver of his rights, privileges, and immunities under the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983 ("Section 1983"). (Compl.¶¶ 134-35.) In particular, Kuehbeck and Bernstein allegedly "procured the assistance of Defendants Ryan and John Does 1-20 and ... acted in concert with said persons to procure the unlawful arrest, detention and prosecution of [Silver]." (*Id.* ¶ 135.)

***9** "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48 (1988). Private persons can only be subject to liability under Section 1983 if they were "jointly engaged with state officials in the challenged action." *Scotto v. Almenas,* 143 F.3d 105, 114 (2d Cir.1998) (quoting *Dennis v. Sparks,* 449 U.S. 24, 27-28 (1980)).

Kuehbeck and Bernstein contend that this claim should be dismissed because the Complaint does not adequately allege that they conspired with Detective Ryan or acted in concert with him to deprive Silver of his civil rights. "[M]erely filing a complaint with the police, reporting a crime, requesting criminal investigation of a person, or seeking a restraining order, even if the complaint or report is deliberately false, does not give rise to a claim against the complainant for a civil rights violation." *Vazquez v. Combs,* No. 04 Civ. 4189(GEL), 2004 U.S. Dist. LEXIS 22137, at *11 (S.D.N.Y. Oct. 22, 2004). *See also Jones v. Maples/Trump,* 2002 U.S. Dist. LEXIS 3175, at *16 (S.D.N.Y. Feb. 26, 2002) ("providing false information to an arresting officer is not, by itself, sufficient to state a claim against [a] private party under § 1983 "); *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 939 n. 21 (1983) (merely invoking state legal procedures against another private person does not constitute "joint participation" or "conspiracy" with state officials so as to satisfy the § 1983 requirement of action under color of law).

Here, the Complaint alleges that Detective Ryan told Silver that he had called Kuehbeck and Bernstein, that they told him they "wished to press charges," and that " 'Bernstein is all over the case." ' (Compl.¶ 45) Such allegations do not show conspiracy or actions in concert that are necessary to

establish a § 1983 violation; otherwise complainants in all arrests could be subject to retaliatory § 1983 actions.

The Complaint further alleges that Kuehbeck and Bernstein "utilized [Bernstein's] influence with the New York City Police to procure [Silver's] arrest," and that the police department "followed Bernstein's and Kuehbeck's instructions with respect to whether to arrest [Silver], when and where to arrest him, and what to charge him with." (Compl.¶ 57.) Such conclusory allegations are not sufficient to state a claim for a § 1983 conspiracy. Furthermore, they are not consistent with the Complaint's rendition of the events immediately preceding Silver's arrest, specifically the allegation that Silver returned to the 19th Precinct of his own volition on the day of his arrest. *See First Nationwide Bank v.. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir.1994) ("Courts do not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened."). Accordingly, Silver's § 1983 conspiracy claim against Kuehbeck and Bernstein is dismissed.

B. Claims Arising From Kuehbeck's Withdrawal of the Power of Attorney in June 2004

1. *Tortious Interference with Business Relations*

***10** Silver's Fifth Claim for Relief alleges that in June 2004 Kuehbeck and Bernstein tortiously interfered with his contractual and business relations with Wolf Popper LLP, the law firm representing the plaintiffs in a class action securities fraud lawsuit in which Kuehbeck was the lead plaintiff. The Complaint alleges that Plaintiff had invested for Kuehbeck in Genesis Microchip, Inc., whose shares dropped sharply. (Compl.¶ 22.) The Complaint also alleges that Plaintiff conceived and organized a class action lawsuit against the company, hired Wolf Popper LLP, and agreed to serve as a consultant (to Wolf Popper) with Kuehbeck's knowledge and consent. (*Id.*) In connection with the lawsuit, Kuehbeck gave Plaintiff power of attorney to act on her behalf. (*Id.*)

To establish a claim for tortious interference with business relations, a plaintiff must show: "(1) business relations with a third party; (2) the defendant's interference with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the business relationship." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir.2000) (citing *Purgess v. Sharrock*, 33 F.3d 134, 141 (2d Cir.1994)).

Kuehbeck and Bernstein first dispute the sufficiency of the allegations with respect to the first element-that a valid "business relationship" existed between Silver and Wolf Popper LLP. The Complaint alleges that Silver "agreed to serve as consultant" to Wolf Popper LLP (Compl.¶ 22) and that he had "contractual and business relations with the Wolf Popper firm" (*Id.* ¶ 82). Thus, although the Complaint does not specify what Silver was to be paid, how often he would work, or what exactly he would do, the allegations are sufficient to plead the first element of this tort.

Kuehbeck and Bernstein next dispute the sufficiency of the allegations with respect to the second element-that they intentionally interfered with a business relationship between plaintiff and a third party. Silver alleges that Bernstein "orchestrat[ed] Kuehbeck's withdrawal of the power of attorney issued in favor of Plaintiff." (Compl.¶ 82.) The withdrawal of a power of attorney is not an interference with Plaintiff's relationship with a third party, namely Wolf Popper LLP. Withdrawing her power of attorney is a decision by Kuehbeck that involves her own relationship with Silver, not the relationship of Silver and Wolf Popper. Therefore, Kuehbeck's withdrawal of her power of attorney does not amount to intentional interference with a business relationship.

Kuehbeck and Bernstein also dispute the sufficiency of the allegations with respect to the third element-that they acted with the sole purpose of

harming Silver or used dishonest, unfair, or improper means. Silver, citing Paragraphs 34 and 35 of the Complaint, contends that Kuehbeck and Bernstein "acted *solely* to harm [Silver] and his business relationship with Wolf Popper." (Silver Opp. Mem. at 24 (citing Compl. ¶¶ 34-35 (emphasis added)).) However, Paragraphs 34 and 35 of the Complaint, quoted below in their entirety, do not allege that Kuehbeck and Bernstein acted with such a single-minded intent.

> *11 34. Now, the depth of Bernstein's "investigation" into [Silver's] private affairs was becoming apparent. [Silver] also learned from Wolf Popper that prior to this period Bernstein had begun inserting himself into the class action securities suit brought in Kuehbeck's name, and had repeatedly urged them privately to ignore and cease dealing with [Silver] in any respect. [Silver] has since heard nothing from the firm.
>
> 35. As [Silver] discovered later, the letter contained a "Notice of Revocation of Power of Attorney," purportedly signed by Kuehbeck. Upon information and belief, the notice was drafted by Bernstein, who compelled Kuehbeck to sign through a combination of threats and the refusal to comply with obligations of their pre-nuptial agreement. This notice purported to withdraw the power of attorney that Kuehbeck had given to [Silver] in connection with activity in her behalf in the securities fraud class action and purported to discharge [Silver] from any further involvement, meaning that his agreement with Wolf Popper could no longer be performed. Not only was the letter hand delivered to [Silver], but a copy of the purported notice was faxed to one of [Silver's] unrelated business colleagues in a transparent effort to embarrass [Silver].

(Compl.¶¶ 34-35.) Considerably later in the Complaint, Silver alleges that "Bernstein and Kuehbeck acted purposefully and knowingly and with the intent of harming [Silver]."

(*Id.* ¶ 83.) The clear import of Paragraphs 34 and 35, however, is that Kuehbeck took actions to prevent Plaintiff from continuing to act as her agent. Read as a whole, the Complaint does not imply that these Defendants' actions at Wolf Popper were taken solely to harm Plaintiff.

The Complaint further alleges that Bernstein repeatedly urged Wolf Popper LLP to ignore Silver and cease dealing with him, and that Bernstein drafted and compelled Kuehbeck to sign a "Notice of Revocation of Power of Attorney." (Com pl.¶¶ 34-35). Silver charges that Bernstein communicated with individuals at Wolf Popper "to convince them to sever their relationship with Plaintiff in connection with the securities class action litigation in which Kuehbeck serves as name Plaintiff." (Compl.¶ 82.) However, the Complaint does not allege that Kuehbeck and Bernstein used dishonest or unfair means, nor do the allegations amount to improper means. New York's Court of Appeals has noted that "there is no liability in tort unless the means employed to effect the interference was wrongful." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 196 (1980). The Court then stated that "wrongful means" include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." *Id.* at 191. Silver's claims involve persuasion, but "mere knowing persuasion would not be sufficient." *Id.* at 196. Therefore, even assuming that all of Silver's factual allegations are true, the conduct alleged in the Complaint is insufficient to support a claim for tortious interference. Accordingly, Bernstein and Kuehbeck's motion to dismiss the tortious interference with business relations claim is granted.

2. *Quantum Meruit*

*12 Silver's Sixth Claim for Relief alleges that he is entitled to recover as damages the reasonable value of the services he has performed, at Kuehbeck's request, for Kuehbeck and the class that she represents. Specifically, the Complaint alleges that

"Kuehbeck asked [Silver] to be one of her investment advisors" (Compl.¶ 22) and that "[i]n the course of conceiving, researching and preparing the securities class action lawsuit in which Kuehbeck is the name plaintiff, [Silver] spent hundreds of hours working on Kuehbeck's behalf and on behalf of the class that Kuehbeck represents." (Compl.¶ 87).

"In order to recover in *quantum meruit,* New York law requires a claimant to establish (1) the performance of services in good faitb, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Longo v. Shore & Reich, Ltd.,* 25 F.3d 94, 98 (2d Cir.1994) (internal quotation marks and citation omitted).

Kuehbeck disputes the sufficiency of the allegations with respect to the third element of Silver's *quantum meruit* claim-expectation of compensation. In response, Silver states in his memorandum of law that he "did not do all of this work out of the goodness of his heart without expecting some compensation in return." (Silver Opp. Mem. at 22.) However, because the Complaint alleges that Silver agreed to serve as a consultant to Wolf Popper LLP (Compl.¶ 22) and that Silver was a long-time friend and some-time lover of Kuehbeck (Id. at ¶ ¶ 21-22), any claim of expectation of compensation is undercut. The Complaint does not include any allegations suggesting tbat Silver had a "reasonable expectancy of receiving such compensation" from Kuehbeck, *Argo Marine Sys., Inc. v. Camar Corp.,* 755 F.2d 1006, 1011 (2d Cir.1985), this claim is dismissed.

C. Other Tort Claims Against Kuehbeck and Bernstein

1. *Slander*

Silver's Ninth Claim for Relief alleges that Bernstein slandered Silver by knowingly and intentionally making disparaging and false statements about Silver to third parties, namely an individual named Ira Garr. Bernstein allegedly stated, *inter alia,* that Silver is a " 'stalker,' " that he is " 'crazy,' " and that he was " 'harassing' " Kuehbeck and Bernstein. (Compl. ¶¶ 100-01.)

"The elements of a cause of action for slander under New York law are (i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) 'of and concerning' the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander *per se,* and (vii) not protected by privilege." *Albert v. Loksen,* 239 F.3d 256, 265-66 (2d Cir.2001). As Judge Scheindlin explained in *Mobile Data Shred, Inc. v. United Bank of Switz.,* No. 99 Civ. 10315(SAS), 2000 U.S. Dist. LEXIS 4252, at *19 (S.D.N.Y. Apr. 5, 2000), "[i]n evaluating the sufficiency of claims of slander, the courts in this Circuit have required that the complaint adequately identify the allegedly defamatory statements, the person who made the statements, the time when the statements were made, and tbe third parties to whom the statements were published." *Id.* at *19 (citing *Ives v. Guilford Mills, Inc.,* 3 F.Supp.2d 191, 199 (S.D.N.Y.1998); *Broome v. Biondi,* No. 96 Civ. 805(RLC), 1997 U.S. Dist. LEXIS 1431 (S.D.N.Y. Feb. 10, 1997); *Reeves v. Continental Equities Corp. of Am.,* 767 F.Supp. 469, 473 (S.D.N.Y.1991)).

***13** Silver bas failed to adequately plead the slander claim against Bernstein. The Complaint identifies only one person, Ira Garr, to whom Bernstein allegedly made defamatory statements about Silver. Mr. Garr was Bernstein's attorney at the time the statements were made and therefore Bernstein's communications with him were privileged. The attorney-client privilege "requires that the asserted holder of the privilege is or sought to become a client, that the person to whom the communication was made is an attorney admitted to practice, and that the communication was made while that person was acting as an attorney. *Hydraflow v. Enidine,* 145 F.R.D. 626, 630 (W.D.N.Y.1993). The purpose of the privilege is "to encourage full and frank communication between attorneys and their

clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. U.S.*, 449 U.S. 383, 398 (1981). Here, Mr. Garr was acting as Bernstein's attorney at the time Bernstein allegedly made defamatory statements to him, and full communication between Bernstein and Garr is protected by the attorney-client privilege. Thus, the statements were privileged and as such, the communications between Bernstein and Mr. Garr cannot serve as the basis for Silver's slander claim. Because the Complaint does not identify any other third parties to whom Bernstein made the alleged statements about Silver,[FN4] this claim is dismissed.

> FN4. Silver states that Bernstein hired Mr. Garr to write and send the letter to Silver, "as well as others." (Silver Opp. Mem. at 26 (citing Compl. ¶ 100).) However, the Complaint fails to identify any third parties, aside from Mr. Garr, to whom the statements about Silver were published.

Silver's Tenth Claim for Relief alleges that Kuehbeck slandered Silver by knowingly and intentionally making defamatory and false statements about Silver to third parties. (*Id.* ¶¶ 105-06.) Kuehbeck allegedly stated, *inter alia,* that Silver " 'tried to kill her.' " (*Id.* ¶ 105.) The Complaint does not identify any "third parties" to whom Kuehbeck made the alleged statements. Accordingly, the slander claim against Kuehbeck is dismissed.

2. *Assault*

Silver's Seventh Claim for Relief alleges that Bernstein assaulted him when the two encountered each other on July 17, 2004. According to the Complaint, "Bernstein approached [Silver], and said, in a threatening voice, 'you and I are taking a walk.' [Silver] told Bernstein that he had nothing to say to him, and kept walking. As [Silver] walked away, Bernstein turned to [Silver] and said, 'I'm going to have you taken care of.' " (Compl. ¶¶ 38, 91 .)

To establish a claim for assault under New York law, a plaintiff must show "an intentional placing of another person in fear of *imminent* harmful or offensive contact." *Girden v. Sandals Int'l,* 262 F.3d 195, 203 (2d Cir.2001) (emphasis added). "[T]hreats, standing alone, do not constitute an assault." *Carroll v. New York Property Ins. Underwriting Ass'n,* 88 A.D.2d 527, 527, 450 N.Y.S.2d 21, 22 (1st Dept.1982) (citation omitted). Bernstein's alleged comments to Silver as he was walking away and as Silver walked away do not suggest "imminent" harmful contact, and Silver makes no arguments in opposition to the motion to dismiss this claim of the Complaint. The assault claim against Bernstein therefore is dismissed.

3. *Prima Facie Tort*

***14** Silver's Fourth Claim for Relief alleges that Kuehbeck and Bernstein engaged in a course of conduct comprised of various acts with the intent and purpose of causing harm to Silver, giving rise to a claim for *prima facie* tort.

"The requisite elements of a cause of action for *prima facie* tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.,* 65 N.Y.2d 135, 142-43 (1985).

Silver's *prima facie* tort claim must be dismissed because it alleges no facts not included in his other claims for relief, and it completely overlaps the other claims alleged in the Complaint. To the extent that allegations provide grounds for other causes of action included in the Complaint, those allegations cannot give rise to a *prima facie* tort claim. *See Chen v. United States,* 854 F.2d 622, 628 (2d Cir.1988) (stating that "a set of facts giving rise to a common-law tort is fatal to a *prima facie* tort claim"). With respect to the other allegations underlying this claim, those allegations are insufficient to adequately plead a *prima facie* tort claim.

Silver's *prima facie* tort claim must also be dismissed because the Complaint fails to plead special damages. According to the Complaint, Silver de-

mands judgment against Kuehbeck and Bernstein on the *prima facie* tort claim, along with eight other claims, in the amount of three million dollars ($3,000,000). (Compl. at 35.) As already noted, courts have dismissed special damages claims where the claim, like Silver's claim, "set[ ] forth damages in round numbers." *Vigoda v. DCA Prods. Plus, Inc.*, 293 A.D.2d 265, 266, 741 N.Y.S.2d 20 (1st Dept.2002); *Ann-Margaret v. High Society Magazine, Inc.*, 498 F.Supp. 401, 408 (S.D.N.Y.1980). Accordingly, Silver's *prima facie* tort claim is dismissed.

III. Abady's Motion to Dismiss

Silver's libel and slander claim against Abady, the Fourteenth Claim for Relief, arises from a statement made by Abady that was quoted by a *New York Post* article. The statement announcing that Silver had commenced this action was published two days after its filing in this Court. Abady's statement, as quoted in the Complaint, reads as follows:

> This complaint is an outrageous falsehood and was filed in a clear effort to extract money from an internationally respected author and journalist and to slander a wonderful woman. Carl Bernstein and his wife have filed formal complaints against Mr. Silver with the NYPD and the Manhattan DA's office for making death threats against them, continual harassment and stalking, and other abusive conduct. We are anxious for the truth to be known about Mr. Silver's motivations and actions-including his record of bizarre and violent behavior against others as well.

(Compl.¶ 138.) Silver alleges that Abady's statement was materially false in a number of respects and that Abady made the statement knowing that it was false and with the intent to defame Silver, to cause damage to Silver's reputation, and to cause Silver mental and emotional distress and suffering. (*Id.* ¶¶ 139-41.)

***15** Section 74 of the New York Civil Rights Law ("Section 74") provides, in relevant part, 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." N.Y. Civil Rights Law § 74. "For a report to be characterized as 'fair and true' within the meaning of the statute ... it is enough that the substance of the article be substantially accurate." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 (1979). "New York courts have extended the privilege to comments made by attorneys to the press in connection with the representation of their clients." *McNally v. Yarnall*, 764 F.Supp. 853, 856 (S.D.N.Y.1991) (citing *Branca v. Mayesh*, 101 A.D.2d 872, 476 N.Y.S.2d 187 (2d Dept.1984); *Ford v.. Levinson*, 90 A.D.2d 464, 454 N.Y.S.2d 846 (1st Dept.1982)).

Abady contends that, like the comments made by the defamation defendant in *McNally v. Yarnall*, his statement is absolutely protected by Section 74 because he was merely summarizing his client's position in the litigation. (Abady Mem. at 9.) In *McNally*, the plaintiff moved to add a cause of action for libel against his opposing party's attorney based on comments the attorney made to a newspaper about the litigation. Judge Sweet denied the motion, holding that statements made by a party's attorney concerning a potential defense in a pending action were protected by Section 74. *See McNally*, 764 F.Supp. at 856. In reaching this conclusion, Judge Sweet explained that the attorney's comments "relate[d] directly to a possible position to be taken by [his client] as a defense to [the defamation plaintiff's] charges," and that the attorney's "alleged statement was merely restating his client's position in defending the action." *Id.*

In opposition, Silver first argues that Abady's statement is not protected by Section 74 because it falls within an exception to that privilege recognized by the New York Court of Appeals in *Williams v. Williams*, 23 N.Y.2d 592 (1969). In *Williams*, the court concluded that Section 74 was not intended to protect a party that "maliciously institutes a judicial proceeding alleging false and defamatory charges" and then publicizes those

charges in the press. *Id.* at 599. However, the *Williams* exception does not apply here for the same reasons it was inapplicable in *McNally.* Unlike the defamation defendant in *Williams,* neither Abady nor Kuehbeck and Bernstein instituted the underlying litigation in order to publicize false and defamatory charges against Silver. Rather, it was Silver who instituted the litigation giving rise to Abady's statement. The Complaint does not allege that Abady called a press conference or sought to publicize his statement in any way; in fact, there is no allegation that Abady's statement was anything other than a response to a media inquiry about the complaint filed by Silver. Furthermore, Abady's statement appeared in an article reporting on the lawsuit that discussed both sides of the controversy and identified Abady as Kuehbeck's and Bernstein's attorney.[FN5] Accordingly, even when accepting the allegations in the Complaint as true, the situation that gave rise to Abady's statement is distinguishable from the "unusual fact pattern" considered in *Williams. Cf. McNally,* 764 F.Supp. at 856 (distinguishing *Williams* where defamation defendant did not initiate the underlying action, did not seek publicity for the action, and the attorney's comments appeared in a balanced article about the controversy).

> FN5. On a motion to dismiss, the Court may take judicial notice of documents such as the *New York Post* article that Silver "either possessed or knew about and upon which [he] relied in bringing the suit." *Rothman v. Gregor,* 220 F.3d 81, 88 (2d Cir.2000).

***16** Silver also contends that Abady's statement is not protected by Section 74 because the statement was not a "fair and true report" of the litigation. To be privileged by Section 74, a report of a judicial proceeding must be "substantially accurate." A statement is "substantially accurate" "if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth." *Zerman v. Sullivan & Cromwell,* 677 F.Supp. 1316, 1322 (S.D.N.Y.1988) (citations omitted). According to Silver, Abady's statement erroneously stated that Kuehbeck and Bernstein "have filed formal complaints" against Silver, that Silver made "death threats" against Kuehbeck and Bernstein, and that Silver has a "record of bizarre and violent behavior against others." However, in view of the entire article in which Abady's statement appeared, the Court finds that Abady's statement was a substantially accurate account of his clients' position in the litigation initiated by Silver's complaint. Accordingly, the Fourteenth Claim for Relief is dismissed.

IV. Detective Ryan's Motion to Dismiss

Silver brings two claims against Detective Ryan. The Eleventh Claim for Relief charges Detective Ryan with malicious prosecution and false arrest in violation of New York state law,[FN6] and the Twelfth Claim for Relief charges Detective Ryan with malicious prosecution and false arrest in violation of Fourth, Sixth, and Fourteenth Amendment rights as secured by 42 U.S.C. § 1983.

> FN6. The Eleventh Claim for Relief also refers to false imprisonment. However, because "[i]n New York, the tort of false arrest is synonymous with that of false imprisonment," *Posr v. Doherty,* 944 F.2d 91, 96 (2d Cir.1991), the Court's discussion of the false arrest claim will apply to the false imprisonment claim.

False arrest and malicious prosecution claims brought under New York state law are "substantially the same" as § 1983 false arrest and malicious prosecution claims rooted in the Fourth and Fourteenth Amendments, *Boyd v. City of New York,* 336 F.3d 72, 75 (2d Cir.2003), with the exception that § 1983 requires that the defendant act "under color of state law," *Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir.1996).[FN7]

> FN7. Here, because the parties do not dispute that Detective Ryan was acting in his capacity as a police officer during all times

relevant to this dispute, he was clearly acting "under color of state law."

To establish a false arrest claim, a plaintiff must show that: (1) the defendant intentionally confined the plaintiff; (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Bernard v. United States,* 25 F.3d 98, 102 (2d Cir.1994); *Davis v. City of New York,* 373 F.Supp.2d 322, 329 (S.D.N.Y.2005). Probable cause to believe that the plaintiff committed a crime constitutes a privilege justifying the arrest. *Marshall v. Sullivan,* 105 F.3d 47, 50 (2d Cir.1996).

"To state a claim under New York law for the tort of malicious prosecution, a plaintiff must show: (1) that the defendant commenced or continued a criminal proceeding against him; (2) that the proceeding was terminated in the plaintiff's favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice." *Kinzer v. Jackson,* 316 F.3d 139, 143 (2d Cir.2003). For a malicious prosecution claim under § 1983, a plaintiff must also demonstrate that the defendant's conduct "result [ed] in a constitutionally cognizable deprivation of liberty." *Id.* at 143. Probable cause defeats a malicious prosecution claim. *Boyd v. City of New York,* 336 F.3d 72, 75 (2d Cir.2003).

***17** Thus, the lack of probable cause is an essential element of both a false arrest and a malicious prosecution claim. *See Boyd,* 336 F.3d at 75 ("If there was probable cause for the arrest, then a false arrest claim will fail. Similarly, if there was probable cause for the prosecution, then no malicious prosecution claim can stand.") (citation and footnote omitted). Detective Ryan seeks to dismiss the claims against him on the ground that Silver has not pleaded sufficient facts in the Complaint to establish a lack of probable cause, thus defeating the claims for false arrest and malicious prosecution. Because the "probable cause determination relevant to a malicious prosecution claim differs from that relevant to a false arrest claim," *Mejia v. City of New York,* 119 F.Supp.2d 232, 254 (E.D.N.Y.2000) , these two determinations are considered separately.

A. Probable Cause for Silver's Arrest

Probable cause to arrest exists "when the arresting officer has knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Escalara v. Lunn,* 361 F.3d 737, 743 (2d Cir.2004) (quoting *Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir.1996)). An arresting officer may rely on the report of a victim of a crime. *See Loria v. Gorman,* 306 F.3d 1271, 1290 (2d Cir.2002). "Once officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury." *Krause v. Bennett,* 887 F.2d 362, 372 (2d Cir.1989); *see also Ricciuti v. N.Y.C. Transit Auth.,* 124 F.3d 123, 128 (2d Cir.1997) (officer "not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest" once reasonable basis for believing there is probable cause). That the plaintiff was found not guilty of the crimes for which he was arrested has no bearing on his false arrest claim. *See Singer,* 63 F.3d 110, 118 ("a favorable termination of the proceedings is not an element of [the] tort [of false arrest]"). "The question of whether or not probable cause existed may be determinable as a matter of law if there is no dispute as to the pertinent events and the knowledge of the officers." *Weyant,* 101 F.3d at 852.

Detective Ryan argues that the false arrest claim must be dismissed because "Kuehbeck's complaint to the NYPD, in and of itself, provided the probable cause for [Silver] to have been arrested." (Ryan Mem. at 6.) According to the Complaint, "on or about August 4, 2004, Defendant Ryan conducted an interview of Bernstein and Kuehbeck during which Kuehbeck falsely alleged that [Silver] had been 'stalking' and 'harassing' her." (Compl.¶ 113.) Silver contends that Kuehbeck's allegations, as recounted in the Complaint, did not give rise to

probable cause because, in view of the fact that that Silver had previously filed a criminal complaint with a different detective in the same police precinct (Compl.¶ 39), Detective Ryan "knew or should have known immediately that there was a history between the parties and that this raised inherent doubts as to the veracity of the Bernstein and Kuehbeck story" (Silver Opp. at 5).

***18** "When information is received from a putative victim or an eyewitness, probable cause exists, *unless the circumstances raise doubt as to the person's veracity." Curley v. Vill. of Suffern,* 268 F.3d 65, 70 (2d Cir.2001) (emphasis added). Taking the facts alleged in the Complaint as true, there is no showing that Detective Ryan had reason to doubt Kuehbeck's veracity. Although Silver had previously filed a criminal complaint in the same precinct against Bernstein, Kuehbeck's husband (Compl.¶ 39), Silver alleges no facts showing that Detective Ryan knew of that complaint. To be sure, the Complaint alleges that, after Detective Ryan informed Silver of Kuehbeck's criminal complaint on August 9, 2004,

> [Silver] related a number of facts to Detective Ryan, including the fact that only five days earlier, he and Kuehbeck had met at the Lake for as swim and had consensual sex. Fortunately, Kuehbeck's message arranging for the tryst was preserved on [Silver's] answering machine, and he played the message for the police. Detective Ryan was apparently surprised, and told [Silver] that he could leave because he now had to call Bernstein and Kuehbeck who were in Europe.

(Compl.¶ 44.) However, the Complaint does not allege that Detective Ryan believed what Silver told him. Silver evidently did not reach that conclusion because he alleges that he returned to the 19th Precinct on the following day, August 10, 2004, "to try to offer additional evidence that [Kuehbeck's] complaint was nonsense." (Compl.¶ 45.) According to the Complaint, the following unfolded:

> [Detective Ryan] then told [Silver] that Bernstein and Kuehbeck wished to press charges, and that he therefore had no choice but to arrest [Silver]. [Silver] asked the precise basis upon which he was being arrested, and Ryan answered that it was on the basis of "many threatening phone messages." [Silver], puzzled, asked Detective Ryan if he found such supposed messages threatening, and Ryan replied "not to my ears, but when a woman is involved we tend to bend over backwards." Upon information and belief, there were no such "messages." Ryan then said that "Bernstein is all over the case, and I'm going to recommend that the ADA interview her separately." He declined to delay his decision pending an investigation of the actual facts. [Silver] was placed in a detention area in the police station behind a locked door, until his release later that day.

(*Id.* ¶ 45.)

In any event, the Complaint does not allege that Detective Ryan had any reason to question Kuehbeck's veracity in her claims that Silver was stalking or harassing her. Silver presented no evidence to demonstrate that Ryan knew of any previous complaint filed by Kuehbeck or any history between the parties. Therefore, information received from Kuehbeck provided Ryan with probable cause to arrest Silver, thereby defeating Silver's false arrest claim.

B. Probable Cause for Silver's Prosecution

***19** Probable cause also defeats a malicious prosecution claim. See *Boyd,* 336 F.3d 75; see also *Kinzer,* 316 F.3d 143. For purposes of the tort of malicious prosecution, probable cause has been defined as "the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of" or whether "a discreet and prudent person would be led to the belief that a crime had been committed by the person charged." *Morillo v. City of New York,* 1997 U.S. Dist. LEXIS 1665 at *14 (S.D.N.Y.) (citing *Loeb v. Teitelbaum,* 432 N.Y.S.2d 487, 494 (1980)). "The existence of probable cause is meas-

ured as of the time the prosecution was initiated and is based on facts known to or believed to be true by the defendant at that time." *Id.* (citing 432 N.Y.S.2d at 494-95). Here, Detective Ryan had probable cause based on defendant Kuehbeck's complaint to the police that was strong enough to justify him in the belief that he had lawful grounds to arrest and prosecute Silver. Nor has Plaintiff shown that a judicial proceeding was instituted, which is the first element of a malicious prosecution claim. *See supra* 8-10. Accordingly, Silver's malicious prosecution claim is dismissed.

CONCLUSION

For the foregoing reasons, Kuehbeck and Bernstein's motion to dismiss Silver's claims for relief are granted as to the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Thirteenth Claims for Relief; Abady's motion to dismiss is granted as to the Fourteenth Claim for Relief; and Detective Ryan's motion to dismiss is granted as to the Eleventh and Twelfth Claims for Relief.

IT IS SO ORDERED.

S.D.N.Y.,2005.
Silver v. Kuehbeck
Not Reported in F.Supp.2d, 2005 WL 2990642 (S.D.N.Y.)

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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,

-against-

Index No. 105573/2011

THE WASHINGTON POST COMPANY, et al.,

Defendants.

STATE OF NEW YORK:)
) ss.:
COUNTY OF NEW YORK:)

JENNIFER MUSARRA, being duly sworn, deposes and says, I am not a party to the action, am over 18 years of age and reside in Bayside, NY.

On June 22, 2011, I served the within **MEMORANDUM OF LAW** addressed to the following person at the last known address set forth below:

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JENNIFER MUSARRA

Sworn to before me this
22nd day of June 2011

Notary Public

VERONICA TORRES
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01TO6065265
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES OCTOBER 15, 2013