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

JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.	:	Index No. 105573/11
Plaintiffs,	:	
- against -	:	
THE WASHINGTON POST, et al.,	:	Justice Shlomo Hagler
Defendants.	:	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF O'HALLERAN DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION TO FURTHER AMEND THE COMPLAINT

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Defendants Jeanne O'Halleran and the Law Office of Jeanne O'Halleran, LLC (collectively, "O'Halleran" or the "O'Halleran Defendants") respectfully submit this memorandum of law; (a) in further support of their motion, pursuant to CPLR 3211(a)(1), (a)(7) and (a)(8), to dismiss the Amended Complaint in its entirety as to them for lack of personal jurisdiction and failure to state a claim upon which relief can be granted; and (b) in opposition to the cross-motion of plaintiffs Joseph Rakofsky and Rakofsky Law Firm, P.C. (collectively, "Rakofsky" or "Plaintiff") to further amend the Complaint, on the ground that Rakofsky's proposed amendments would be futile.

PRELIMINARY STATEMENT

Plaintiff has no jurisdiction over the O'Halleran Defendants and not a single viable claim to assert against them.

These Defendants, the principal of a small law practice in Georgia and the Law Office itself, have a local practice with no ties to or clients in New York whatsoever. Ms. O'Halleran's comment on a "hyper-local" website called Paulding.com, which covers issues of concern to residents of Paulding County, Georgia, is the sole basis for Rakofsky's claims against her. She did not transact business in New York or direct any activities toward it. There is no conceivable basis for personal jurisdiction.

Even if Rakofsky could establish personal jurisdiction, he would still not be able to assert a claim against the O'Halleran Defendants. Ms. O'Halleran's comment is absolutely privileged under New York Civil Rights Law § 74. He does not allege any conduct by these Defendants that would support a claim of Intentional Infliction of Emotional Distress, Tortious Interference or Commercial Misappropriation. Nor has he proposed any viable cause of action in his proposed amended complaint. The Amended Complaint should be dismissed as to the

O'Halleran Defendants and Rakofsky should not be permitted to prolong this frivolous litigation any further by amending to add futile new claims.

ARGUMENT

I. Rakofsky Has Not Met His Burden to Establish Long-Arm Jurisdiction over O'Halleran

The moving affidavits demonstrate that there is no personal jurisdiction in New York over the O'Halleran Defendants, who are non-residents; and Rakofsky utterly fails to raise any credible argument for opposing their prompt dismissal from this suit on jurisdictional grounds.

It is hornbook law that when faced with a motion to dismiss for lack of personal jurisdiction, the burden shifts to the plaintiff to make a prima facie showing that jurisdiction exists. As such, Rakofsky is not permitted to rely on the boilerplate, "information and belief" allegations in his Amended Complaint and proposed Second Amended Complaint. Instead, he must "come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction." Vincent C. Alexander, *Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR 302:5. Faced with the burden of establishing that O'Halleran "transacts business" in New York, and that their cause of action "aris[es] from" such business transaction (CPLR 302(a)(1)), Rakofsky fails to present a single piece of jurisdictional evidence even mentioning the O'Halleran Defendants; and cannot overcome the Affidavit of Jeanne O'Halleran showing that neither she nor her law firm has transacted any business in New York in connection with the publication of the allegedly defamatory comment. As a result, since the strict requirements for long-arm jurisdiction under CPLR 302(a)(1) have not been met, the O'Halleran Defendants must be dismissed from this action. Indeed, Rakofsky' continued

assertion of jurisdiction over these defendants, without a shred of evidence connecting them to New York, is sanctionable.[1]

Rakofsky does not (and cannot) deny that neither Ms. O'Halleran nor her law firm have any connection to, or clients from, New York. O'Halleran Aff. ¶¶ 3-15. He does not (and cannot) deny that the allegedly defamatory statement was researched, written, and uploaded to the Internet in Dallas, Georgia, and published as a comment on a forum section on "Paulding.com," a hyper-local news website operating out of, and relating to, issues of concern to Paulding County, Georgia residents. *Id.* ¶17-18. He does not (and cannot) deny that the O'Halleran Defendants do not target or advertise to potential clients outside of the state of Georgia. *Id.* ¶¶ 7.[2] Unable to proffer a shred of evidence connecting O'Halleran or her comment on the Paulding.com site to New York, Rakofsky instead frivolously asserts in blunderbuss fashion – indiscriminately lumping all 81 defendants in this action together – that the "totality of defendant's activities in New York" (Opp. at 30) support jurisdiction under CPLR 302(a)(1). Yet Rakofsky does not allege a single such "activity" of O'Halleran, much less one that gives rise to any of his claims. As a result, Rakofsky has failed to meet his burden vis-à-vis O'Halleran.

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[1] Rakofsky has apparently abandoned his claim of jurisdiction under CPLR 301 (Opp. at 28). This Reply will therefore focus on the reach of CPLR 302. To the extent that Plaintiff still maintains that general jurisdiction exists, the O'Halleran Defendants refer to their Motion to Dismiss at pp. 9-10, incorporated by reference herein.

[2] The only New York-specific allegation made by Rakofsky in his Opposition is that defendants should expect to be hauled into a New York court because they knew that Rakofsky was a "New York based" lawyer because the Washington Post article said so. Opp. at 34. This fails for several reasons, the most obvious being that Rakofsky is a New Jersey, not New York, attorney. It beggars belief that the defendants would expect ***New York*** consequences as the result of publishing a comment on a ***Georgia*** news site about a ***New Jersey*** lawyer's handling of a ***D.C.*** criminal trial. And Rakofsky does not refute that O'Halleran's comment followed the ABA article about him, which does not identify him as New York based, or that O'Halleran did not know until the suit was filed that Rakofsky resided in New York. O'Halleran Aff. ¶ 20. Moreover, New York courts consistently reject the notion that consequences within the State were foreseeable based on plaintiff's domicile there. *See, e.g.*, *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996); *Best Van Lines v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) ("the nature of Walker's comments does not suggest that they were purposefully directed to New Yorkers rather than a nationwide audience," even though the plaintiff was identified as a New York company in one of the defendant's postings).

Thus, in support of his "totality of activities" argument, Rakofsky asserts virtually incomprehensible allegations based on a "link network," and a "bulletin board used by defendant and owners and New York contributors thereto." Opp. at 31. Solely based on Defendant's "signature block" which included a link to her law firm's business website (Rakofsky Aff. Ex. 32), Rakofsky asserts that

> given the number of New York-based defendants in this action who are charged with publishing defamatory material on their websites, the likelihood of interaction between the bulletin board used by defendant and owners and New York contributors thereto is increased, as well as other defendants who similarly published defamatory statements about plaintiffs, on many occasions, directed viewers to Defendants' defamatory publications, who, in turn, directed viewers to their website.

Opp. at 33. Unpacking this extraordinary statement, it appears that Rakofsky asserts jurisdiction over O'Halleran because there are other defendants from New York, who "likely" interacted with a Paulding County, Georgia local news website (Rakofsky offers no evidence of such interaction); and other, New York-based contributors to Paulding.com (none of whom are identified), directed viewers to O'Halleran's statement (Rakofsky has offered no evidence of any such links). To explain the statement is to demonstrate its absurdity.

In connection with his argument, Rakofsky submits printouts from some of the defendants' websites showing "links" to the *Washington Post* and to other defendants' articles (Pl. Exhs. 16-37); and the affidavit of "expert" Osvaldo Alayon asserting that some defendants linked to one another in order to improve their visibility on Google and other search engines (Osvaldo Aff. Ex. A-W). Yet all of Rakofsky's exhibits relate to other defendants. None of the exhibits reflect any activity of O'Halleran, who was a mere *commenter* on – not the host of – the Paulding.com site. The site is not alleged to have any New-York focused advertising, and even if it did, as a mere commenter, Ms. O'Halleran would not be a beneficiary of such advertising. What's more, Rakofsky makes no effort to explain, and O'Halleran cannot fathom, the relevance

of this information to jurisdiction. Indeed, *Rakofsky does not (because he cannot) explain how these linking activities involving totally different defendants could possibly be deemed business transactions of O'Halleran in New York*, much less how they could possibly have an "articulable nexus" to or "substantial relationship" with O'Halleran's posting of her comment on the Paulding.com website, which Rakofsky acknowledges (Opp. at 29) is the proper test for long-arm jurisdiction under Section 3201(a)(1).

Rakofsky's lengthy case law citations are also manifestly unhelpful to his cause. Indeed, the Court in *Gary Null & Assoc., Inc. v. Phillips,* 29 Misc.3d 245, 906 N.Y.S.2d 449 (Sup. Ct. NY Co. 2010) (*cited at* Opp. at 33), specifically rejected the same arguments put forth by Rakofsky.[3] Similarly, both cases cited for the proposition that a court should look at the totality of the circumstances actually affirmed orders finding personal jurisdiction to be lacking. *Farkas v. Farkas*, 36 A.D.3d 852, 830 N.Y.S.2d 220 (2d Dep't 2007); *Cushley v. Wealth Masters Intl.*, No. 2009-1564QC, 2010 WL 5186654 (2d Dep't Dec. 16, 2010).[4]

Simply put, the law is settled that the mere publication of the challenged comment on a Paulding, Georgia based "hyper-local" website does not permit personal jurisdiction under New York's narrowly circumscribed long-arm statute. And since O'Halleran filed her dismissal

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[3] In the *Phillips* case, a Virginia resident writing on a Washington, DC based website allegedly defamed the plaintiff, who claimed New York jurisdiction based on the site's availability in New York, the possibility that people would search the site for accommodations or restaurants in New York and simultaneously see the allegedly defamatory articles, and Google-generated advertisements of New York businesses on the site. The court rejected the assertions, finding that the defendant did not engage in any activity "purposefully directed" towards New York.

[4] The Court of Appeals *in Ehrenfeld v. Bin Mahfouz*, also cited by Rakofsky, likewise granted dismissal for lack of personal jurisdiction. 9 N.Y.3d 501, 851 N.Y.S.2d 381 (2007); *see also Henderson v. Phillips*, 2010 N.Y. Slip Op 31654U (Sup. Ct. N.Y. Co. 2010). And the few cases relied on by Rakofsky where the court found jurisdiction are all patently inapposite, as they involved business in New York. *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 839 N.Y.S.2d 670 (4th Dept. 2007) (involving a New York franchise agreement); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (Ct. App. 1965) (involving a defendant who had lengthy negotiations with and a contract with a New York corporation); *Catauro v. Goldome Bank For Sav.*, 189 A.D.2d 747, 592 N.Y.S.2d 422 (2d Dept. 1993)(involving a defendant who corresponded with a New York bank, closed an account and withdraw all of the money therein); *Grimaldi v. Guinn*, 72 A.D.3d 37, 895 N.Y.S.2d 156 (2d Dep't 2010) (involving a truck sale to a New York plaintiff and lengthy correspondence to New York regarding future projects).

Motion, the New York Court of Appeals has spoken definitively on this subject. In affirming the grant of dismissal for lack of personal jurisdiction in *SPCA of Upstate New York, Inc. v. American Working Collie Ass'n*, 18 N.Y.3d 400, 940 N.Y.S.2d 525 (2012), the Court reiterated that "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation," *id.* at 405 (citation omitted), and found that a Vermont defendant's three phone calls, two visits, and donation of cash and leashes to an allegedly defamed New York organization were insufficiently related to the website article to confer personal jurisdiction, even where it was on one such visit that the defendant observed activities which prompted, and were the subject of, the article. *Id.*[5] Here, where the claim-related contacts with New York are not only far weaker, but literally non-existent, dismissal of the O'Halleran Defendants from this suit is plainly mandated.[6]

II. The O'Halleran Defendants' Comment is a Fair Report of Judge Jackson's Bench Ruling and Thus Absolutely Privileged under Section 74

Not only does Rakofsky fail to credibly respond to the undisputed evidence mandating dismissal of the O'Halleran Defendants for lack of personal jurisdiction, he likewise offers no reasoned opposition to dismissal based on the additional ground that O'Halleran's comment is

[5] The law is also settled that Rakofsky cannot evade the defamation exception in Section 302(a)(3) by re-labeling his defamation claim as something else. Therefore their tag-along tort claims in the Amended Complaint cannot independently establish a basis for personal jurisdiction. Mov. Br. at 15-16 (citing cases). The proposed Second Amended Complaint likewise seeks to add claims based on the identical set of facts as the defamation claim, and therefore fare no better. *See, e.g., Amer. Radio Ass'n AFL-CIO v. Abell Co.,*, 58 Misc.2d 483, 485, 296 N.Y.S.2d 21, 23 (Sup. Ct. N.Y. Co.) (after dismissing libel action on jurisdictional grounds, ruling that "plaintiffs' attempt to convert the alleged tort from defamation to something else must be rejected as spurious"); *Willms v. CTVGlobemedia, Inc.*, No. 111988/10; 2011 WL 2941336 (Sup. Ct. N.Y. Co. June 22, 2011) (rejecting tortious interference with prospective economic advantage claim as duplicative of defamation claim, over which the court lacked personal jurisdiction). As these proposed additional claims are the sole substantive amendments in the Second Amended Complaint, Plaintiffs' Cross Motion to Amend should be denied as futile since it fails to establish a legitimate basis for asserting personal jurisdiction over O'Halleran.

[6] Rakofsky's facially meritless arguments also fail to warrant any request for jurisdictional discovery, as he has not made a "sufficient start" showing that his claim of jurisdiction is not frivolous. *Peterson v. Spartan Indus.*, 33 N.Y. 2d 463, 467, 354 N.Y.S.2d 905, 908 (1974). A "sufficient start" requires "more than conclusory allegations, and [plaintiff] needed to submit some tangible evidence to substantiate its allegations" supporting personal jurisdiction. *NYC Med. v. Republic W. Ins. Co.*, 8 Misc. 3d 33, 37, 798 N.Y.S.2d 309, 312 (2d Dept. 2004). As Rakofsky has offered no evidence whatsoever regarding the O'Halleran Defendants, any such request for jurisdictional discovery must be denied.

absolutely privileged under N.Y. Civil Rights Law §74. Because Rakofsky cannot refute that Ms. O'Halleran's comment was substantially true, he launches an attack on Judge Jackson for commenting on his incompetence, engages in a lengthy – and utterly irrelevant – diatribe about alleged falsities in the *Washington Post* article (which is an entirely different publication unrelated to O'Halleran), and utterly mischaracterizes his role in the criminal trial. The few generalized arguments that Rakofsky makes are meritless on their face. Thus, Rakofsky suggests that Ms. O'Halleran's statement is not a fair and true report because (a) Judge Jackson did not "declare" a mistrial, instead, by allowing Mr. Deaner new counsel, a mistrial resulted; and (b) Judge Jackson granted a new trial solely because Rakofsky requested withdrawal, not even in part as a result of of Rakofsky's incompetence; and (c) because Rakofsky was not incompetent (Opp. at 34-35). Indeed, Rakofsky has so convinced himself of his own "heroics" on behalf of Mr. Deaner (Opp. at 68) that he incredibly suggests that Judge Jackson's explicit on-the-record criticism of defense counsel's incompetence was not even directed at Rakofsky. (Opp. at 36).

Simply put, despite Rakofsky's clumsy attempt to re-interpret the hearing transcript, he cannot get around the bedrock principle that the fair report privilege immunizes *substantially accurate* reporting of judicial decisions – whether or not the judge "got it right" in his decision. The privilege exists to prohibit exactly what Rakofsky seeks to do here – that is, to force reporters to act as judge and jury by verifying the truth of all allegations put forth in public proceedings and rulings. *Glantz v. Cook United, Inc.*, 499 F. Supp. 710, 715 (E.D.N.Y. 1979). Mov. Br. at 19-20. It cannot be disputed that the brief comment challenged by Rakofsky – "A judge recently declared a mistrial in a murder case because of the defense attorney's incompetence" – is a substantially accurate report of the hearing (Rosenfeld Aff., Ex. C at 3-6), regardless of whether Judge Jackson was correct in his assessment of Rakofsky's skill and

experience, and regardless of whether the mistrial was "declared" or was simply the natural result of Judge Jackson having granted Deaner's request for new counsel (*Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 67-68, 424 N.Y.S.2d 165, 168 (1979) ("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")), regardless of whether there were other reasons, in addition to Rakofsky's incompetence, that underlay Judge Jackson's decision (*Leder v. Feldman*, 173 A.D.2d 317, 569 N.Y.S.2d 702 (1st Dep't 1991) (requiring only substantial accuracy for application of the privilege)); indeed, regardless of whether Rakofsky is, in fact, incompetent (*Schneph v. New York Times Co.*, 32 Misc.2d 237, 240, 223 N.Y.S.2d 90, 94 (Sup. Ct. Bronx. Co. 1961) ("the purpose of [Section 74] is to protect absolutely from liability for libel one who, without concerning himself in the slightest with the truth of the defamatory statements made ... in the course of official proceedings, publishes a fair report of that proceeding including the libelous matter")).

In his voluminous Opposition (largely directed at the *Washington Post*, rather than O'Halleran[7]), Rakofsky appears to make only two points directly relevant to the O'Halleran motion. First, he dissects the use of the word "mistrial", arguing that O'Halleran's statement was untrue because a mistrial cannot be declared, it simply occurs, and what Judge Jackson actually "declared" was a new trial, and that only as a result of Rakofsky's motion to withdraw as counsel. Opp. at 34-35. Rakofsky is wrong on both the facts and the law. As Judge Jackson made clear, he believed a mistrial was a necessary corollary of granting Deaner's request for a new lawyer, which he resolved as a request for a new trial. (Rosenfeld Aff. Ex. B at 7). Therefore, the reason he allowed a change of counsel and the reason the mistrial occurred were

[7] For example, Rakofsky's lengthy exposition related to the investigator, Mr. Bean, and his motion (Opp. at 41-53), is utterly irrelevant to the O'Halleran Motion to Dismiss and should be ignored.

identical.[8] Moreover, even assuming *arguendo* that the comment was technically incorrect in referring to the "mistrial" rather than to a decision granting a "request for new counsel", that type of picayune error would not have "produce[d] a different effect on the reader" (*Klig v. Harper's Mag. Found.*, No. 600899/10, 2011 WL 1768878 (Sup. Ct. Nas. Co. Apr. 26, 2011); *see also* Mov. Br. at 19-20) than if Defendants had written "A judge recently granted a request for new counsel in a murder case because of the defense attorney's incompetence," since the hearing transcript is abundantly clear that Judge Jackson, in his decision granting the motion, expressly referred to his concerns about Rakofsky's skills and competence. Accordingly, the gist and sting of the comment is substantially accurate.

Second, Rakofsky rewrites history to make himself the hero of the Deaner trial, whose "heroic self-sacrificing efforts on behalf of his client [were] the very antithesis of incompetence" (Opp. at 68). To that end, Rakofsky brazenly asserts that Judge Jackson never laid any acts of incompetence against him (Opp. at 67), and mischaracterizes Judge Jackson's reasons for granting Deaner's request for new counsel and the attendant mistrial by stating that the decision to grant a mistrial was "was expressly the result solely of Mr. Rakofsky's own motion to withdraw," Opp. at 40.[9] Of course, the transcript of the proceedings speaks for itself: Rakofsky filed a motion to withdraw, which Judge Jackson considered only after confirming that Mr. Deaner wanted new counsel (Rosenfeld Aff., Ex. C at 3-4). Judge Jackson ultimately granted

[8] Incredibly, Rakofsky later acknowledges that mistrials are, indeed, "declared" (Opp. at 35), thus rendering inexplicable his challenge to that part of O'Halleran's statement. Notably, Rakofsky's comment that a mistrial didn't even have to occur here because of the availability of other counsel (Opp. at 35), undermines his argument. If a mistrial was not necessary, but did occur, it happened as an affirmative act of Judge Jackson – substantially what O'Halleran wrote.

[9] Rakofsky both denies that he argued that the mistrial was solely based on Rakofsky's motion to withdraw (Opp. at 34-35), and *then repeats the same allegation.* Possibly he is referring only to the "mistrial" and not to the grant of the request for new counsel. But as noted above, for the purpose of the privilege, there is no substantive difference between the two. If the request for new counsel was granted even in considerable part because of Jackson's assessment of Rakofsky's incompetence – and even Plaintiff may acknowledge that it was part of the reasoning (Opp. at 35) – that is sufficient to bring the statement within the privilege. *Klig*, 2011 WL 1768878.

Mr. Deaner's request, and the attendant mistrial, largely because of his repeated assessment of Rakofsky's legal skills, which he believed were "not up to par under any reasonable standard of competence under the Sixth Amendment." Rosenfeld Aff. Ex. C at 6. To wit, in connection with deciding whether to grant the request for new counsel, Judge Jackson made the following statements:

- "[Q]uite frankly, it was evidence, 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 (*Id.* Ex. C at 4);
- "there were...defense theories out there, but the inability to execute those theories" (*Id.*);
- "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" (*Id.*);[10]
- "I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly ....made.... 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" (*Id.* at 5);
- "I believe that based on my observation and, as I said, not just the fact that lead counsel had not tried a case before; any case.... 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." (*Id.*)[11]

In the face of the transcript, it cannot be legitimately disputed that Rakofsky's perceived incompetence was the primary factor in Judge Jackson's decision to grant Deaner's request for new counsel. That it may not have been the only reason is not enough to divest O'Halleran of the fair report privilege. *Holy Spirit Ass'n.*, 49 N.Y.2d at 67-68, 424 N.Y.S.2d at 168; *Glendora*

[10] Rakofsky makes much of the fact that this statement was "hypothetical." (Opp. at 63-67). Certainly it was hypothetical to the extent that there was no such conviction. But the fact that he believed – and so stated on the record – Rakofsky to be so unskilled as to require a new trial in the event of conviction, is without a doubt a reflection of the Judge's reasons for allowing mistrial, and therefore relevant.

[11] Contrary to Rakofsky's assertion, there is no doubt that Judge Jackson is referring to Rakofsky, not Mr. Grigsby, when discussing the skills of Deaner's "lead counsel".

v. Gannett Suburban Newspapers, 201 A.D.2d 620, 608 N.Y.S.2d 239 (2d Dep't 1994) (accuracy of report not altered by failure to report plaintiff's side of judge's decision); Mov. Br. at 22-23 (citing cases). Reading the transcripts in full, and contrary to the Opposition, Rakofsky's request to withdraw appears to be the *least* animating factor behind Judge Jackson's mistrial decision: Indeed, when the only issue was Rakofsky's interest in withdrawing, Judge Jackson expressed his disinclination to allow it. Rosenfeld Aff. Ex. B at 4.

In sum, the challenged comment is a substantially fair and accurate report of the proceedings, and, as such, is absolutely privileged under Section 74. Accordingly, even if the O'Halleran Defendants were subject to personal jurisdiction in New York (which they are not), Rakofsky's defamation cause of action must be dismissed as a matter of law.

III. Each of Rakofsky's Tag-Along Claims Fail as a Matter of Law

Rakofsky acknowledges that his Intentional Infliction of Emotional Distress claim and Tortious Interference with Contract claim will likely fail against some defendants (*see* Opp. at 68, 70). As he does not allege or identify *any* conduct by O'Halleran as constituting Infliction or Interference – indeed all of the actions Rakofsky identifies are attributed to other Defendants (Opp. at 68-70)[12] – he has apparently abandoned these causes of action against them. Regardless, the Opposition does not remedy the failures raised by O'Halleran's Motion to Dismiss.

A. Intentional Infliction of Emotional Distress

Fatal to his intentional infliction of emotional distress claim, Rakofsky has manifestly failed to allege any conduct by the O'Halleran defendants that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

[12] Likewise, the O'Halleran Defendants are not alleged to have "linked" to any of the statements alleged to be intentional infliction or tortious. See Opp. at 68-69, Pl. Exhs 1, 40, 15, 22, 17, and 41.

atrocious, and utterly intolerable in a civilized community." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 236 (1983). Contrary to the Opposition (Opp. at 68), a plaintiff alleging intentional infliction must plead "specific conduct [] constitut[ing] the tort," and mere publication of an allegedly defamatory statement on a news forum – all that has been alleged against O'Halleran – does not qualify as a matter of law. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92, 760 N.Y.S.2d 133, 138 (1st Dep't 2003). Moreover, Rakofsky does not (because he cannot) dispute that under New York law, a cause of action for emotional distress grounded on the same underlying conduct as a libel claim must be dismissed as duplicative. Mov. Br. at 24-25 and n.9 (citing cases). Here, Rakofsky has asserted no conduct by O'Halleran other than the single posting. Accordingly, his intentional infliction claim must be dismissed as duplicative.

B. Tortious Interference with Contract

The law is clear that, to state a cognizable claim for intentional interference with contractual relations, the plaintiff must identify the existence of a specific contract with a third party that was breached by that third party. Yet, despite this well-established requirement, Rakofsky still fails to identify any such agreement. Instead, he asserts that "Defendants are aware in the abstract that plaintiffs had contracts with third parties", and hopes that it will be "sufficient that Defendants knew that such contracts *probably* existed." Opp. at 71 (emphasis added). The notion that O'Halleran would be aware of contracts that Rakofsky himself cannot identify is absurd. The only logical conclusion from Rakofsky's inability to identify any contracts is that there were none, and that he is attempting to achieve a windfall based not on *actual damage to existing contracts*, but on unsubstantiated hopes for the business he was hoping to build. The failure to allege any specific contract that was breached is fatal to Rakofsky's tortious interference claim, mandating dismissal. *NBT Bancorp, Inc. v. Fleet/Norstar Financial*

Group, Inc., 87 N.Y.2d 614, 620-21, 641 N.Y.S.2d 581, 584 (1996); *see also Downtown Women's Center, Inc. v. Carron*, 237 A.D.2d 209, 210, 655 N.Y.S.2d 479, 480 (1st Dep't 1997) (actual breach is "necessary to any cause of action for tortious interference with contract").

C. Commercial Misappropriation

By failing to address it, Rakofsky has presumably abandoned his commercial misappropriation claim under Sections 50 and 51 of the New York Civil Rights Law. Even if not abandoned, the claim must be dismissed since Rakofsky does not – and obviously cannot – allege that O'Halleran used his name or likeness for an "advertising" or "trade" purpose, as is strictly required to state a cause of action under Sections 50/51. Since Rakofsky's name was used in O'Halleran's posting for a newsworthy, editorial use, his commercial misappropriation claim fails on its face. (See Mov. Br. at 28-29).

IV. Since Rakofsky's Proposed New Causes of Action Cannot Survive a Motion to Dismiss, His Proposed Amendments Must be Denied as Futile

Perhaps seeing the writing on the wall, Rakofsky now seeks to add four new tag-along tort claims, apparently hoping something will stick. But these proposed new claims suffer the same problems as the original tag-along claims: each is based on exactly the same set of facts as Rakofsky's defamation claim, and each alleges injuries to Rakofsky's reputation. As a result, none could survive a motion to dismiss since they are duplicative of the defective defamation claim. *O'Brien v. Alexander*, 898 F. Supp. 162, 172 (S.D.N.Y. 1995), *aff'd in part and rev'd in part on other grounds*, 101 F.3d 1479, 1488 (2d Cir. 1996). *Chao v. Mt. Sinai Hosp.*, No. 10 Cv. 2869 (S.D.N.Y. Dec. 17, 2010). Accordingly, the proposed amendment would be futile, and the cross-motion to amend should be denied.

A. Tortious Interference with Prospective Business Relations

"Plaintiff is not permitted to dress up a defamation claim as a claim for intentional interference with a prospective economic advantage," *Krepps v. Reiner,* 588 F. Supp. 2d 471, 485 (S.D.N.Y. 2008), and for that reason alone, the cause of action would fail. Additionally, Rakofsky has not pled facts supporting any of the elements of the tort, at least vis-à-vis O'Halleran.[13] Accordingly, amendment would be futile.

Despite several opportunities, Rakofsky has failed to identify any "particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious behavior." *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995) (citation omitted) (granting motion to dismiss where complaint referred only generally to potential contracts); Mov. Br. at 26-27. The vague allegation that "Rakofsky had a valid economic relationship with other parties containing the probability of future economic benefit to plaintiffs" (Prop. 2d Am. Comp. ¶ 563), is woefully inadequate. *Kramer*, 890 F. Supp. at 258. Unable to identify any such relationship, it goes without saying that Rakofsky could never adequately plead that O'Halleran was somehow aware of them. *PPX Enterprises, Inc. v. Audiofidelity Enters., Inc.* 818 F.2d 266, 270 (2d Cir. 1987) (approving jury charge requiring knowledge by Defendant of the relationship). And never having pled a specific relationship that was harmed, Rakofsky can only conclusorily allege injury, and that such injury was "but for" caused by O'Halleran's post. These non-specific, boilerplate allegations are insufficient as a matter of law. *Murphy v. City of New York*, No. 106059/2006, 2008 WL 2789093 (Sup. Ct. N.Y.

[13] To plead interference with prospective business relations, a plaintiff must meet requirements more demanding than those for interference with the performance of an existing contract. *See Fine v. Dudley D. Doernberg & Co.*, 203 A.D.2d 419, 610 N.Y.S.2d 566, 567 (2d Dep't 1994). "Under New York law, the elements of a claim for tortious interference with prospective business relations are: (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 criminal or tortious means; and (4) injury to the business relationship." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000).

Co. July 2, 2008) (allegations that plaintiff was unable to secure position with MTA after defendants published negative report were legally insufficient, since plaintiff failed to allege facts evidencing that "but for" the defendants' actions, he would have secured the position).[14] Amendment would be futile, and the cross-motion should be denied.

B. Injurious Falsehood

The law is well-established that where (as here) the crux of a complaint sounds in defamation, New York courts dismiss causes of action for injurious falsehood. *See Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 149 (E.D.N.Y. 2010) ("to the extent plaintiff alleges a claim for injurious falsehoods based on the statements in the Newsday articles, such a claim is dismissed as duplicative of the libel and slander claims"); *O'Brien*, 898 F. Supp. at 172. Moreover, like defamation, injurious falsehood allegations are subject to the fair report privilege of § 74 of the New York Civil Rights Law. *See, e.g., Icahn v Raynor*, 32 Misc. 3d 1224A, 936 N.Y.S.2d 59 (Sup. Ct. N.Y. Co. 2011); *Alzheimer's Found. of Am., Inc. v. Alzheimer's Disease & Related Disorders Ass'n*, 796 F. Supp. 2d 458, 471 (S.D.N.Y. 2011); *Adams v ALM Media Props.*, LLC, No. 115525/2010, 2011 WL 5931469 (Sup. Ct. N.Y. Co. Nov. 14, 2011). Accordingly, Rakofsky's proposed injurious falsehood claim could not withstand a motion to

[14] Even if Rakofsky could overcome all of those difficulties, his claim would still fail, because he could not show interference by "wrongful means," or that O'Halleran's sole purpose in writing the post was to harm them. *Snyder v Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 684 N.Y.S.2d 235 (1st Dep't 1999). *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313, 776 N.Y.S.2d 279, 280 (1st Dep't 2004). "'Wrongful means' includes physical violence, fraud or misrepresentation, civil suits, and criminal prosecutions and some degree of economic pressure. . . ." (*Carvel Corp. v. Noonan*, 3 NY 3d 182, 191, 785 N.Y.S.2d 359, 363 (Ct. App. 2004). Rakofsky alleges that O'Halleran's interference was accomplished through the allegedly defamatory post alone. However, because he is unable to establish defamation (*see* above), he "can point to no 'wrongful means' by which defendants interfered." *Murphy*, 2008 WL 2789093. In addition, because O'Halleran obviously had a lawful interest in reporting the news of Mr. Deaner's mistrial to the public, Rakofsky plainly cannot establish that she posted the comment at issue solely to harm him. *Kahn v. Salomon Brothers, Inc.*, 813 F.Supp. 191, 195 (E.D.N.Y.1993) ("where a defendant's interference is intended even partially to advance its own interests, the misconduct must rise to the level of fraudulent or criminal acts."). For all these reasons, the claim of tortious interference must be dismissed.

dismiss for the reasons discussed above, and amendment would be futile. Rakofsky's cross motion should accordingly be denied.[15]

C. Negligence

Rakofsky's proposed negligence claim is a transparent attempt to evade New York's stringent fault standard in libel actions, established in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975), which requires that a plaintiff plead and prove that the defendant acted with (at least) "gross irresponsibility" in posting a comment on a matter of public interest – which O'Halleran's comment about the Deaner trial surely was. For that reason, where (as here) the crux of a complaint sounds in defamation, New York courts routinely disallow duplicative claims under the rubric of negligence. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 21 A.D.3d 826, 826-27, 801 N.Y.S.2d 38, 40 (1st Dep't 2005) ("since plaintiff's negligence claim is based upon the very same factual allegations underlying its defamation claim and, like the defamation claim, seeks redress for injury to reputation, the negligence claim was properly dismissed as duplicative"); *Colon v. City of Rochester*, 307 A.D.2d 742, 744, 762 N.Y.S.2d 749, 752 (4th Dep't 2003) (where "plaintiff alleges an injury to his reputation as a result of statements made or contributed to by defendants, plaintiff is relegated to whatever remedy he might have under the laws of defamation and cannot recover under principles of negligence"); *Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783, 785, 610 N.Y.S.2d 664, 666

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[15] Additionally, Rakofsky's injurious falsehood – or trade libel – claim fails because he has not pled special damages with sufficient specificity. Out of pocket losses, loss of salary, and loss of customers can be actionable under an injurious falsehood theory only when the losses are identified with particularity in the complaint and causally linked to the specific action complained of. *Emergency Enclosures, Inc. v. National Fire Adj Co., Inc.*, 68 A.D.3d 1658, 1660, 393 N.Y.S.2d 414, 417 (N.Y. App. Div. 4th Dep't 2009). *See also Conte*, 703 F. Supp. 2d at 149 (round number of $500 million in damages, without itemization, is insufficiently specific); *Rall v. Hellman*, 284 A.D.2d 113, 726 N.Y.S.2d 629 (1st Dep't 2001) (losses must be identified with particularity); *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 199 N.Y.S.2d 33 (1960) (if the claimed special damage was loss of customers, the persons who refused to purchase must be named or "no cause of action is stated"); *Fabry v. Meridian Vat Reclaim, Inc.*, Nos. 99 Civ. 5149, 99 Civ. 5150, 2000 WL 1515182 (S.D.N.Y. Oct. 11, 2000) (dismissing claim where plaintiffs failed to name specific clients or business prospects that were lost). Plaintiff's vague allegations (Prop. 2d Am. Compl. ¶¶ 1033, 1036) are woefully insufficient.

(3d Dep't 1994) ("The facts alleged by plaintiff are, in essence, inseparable from the tort of defamation and, as such, plaintiff is relegated to any remedy that would have been available on that basis."); *Anyanwu v. CBS, Inc.*, 887 F. Supp. 690, 693-94 (S.D.N.Y. 1995) ("New York cases have held that a separate cause of action for what are essentially defamation claims should not be entertained. New York Courts have so held with respect to negligence claims coupled with claims for defamation.") (citations omitted). Because it cannot withstand a motion to dismiss, amendment of the Complaint to add a negligence claim would be futile, and Plaintiff's cross motion should be denied.

D. Prima Facie Tort

Finally, as the Court of Appeals has squarely held, prima facie tort "should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs," *Curiano v. Suozzi*, 63 N.Y.2d 113, 118-19, 480 N.Y.S.2d 446, 469 (1984), and cannot be used to avoid the stringent pleading and proof requirements of traditional torts. *Id.* Yet that is exactly what Rakofsky attempts to do here – circumvent the requirements of a defamation action by pleading every possible alternative. His efforts must be rejected.

Prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be *lawful*. *Advance Music Corp. v American Tobacco Co.*, 296 N.Y. 79, 83-84, 71 U.S.P.Q. 279 (1946). "Where specific acts, recognized as tortious in the law, are asserted, the remedies lie only in the classic categories of tort." *Ruza v. Ruza*, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 810 (1st Dep't 1955). Thus, where the claimed harm results from an alleged defamation, the remedy is only in defamation. "[T]hese plaintiffs are simply alleging additional damages resulting from the defamatory statements allegedly made by defendants," which will not be permitted. *Cartwright v. Golub Corp.*, 51 AD 2d 407, 410, 381 N.Y.S.2d 901, 902 (3rd Dep't 1976).

Rakofsky attempts to get around this roadblock by complaining about "mobbing" by defendants ("linking their Internet websites to the Internet websites of their 'co-conspirators'" in an effort to "precipitat[e] the republication of the defamatory publications") and "cyber-bullying" ("linking their Internet websites to the Internet websites of their 'co-conspirators to silence plaintiff and intimidate him from, and retaliate against him for, resorting to the legal processes available"). Prop. 2d Am. Compl. ¶¶1203-1205. Of course, giving an alleged defamation a new name does not change its fundamental character, and will not, as a matter of law, support a prima facie tort claim. *Metropolitan Diagnostic Imaging Group, LLC v. U.S. Healthcare Mgt., Inc.*, No. 006499/2010, 2010 WL 3073727 at *3 (Sup. Ct. Nassau Cty. 2010)("the spread of disparaging and false information so as to prevent defendant from entering into business arrangements...is trade libel, a recognized form of tort. When the conduct complained of can be categorized as a form of recognized tort, an action for prima facie tort will not stand"); *cf. Ruza*, 286 App. Div. at 769, 146 N.Y.S.2d at 810 ("it is not surprising that the remedy need rarely be invoked, for the 'categories of tort' are many, and development within the categories is progressive indeed").

Moreover, even if "mobbing" or "cyber-bullying" as defined by Rakofsky could be considered lawful conduct actionable as a prima facie tort, nowhere in his proposed prima facie tort claim – nowhere – does Rakofsky allege any acts of "mobbing" or "cyber-bulling" by O'Halleran herself or her law firm. Nowhere in the proposed Second Amended Complaint or Rakofsky's supporting affidavits is O'Halleran accused of "stalking" Rakofsky, publishing child pornography content, using the image of Rakofsky in any harmful manner, describing Rakofsky as mentally ill, and so forth. *See* Prop. 2d Am. Compl. ¶¶ 1204-1209.[16] Nor is she alleged to

[16] Ms. O'Halleran's single hyperlink to the ABA website cannot form the basis for liability under any theory. Mov. Br. at 23 n.8.

have benefited from being linked to by anyone publishing such statements about Rakofsky. Alayon Affidavit ¶¶ 39-41. The sole act by O'Halleran alleged to be harmful is the single statement in the post, actionable – if at all – only as defamation. Accordingly, the prima facie tort claim against O'Halleran would not withstand a motion to dismiss, and the proposed amendment is futile.[17]

CONCLUSION

Faced with incontrovertible law requiring dismissal, Rakofsky offers a barely responsive and excessively long Opposition that does nothing to establish even the barest basis for personal jurisdiction, and cannot overcome the legal flaws in each of his claims. Rakofsky further ties up this Court's (and 81 defendants') time and resources by proposing four new – yet equally unsustainable – causes of Action. For all of the foregoing reasons, the Amended Complaint against O'Halleran Defendants should be dismissed in its entirety with prejudice, Rakofsky's Motion to Amend the Complaint should be denied as futile, and sanctions should be awarded.

Dated: New York, New York
June 8, 2012

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: _____

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[17] Rakofsky's prima facie tort claim would also fail for two additional reasons: (1) he has not special damages "with sufficient particularity to identify actual losses," *El Greco Leather Products Co. v. Shoe World, Inc.*, 623 F. Supp. 1038, 1045 (E.D.N.Y. 1985) (finding that damages pleaded without itemization are deemed general, not special); *Emergency Enclosures*, 68 A.D.3d at 1660, 893 N.Y.S.2d at 417; and (2) he could not establish that "a disinterested malevolence to injure plaintiff constitute[d] the *sole* motivation" for O'Halleran's posting of the newsworthy comment about the Deaner trial, *Id.*, *citing Great Am. Trucking Co. v Swiech*, 267 A.D.2d 1068, 1069, 700 N.Y.S.2d 632 (1999) (emphasis added), as O'Halleran had a lawful interest in reporting the news of the mistrial to the public.

Attorneys for Defendants Jeanne O'Halleran, Law Office of Jeanne O'Halleran, LLC

Appendix A

Supreme Court, New York.
New York County
Jon ADAMS, Plaintiff,
v.
ALM MEDIA PROPERTIES, LLC, National Law Journal and New York Law Journal, Defendants.
No. 115525/2010.
November 14, 2011.

Motion Seq. No. 001
[This opinion is uncorrected and not selected for official publication.]

Present: Hon. Paul Wooten, Justice.
The following papers were read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211 and for sanctions.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause- Affidavits-Exhibits ...	_
Answering Affidavits - Exhibits (Memo)	_
Reply Affidavits - Exhibits (Memo)	_

Cross-Motion: [ ] Yes X No

ALM Media Properties, LLC (ALM), National Law Journal (NLJ) and New York Law Journal (the Law Journal) move to dismiss plaintiff's complaint pursuant to CLPR 3211 (a)(7) for failure to state a claim and for sanctions. For the reasons set forth below, the complaint is dismissed, but the Court exercises its discretion to decline to impose sanctions.

BACKGROUND

Plaintiff is an attorney who was employed by the law firm of Labaton, Sucharow & Rudoff LLP (the Law Firm) from July 2004 until June 2007 (*Adams v Labaton, Sucharow & Rudoff LLP*, Sup Ct, N.Y. County, Index Number 106045/2009 (the Underlying Action), complaint, ¶ 8). In the Underlying Action, plaintiff alleged that he had "connections to New Mexico's political and government" leaders and that he was hired by the Law Firm due to "his ability to generate business [through these connections] from New Mexico" (*id.*, ¶¶ 17, 35).

Plaintiff further asserted that he was promised 10% of the business that he brought into the Law Firm when he was hired, that New Mexico's Attorney General, Patricia Madrid, was hiring law firms to represent the state's pension funds (the Pension Funds) and that, as a result of his political connections, the Law Firm received legal work representing the Pension Funds (*id.*, ¶¶ 32, 40-41, 59, 61).

More specifically, he claimed that, while working for the Law Firm, the Law Firm represented the Pension Funds and obtained a settlement in an action entitled *In Re:St. Paul Traders Securities Fraud Litigation* (United States District Court,

D. Minn., Docket Number 04-cv-3801) (the St. Paul Action) in the amount of $144,500,000 and the Law Firm was awarded or entitled to fees in the amount of $21,550,000 (*id.*, ¶¶ 61-63). He also states that, while he was working for the Law Firm, the Law Firm represented the Pension Funds and obtained a settlement in an action entitled *In Re:Health South Securities Litigation* (United States District Court, N.D. Ala., Docket Number 03-cv-01500) (the Health South Action) in the amount of $445,000,000, with an anticipated fee to the Law Firm of $66,750,000 (*id.*, ¶ 64).

Plaintiff also states that he brought in eight of the Law Firm's thirteen clients in an action entitled *In Re:Air Cargo Shipping Services Antitrust Litigation* (United States District Court, E.D.N.Y, Docket Number 06-md-01775) (the Air Cargo Action), which was partially settled for $85,000,000 and that the Law Firm's fee was $12,750,000 (*id.*, ¶¶ 66, 69).

Plaintiff contended that the Law Firm reneged on its promise of a 10% fee and the partner who hired him, Dubbs, falsely claimed that he had obtained the New Mexico business, leading plaintiff to resign his employment with the Law Firm (*id.*, ¶¶ 80-86).

On August 6, 2007, plaintiff commenced an action against the Law Firm in the United States District Court for the Southern District of New York (Docket Number 07-civ-7017) (the Federal Action), asserting claims of breach of contract, unjust enrichment, fraud and estoppel. Judge Deborah Batts dismissed the Federal Action by order dated March 30, 2009 (motion, Exhibit A).

On April 29, 2009, plaintiff brought the Underlying Action against the Law Firm, Dubbs and Keller (a partner in the Law Firm), alleging claims of estoppel, fraud, negligent misrepresentation, conversion and breach of contract. Justice Barbara Kapnick, by order dated January 4, 2010, dismissed the Underlying Action against Dubbs and Keller, denied dismissal of plaintiff's contract cause of action and dismissed all of his other claims.

On March 29, 2010, plaintiff submitted an affidavit (Plaintiff's Affidavit) in connection with the settlement of the Underlying Action. In Plaintiff's Affidavit, he stated that he had reviewed the affidavits of Madrid and Glenn Smith and that he "now better [understood] the process by which [the Law Firm] was selected" to represent New Mexico (¶ 3). While he asserted that he "had a good faith basis" for making the allegations in both the Federal Action and the Underlying Action, he now "appreciate(d) that whatever suggestions or inferences [he had made that] ... contributions made by any [Law Firm attorney] to [New Mexico's] Governor Richardson [caused the Law Firm to be chosen to represent the Pension Funds ... [those claims] are not true" (*id.*, ¶ 3). He further stated that his "prior relationship with the New Mexico Attorney General's office did not cause [the Law Firm] to be selected in any particular case" (*id.*, ¶ 9), that Dubbs had previously contributed to Governor Richardson's political campaigns as early as 1980, more than 20 years prior to plaintiff's coming to work for the Law Firm, and that the Law Firm had been chosen to represent the Pension Funds in March 2004, months before plaintiff started his employment with the Law Firm in July 2004 (*id.*, ¶ 5). These statements conflicted with plaintiff's allegations in the Underlying Action that, as a result of his political connections, the Law Firm was chosen to represent the Pension Funds in the St. Paul Action and the Health South Action and that he was therefore entitled to 10% of the Law Firm's fees in those actions.

On April 14, 2010, the Law Journal published an article (the Article) entitled "Ex-Associate Ends Fee Suit Against Labaton Sucharow" (motion, Exhibit G). The Article stated that plaintiff had sued the Law Firm "for $12 million in fees he claimed were derived from his political connections in New Mexico [but] has agreed to end the suit, saying he was wrong." The Article further stated that, while plaintiff had said that he had a good faith basis for his allegations, he "now realized that before he began working for [the Law Firm, it] had already been selected ... to represent [the Pension Funds]" and that "any suggestion that [the Law Firm] engaged in a pay-to-play effort were 'not true.' " The Article also noted that "the parties agreed to keep the terms of the resolution confidential."

On April 15, 2010, the Law Journal published an article entitled "Clarification" (the Clarification) (motion, Exhibit H). The Clarification stated that the Article "incorrectly stated that [the plaintiff] said he was 'wrong' [and that] in his affidavit in connection with the settlement of his action against [the Law Firm, he] said that he had 'a good faith basis' for making allegations against [the Law Firm], but that he now has a 'new understanding' and a 'better understanding' of the situation involving the [Law Firm's] representation of New Mexico's pension funds."

On April 19, 2010, NLJ published an article (the NLJ Article) entitled "Ex-Associate now says fee fight was all a big mistake." The NLJ Article stated that plaintiff had "agreed to end [his lawsuit)] claiming he was owed 10 percent of $118 million in fees ... saying that he was wrong [and] that, while he 'had a good faith basis' [for his allegations] he now realized that [the Law Firm] had already been selected ... before he began working [there],"

On November 29, 2010, plaintiff commenced this action by filing a summons with notice. Plaintiff's complaint alleges that the Article, the Clarification and the NLJ Article were "false", since plaintiff "never once used the word 'wrong' ... [or] 'mistake' " (complaint, ¶ 14) and that the "gist of the story was totally incorrect [damaging his] reputation as an attorney (*id.*, ¶¶ 22-23). Plaintiff's complaint asserts causes of action for defamation, injurious falsehood and negligence.

DEFAMATION

The essence of the tort of defamation is "the publication of a statement about an individual that is both false and defamatory [and] ... a libel action cannot be maintained unless it is premised on published assertions of *fact" (Brian v Richardson,* 87 NY2d 46, 51 [1995] [italics in original]). Moreover, in distinguishing between factual assertions and nonactionable statements of opinion, "the courts must consider the content of the communication as a whole ... [and] [r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context" and resolve whether a reasonable reader would believe the statements convey assertions of fact, rather than opinion or rhetoric (*id.* at 51, 53; *see Mann v Abel,* 10 NY3d 271, 276 [2008], *cert denied,* -US-, 129 S.Ct. 1315 [2009]; *Galanos v Cifone,* 84 AD3d 865 [2d Dept 2011]).

CIVIL RIGHTS LAW § 74

Civil Rights Law § 74 provides, in pertinent part,:
"A civil action cannot be maintained against any person, firm or corporation, for publication of a fair and true report of any judicial proceeding."

In reviewing a newspaper account under this section, "it is enough that the substance of the article be substantially accurate ... [and] [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 [since an article is], by its very nature, a condensed report of events which must, of necessity, reflect in some degree the subjective viewpoint of its author [and should not] ... be thereafter parsed and dissected" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.,* 49 NY2d 63, 67-68 [1979] [internal citations omitted]; *Lacher v Engel,* 33 AD3d 10, 17 [1st Dept 2006]).

DISCUSSION

Both in considering whether the Article, the Clarification and the NLJ Article (collectively, the Articles) set forth statements that can constitute defamation and in considering whether the Articles are a fair and true report of the resolution of the Underlying Action, the Court must view the Articles as a whole and not parse and dissect them line by line, hunting for falsity (*see Brian,* 87 NY2d at 53; *Holy Spirit,* 49 NY2d at 67-68).

Viewed from this perspective, plaintiff's complaint cannot stand. The decision to omit some details that plaintiff would have wished included in the Articles improperly intrudes on editorial decision making (*Sassower v New York Times Co.*, 48 AD3d 440, 441 [2d Dept 2008]). In his complaint in the Underlying Action, plaintiff stated that the principal basis upon which he sought between $8.8 million and $11.75 million was that he was promised 10% of the fees the Law Firm received from New Mexico and that the Law Firm's receipt of business from New Mexico was due to his "crucial connection ... [and that] only happened because of [plaintiff's] introduction" (¶¶ 57, 59). In contrast, Plaintiff's Affidavit states that he now understands that his "prior relationship ... did not cause [the Law Firm] to be selected in any particular case" (¶ 9), and that any "suggestion or inferences" that the Law Firm obtained business from New Mexico as a result of campaign contributions "are not true" (*id.*, ¶ 3).

The Articles summarized plaintiff's statements as an admission that he was wrong. The Articles did not need to be a word-for-word recitation of all the statements in Plaintiff's Affidavit, but merely a substantially accurate account of the substance of the proceeding (*see Holy Spirit*, 48 NY2d at 67; *Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]). Minor inaccuracies in an article are insufficient to set aside the absolute privilege of Civil Rights Law § 74 (*see Posner v New York Law Pub. Co.*, 228 AD2d 318 [1st Dept], *lv denied* 89 NY2d 805 [1996]). Since the Articles were substantially accurate, defendants' motion to dismiss the complaint must be granted.

Moreover, the allegations in the complaint that the Articles were false because they stated that the plaintiff said he was wrong and that it was a mistake, when now plaintiff states in Plaintiff's Affidavit that he understood that his assertions of his crucial status in obtaining New Mexico's business, entitling him to a multi-million fee was "not true" amounts, in the context of the communications as a whole, to nonactionable opinion rather than fact (*Brian*, 87 NY2d at 51; *see GS Plasticos Limitada v Bureau Veritas*, 84 AD3d 518 [1st Dept 2011]). In Plaintiff's Affidavit (¶ 3), he stated that his prior allegations in the Underlying Action that the Law Firm was hired to represent the Pension Funds and that, therefore, he was entitled to 10% of the Law Firm's fees in the St. Paul Action and the Health South Action were "not true." Referring to this as "wrong" and "a big mistake" cannot be considered false (*Posner*, 228 AD2d at 228).

However, plaintiff's arguments were not frivolous, made in bad faith or wrongful (*see* 22 NYCRR 130-1.1[c]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011]; *see also Costanza v Seinfeld*, 279 AD2d 255 [1st Dept 2001]) and, accordingly, the Court declines to impose sanctions.

CONCLUSION

It is, therefore,

ORDERED that the portion of defendants' motion that seeks to dismiss plaintiff's complaint is granted and the complaint is dismissed, with costs and disbursement to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants' motion that seeks ti impose sanctions is denied.

This constitutes the Decision and Order of the Court.

Dated: 11-14-11

<<signature>>

PAUL WOOTEN *J.S.C.*

Check one: X FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

Adams v. Alm Media Properties, LLC
2011 WL 5931469 (N.Y.Sup.) (Trial Order)

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STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENGJUN CHAO, M.D.,	:	
	:	
Plaintiff,	:	
	:	**10 CV 2869 (HB)**
- against -	:	
	:	**OPINION & ORDER**
THE MOUNT SINAI HOSPITAL, THE MOUNT SINAI MEDICAL CENTER, THE MOUNT SINAI SCHOOL OF MEDICINE, DENNIS S. CHARNEY, M.D., REGINALD MILLER, DVM, ELLEN F. COHN, Ph.D., a/k/a/ ELLEN BLOCK COHN, MAREK MLODZIC, Ph.D., HANS SNOECK, Ph.D., TERRY KRULWICH, Ph.D., HELEN VLASSARA, M.D., JAMES GODBOLD, Ph.D., LILIANA OSSOWSKI, MSc, Ph.D.,	:	
	:	
Defendants.	:	

Hon. Harold Baer, Jr., District Judge:

Plaintiff Dr. Hengjun Chao asserts claims for defamation and other torts arising from a series of statements made during the course of an investigation and disciplinary proceeding related to allegations of research misconduct. Dr. Chao also brings contract-related claims in connection with the termination of his employment contract as well as claims for race-based discrimination under federal, state and local law. Defendants move to dismiss the claims for defamation and other torts, but have not challenged the remaining claims. Although both parties have been unable to follow the page limits permitted and their briefs far exceed the length allowed, I have considered the entirety of their submissions. For the reasons that follow the motion to dismiss is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The genesis of the dispute and allegations of research misconduct

In 2007 Dr. Chao worked for Defendant Mount Sinai School of Medicine ("MSSM") as an Assistant Professor and medical researcher. Compl. ¶ 9. Defendant Dr. Ellen Cohn was a post-doctoral student working in Dr. Chao's laboratory. Compl. ¶ 24. This dispute writ large originated with a series of research misconduct allegations that Dr. Chao and Dr. Cohn made against one another in 2007. Dr. Cohn claimed that in July, 2007, Dr. Chao asked her to misrepresent research

results by omitting certain data collected from experimental mice, switching other data, and using insufficient sample sizes and analysis. Essig Aff. Ex. E, at 2, 7. Dr. Chao claimed that Dr. Cohn had chosen to misrepresent data of her own and he had tried to stop her. Compl. ¶¶ 24, 26; Essig Aff. Ex. D, at 1, Ex. E, at 7-9. On the advice of a faculty advisor, Cohn consulted Dr. Gwen Randolph, who was collaborating with both parties on the disputed project. Dr. Randolph met with Dr. Chao and Dr. Cohn on July 26, 2007, but was ultimately unable to resolve their dispute over the appropriateness of switching and omitting certain data. Essig Aff. Ex. D., at 2., Ex. E, at 8. As a result, Dr. Cohn transferred out of Dr. Chao's laboratory on August 17, 2007, and began working instead with Defendant Dr. Liliana Ossowski.

On September 21, 2007, Cohn discovered that Dr. Chao was about to submit a manuscript to the journal Nature Medicine that included the allegedly misrepresented data that had given rise to her dispute with the Plaintiff. Dr. Cohn was concerned not just about the propriety of using the data, but also about the fact that she was named as the second author despite having done most of the underlying research and having been largely excluded from the writing and review process. Essig Aff. Ex. D, at 2. On September 25, 2007, Dr. Cohn met with Division Chief Atweh to voice these concerns. Atweh agreed to request that Dr. Chao not submit the manuscript, and arranged a meeting with Dr. Chao and Dr. Cohn for September 27, 2007.

On September 26, 2007, before that meeting could take place, Chao filed a complaint with MSSM's Research Integrity Officer, Defendant Reginald Miller ("RIO Miller"), alleging that Dr. Cohn had fabricated research data in an experiment conducted in January. Compl ¶ 27; Essig Aff. Ex. D, at 2. RIO Miller cautioned Chao that he was concerned the allegations were made for retaliatory reasons. Chao maintained that his complaint was well founded and he wished to press ahead. After commencing an informal preliminary review, RIO Miller determined that Dr. Chao's allegations could not be supported, and Dr. Chao withdrew his complaint. Compl ¶¶ 28-29; Essig Aff. Supp. Mot. Dismiss Ex. E, at 2. Cohn learned of this the next day and, on September 28, learned that Chao had submitted the manuscript without meeting with her.

On October 3, 2007, Cohn filed her own complaint with RIO Miller against Chao. Compl. ¶¶ 30-31. On November 20, 2007, Chao renewed his allegations of research misconduct against Cohn.

Regulations governing research misconduct at MSSM

When MSSM receives a complaint of research misconduct, it must investigate the allegations in conformity with two coextensive procedures. One is mandated by federal regulations applicable to institutions receiving federal Public Health Service ("PHS") funding, and falls within the jurisdiction

of the Office of Research Integrity ("ORI"), an independent entity within the U.S. Department of Health and Human Services. The other is mandated by MSSM's Faculty Handbook, which incorporates in large part the relevant federal regulations, and falls within the jurisdiction of MSSM's multi-tiered disciplinary review system described below. *See* MSSM Faculty Handbook, Ch. VI, Essig Aff. Ex. B; 42 C.F.R. § 93.300-319 (detailing "Responsibilities of Institutions").

In accordance with the MSSM Faculty Handbook, allegations of misconduct are reported to the Research Integrity Officer ("RIO"). *See* MSSM Faculty Handbook, Essig Aff. Ex. C, at 7. The RIO meets with the Research Integrity Committee ("RIC") to determine whether the allegations fit within the definition of research misconduct and/or trigger obligations under federal regulations, and assess whether the allegations are "sufficiently credible and specific" to merit further action. If further action is appropriate, the RIC may convene a standing Inquiry Panel ("the Panel"), which consists of at least three members and conducts an initial fact-finding inquiry into the alleged misconduct to determine whether a full investigation should be carried out. The accused faculty member may object to the composition of the Panel based on conflicts of interest. Within 60 days, the Panel must issue a report to the Deciding Officer, in this case the Dean, elaborating its findings and recommending whether to proceed to the "investigation stage." The accused faculty member receives a draft of the report and is entitled to respond and any response will be included in the final report to the Dean. Based on the final report, the Dean decides whether a formal investigation is called for, and must notify ORI within 30 days of his decision.

At the formal investigation stage, the RIC appoints a fact-finding committee (the "Investigation Committee"). The Investigation Committee is composed of research scientists and conducts "a thorough investigation." Its review must "encompass all significant issues identified during the course of the investigation," and "review all relevant documents and interview each person who has been reasonably identified as having relevant information." *Id.* It then issues a report to the Dean outlining its conclusions regarding research misconduct using a preponderance of the evidence standard. *Id.* at 10. *C.f.* 42 C.F.R. § 93.219. Once again, the accused must receive a draft and has access to evidence in order to respond. Any response will be considered in a final report to the Dean. Within 120 days the Dean must review the report and take any related action including disciplinary action. *Id.* at 10-11.

Any faculty member subject to disciplinary action is entitled to appeal to the Faculty Disciplinary Tribunal upon request to the chair of the faculty. *See* MSSM Faculty Handbook, Ch. VI,

Essig Aff. Supp. Mot. Dismiss Ex. C.[1] The Tribunal must hold a hearing within 20 days of a request and "examine all charges and allegations, hear testimony, question witnesses, inspect records and reports, call witnesses, and request the production of records and reports" and allow the faculty member to present relevant witnesses and evidence on his behalf. Testimony must be under oath, the hearing must be recorded stenographically, and both the Dean and Investigation Committee, whose determinations are being appealed, as well as the accused faculty member may be represented by counsel. *Id.* at 2. The Tribunal makes its findings based on "a preponderance of the evidence" standard, and if appropriate may recommend disciplinary action, including termination. *Id.* The Dean relays this report to the accused.

The Faculty Disciplinary Tribunal's findings may be appealed to the Board of Trustees. The Chair of the Board convenes an Appeals Board withat least three members from the Board of Trustees. The Appeals Board reviews the record below for: (a) fairness, and (b) a reasonable basis for the findings of the Tribunal and the actions of the Dean. This decision is final within MSSM. *Id.* at 2-3.

Apart from the MSSM process, ORI may respond separately and directly to any allegation of research misconduct. *See* 42 C.F.R. § 93.400-523; 42 U.S.C. § 216, 241, 289b. It may review an institution's findings and process, or conduct a separate investigation, make a separate finding of misconduct, and recommend separate disciplinary actions. § 93.400. In making its independent assesment of the allegations, ORI must considers whether they meet the definition of misconduct, whether they implicate PHS funding, and whether they are sufficiently specific. § 93.402.

The inquiry and investigation into research misconduct

a. The initial inquiry into allegations of research misconduct

After receiving the cross-complaints of research misconduct from Dr. Cohn and Dr. Chao, RIO Miller met with the RIC and determined that both complaints were sufficiently credible and specific to carry forward. He then convened an Inquiry Panel to review both complaints separately. Compl. ¶¶ 31, 39-40; Def.'s Mem. Supp. Mot. Dismiss 9; Pl.'s Mem. Opp'n Def.'s Mot. Dismiss 5; Essig Aff. Ex. E, at 2.

On December 6, 2007, the Inquiry Panel reviewed the complaint against Dr. Chao and prepared a report which it distributed first to Chao, and then to Defendant Dean Charney and ORI, recommending the commencement of an investigation. Compl. ¶¶ 40-43; Def.'s Mem. Supp. Mot.

[1] The Handbook's rules for composition of the Tribunal are detailed in Handbook Ch. III, not included in the Briefs. *See* MSSM Faculty Handbook, Ch. VI, Essig Aff. Supp. Mot. Dismiss Ex. C., at 2.

Dismiss 8. On February 25, 2008, the Inquiry Panel decided that certain allegations against Cohn were likewise sufficiently substantial to commence an investigation. The Panel distributed the second report to Cohn, and then to Dean Charney and ORI. On March 18, 2008, after reviewing the Panel's reports, Dean Charney informed ORI that he had determined that MSSM would proceed with an investigation into both allegations. Essig Aff. Ex. E, at 3.

b. The formal investigation

Based on ORI's recommendation for ensuring fairness, MSSM's formal investigation addressed both complaints as part of the same proceeding. Dean Charney appointed an Investigation Committee comprised of defendant faculty members Dr. Mlodzik, Dr. Snoeck, Dr. Krulwich, Dr. Vlassara, and Dr. Godbold. These members came from various divisions of MSSM. Compl. ¶ 39; Essig Aff. Ex. E, at 1. The Committee met first on April 14, 2008, and held 13 formal sessions between April 28, 2008, and March 13, 2009. At these sessions the Committee interviewed Dr. Cohn, Dr. Chao, Meagan Kelly (a lab technician who had worked with Dr. Chao), Dr. Randolph (who had collaborated with both complainants), Defendant Dr. Ossowski (who ran the lab that Dr. Cohn went to work in after her dispute with Dr. Chao), Dr. Christopher Walsh (Dr. Chao's mentor), Dr. Carl Nathan, and Dr. Atweh (the complainants' Division Chief). Compl. ¶¶ 41, 62; Essig Aff. Ex. E, at 4.

In early 2009, the Committee provided a draft report to Chao finding that he had committed research misconduct. Dr. Chao responded with comments and objections on February 11, 2009. On April 7, 2009, the Committee issued its final report to Dean Charney and to ORI, concluding that Chao had engaged in misconduct and failed to follow the "standards of good laboratory practice" (the "Report" or "Final Report"). Compl. ¶¶ 51, 55-57; Essig Aff. Ex. E. The Report included an addendum in which the Investigaiton Committee provided responses to Chao's comments and objections. Essig Aff. Ex. E. Addendum, at 2.

On May 7, 2009, Dean Charney terminated Chao's appointment to the faculty, based on the Committee's Final Report. Compl. ¶ 63; Essig Aff. Ex. F. Dr. Chao sought review of his termination before the Faculty Disciplinary Tribunal. On June 10, 2009, as part of his ongoing efforts to clear his name, Dr. Chao obtained a letter from Dr. Alan R. Price, a private consultant and former ORI official, in which Dr. Price argued that the Final Report was "inadequate, seriously flawed and grossly unfair in dealing with Dr. Chao." Moskowitz Aff. Ex. C.

The ORI review

The ORI's Division of Investigative Oversight ("DIO") reviewed the Final Report issued in both Chao's and Cohn's cases. In the fall of 2009, it informed RIO Miller that it was declining to recommend that ORI pursue findings of research misconduct in either case. Compl. ¶ 53; Moskowitz Aff. Ex. D; Essig Aff Ex. G; Pl.'s Mem. Opp'n Def.'s Mot. Dismiss 12-13. In announcing its decisions on each case, DIO used form language affirming the institution's authority to conduct its own investigation and make its own findings, according to its own particular standards. In pertinant part, it concluded the following:

> Based on the evidence provided by MSSM and during DIO's oversight review, ORI is declining to pursue findings of research misconduct in this case.
>
> In choosing not to pursue findings of research misconduct, ORI recognizes the authority of MSSM to independently set its own standards and make determinations of when staff have failed to meet the norms of behavior expected at the institution. ORI's administrative determination in this case does not diminish the authority of MSSM to draw its own conclusions about the scientific or professional misconduct [at issue].

Moskowitz Aff. Opp'n Mot. Dismiss Ex. D; Essig Aff. Supp. Mot. Dismiss Ex. G.

The MSSM appeals process

On November 19, 2009, the Faculty Disciplinary Tribunal affirmed Dr. Chao's termination. MSSM's Faculty Disciplinary Tribunal, convened by the Faculty Council and not the Dean, met for three sessions in 2009. It reviewed the claims, records and reports, and heard the testimony and cross-examination of several witnesses, including members of the Investigation Committee. Dr. Chao and Dean Charney were each represented by counsel. Compl. ¶ 65; Essig Aff. Ex. H. In affirming Dr. Chao's termination, the Tribunal found that the Investigation Committee's conclusions were substantiated by a preponderance of the evidence. Compl. ¶ 70; Essig Aff. Ex. H.

On December 16, 2009, Chao appealed the decision of the Faculty Disciplinary Tribunal to MSSM's Board of Trustees, which is independent of both the faculty and the Dean. Moskowitz Aff. Ex. B. The Chairman of the Board of Trustees appointed an Appeals Board consisting of three members of the Board of Trustees. Chao and Dean Charney were once again represented by counsel for these proceedings. On January 26, the parties made written submissions and on February 9, 2010, they made responses. On March 9, 2010, the Board heard oral arguments from both parties. On March 16, 2010, the Board rendered its decision to sustain Dr. Chao's termination, finding no basis to

overturn the Dean's action nor the decision of the Faculty Disciplinary Tribunal . Compl. ¶ 71; Essig Aff. Ex. I.

The current action

Following the decision of the Appeals' Board, Dr. Chao commenced the present civil action on April 2, 2010. Chao brings claims for defamation and other torts, arguing that statements made by the Defendants at various stages of the process caused injury to his reputation as well as the loss of his job, attorneys fees , emotional distress as a result of the process, and distraction from his research. In particular, Dr. Chao points to (1) statements made by Dr. Cohn and Dr. Ossowski in offering evidence during the inquiry and investigation phases; (2) statements made in the Investigation Committee's Final Report; (3) statements made by members of the Investigation Committee and Dean Charney while testifying before the Faculty Disciplinary Tribunal; (4) statements made by Dean Charney to the Appeals Board; and (5) statements made by MSSM that "Chao had been fired for data fraud."

DISCUSSION

A motion to dismiss brought under Rule 12(b)(6) will be granted if there is a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive dismissal on this ground, a plaintiff must "plead enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facially plausible claim is one where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While the court must "draw all reasonable inferences in the [non-movant's] favor," *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007), it need not accord "[l]egal conclusions, deductions or opinions couched as factual allegations ... a presumption of truthfulness." *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007) (quotation marks omitted); *Fuji Photo Film U.S.A., Inc. v. McNulty*, 669 F. Supp. 2d 405, 410 (S.D.N.Y. 2009).

A court may consider "undisputed documents, such as a written contract attached to, or incorporated by reference in, the complaint." *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 234 (2d Cir. 2008); *Gargiulo v. Forster & Garbus Esqs.*, 651 F. Supp. 2d 188, 190 (S.D.N.Y. 2009) (a district court deciding a motion to dismiss defamation claims "may consider documents attached to the complaint or incorporated by reference, such as the affidavits containing the allegedly actionable statements."). "[E]ven if not attached or incorporated by reference, a document upon

which the complaint *solely* relies and which is *integral to the complaint* may be considered" on a motion to dismiss. *Roth*, 489 F.3d at 509.

1. Defamation (4th cause of action)

A claim for defamation in New York must allege "(1) a false statement about the complainant; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused 'special damages.'" *Gargiulo*, 651 F. Supp. 2d at 192 (S.D.N.Y. 2009) (internal quotation marks removed) (*citing Dillon v. City of New York*, 261 A.D.2d 34, 38 (N.Y. App. Div. 1999)). "A statement that tends to injure another in his or her trade, business or profession is defamatory per se." *Fuji Photo Film U.S.A., Inc*, 669 F. Supp. 2d at 411.

Plaintiff's defamation claim is dismissed for two reasons. First, the allegedly defamatory statements made prior to April 2, 2009 are barred by the applicable one year statute of limitations. Second, all of the statements are protected by qualified privilege. Overcoming qualified privilege requires a showing of malice, which Plaintiff has failed to do.

a. Statements made prior to April 2, 2009 are time-barred

New York defamation claims are subject to a one year statute of limitations. *See* N.Y. C.P.L.R. § 215(3); *Firth v. State*, 775 N.E.2d 463, 464 (N.Y. 2002). The claim accrues on the date of publication of the allegedly defamatory statement. *Firth*, 775 N.E.2d at 464-65. This action was commenced on April 2, 2010, so any statement made prior to April 2, 2009 is time-barred and may not form the basis for a defamation claim by Dr. Chao. This precludes consideration of the statements made by Dr. Cohn in her complaint dated October 3, 2007, her testimony before the Investigation Committee throughout 2008, and Ossowski's testimony before the Investigation Committee on May 12, 2008.

b. Statements made after April 2, 2009 are protected by privilege

New York law recognizes both absolute and qualified privilege; while an absolutely privileged statement may not give rise to a defamation claim regardless of the speaker's intent, "[t]he shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant spoke with 'malice.'" *Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992). The qualified privilege is defeated by either common law or constitutional malice. *Id.* at 437-38. Common law malice consists of statements published with "spite or ill will", and defeats qualified privilege "only if it is 'the one and only cause for the publication.'" *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 98 (2d Cir. 2000) (*citing Liberman*, 80 N.Y.2d at 439 ("If the defendant's statements were made [for a

legitimate, privileged purpose], it matters not that defendant *also* despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the publication'") (internal citations omitted)). To show constitutional malice the plaintiff must demonstrate that the "statements were made with a high degree of awareness of their probable falsity." *Liberman*, 80 N.Y.2d at 438. "In other words, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." *Id.* (internal citations omitted); *Fuji Photo Film U.S.A., Inc.*, 669 F.Supp.2d at 412. "The critical difference between common-law malice and constitutional malice, then, is that the former focuses on the defendant's attitude toward the plaintiff, the latter on the defendant's attitude toward the truth." *Konikoff*, 234 F.3d at 99.

New York recognizes a "common interest" qualified privilege that protects communications "made by one person to another upon a subject in which both have an interest." *Liberman*, 80 N.Y.2d at 437. *See also Slue v. New York University Medical Center*, 409 F. Supp. 2d 349, 366 (S.D.N.Y. 2006) (*citing Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001)). The scope of the privilege is limited to those persons who share the interest, and will not protect communications to others. *Slue*, 240 F.3d at 367. The common interest privilege has been applied to communications among fellow employees, including faculty members. *See Stukuls v. New York*, 42 N.Y.2d 272, 280 (1977); *Slue*, 409 F. Supp. 2d at 366. In *Slue*, the plaintiff, a doctor employed by NYU Medical School, brought defamation claims on the basis of statements made by his colleagues indicating that he had been terminated for taking inappropriate pictures of patients. *Slue*, 409 F. Supp. 2d at 366-67. This Court found that the common interest privilege defeated the defamation claims because "[b]y virtue of their employment with NYU Medical School, [the individuals to whom the statements had been published] had an interest in the details of Slue's discharge." *Id.* at 367.

Qualified privilege also attaches when the speaker believes he has a duty to make the communication, "though the duty be not a legal one, but only a moral or social duty of imperfect obligation." *Slue*, 409 F. Supp. 2d at 367 (*citing Shapiro v. Health Ins. Plan of Greater N.Y.*, 7 N.Y.2d 56, 60 (1959)).

The allegedly defamatory statements that are timely in this case include (1) statements made in the Investigation Committee's Final Report that were published to Defendant Charney, the Faculty Disciplinary Tribunal, and ORI (Am. Compl. ¶ 55-62); (2) statements made by Defendant Mlodzic while testifying before the Faculty Disciplinary Tribunal, which in turn published them to the MSSM

Board of Trustees (Am. Compl. ¶ 66); (3) statements made by Defendant Snoeck while testifying before the Faculty Disciplinary Tribunal, which in turn published them to the MSSM Board of Trustees (Am. Compl. ¶ 67); (4) statements made by Defendant Charney while testifying before the Faculty Disciplinary Tribunal and before the MSSM Board of Trustees (Am. Compl. ¶68-69); (5) statements made by MSSM via its counsel Sally Strauss in March and April of 2010 during meetings with several members of MSSM's Hematology-Oncology department, indicating that Dr. Chao had been fired for data fraud, and that his research suffered from multiple problems (Am. Compl. ¶ 72-74).

The parties argue at length as to whether absolute privilege attaches to these statements. I decline to consider these arguments because Plaintiff concedes that these statements are subject to qualified privilege and I conclude that qualified privilege alone provides grounds for dismissal. As described below, Plaintiff's allegations of malice constitute "[l]egal conclusions, deductions or opinions couched as factual allegations." *In re NYSE Specialists Sec. Litig.*, 503 F.3d at 95. Plaintiff has failed to show that either constitutional or common law malice overcomes the privilege because the statements were all made as part of carefully-conducted investigation and disciplinary proceeding that involved a multi-level review process and was required by institutional and federal regulations. Plaintiff points to a number of facts that he argues indicate malice, and they are addressed in turn as follows.

i. Testimony in support of Dr. Chao's character

Plaintiff argues that the Investigation Committee's Report that concluded that he committed misconduct and promoted a laboratory culture of misconduct and authoritarianism was published with constitutional malice. According to him, the Committee had a high degree of awareness of the probable falsity of its conclusions because it had heard testimony that did not support those conclusions. In particular, Plaintiff's lab technician, Ms. Kelly, who had worked in his lab for three years, testified that she "never felt pressured to make up things . . . and show [Plaintiff] what he wanted to hear . . ." Am. Compl. ¶ 59. In addition, Dr. Walsh testified in support of Plaintiff's integrity and professionalism. *Id.* ¶ 61.

These facts are far from sufficient to show that the Investigation Committee acted with constitutional malice. Ms. Kelly's assertion that she never felt pressured by the Plaintiff does not prove the probable falsity of other testimony to the contrary, nor discredit the Investigation Committee's findings made following an investigation that lasted 11 months, met at least13 times, reviewed voluminous records, and interviewed 8 witnesses. Dr. Walsh's testimony was mixed, and

while he testified in support of Plaintiff's integrity and professionalism, he also provided testimony that supported the Investigation Committee's findings. *See* Essig Aff. Ex. E at 12. The Investigation Committee compiled a storehouse of evidence, and the fact that some of the testimony by 2 witnesses did not support its conclusion cannot be the fulcrum by which Plaintiff's research misconduct is excused. *See Fuji Photo Film U.S.A., Inc*, 669 F. Supp. 2d at 412.

ii. The Investigation Committee's choice of witnesses

Plaintiff charges that the Committee's determination not to interview certain of the witnesses that he identified supports a finding of malice. Consistent with the MSSM Faculty Handbook and federal regulations, the Investigation Committee was required to interview witnesses "reasonably identified as having information regarding any relevant aspects of the investigation, including witnesses identified by the respondent", and to pursue "all significant issues and leads discovered that are determined relevant to the investigation." 42 C.F.R. § 93.310(f)-(h); Essig Aff. Ex. B, MSSM Faculty Handbook, Chapter VI (B)(9). The Investigation Committee thus had discretion to make determinations as to what was "relevant" and "significant" and that is precisely what it did. *See* Essig Aff. Ex. E, Report, Addendum at note 1. These facts simply do not indicate that ill will or spite was the Investigation Committee's sole motivation in its determinations, s*ee Konikoff*, 234 F.3d at 98, particularly in light of the fact that it was acting pursuant to its obligations under the MSSM Faculty Handbook and federal regulations.

iii. Content of the Investigation Committee Report

As evidence of malice, Plaintiff also points to both the scope and content of the Report. He argues that statements related to his credibility, honesty and professionalism, as well as the inclusion of topics such as sample size, presence of statistical analysis, and order of authorship, were outside the scope of the inquiry, and therefore spite or ill will must have been the sole cause for their publication. On the contrary the objected to statements were within the appropriate scope of the investigation and provided relevant information that supported the Committee's findings, as required by federal regulations.

The scope of the investigation encompassed the general conduct of research in Plaintiff's lab. In convening the Investigation Committee, Dean Charney, consistent with his authority and obligations under federal regulations, wrote to ORI to inform it of the investigation, and to say that, as Dean of MSSM he had "determined that the scope of the investigation should include the general conduct of research within Dr. Chao's laboratory." *See* Letter to John E. Dahlberg, PhD., Director Division of Investigative Oversight and Associate Director, Office of Research Integrity, from Dean

Charney, dated March 18, 2010. Plaintiff notes that this letter "provides additional evidence that defendants expanded the investigative process beyond what was required by 42 C.F.R 93." This expansion was consistent with the Dean's authority, as recognized by ORI. *See, e.g.*, Moscowitz Aff., Ex. D. The expanded scope was a legitimate inquiry into the background of the allegations and the general conduct of research at MSSM, which is an appropriate subject for the Dean's professional concern. Indeed, the legitimacy of the expanded scope of the inquiry was affirmed by the Faculty Disciplinary Tribunal, which on Chao's appeal affirmed that he had violated the "standards of good laboratory practice," Essig Aff. Ex. H at 2, a charge separate from the research misconduct charge reflected in 42 C.F.R. 93. The expanded scope of investigation does not evidence ill will or spite, nor do the statements made in the Investigation Committee's Report explaining and supporting its conclusions.

The Report's content provided appropriate background facts supporting its conclusions. The rules governing the Investigation Committee required it to include in its report, among other things, a summary of "the facts and the analysis which support the conclusion." 42 C.F.R. § 93.313(f)(2). Although Plaintiff characterizes the Report's findings as "character assassination", the statements addressed to his professionalism or lack of it are directly related to the question of his research misconduct. In particular, he points to the following statements that he:

- was "remarkably ignorant about the details of his protocol and the specifics of his raw data"
- was "willing to use sloppy data; selective data and manipulated data in order to support his thesis and generate his papers for publication"
- had a "general willingness to use selective data and omit inconsistent data"
- "[demonstrated] an overall pattern of excluding data that did not conform to his hypothesis"
- was willing "to rush to scientific conclusions without a full command of the underlying data"
- promoted "a laboratory culture of misconduct and authoritarianism by rewarding results consistent with his theories and berating his staff if the results were inconsistent with his expectations."

Am. Compl. ¶¶ 55, 57; Essig Aff. Ex. E, Investigation Report at 4-5, 14. While certainly negative, these comments are directed to his research habits and provided relevant background information supporting the Committee's finding of misconduct, as required by 42 C.F.R. § 93.313(f)(2).

Similarly, the statements addressed to Plaintiff's credibility and honesty exhibit a highly negative assessment, but do not evidence malice or ill will. They provide relevant background information supporting the Investigation Committee's conclusions, and were motivated at least in

part by the Investigation Committee's stated concern that Plaintiff had not been forthright in the investigation process. *See* Essig Aff. Ex. E, Investigation Report at 14. The statements highlighted by Plaintiff as defamatory and exhibiting malice include that he:

- "often claim[ed] a lapse in memory when his testimony would have otherwise undermined his position"
- "use[d] his memory lapses as a shield to avoid accepting responsibility for his lapses in oversight"
- "lack[ed] credibility"
- "fail[ed] to be forthright during the investigation"
- "[was] cavalier with his selective memory"

Am. Compl. ¶¶ 55-57. These statements too provide background information supporting the conclusion that Plaintiff was willing to use selective facts. Moreover, they are relevant to the Investigation Committee's concern for the integrity and reliability of its own proceedings.

The statements finding that Plaintiff used small sample sizes and failed to perform statistical analysis may not have been necessary to a finding of research misconduct as defined by ORI, but again provide relevant background information and are well within the expanded scope of the investigation into the general conduct of research within Plaintiff's laboratory. The inclusion of these observations was directly related to the investigation and does not provide evidence that ill will or malice was present, let alone that it was the sole factor motivating the Investigation Committee's statements. *See Konikoff*, 234 F.3d at 98. While it is understandable that plaintiffs never applaud alleged defamation, nonetheless their dislike for the findings does not make them actionable.

iv. The comment regarding Dr. Chao's authoritarian character

The Amended Complaint notes that during the investigation, it was said that Plaintiff's allegedly authoritative nature was due to his Chinese background and "cultural" differences. Am. Comp. ¶ 50. This comment, if it occurred at all, was inappropriate, regrettable and without any justification or utility in the context of the investigation into research misconduct. It evidences ignorance and latent racism on the part of the speaker. However, Plaintiff has not attributed the comment to a particular individual nor pleaded it as a basis for his defamation claim.

v. ORI's determination not to pursue findings of misconduct

Plaintiff asserts as evidence of malice the fact that the proceedings occurred despite ORI's decision not to pursue findings of research misconduct. This argument fails because ORI's determination does not amount to a finding that no research misconduct occurred, and ORI

determination did not in any way diminish MSSM's authority to make its own findings of misconduct pursuant to its own process, as expressed by ORI itself. *See* Compl. ¶ 53.

The ORI determination does not vindicate Dr. Chao. The criteria ORI applies when determining whether to open a case include (1) whether the misconduct alleged involved or related to an application for Public Health Service (PHS) funds; (2) whether the conduct met the definition of research misconduct in 42 C.F.R 93; and (3) whether there was sufficient information about the alleged research misconduct to proceed with an inquiry. 2008 ORI Annual Report, Part I, Responding to Research Misconduct Allegations at 1.

Because the allegations did relate to an application for PHS funds, Plaintiff reasons that ORI's determination must have been based on its conclusion either that Plaintiff's actions did not meet the definition of research misconduct or that the allegations did not contain sufficient information to proceed. However, the ORI letter to Defendant Miller is silent as to the reasons for ORI's determination not to pursue findings, and made it clear that ORI "recognizes the authority of MSSM to independently set its own standards and make determinations of when staff has failed to meet the norms... [and ORI's] administrative determination does not diminish [that authority]." Compl. ¶ 53.[2] Indeed, the Report made findings not just of research misconduct, but also of a failure to follow the standards of good laboratory practice, and this was affirmed by two independent review bodies convened by two independent authorities. *See* Essig Aff. Exs. H at 2; I at 6. Thus, even if ORI and MSSM ultimately came to contrary views on whether a violation was committed, this fact does not give rise to an inference that MSSM's findings were motivated by ill will or malice.

vi. Dr. Price's criticism of the Investigation Committee Report

Dr. Price, a former chief research misconduct investigator at ORI, prepared a letter on June 10, 2009 in which he asserted that the Investigation Report was "inadequate, seriously flawed and grossly unfair in dealing with Dr. Chao." Moskowitz Aff., Ex. C at 3. Plaintiff argues that this supports his allegations of malice.[3] If the Report was "grossly unfair in dealing with Dr. Chao" that

[2] MSSM's Faculty Handbook incorporates the definition of research misconduct found under 42 C.F.R § 93.103. *See* MSSM Faculty Handbook, Essig Aff. Supp. Mot. Dismiss Ex. C, at B(3).

[3] In considering Dr. Price's comments as part of the allegations on a motion to dismiss, the Court is not evaluating their weight nor reviewing the Investigation Committee's findings. However, in carefully examining whether the facts available to the Court as part of the allegations suggest the existence or pervasiveness of malice, it nonetheless bears mentioning that Dr. Price's comments are not entirely persuasive. First, he gave his opinion not in his official capacity, but as a private consultant, and in a letter to an attorney whose connection to this case is undisclosed. Second, although Dr. Price predicted that ORI would note the Report's shortcomings and perhaps require the Investigation Committee to readdress certain issues, ORI did not mention any shortcomings in the Report. In addition, two MSSM institutional bodies, both independent of the Investigation Committee, formally reviewed the Report and affirmed its findings and

could lead to a reasonable inference of spite or ill will. However, it does not vitiate the fact that, as noted above, the Investigation Committee was acting pursuant to an interest common to all concerned, and was obligated by the MSSM Faculty Handbook and federal regulations to conduct the investigation and issue the Report. This defeats any allegation that spite or ill will was the sole motivating factor here, *see Konikoff*, 234 F.3d at 98, qualified privilege remains undisturbed and the defamation claim is dismissed.

2. Other Tort Claims

Where tort claims essentially restate a defamation claim that has been dismissed on a motion to dismiss, the tort claims must also be dismissed. *See O'Brien v. Alexander*, 898 F. Supp. 162, 172 (S.D.N.Y. 1995) (Chin, J.) (dismissing claims for injurious falsehood, negligence and general tort where they were duplicative of the defamation claim dismissed on the basis of privilege). Under New York law, tort claims are construed as defamation claims not just when they "seek damages only for injury to reputation, but also where the entire injury complained of by plaintiff flows from the effect on his reputation." *Jain v. Securities Indus. and Fin. Markets Assoc.*, No. 08 Civ. 6463, 2009 WL 3166684, at *9 (S.D.N.Y. Sept. 28, 2009) (*citing Goldberg v. Sitomar, Sitomar & Proges*, 469 N.Y.S.2d 81, 82 (App. Div. 1983), *aff'd* 63 N.Y.2d 831, 482 (1984)); *Riddell Sports Inc. v. Brooks*, 872 F.Supp. 73, 76 (S.D.N.Y. 1995) (dismissing on the grounds that the "one year [defamation] limitations period [applies] despite the labels which counterplaintiffs apply to their [injurious falsehood] claims" since the essence of the claimed injury was one to reputation).

In *Jain* the gravamen of plaintiff's alleged injury in each of her non-defamation claims either was harm to her reputation or harm that flowed from the alleged effect on her reputation, and the court found that this included her termination from employment, the resulting loss of income and benefits, her inability to find additional work, damage to physical health, and legal expenses. *Id.* Thus the rule applies broadly and even where "plaintiff takes care not to state that the damages are the result of injury to his reputation." *O'Brien*, 898 F. Supp. at 172.

a. Injurious Falsehood/Trade Libel (5th cause of action)

This cause of action relies on the same statements and the same damages as alleged in the defamation cause of action. Plaintiff claims that the two-year investigation process caused him injury beyond reputational harm, including the cost of attorneys throughout the process, injury to his ability to focus on his research, emotional distress, and his ultimate termination. These damages all flow

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procedural fairness. These factors cast doubt on Dr. Price's conclusions and dampen the reasonableness of inferring that any malice was present here at all.

from the effect of the allegedly defamatory statements and this cause of action is dismissed on the same grounds as the defamation claim. *See Jain*, 2009 WL 3166684, at *9.

Even were the damages separable, Plaintiff has failed to adequately allege a claim for trade libel or injurious falsehood, which requires the "knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relation with others, to its detriment." *Kasada, Inc. v. Access Capital, Inc.*, 01 Civ. 8893 (GBD), 2004 WL 2903776, at *15 (S.D.N.Y. Dec. 14, 2004) (*citing Global Merch., Inc. v. Lombard & Co.*, 234 A.D.2d 98, 99 (1st Dep't 1996). Despite Plaintiff's allegation that the statements at issue "were calculated to interfere with his employment with Mount Sinai/MSSM and to prevent others from employing him," Am. Compl. ¶ 120, he has failed to show malice and failed to allege any facts plausibly giving rise to a reasonable inference of such inrtentional calculation on the part of Defendants. *See Iqbal*, 129 S.Ct. at 1949. Here as elsewhere he has failed toovercome the fact that the defendants were acting pursuant to a legal obligation to investigate research misconduct.

b. Tortious interference with contract (1st cause of action)

This claim too is duplicative of the defamation claim; it alleges the same injuries noted above which flow from the allegedly defamatory statements and it must be dismissed on the same grounds. *Jain*, 2009 WL 3166684, at *9.

Moreover, Plaintiff fails to state a claim. "Under New York law, the elements of a tortious interference claim are: (a) that a valid contract exists; (b) that a "third party" had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff." *Albert v. Loksen*, 239 F.3d 256, 274 (2d Cir. 2001). Plaintiff has not shown any facts suggesting that Defendants employed wrongful means in the alleged interference; indeed all the investigatory work and all the testimony was conducted pursuant to obligations established in the Faculty Handbook and ORI regulations.

Plaintiff argues that the Investigation Committee did not include exculpatory evidence in its Report, did not interview all individuals requested by Plaintiff to be interviewed, and charges that false statements were made. His allegations lack specificity: the allegations of false statements are apparently sweeping references to all charges of misconduct brought against him, but while he repeatedly accuses the Defendants of false statements he alleges no facts that give rise to a reasonable inference that any particular statement was false. *See Iqbal*, 129 S.Ct. at 1949. His argument concerning the exclusion of exculpatory evidence is unpersuasive because he points to none which was excluded, nor does he point to the source of any obligation to interview all witnesses he

identified. The suggestion that this conduct amounts to wrongdoing intended to procure a breach of contract is particularly unpersuasive in light of the fact that the investigative record did contain testimony that was favorable to Dr. Chao, all of which was considered not just by the Investigation Committee but also by the Faculty Disciplinary Tribunal. *See* Essig Aff., Ex. H at 2.

c. Tortious interference with prospective business advantage (2nd cause of action)

Like the previous claims, this is duplicative of the defamation allegations because the injury is measured only by the harm to Plaintiff's reputation, and "Plaintiff is not permitted to dress up a defamation claim as a claim for intentional interference with a prospective economic advantage." *Krepps v. Reiner*, 588 F. Supp. 2d 471, 485 (S.D.N.Y. 2008) (dismissing a claim for tortious interference with prospective business advantage where it was based on an allegedly defamatory letter that the court found insufficient to state a cause of action for defamation).

Additionally, Plaintiff fails to state a claim. A New York claim for interference with a prospective economic advantage requires a Plaintiff to prove that "(1) the plaintiff had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *Pasqualini v. MortgageIT, Inc.*, 498 F.Supp.2d 659, 669 -670 (S.D.N.Y. 2007) (*citing Am. Nat'l Theatre & Academy v. Am. Nat'l Theatre Inc.*, No. 05 Civ. 4535, 2006 U.S. Dist. LEXIS 69420, at *5 (S.D.N.Y. Sept. 27, 2006). First, the sole purpose of Defendants' conduct could not have been to harm Plaintiff, because they acted at least in part pursuant to obligations imposed by the Faculty Handbook and ORI regulations. Second, there was no intentional and malicious interference with a business relationship. Plaintiff has not alleged that Defendants' directed any conduct to third parties to prevent them from entering into a business relationship with Plaintiff. This element too is defeated by the fact that Defendants simply pursued their duties as required by law, and Plaintiff alleges no facts that suggest that they acted solely with malice.

d. Prima facie tort (3rd cause of action)

"[W]here the factual allegations underlying the prima facie tort cause of action relate to the dissemination of allegedly defamatory materials, that cause of action must fail." *McKenzie v. Dow Jones & Co.*, 355 Fed. App'x 533, 536 (2d Cir. 2009). Plaintiff's claim for prima facie tort is based solely on defendant Cohn's alleged dissemination of false statements in the 2007 letter that initiated the investigation and in subsequent communications in connection with the investigation. As such,

the claim relates only to defamatory allegations and must fail. *See McKenzie*, 355 Fed. App'x at 536; *Springer v. Viking Press*, 457 N.Y.S.2d 246, 248 (App. Div. 1982) (in case involving allegedly libelous depiction of plaintiff in novel, there was "no warrant for the invocation of the prima facie tort doctrine" where plaintiff could not succeed "without, at the same time, establishing the classical tort of libel").

Plaintiff claims that he has alleged injurious conduct beyond Cohn's dissemination of false statements, and points to his allegations that she fabricated data, falsified lab notes, and initially denied any wrongdoing. However, these allegations fail for two reasons. First, Plaintiff does not spell out how Dr. Cohn's alleged research misconduct harmed him. Second, "New York courts have been very strict in holding that a cause of action for prima facie tort will not lie unless the actions complained of can be plausibly said to have been motivated *solely* by malice towards the plaintiff." *McKenzie*, 355 Fed. App'x at 536 (emphasis in original). Again, Plaintiff nowhere alleges that Cohn's alleged misconduct was motivated solely by an intent to injure him.

3. Claims against Mount Sinai Hospital and Mount Sinai Medical Center

Defendants argue that all claims against Mount Sinai Hospital and Mount Sinai Medical Center (the "Mount Sinai Entities") should be dismissed because those entities are separate and apart from Plaintiff's employer, MSSM. They cite *Leung v. New York University*, which dismissed claims against New York University ("N.Y.U.") where plaintiffs were employed by New York University Medical Center, and had failed to show that N.Y.U. "engaged in, condoned, or in any way participated in the allegedly unlawful actions" or "that N.Y.U. was their employer at the time the alleged unlawful acts occurred." *Leung*, 2010 WL 1372541, at *9-10. That decision addressed Title VII claims, and affirmed that N.Y.U. could not be held liable for allegations against the Medical Center "based solely on common ownership." *Id.* at *9.

In pressing his defamation claims against the Mount Sinai entities, Plaintiff maintains that he was an employee of the Mount Sinai Entities because he was listed as such on his employment benefits form. He also asserts that the Mount Sinai Entities can be held liable for allegations against MSSM because they share the same legal, human resources, security, finance and other departments, and have integrated web sites. At the motion to dismiss stage credence must be given to the Plaintiff's position. While it probably makes no difference to keep them in the lawsuit since MSSM surely has the funds to cover any judgment, Plaintiff has alleged sufficient facts to raise a reasonable inference that, unlike in *Leung*, the Mount Sinai entities are connected and will not be dismissed at this stage of the proceedings.

CONCLUSION

For the foregoing reasons Defendants' allegedly defamatory statements are either outside the applicable statute of limitations or protected by qualified immunity, and Plaintiff's defamation claim is dismissed. The other tort claims, including injurious falsehood/trade libel, tortious interference with contract, tortious interference with prospective business advantage, and prima facie tort, are duplicative of the defamation claim and in any case Plaintiff has failed to allege sufficient factual content to sustain them. Those claims are likewise dismissed. The Mount Sinai Entities remain defendants, and Plaintiff may proceed on his sixth through eleventh causes of action, which have not been challenged in this motion.

The Clerk of the Court is instructed to close this motion and remove it from my docket.

SO ORDERED
December 17, 2010
New York, New York

Hon. Harold Baer, Jr.
U.S.D.J.

Slip Copy, 29 Misc.3d 144(A), 2010 WL 5186654 (N.Y.Sup.App.Term), 2010 N.Y. Slip Op. 52221(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2010 WL 5186654 (N.Y.Sup.App.Term))

C

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Appellate Term,
2nd, 11th and 13th Judicial Districts.
Roderick **CUSHLEY**, Appellant,
v.
WEALTH MASTERS INTERNATIONAL, a Texas Corporation, Kip Herriage, Karl Bessie, Mary Dee, Michael Force and Rio All Suite Hotel & Casino, Respondents.

No. 2009–1564 Q C.
Dec. 16, 2010.

Present: STEINHARDT, J.P., PESCE and WESTON, JJ.

*1 Appeal from an order of the Civil Court of the City of New York, Queens County (Diccia T. Pineda–Kirwan, J.), entered June 2, 2009, deemed from a judgment of the same court entered June 29, 2009 (see CPLR 5501[c]). The judgment, entered pursuant to the June 2, 2009 order granting defendants' motions to dismiss, dismissed the complaint.

ORDERED that the judgment is affirmed, without costs.

Plaintiff commenced this action in the Civil Court of the City of New York, Queens County. In his verified complaint, he alleged, without specification, that at all times relevant to the complaint, he had "engaged Defendants" over the Internet, over the telephone and by mail, and that during all such "engagements," he was "located in New York." He further alleged that he had found defendant "Wealth Masters International, a Texas Corporation" (WMI) through its subsidiary, Carbon Copy Pro, from which he had purchased a book on marketing. The marketing book did not contain the material that he had paid for, and was merely an advertisement for WMI, from which he ordered additional books and materials on marketing. According to plaintiff, he paid $9,000 by check to one David Boyce, a person who, he believed, was a representative of defendant Michael Force (Force), an agent of WMI. Force had cashed the check, using his own personal bank account, and/or sent the money to WMI. On June 11, 2008, he had sent another check to Force, in the sum of $13,000, which had also been cashed, using Force's personal bank account, and/or sent to WMI. Plaintiff asserted that he had not received any of the products that he had ordered, but instead had been directed to market WMI's products, to deposit any checks he received into his own personal checking account, and then to withdraw and forward the funds. He believed that he was being used to launder money he received from contractors. He demanded a refund from Force, and from defendants Mary Dee (Dee) and Kip Herriage (Herriage), both officers of WMI, and sought to sever all ties with them. Force offered him a partial refund of $10,000, which he refused, since he wanted a total refund. After WMI, through its officers and agents, refused to communicate with him, he decided to travel to a WMI convention in Las Vegas, which was being held from July 27 through 29, 2008, at the Rio All Suite Hotel & Casino (Rio). On July 28, 2008, he met with Dee to discuss the matter, and a dispute arose, which became physical. Rio's hotel security arrived at the scene and summoned the local police. Rio denied him the use of his room, confiscated his belongings and identification, and allegedly removed $700 in cash stored in his belongings. He suffered a seizure and was taken to the emergency room of a local hospital. The criminal charges against him were subsequently dismissed.

Thereafter, he commenced this action, asserting breach of contract (first cause of action), violation of General Business Law § 349 (second cause of action), abuse of process (third cause of action),

and fraud (fourth cause of action) as against defendants WMI, Herriage, Dee, Force and Karl Bessie (Bessie), also an officer of WMI; conversion (fifth cause of action) as against WMI, Dee and Force; conversion (sixth cause of action) against Rio; and conversion (seventh cause of action) against unspecified defendants.

***2** By pre-answer motions, defendants sought dismissal of the complaint pursuant to CPLR 3211 (a)(8), alleging that they were beyond the reach of the Civil Court's long-arm jurisdiction. Plaintiff submitted affirmations of counsel in opposition to the motions. By order entered June 2, 2009, the Civil Court granted the motions to dismiss, and this appeal by plaintiff ensued. A judgment dismissing the complaint was subsequently entered on June 29, 2009, from which the appeal is deemed to be taken (*see* CPLR 5501[c]).

Section 404 of the New York City Civil Court Act, the long-arm statute of the Civil Court, provides, in pertinent part, as follows:

> "Acts which are the basis of jurisdiction. The court may exercise personal jurisdiction over any non-resident of the city of New York ... as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state and a resident of the city of New York, if, in person or through an agent, he:
>
> 1. transacts any business within the city of New York ...; or
>
> 2. commits a tortious act within the city of New York ..."

On the issue of whether a court may assert jurisdiction over a defendant, the ultimate burden of proof rests with the party asserting jurisdiction (*see Sanchez v. Major,* 289 A.D.2d 320 [2001]; *Brandt v. Toraby,* 273 A.D.2d 429 [2000]). However, in order to successfully oppose a pre-answer motion to dismiss a complaint pursuant to CPLR 3211(a)(8), a plaintiff need only "make a prima facie showing that personal jurisdiction exists" (*Opticare Acquisition Corp. v. Castillo,* 25 AD3d 238, 243 [2005]). In determining whether a plaintiff has met his burden of making a prima facie showing, the court must construe the pleadings, affidavits and other evidentiary materials in a light most favorable to the plaintiff, and must resolve all doubts in favor of jurisdiction (*see Brandt,* 273 A.D.2d 429). In the instant case, plaintiff's opposition papers consisted only of the affirmations of his counsel, who had no personal knowledge of the underlying facts (*see Carte v. Parkoff,* 152 A.D.2d 615 [1989]). However, we may consider the allegations of the complaint, which was verified by plaintiff, in determining whether plaintiff made a prima facie showing of personal jurisdiction over defendants (*see* CPLR 105[u]). Upon a review of the complaint, we find that plaintiff failed to meet his burden of showing the existence of facts sufficient to warrant the exercise of jurisdiction over any of the defendants.

In support of its motion to dismiss, defendant Rio submitted the affidavit of its regional vice-president of finance, who averred, among other things, that Rio was a Nevada corporation which was not authorized or registered to do business in New York, and which had never transacted or conducted any business in New York. It did not maintain any office space in New York, and had not had employees or agents present in New York. Moreover, the events outlined in the complaint with respect to Rio occurred in Las Vegas, Nevada.

***3** With respect to the motion to dismiss submitted on behalf of the remaining defendants, defendant WMI submitted the affidavit of Bessie, an officer of the corporation, who averred, among other things, that WMI was a Texas corporation, with an office in Texas which handled all the orders, product development, accounts payable and receivable, and member services. WMI did not maintain offices or sales personnel in New York State and did not pay New York State taxes. WMI did main-

tain an Internet Web site, which could be used by customers throughout the world. The remaining individual defendants all averred, among other things, that they were not New York State residents, had no contacts with New York State, and did not conduct business in New York State. Defendants Bessie and Force also stated that they had never met plaintiff nor had any contact with him.

With respect to all the defendants, plaintiff failed to demonstrate, prima facie, that they had either transacted any business within New York City or committed a tortious act within New York City in connection with the various causes of action asserted against them. The fact that some of the defendants maintained an Internet Web site, did not, without more, subject them to the jurisdiction of the Civil Court (*see Grimaldi v. Guinn,* 72 AD3d 37 [2010]). In determining whether a party has transacted business in New York City, a court must look at the "totality of the circumstances" concerning that party's interactions with, and activities in, New York City (*see Grimaldi,* 72 AD3d at 51). In order to sustain long-arm jurisdiction, the New York City contact must be of such a nature that the nonresident defendant can be deemed to have purposefully availed itself of the "privilege of conducting activities within the forum ..., thus invoking the benefits and protection of its laws" (*McKee Elec. Co. v. Rauland-Borg Corp.,* 20 N.Y.2d 377, 382 [1967]). Plaintiff failed to show any "purposeful activity" within New York City which could form the basis of a finding that any of the defendants had transacted business in New York City.

We further note that while plaintiff, in his appellate brief, requests this court to order limited jurisdictional discovery pursuant to CPLR 3211(d), he did not make such a request in the papers submitted to the Civil Court in opposition to defendants' motions.

Accordingly, we find that the Civil Court properly granted defendants' motions to dismiss the complaint for lack of personal jurisdiction, and the judgment entered pursuant to the order dismissing the complaint is therefore affirmed.

STEINHARDT, J.P., PESCE and WESTON, JJ., concur.

N.Y.Sup.App.Term,2010.
Cushley v. Wealth Masters Intern.
Slip Copy, 29 Misc.3d 144(A), 2010 WL 5186654 (N.Y.Sup.App.Term), 2010 N.Y. Slip Op. 52221(U)

END OF DOCUMENT

C

United States District Court, S.D. New York.
Michel FABRY, Plaintiffs,
v.
MERIDIAN VAT RECLAIM, INC., Defendant.
ITS FABRY, INC., Its Fabry, S.A., Utilis, S.A.R.L., and Fabry Belgique S.P.R.L., Plaintiffs,
v.
MERIDIAN VAT RECLAIM, INC., Defendant.

Nos. 99 Civ. 5149 NRB, 99 Civ. 5150 NRB.
Oct. 11, 2000.

MEMORANDUM AND ORDER

BUCHWALD, J.

***1** Michel Fabry (hereinafter "Fabry" or "plaintiff") and several member companies of The Fabry Group including I.T.S. Fabry, Inc., I.T.S. Fabry, S.A., Utilis S.A.R.L., and Fabry Belgique S.P.R.L., (collectively, "Fabry Group plaintiffs") filed these two consolidated lawsuits in July, 1999, invoking the court's diversity jurisdiction. The plaintiffs allege that certain written and oral statements made by Meridian VAT Reclaim, Inc. ("Meridian" or "defendant") in early June, 1995 were false and defamatory. Plaintiffs specifically allege that the statements were (1) slanderous *per se,* (2) part of a larger conspiracy against the Fabry Group, and (3) tortious under the doctrines of injurious falsehood and *prima facie* tort. For the following reasons, we now dismiss both complaints in their entireties pursuant to Fed.R.Civ.P. 56.

I. BACKGROUND

The statements at issue were made in a letter by the President of Meridian USA, Deborah Ferolito (the "Ferolito letter") which was sent to approximately fifteen Fabry Group clients with two enclosures. The enclosures consisted of three allegedly false and defamatory newspaper articles that appeared in a French regional newspaper, *La Voix Du Nord,* and the English translations of two of those articles. In general, the statements concerned a French police investigation of Michel Fabry for allegedly improperly retaining clients' value-added tax ("VAT") refunds.

At the completion of discovery, the parties entered cross-motions for summary judgment which were limited by the court to the issue of whether the statements by Meridian—including the Ferolito letter, the articles, and the translations—were libelous. Oral argument was held on August 3, 2000 and on August 30, 2000 this court issued an opinion read from the bench.[FN1] At that time we dismissed entirely the complaint denominated 99 Civ. 5150, brought by the Fabry Group plaintiffs. We also dismissed only the libel and conspiracy claims in complaint 99 Civ. 5149, the complaint of Michel Fabry.

FN1. The transcript of this ruling has been docketed.

In brief, we held that the statements were qualifiedly privileged because under New York State law, Meridian may reasonably rely on the accuracy of a reputable newspaper when republishing its statements absent "substantial reasons" to doubt the statements' veracity, *see Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 540-42, 435 N.Y.S.2d 556 (1980); *Weiner v. Doubleday & Co.,* 74 N.Y.2d 586, 595, 550 N.Y.S.2d 251 (1989), *cert. denied,* 110 S.Ct. 2168 (1990).[FN2] No showing of a reason for defendant to doubt the accuracy of the French newspaper was made. We then held that by the same logic plaintiff may reasonably rely on a professional translator absent reason to doubt the accuracy of the translation. *Cf. Geiger v. Dell Publishing Co.,* 560 F.Supp. 12, 14 (D.Mass.1983) (applying New York law). Similarly, plaintiffs gave no reason that Meridian might doubt the accuracy of the translation service upon which it regularly relied. On August 30, 2000 we also dismissed the conspiracy claims included in the amended complaints for a failure to state a claim.

FN2. The plaintiff here is undisputedly a

private figure, which gives the state some latitude in formulating a defamation standard. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Looking to New York State private plaintiff libel law, the Court of Appeals has established the rule that "where 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 can recover" if he can "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*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61 (1975). *See also Sack on Defamation*, §§ 6.1–4. Under *Chapadeau*, defendant's statements and adoptions (which concerned a police investigation and international trade) are clearly of public concern.

***2** After dismissing these parts of the complaints, we asked the parties to consider whether the common law claims of prima facie tort and injurious falsehood in the Fabry Complaint could survive independently. Through an exchange of correspondence from September 20–27, 2000, the plaintiffs took the position that the remaining tort claims indeed survived the dismissal of the libel claims, while the defendant took the contrary view and sought to move for summary judgment on those remaining claims. By letter of September 27, 2000 plaintiffs stated that in light of the extended correspondence on this question, "we do not believe any more can be written on the issue that has not already been addressed in the correspondence" and requested that the court issue a final order resolving all the claims. The defendant acceded to this request by a letter of the same date. We therefore treat the parties' letters as cross-motions for summary judgment and proceed to address the legal sufficiency of plaintiff's common law tort claims.

II. DISCUSSION

A. Prima Facie Tort

Prima facie tort is defined as "the intentional infliction of harm, which results in special damages, without any excuse or justification, by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142–43, 490 N.Y.S.2d 735 (1985); *see also Durham Industries v. North River Insurance Co.*, 673 F.2d 37 (2d Cir.1982); *ATI, Inc. v. Ruder & Finn* 42 N.Y.2d 454, 398 N.Y.S.2d 864 (1977).

Here, assuming all inferences to the benefit of the plaintiff the elements of the tort are nonetheless not met. It is certainly the case that a statement not found to be libelous may still be tortious, *see Al Raschid v. News Syndicate Co.*, 265 N.Y. 1 (1934). However, for an action in prima facie tort to succeed, as Justice Holmes noted in first recognizing the tort, a plaintiff must demonstrate that the defendant inflicted harm "for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." *Aikens v. Wisconsin*, 195 U.S. 194, 203, 25 S.Ct. 3 (1904).

Indeed, in the case establishing the prima facie tort in New York, the Court of Appeals noted that where, as here, "an act ... is a product of mixed motives some of which are perfectly legitimate" then recovery in prima facie tort is impossible. *Beardsley v. Kilmar*, 236 N.Y. 80 (1923). Thus, since then "New York courts have emphasized repeatedly that malice is an essential element of prima facie tort and that a claim of prima facie tort does not lie where defendant has *any* motive other than a desire to injure the plaintiff." *Durham*, 673 F.2d at 40 (emphasis added) (citing cases); *see also Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983) (requiring "disinterested malevolence" for recovery) (citing *American Bank & Trust Co. v. Federal Bank*, 256 U.S. 350, 358 (1921) (Holmes, J.)).

***3** It is apparent from the pleadings that defendant Meridian USA had an independent justification for sending out the Ferolito letter and disseminating the articles and translations: its business advantage. Business advantage has long been considered a justification for an alleged prima facie tort. *See, e.g.,* Cohen's *West 14th St. Corp. v. Parker 14th Assoc.*, 125 A.D.2d 249, 509 N.Y.S.2d 340 (1986), *RKO–Stanley Warner Theatres, Inc. v. Century Circuit, Inc.*, 37 A.D.2d 828, 325 N.Y.S.2d 270 (1971). Thus, even assuming that one of Meridian's motives in making the statements at issue here was to injury the Fabry Group, the plaintiffs have nonetheless failed to state a prima facie tort claim because they have not demonstrated the necessary "disinterested malevolence". *See also* 103 *N.Y. Jur.* § 27 (1992) ("[J]ustification is made out where the defendant shows that the acts or conduct were done ... [for] business advantage ...")

B. Injurious Falsehood

Plaintiffs' claims for injurious falsehood must also be dismissed. In the leading New York case addressing this tort, the Court of Appeals set forth the following standard:

> A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other is liable to the other for such resulting harm as he should have realized might be caused by his statement.

Penn–Ohio Steel Corp. v. Allis–Chalmers Manuf. Co., 184 N.Y.S.2d 58 (1959) (quoting *Restatement of Torts*, § 873).

However, here plaintiffs have failed to meet the actual knowledge standard of the injurious falsehood tort. It is nowhere alleged that Ms. Ferolito had actual knowledge of any falsities in her letter or the accompanying articles and translations. Indeed, we can resolve this claim without reaching the issue of whether falsities existed in these statements, as plaintiffs concede that Ms. Ferolito had no actual knowledge of their alleged falsehood. *See* Plaintiffs' Supplemental and Counter–Statement of Undisputed Facts Pursuant to Rule 56.1 ("Pl. Supp. 56.1 Stmt."), ¶ 24. Plaintiffs do not dispute that Ms. Ferolito believed the articles' essential point, that Fabry was in fact under investigation by the French authorities, and took no view on the ultimate truth of the allegations against Mr. Fabry. *See* Ferolito deposition at 109, 113–14.

Accordingly, an action for injurious falsehood cannot lie on these facts. Not only is the knowledge requirement not met, but plaintiffs' claim must also be dismissed because the allegedly false statements do not concern "another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom." *Cunningham v. Hagedorn*, 72 A.D.2d 702, 704, 422 N.Y.S.2d 70 (1st Dep't 1979). The injurious falsehood tort requires plaintiffs to allege "injury to any *legally protected* property interest." *Miller v. Richman*, 184 A.D.2d 191, 194, 592 N.Y.S.2d 201 (1992) (emphasis added).

***4** In a case with facts fairly similar to this one, therefore, the New York State courts dismissed a claim for injurious falsehood when defendant wrote a letter to various public and private entities stating that plaintiff, a real estate broker, had behaved unscrupulously during a transaction. *See Jonas v. Faith Properties, Inc.*, 221 A.D.2d 959, 634 N.Y.S.2d 323 (4th Dep't 1995). That letter, like the one at issue here, merely created potential reputational harm to a business and thus "fail[ed] to allege any legally protected property interest." *Id.* at 962 (citations omitted). Thus, the action for injurious falsehood is also dismissed.

C. Special Damages

These conclusions notwithstanding, plaintiffs' prima facie tort and injurious falsehood claims must additionally be dismissed for a failure to plead special damages. The plaintiffs' allegation of damages, Fabry Group Amend. Compl, ¶¶ 80–88, lacks the specificity required to prove each tort. Special damages are an "essential element of both injurious falsehood and prima facie tort...." *DiSanto v. Forsyth*, 258 A.D.2d 497, 498 684 N.Y.S.2d 628 (2d

Dep't 1999) (citing *Freihofer*, 65 N.Y.2d at 144).

Plaintiffs allege a vague "drop in their VAT reclaim business volume, commissions, and profits" totaling $2 million over the years 1997–98 when compared to some unspecified projected profit trend. However, these unspecified losses might be caused by any number of factors, and no causal connection to the actions of defendant Meridian has been established. "[G]eneral allegations of lost sales from unidentified lost customers are insufficient" to make out injurious falsehood or prima facie tort claims. *DiSanto*, 258 A.D.2d at 498.

Plaintiffs allege actual damages of approximately $2.2 million. However, "such round figures, with no attempt at itemization, must be deemed to be a representation of general damages." *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435, 441, 199 N.Y.S.2d 33 (1960). Plaintiffs did not name *specific* clients who left ITS Fabry, nor did they identify business prospects turned away by the contents of the Ferolito letter. Indeed, plaintiffs identify only one potential client who might have contracted for VAT reclaim services with Meridian rather than Fabry. *See* Pl. Supp. 56.1 Stmt., ¶ 27(d). Otherwise, the record is replete with mentions of "concern" by clients about the reputation of I.T.S. Fabry, *e.g.*, *id.* at ¶ 27(b), but no concrete losses, much less a causal link between such losses and Meridian's acts. *See also id.* at ¶ 27(a), (c)-(j). The generalities in the damage allegations are simply insufficient as a matter of law to maintain these claims because they are not "reasonable, identifiable, specific and measurable losses." *Gifford v. Guilderland Lodge*, 178 Misc.2d 707, 713, 681 N.Y.S.2d 194 (1998); *cf. Squire Records v. Vanguard Recording Soc'y*, 25 A.D.2d 190, 268 N.Y.S.2d 251 (1966) (finding special damages adequately pled because plaintiff "specifically names the customers" whose business was allegedly lost because of defendant's acts).

III. CONCLUSION

***5** For the foregoing reasons, the defendant's motion for summary judgment is granted and, in conjunction with the court's order of August 30, 2000, all claims are now dismissed. The Clerk of the Court is respectfully directed to close both cases.

IT IS SO ORDERED.

S.D.N.Y.,2000.
Fabry v. Meridian Vat Reclaim, Inc.
Not Reported in F.Supp.2d, 2000 WL 1515182 (S.D.N.Y.), 29 Media L. Rep. 1821

END OF DOCUMENT

Supreme Court of New York.
New York County
Douglas HENDERSON Jr., Plaintiff,
v.
Lee PHILLIPS, Defendant.
No. 110632/09.
June 28, 2010.

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

Hon. Joan A. Madden, J.S.C.
?? 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 is determined in accordance with the annexed decision and order.

Dated: June 28, 2010

<<signature>>

HON. JOAN A. MADDEN

J.S.C.

In this action for defamation based on internet communications, defendant Lee Phillips moves for an order pursuant to CPLR 3212(a)(5), (7) and (8) dismissing the complaint for lack of personal jurisdiction, for failure to state a cause of action and as time-barred by the statute of limitations.

Plaintiff Douglas Henderson Jr., pro se, commenced this action on July 27, 2009; Henderson is the "Director of Operations" for Garry Null & Associates, Inc.[FN1] The complaint alleges that defendant Phillips "is a resident of Washington, D.C.," and assets a first cause of action for defamation, seeking $2,000,000 in damages; a second cause of action for "false light" invasion of privacy, seeking $1,000,000 in damages; and a third cause of action for "injunctive relief directing defendant Phillips "to immediately and permanently take the aforementioned articles off of the Internet."

FN1. On July 24, 2009, Garry Null & Associates, Inc. commenced a similar action for defamation against the same defendant in this action, Lee Phillips, *Garry Null & Associates, Inc. v. Lee Phillips,* Index No. 110508/09

(Sup Ct, NY Co). Phillips made a motion to dismiss the complaint in that action, on the identical grounds as in the instant motion. The court is issuing a decision and order granting that motion, simultaneously with the decision and order in the instant action.

The first cause of action for defamation alleges that Phillips published false statements about Henderson on the internet, which caused "special harm to Henderson and his reputation," and "amount to defamation per se." As to the specific allegedly defamatory statements, the complaint alleges that on or about April 21, 2008, Phillips "wrote and placed an open letter on the Internet entitled 'My Response to Gary Null's Organization,' " stating " 'I'll leave it to you to guess whether the review was written by Mr Henderson or Mr. Null himself. You will also find some very embarrassing and personal things about dhender499 in your Google search, but I'll resist the temptation to bring those up, as they are not relevant to the issue of Gary Null's radio show. The details are there for anyone to see, and provide an effective remainder to use the internet with care." The complaint also alleges that "[s]hortly after Phillips published the letter cited above, Henderson began receiving phone calls and emails asking why he would go to a house of prostitution in Nevada," but he did not know what the phone calls and e-mail were about until "a caller" told him about "the aforementioned letter by Phillips and he looked up dHender499 on the Internet," and found the following:
NVBrothels.net Forum - Members List
dhender499. Registered User. O dhavid. Registered User. O. DHaven. Registered User. O. dhampste. Registered User. O. dh1. Registered User ...

The complaint alleges that the foregoing letter, "impugned my [Henderson's] reputation and defamed me by strongly suggesting that I was a member of a Nevada house of prostitution. For the record, I have *never* been to Nevada, nor am I a member of any house of prostitution." The complaint further alleges that on or about April 21, 2008, Phillips "made another false statement,... by placing another article ... openly on the Internet, which was entitled 'Garry Null's Goons Threaten to Sue Me: My Response."[FN2] The complaint alleges that Phillips' "placement of these articles on the Internet was with fault amounting to, at the very least, negligence."

FN2. The complaint does not include any specific allegedly defamatory statements from such article.

The second cause of action for "false light" invasion of privacy alleges that by "publishing the above-cited letter and leading countless Internet users to believe that Plaintiff was a member of a Nevada brothel, [Defendant] cast the Plaintiff in a false light," and that as a "non-public person, Plaintiff is entitled to the right of privacy from publicity which puts him in a false light to the public." The "false light" cause of action further alleges that Henderson's "mental and emotional well-being were severely harmed by the Defendant's statement in his letter published on the Internet on April 21, 2008," which "gave the impression that Plaintiff was a member of a Nevada house of prostitution," and that "[s]uch a letter, from a professional researcher with a doctorate degree is not only misleading, but intentionally misleading."

In seeking to dismiss the first cause of action for defamation, Phillips contends that no basis exists for exercising long-arm jurisdiction over him with respect to that claim, since he resides in Virginia, works in Washington, D.C., and he wrote the statements at issue on his personal computer at his home in Virginia, and did not send the statements to any person or entity in New York. In seeking to dismiss the second cause of action for "false light" invasion of privacy, Phillips asserts that no such tort exists under New York law.

Henderson's opposition papers address only the defamation claim, and are silent as to the second cause of action for "false light." Henderson does not dispute that Phillips resides in Virginia and works in Washington, D.C., but argues that the court has personal jurisdiction over Phillips, based his "internet postings [which] reach New Yorkers, and show that he "has taken his business to New York."

As an out-of-state resident, Phillips cannot be subject to personal jurisdiction in New York unless Henderson proves that New York's long-arm statute confers jurisdiction over him by reasons of his contacts within the state. *See Copp v. Ramirez*, 62 AD3d 23, 28 (1st Dept), lv app den 12 NY3d 711 (2009). The burden rests on Henderson, as the party asserting jurisdiction. *See* id. New York long-arm jurisdiction is governed by CPLR 302, which provides in relevant part, as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, *except as to a cause of action for defamation of character* arising from the act; or

3. commits a tortious action without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character* arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent courts of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the states, or

(ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(emphasis added).

By its terms, the long-arm statute as quoted above, has limited applicability in defamation cases, since it is intended "to avoid unnecessary inhibitions on freedom of speech or the press." *Legros v. Irving*, 38 AD2d 53, 55 (1st Dept 1971), app dism 30 NY2d 653 (1972); *accord SPCA of Upstate New York, Inc. v. American Working Collie Association*, ___ AD3d ___, 2010 WL 2196087 (3rd Dept 2010). Defamation actions are expressly exempted from CPLR 302(a)(2) and (3), so the only provision at issue with respect to plaintiffs first cause of action is CPLR 302(a)(1), which requires defendant Phillips to transact business within the state, and the defamation claim to arise from his transaction of that business. *See Ehrenfeld v. Bin Mahfouz*, 9 NY3d 501 (2007). "If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1)." *Johnson v. Ward*, 4 NY3d 516, 519 (2005); *accord Copp v. Ramirez, supra* at 28. In determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of the defendant's activities within the state, to decide if he has transacted business in such a way that it constitutes "purposeful activity," which is defined as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *McKee Electric Co. Inc. v. Rauland-Borg Corp*, 20 NY2d 377, 382 (1967) (quoting *Hanson v. Denckla*, 357 US 235, 253 [1958]); *accord Fischbarg v. Doucet*, 9 NY3d 375, 380 (2007).

The case at bar involves developing issues of New York long-arm jurisdiction in a defamation action based on statements appearing on an internet website. As the Second Circuit noted in 2007, "[w]hile no New York appellate court has yet explicitly analyzed a case of website defamation under the 'transact[ing] business' provision of section 302(a)(1), several federal district courts in New York have ... [and] concluded that the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transact [ing] business' in New York for the purposes of New York's long-arm statutes." *Best Van Lines, Inc. v. Walker*, 490 F3d 239, 250 (2nd Cir 2007) (citing *Realuyo v. Villa Abrille*, 2003 WL 21537754 [SDNY 2003], aff'd 93 Fed Appx 297 [2nd Cir 2004]; *Starmedia Network, Inc. v. Star Media, Inc.*, 2001 WL 417118 [S.D.N.Y. 2001; *Competitive Technologies. Inc. v. Pross*, 14 Misc3d 1224(A) (Sup Ct, Suffolk Co 2007]).

This court's research reveals a recent appellate case from the Third Department, *SPCA of Upstate New York, Inc. v. American Working Collie Association, supra* which relies on the Second Circuit's reasoning in *Best Van Lines. Inc. v. Walker,* to conclude that defendants were not subject to long-arm jurisdiction in a defamation action based on writings posted on their website. Notably, the Third Department agreed with the Second Circuit's "apt" observation that "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." *SPCA of Upstate New York, Inc. v. American Working Collie Association, supra* (quoting *Best Van Lines. Inc. v. Walker, supra* at 248).[FN3]

> FN3. At least one New York trial court recently considered the issue, and found that long-arm jurisdiction existed over a defamation action based on internet communications. *See Intellect Art Multimedia, Inc. v. Milewski,* 24 Misc3d 1248(A) (Sup Ct, NY Co 2009) (holding that plaintiff alleged sufficient facts to show that defendant transacts business in New York through its "Ripoff Report" website, "given the high level of interactivity of the website, the undisputed fact that information is freely exchanged between website users," defendants' "alleged role in manipulating user's information and data," and defendant's "solicitation of companies and individuals to 'resolve' the complaints levied against them on the Ripoff Report").
>
> Other recent cases have considered the issue of long-arm jurisdiction and the internet, but do not involve defamation claims. *See e.g. Grimaldi v. Guinn,* 72 AD3d 37 (2nd Dept 2010) (in breach of contract action, defendant's passive website alone did not provide basis for long arm jurisdiction, but defendant had other contacts with New York that were sufficient to confer jurisdiction); *Zottola v. AGI Group, Inc.,* 63 AD3d 1052 (2nd Dept 2009) (in breach of contract action, Florida defendant who sold boat to New York plaintiff, had sufficient minimum contacts with New York for long-arm jurisdiction); *CRT Investments v. Merkin,* NYLJ, May 11, 2010, p 40, col 3 (Sup Ct, NY Co) (in fraud action, court considered defendant's e-mails and website, in determining that the totality of defendant's contacts with New York did not support any finding that it projected itself into New York to indicate the transaction of business under CPLR 302 [a][1]); *LB International Inc. v. Rainmaker Liquidators Inc.,* NYLJ, May 4, 2010, p 28 col 1 (Sup Ct, Suffolk Co) (in breach of contract action, defendant's website alone, which provided information about its products but did not permit consumer to order products online, was insufficient to confer long-arm jurisdiction under CPLR 302 [a] [1]).

Here, the issue is whether the conduct out of which Henderson's defamation claim arose was a "transact[ion] of business" under CPLR 302(a)(1), which requires Henderson to establish that Phillips conducted purposeful activity within the state, and that a substantial relationship exists between that activity and the defamation claim asserted against him. *See Ehrenfeld v. Bin Mahfouz, supra.* In other words, were Phillips' internet postings and writings the kind of activity by which he "purposefully availed himself of the privilege of conducting activities" within New York, thus invoking the benefits and protections of New York laws. *Best Van Lines. Inc. v. Walker, supra* at 253 (quoting *McKee Electric Co. Inc. v. Rauland-Borg Corp., supra* at 382); *accord Kreutter v. McFadden Oil Corp.,* 71 NY2d 460, 467 (1988).

As noted above, the posting of defamatory material on a website accessible in New York does not, without more, constitute "transacting business" in New York for the purposes of CPLR 302(a)(1), and an out-of-state resident does not subject himself to jurisdiction in New York by simply maintaining a website visited by New Yorkers. *See Best Van Lines. Inc. v. Walker, supra* at 250. Henderson essentially contends that this case involves more than mere business transactions incident to establishing a website, because Phillips' "writings" on the website of a New York radio program known as the Leonard Lopate show, "were purposeful, as were his other attacks against Gary Null and me, which appear on numerous websites - all of which New Yorkers have access to ... [and that] all of his attacks refer the reader back to his original defamatory statements which are published on his website." Henderson also contends that Phillips "admits to having been contacted [by] Gary Null's office for a debate," and that Phillips "has done enough research to know that his show is

heard all over the world on the internet with an extremely high percentage of listeners coming from the New York metropolitan area."

Henderson's contentions are without merit, as neither the presence of Phillips' comments on the Leonard Lopate Show website, nor Phillips' appearance on Gary Null's radio show, is sufficient to constitute the "transaction of business" in New York within the meaning of CPLR 302(a)(1). Phillips submits an affidavit, stating that WPFW is a local radio station in the Washington, D.C. area, which he "occasionally" listens to, and on April 18, 2008, "I emailed the Program Director and General Manager of WPFW to complain about statements that Gary Null had made during a recent broadcast of his radio program." Phillips states that on the same day, "I posted the email as an 'open letter' on my website, lee-phillips.org," and soon afterwards, "WPFW forwarded a response from someone named 'Doug,' with the email address *'dhender499 @aol.com.' "* After conducting a Google search for "dhender499," Phillips "concluded that the email had been sent by Doug Henderson, who appeared to work for Gary Null."

Phillips states that on April 21, 2008, he wrote "a second email to WPFW, and posted both the forwarded letter I had received and my response on my website under the heading, 'Gary Null's Goons Threaten to Sue Me: My Response.' " Phillips states that he received an email response from Doug Henderson, inviting him to appear on Gary Null's radio program "to debate him on a number of issues," and in "my April 21, 2008 letter, I accepted the invitation." According to Phillips, on April 29, 2009, "I did 'appear' on Gary Null's show by telephone," when "someone from WPRW called me at home at a predetermined time." Phillips also states that his "April 21, 2008 web posting, which is the subject of this action, was written on my personal computer in my home in McLean, Virginia. I have never sent it (whether in physical or electronic form) to any person or entity in New York."

Phillips submits an reply affidavit stating that in August 2008, "when searching for information about Gary Null on my home computer, in Virginia, I came across a radio broadcast and related comments on the website of the Leonard Lopate Show," and "placed a comment on the comment section expressing my views on Gary Null's academic credentials." Phillips states that he "did not appear on the Leonard Lopate program" and he did not "travel to New York at any time to conduct 'research' about Gary Null." Phillips also states that he has "never said, either orally or in print, that Doug Henderson visited a house of prostitution in Nevada, or that he has had sex with prostitutes there or anywhere else."

Based on the foregoing, it is clear that Phillips did not engage in any activity indicating that he "purposefully directed" his activities toward New York. The nature of Phillips' comments about Henderson on his personal website does not suggest that they were specifically targeted to New York viewers, as opposed to a nationwide audience. *See Best Van Lines, Inc. v. Walker,* supra at 253. Moreover, Phillips merely appeared by telephone from his home on Gary Null's radio show, and merely used his home computer to post a comment on the website of the Leonard Lopate show. Notably, Henderson does not allege that he was defamed by comments Phillips made during his appearance on Gary Null's radio show, or by comments Phillips posted on the Leonard Lopate show's website. In any event, the making of allegedly defamatory statements outside New York about a New York resident, does not without more, provide a basis for personal jurisdiction under CPLR 302(1)(a), even if those statements are posted on a website originating from New York and accessible to New York readers. *See Best Van Lines. Inc., supra* at 253; *Competitive Technologies, Inc. v. Pross, supra.* The fact that Phillips' statements are accessible from other websites does establish that they were posted in connection with some business activity. As with the report in *Best Van Lines, Inc. v. Walker, supra* and the column in *Realuyo v. Villa Abrille, supra,* the accessibility of Phillips statements from other websites, "arises solely from the aspect of the website from which anyone - in New York or throughout the world - could view and download the allegedly defamatory" material. *Best Van Lines, Inc. v. Walker,* supra at 253 (quoting *Realuyo v. Villa Abrille, supra*).

Thus, since Henderson has failed to establish a basis under CPLR 302(a)(*1*) for exercising personal jurisdiction over

Phillips in connection with the defamation claim, the first cause of action must be dismissed. The second cause of action for "false light" invasion *of privacy is* also dismissed, in the absence of opposition, and based on New York law, which does not recognize a common law right to privacy. *See Messenger v. Gruner Jahr Printing & Publishing*, 94 NY2d 436, 441 (2000); *Howell v. New York Post Co.*, 81 NY2d 115 (1993); *Arrington v. New York Times Co.*, 55 NY2d 433 (1982). In light of this determination, the court need not consider the additional grounds for dismissal raised in Phillips' motion papers.

Accordingly, it is hereby

ORDERED that defendant Lee Phillips' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: Jun 28, 2010

ENTER:

<<signature>>

J.S.C.

Henderson v. Phillips
2010 WL 2754080 (N.Y.Sup.) (Trial Order)

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C

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 had 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 this 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

52A Cedar Drive

Great Neck, NY 11021

Davis Wright Termaine LLP

Attorneys for Defendant

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

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Supreme Court of New York.
Nassau County
METROPOLITAN DIAGNOSTIC IMAGING GROUP, LLC, and Queens Diagnostic Management, LLC, Plaintiffs,
v.
U.S. HEARTCARE MANAGEMENT, INC., Nuclear Cardiac and Medical Imaging Services, P.C., and Medical Diagnostic Management Services, Defendants.
No. 006499/2010.
July 26, 2010.

Motion Sequence: 001

Short Form Order

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

Present: Hon. Ira B. Warshawsky, Justice.
MOTION DATE: 05/14/10

The following papers read on this motion:

Order to Show Cause, Affidavits & Exhibits Annexed.	1
Affirmation of Glenn T. Nugent in Opposition, Affidavits & Exhibit Annexed.	2
Affidavit in Opposition of Kunal Soni.	3
Reply Affidavit of Greg S. Zucker, Esq. in Further Support, Reply Affidavit of Alan Winakor in Further Support & Exhibits Annexed.	4
Verified Answer with Counterclaims.	5

PRELIMINARY STATEMENT

Plaintiff moves by order to show cause (a) for a pre-judgment order of attachment against all property in which defendants have an interest to the extent of $186,796.14, including without limitation:
• 2006 Dodge Cargo Van, BIN WDOPD744265917565; J.P. Morgan Chase Bank Account # XXXXXXXXXX; State Bank of Long Island Bank Account # XXXXXXXXXX; Park Avenue Bank Account # XXXXXXXXX; and, all equipment owned by any of the defendants; and all debts owed to defendant U.S. Heartcare;
• all accounts, real property, personal property and other assets of defendant Medical Diagnostic Management Services ("MDMS"), and all debts owed to defendant MDMS; and
• all accounts, real propety, personal proeperty and other assets of defendant Nuclear Cardiac and Medical Imaging Services, P.C. ("Nuclear"), and all debgts owed to defendant Nuclear.

(b) directing plaintiffs post an undertaking of $500;

(c) directing garnishees to serve upon the Sheriff or Marshal a statement of all debts of garnishee owed to defendants, within 10 days of service upon them of order of attachment.

BACKGROUND

Plaintiff is a subtenant of Leyben Realty Corp. by virtue of a sublease agreement dated June 30, 1997 and a July 1, 1998 purchase by Queens Diagnostic Management, LLC of the interests of Medical Marketing Development, Inc., the original subtenant. U.S. Healthcare is an undertenant of plaintiff, occupying two offices at the premises. They further subleased the property Nuclear Cardiac & Medical Imaging, P.C. ("Nuclear"), and, until recently, managed the affairs of Nuclear's medical practice. U.S. Healthcare was in default in rental payments and, after receipt of a notice to terminate, agreed to vacate the premises as of April 30, 2010, but refused to sign documents to this effect.

Plaintiffs contend that Nuclear has ceased paying revenues from their medical practice to U.S. Heartcare, and has begun forwarding payments to Medical Diagnostic Medical Services ("MDMS"), a management company established by U.S. Heartcare. Plaintiffs also assert that Nuclear is attempting to sell the medical practice to a third party. U.S. Heartcare's sub-lease expired on June 30, 2009. Plaintiff notified U.S. Heartcare on December 3, 2009 that it's month-to-month tenancy was terminated as of January 31, 2010. They have held over and retain possession of the premises without consent of the plaintiffs. Plaintiff alleges that U.S. Heartcare failed to pay its rent and additional rent for June 2009. They further assert that the Over-Lease provides that a sub-tenant who holds over after its tenancy is terminated, is liable for "per diem use and occupancy ... equal to two times the [rent and additional rent] payable under this Sublease for the last year of the term of this Sublease (which amount [plaintiffs and U.S. Heartcare] presently agree is the minimum to which [plaintiffs] would presently be entitled, is presently contemplated by them as being fair and reasonable under such circumstances and is not a penalty)." Exh. "A" at ¶ 38. Plaintiff calculates these damages as of the date of the filing the Order to Show Cause to be $186,796.14.

Defendants oppose the motion for attachment and contend that U.S. Heartcare is not in default under the terms of the sublease as set forth in the answer and counterclaims. They further contend that defendants Nuclear and MDMS have no contractual obligations to the plaintiffs, and are not subject to attachment.

DISCUSSION

Attachment is governed by Civil Practice Law and Rules § 6201:

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiffs favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the action is brought by the victim or the representative of the victim of a crime, as defined in *subdivision six of section six hundred twenty-one of the executive law,* against the person or the legal representative or assignee of the person convicted of committing such crime and seeks to recover damages sustained as a result of such crime pursuant to *section six hundred thirty-two-a of the executive law;* or

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which

is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

Plaintiffs primary contention is that defendant U.S. Heartcare, in violation of the provisions of subdivision "3", has extricated itself from the receipt of funds from Nuclear through the creation of a third party, MDMS, to whom the occupant of the premises ostensibly pays for use and occupancy, thereby seeking to either defraud plaintiff, or frustrate the ability of plaintiff to enforce a judgment to which it may be entitled.

There is no question but that Heartcare has not paid rental since June 1, 2009, nor has it paid the use and occupancy fees and other charges after January 31, 2010, the date that their month-to-month tenancy terminated. Heartcare is obligated under the terms of the sublease, which incorporates the obligations of the overlease. Plaintiff has established a prima facie entitlement to attachment of assets owned by Heartcare and debts owed to Heartcare by third parties and the Motion to Attach the assets of Heartcare as set forth in the moving papers to the extent of $186,796.14 is granted.

Plaintiff also seeks to attach assets belonging to defendants MDMS and Nuclear. The Court concludes that MDMS is the alter ego of U.S. Heartcare, with the same office address and phone number, and serving the role previously played by Heartcare, its creator. There has been no evidence submitted to the effect that MDMS has any function other than to perform the work of Heartcare. (*Simplicity Pattern Co., Inc. v. Miami Tru-Color Off-Set Serv., Inc.*, 210 A.D.2d 24 [1st Dept. 1994]). Plaintiffs' motion to attach assets of MDMS to the extent of $186,796.14 is granted. Entitlement to attach assets of Nuclear, with whom plaintiff has no privity, and which is not an alter ego of U.S. Heartcare, is a more contentious issue. Nevertheless, Civil Practice Law and Rules § 6202 provides that "(a)ny debt or property against which a money judgment may be enforced pursuant to § 5201 is subject to attachment". To the extent that Nuclear has funds which are owed to either U.S. Heartcare or MDMS, it is a debt which attachable in the same respect as it would be subject to enforcement under a money judgment. § 5201 provides that execution is authorized against:
(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

Since MDMS has taken over the responsibilities of U.S. Heartcare in managing the medical practice of Nuclear, and, in this capacity, are serving as the alter ego of U.S. Heartcare, monies owed to them which is past due, or will become due upon demand of defendant, is attachable in the same manner as it would be in the enforcement of a money judgment.

The motion for an order of attachment of the assets of MDMS to the extent of $186,796.14 is granted.

Defendants Counterclaims

Defendants claim as an Eighth Affirmative Defense and First Counterclaim that MDIG and its principal, Dr. Winakor, promised to refer not less than $30,000 per month in nuclear medicine in return for U.S. Heartcare's promise to pay rental of $9,500 per month, and that this representation was an integral part of the sublease, without which no agreement would have been made.

The second counterclaim is that plaintiff and Dr. Winakor, by tortious interference with the business of U.S. Heartcare, and the spread of disparaging remarks about the company, have precluded counterclaimant from entering into one or more business arrangements, and actively undermined negotiations toward that end.

In its third counterclaim defendant alleges prima facie tort against plaintiff by virtue of its claimed intentional acts, executed solely for the purpose of inflicting physical and economic damages upon defendants. Plaintiff has represented that the counterclaims are not in excess of the amount claimed in the complaint.

As to the first counterclaim, the claimed representation is not in writing and should be barred by the Statute of Frauds. . According to defendant's claim, plaintiff was to make monthly referrals of not less than $30,000 per month in nuclear medicine business during the term of the sublease. The sublease agreement was for more than one year, and the claimed obligation of the plaintiff could therefore not conclude within one year of the date upon which it was allegedly made. As movant points out, an agreement whereby the amount of rent paid is contingent upon income or receipts from a medical practice is expressly prohibited by Education Law § 6530(19). The entry into a lease agreement by a medical facility which takes into account the volume or value of business or referrals generated between the parties violates 42 U.S.C. §1395nn(e)(l)(A)(iv) and 42 U.S.C. § 1320a-7b(b)(l)(A), 2(A). Thus, even if the representation as to the amount of referrals which U.S. Heartcare could expect from plaintiff is true, it is almost assuredly unenforceable.

The elements of tortious interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom. In its counterclaim, there is no reference to a valid contract between U.S. Heartcare and some third party, plaintiffs knowledge of the contract, its efforts to cause the third party to breach it, or otherwise render performance impossible, or what damages have been sustained.

Defendants' third counterclaim is for prima facie tort. Elements which must be pled and proven are (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful. (*Friehofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985). This is essentially a claim that the opposing party has done something lawful in itself, but done for the sole purpose of causing harm to the other party. The allegations to which this counterclaim refer are the spread of disparaging and false information so as to prevent defendant from entering into business arrangements. What defendant describes is trade libel, a recognized form of tort. When the conduct complained of can be categorized as a form of recognized tort, an action for prima facie tort will not stand. (*Ruza v. Ruza,* 286 A.D. 767, 769 - 770 [1st Dept. 1955]).

What defendant has alleged is that plaintiff has disseminated false statements with the intent to damage its business. These claims of slander are not adequately alleged as required by CPLR § 3016 (a). (*Kaminer v. Wexler,* 40 A.D.3d 405 [1st Dept. 2007]).

The claims in the complaint are not outweighed by potential recovery on counterclaims.

Plaintiffs are required to post security in an amount sufficient to reimburse defendants in the event attachment is subsequently determined to be unwarranted, or in the event of a resolution of the matter in favor of defendants. The Court directs that plaintiffs are to file a surety bond by a licensed New York State insurer in the amount of $100,000 as a condition of exercising the right of attachment granted to them.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2010

<<signature>>

J.S.C.

Metropolitan Diagnostic Imaging Group, LLC v. U.S. Heartcare Management, Inc.
2010 WL 3073727 (N.Y.Sup.) (Trial Order)

END OF DOCUMENT

H

Supreme Court, New York.
New York County
John J. MURPHY, Plaintiff,
v.
CITY OF NEW YORK, Board of Trustees of the New York City Employees Retirement System, Martha Stark, Chair, and Department of Investigation, Vincent E. Green, Supervising Inspector General, Defendants.
No. 0106059/2006.
July 2, 2008.

West Headnotes
Libel and Slander 237 ⚿39

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k35 Absolute Privilege
237k39 k. Official Acts, Reports, and Records. Most Cited Cases
Absolute immunity, from defamation claim by former executive director of city employee retirement system, attached to official report by Department of Investigation regarding alleged improper relationship between the director and an employee that allegedly resulted in improper promotions for the employee.

Decision and Order

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

Present: Hon. Karen Smith, Justice.
The following papers, numbered 1- were read on this motion to/for _

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	1
Answering Affidavits - Exhibits_____	2
Replying Affidavits_____	3

_____

Cross-Motion: [ ] Yes X No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached memorandum decision and order

Dated: 6/29/08

<<signature>>

J.S.C.

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants', City of New York, Board of Trustees of the New York City Employers Retirement System, Martha Stark, Department of Investigation, and Vincent E. Green (collectively "defendants"), motion for summary judgment, dismissing plaintiffs complaint, is granted for the reasons stated more fully below.

Plaintiff brought the instant action to recover for defendants' alleged defamation, interference with profession and employment, and violation of New York City Charter §§ 803 and 805, in the circumstances leading up to his retirement as Executive Director of the New York City Employees Retirement System ("NYCERS"). Defendants, collectively, now move for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs complaint in its entirety.

In support of their motion, defendants submit: 1) the EBT of Martha Stark; 2) the EBT of plaintiff; 3) an anonymous letter to the NYCERS Board of Trustees, dated June 1, 2004; 4) a NYCERS "organizational chart"; 5) a copy of Executive Order No. 16; 6) a letter from defendant Stark to defendant Vincent Green dated June 21, 2004; 6) the EBT of defendant Green; 7) a letter from Green to Stark dated March 1, 2005; 8) a portion of the NYCERS Employee Handbook; 9) a memorandum from Karen Mazza, NYCERS' general counsel, to "All Staff" dated December 9, 2002; 10) a "Receipt for Employee Handbook" signed by plaintiff and dated October 8, 2002; 11) a letter by plaintiff to new NYCERS employees and included with the Employee Handbook, undated; 12) a string of emails between Stark and plaintiff, dated March 9, 2005; 13) a string of emails between Stark and plaintiff, dated March 16-17, 2005, including a letter from plaintiff to the NYCERS Board of Trustees, sent to Stark as an attachment to an email; and 14) the affirmation of plaintiffs counsel, which was submitted to the Court on his prior motion to amend the complaint.

Plaintiff opposes the motion and submits the following: 1) plaintiffs resume; 2) NYCERS' organizational chart; 3) the anonymous letter send to the NYCERS Board of Trustees, dated June 1, 2004; 4) a letter from Stark to Green dated June 21, 2004; 5) handwritten notes of an interview with plaintiff by the Department of Investigations; 6) a letter from Green to Stark, dated March 1, 2005; 7) a letter from Astrid B. Gloade of the City of New York Conflicts of Interest Board, to Green, dated May 31, 2005; 8) the EBT of Green; 9) a series of newspaper articles plaintiff alleges contain defamatory allegations about him; 10) a separate news article that plaintiff alleges contains defamatory allegations about him; 11) the EBT of Carol De Freitas, an investigator with the Department of Investigations; 12) employment evaluations of Niki Browne; 13) a memorandum of an interview written by De Freitas, dated July 30, 2004; 14) a memorandum of an interview written by De Freitas, dated August 2004; 15) the EBT of Milton Aron, former Acting Executive Director of NYCERS; 16) a letter from Aron to Green, dated April 15, 2005; 17) memorandum from Patrice Barnet to Kisha Shrouder regarding "work performance", dated December 22, 2003; 18) the EBT of Stark; 19) an undated letter from plaintiff to Stark; 20) Analytic Summary "Re: NYCERS Executive Director John Murphy"; 21) an email from Michael Musuraca to Diane Bratcher dated March 4, 2005; 22) the EBT of Diane Bratcher; 23) Plaintiffs Interrogatories to Non-Party Witness Leo Vallee, Defendants' Cross-Questions to the Deposition on Written Questions of Non-Party Leo Vallee, and Vallee's sworn responses to each; 24) memoranda to plaintiff from Aron and Niki Browne, dated June 9, 2004; 25) a portion of the EBT of non-party witness Martin Murphy; 26) a portion of the EBT of non-party witness Michael Sinclair; 27) a portion of the EBT of Roger Touissant; 28) memorandum by Daniel Lau, investigator with DOI, dated September 17, 2004; 29) EBT of Karen Mazza; 30) memorandum by De Freitas dated July 23, 2004; 31) an email from De Freitas to Kin Mak, dated July 26, 2004; 32) memorandum by De Freitas dated August 13, 2004; 33) a photocopy of a newspaper advertisement for Pension Administrator; 34) the EBT of Andronoki Browne; 35) an decision an order of the Hon. Doris

Ling-Cohen, dated April 10, 2006, in plaintiffs separate Article 78 action; 36) portions of the EBTS of witnesses Martinez and Sparks.

The material facts are contained in the parties' motion papers and are not in serious dispute, unless noted below. Plaintiff John J. Murphy ("Murphy") was the Executive director of NYCERS between 1990 and March 2005, when he retired. In June 2004, NYCERS received an anonymous letter from a current employee alleging, *inter alia,* that Murphy was involved in a romantic relationship with a subordinate employee named Androniki Browne ("Browne"), who he had inappropriately promoted and, in addition, had hired Browne's "best friend", Felita Baksh, as NYCERS' Director of Human Resources under allegedly dubious circumstances. The letter claimed that Browne's success at NYCERS - including a significant salary increase - was a direct result of her relationship with plaintiff, and that other employees were being overlooked or pushed out of NYCERS to make room for Browne's promotions.

In response to the anonymous letter, defendant Martha Stark ("Stark"), Chair of the NYCERS Board of Trustees, referred the matter to defendant Vincent Green ("Green"), Assistant Commissioner and Inspector General at the New York City Department of Investigations ("DOI") by letter dated June 21, 2004. Stark, on behalf of the Board of Trustees, asked Green to investigate two things: 1) "Did Androniki (Niki) Brown [sic], current Director of Administration improperly benefit from her alleged personal relationship with Mr. Murphy?" and 2) "Was Felita Baksh improperly hired as Director of Human Resources because of her friendship with Niki Browne?" Green and the DOI conducted an investigation and, by letter dated March 1, 2005, communicated the results to Stark. In the letter, Green states that a romantic relationship did exist between Murphy and Browne, and that Browne had received "several promotions and salary increases under the direction of Murphy during the time that he and Browne were romantically involved, possibly in violation of... the NYCERS Employee Handbook," but did not conclusively answer whether Browne improperly benefitted from her relationship with plaintiff. The DOI also found that some of the circumstances surrounding Baksh's hiring were inappropriate, but those allegations did not implicate plaintiff. Green stated that the findings were being referred to the New York City Conflicts of Interest Board ("COIB") in addition to the NYCERS Board of Trustees to determine appropriate action.

Stark gave a copy of Green's findings to Murphy on March 9, 2005. She then asked Murphy, via email, to attend the March 10, 2005 Board meeting to address the DOI's findings. In response, Murphy emailed Stark disputing many of the DOI's findings, but admitting to having a romantic relationship with Browne and stating that he had specifically chosen not to be involved with personnel decisions regarding Browne to avoid opening himself up to accusations of favoritism or creating an appearance of a conflict of interest. Rather, he said, the decision to promote Browne to her current position was made by her immediate supervisor, Milton Aron, independently, and that he did not reveal his relationship with Browne to Aron because he did not want to "interfere with her promotion." However, Murphy did acknowledge that the relationship was "not good management policy" and that it created "an ongoing problem."

The NYCERS Board of Trustees met on March 10, 2005, at which time Stark provided each member with a copy of Green's letter[FN1] and Green made a presentation to the Board members regarding the findings of the DOI investigation in an executive session. According to Stark's deposition, she then went to plaintiffs office at the Board's request to discuss the report with him. During that exchange, Stark claims that plaintiff expressed his desire to retire from NYCERS and also to have an opportunity to address the Board. Plaintiff then met with the Board of Trustees at which time he admitted having a romantic relationship with Browne but denied making any personnel decisions as a result. Plaintiff requested and was granted the right to provide the Board with a written statement. The statement had to be submitted by March 16, 2005. According to Stark's EBT, after plaintiff left the meeting, the Board determined it would accept plaintiffs retirement effective June 30, 2005. Stark testified that she called plaintiff at home that night and informed him of the Board's acceptance, and that beginning the following day, March 11, he would no longer serve as Executive Director. Stark testified that although he would not be Executive Director, she expected him to stay on to provide transition

assistance to the Acting Executive Director until June 30, 2005. Plaintiff disputes Stark's version of events, as it pertains to the circumstances of his agreeing to retire, and claims that he was forced to retire. This dispute was the subject of a separate Article 78 proceeding, and is not material to the issues raised on this motion.[FN2] However, plaintiff also alleges that his offer to retire was conditioned on the Board agreeing to change what he determined were inaccuracies in the DOI's findings. Stark denies that plaintiff made such a demand at the Board meeting. Plaintiff filed his retirement papers the following day, on March 11, 2005.

FN1. There is some indication that some or all of the Trustees may have received a copy of the report on the night of March 9, 2005 by fax, but each of the Trustees at the meeting received a hard copy from Stark on March 10, 2005.

FN2. See *Matter of Murphy v. City of New York, et al.*, 35 A.D.3d 319, 827 N.Y.S.2d 46 (1st Dept 2006); See also *Matter of Murphy v City of New York, et al.*, Decision and Order Entered May 24, 2006 (Index No. 109352/05) (Hon. Doris Ling-Cohan).

In news articles in a variety of New York newspapers dated March 22, March 23 and March 24, 2005, and April 3, April 8, and April 30, 2005, the findings of fact and allegations contained in the DOI report were referenced. On March 23, 2005, the television channel "New York 1" aired a story about the newspaper coverage. Thereafter, plaintiff commenced this action, alleging that 1) defendants defamed him "by the illegal and wrongful public dissemination of the DOI Report which contained ... defamatory and false statements"; 2) defendants "maliciously and wrongfully interfered with plaintiffs employment and profession ... by the illegal and wrongful public dissemination of the DOI Report"; and 3) defendants violated their duties under New York City Charter §§ 803 and 805, which sections, plaintiff argues, mandated that the DOI Report be kept confidential. Defendants, collectively, now move for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs complaint in its entirety.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Absolute Immunity

Defendants first argue that plaintiffs cause of action for defamation must be dismissed because the DOI Report is protected by absolute privilege.

"The privilege of absolute immunity is bestowed upon an official who is 'a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension.' " (*Firth v. State of New York*, 12 A.D.3d 907, 785 N.Y.S.2d 755 [3d Dept 2004], *lv denied*, 4 N.Y.3d 709 [2005]; quoting *Stukuls v. State of New York*, 42 N.Y.2d 272, 275 [1977]). This privilege "extends to those of subordinate rank who exercise delegated powers." *quoting Ward Telecom. & Computer Services v. State of New York*, 42 N.Y.2d 289, 292 [1977]).

Defendants argue that DOI is both 1) delegated executive responsibilities of investigating misconduct in City agencies, and 2) charged by law with administrative or executive policy-making responsibilities comparable to those described by the Appellate Division, Third Department, in *Firth v State of New York*. (12 A.D.3d 907, 908, 785 N.Y.S.2d 755 [3d Dept 2004], *lv denied*, 4 N.Y.3d 709 [2005]). In *Firth*, the New York Office of the State Inspector General ("OSIG") was found to be cloaked with absolute immunity, where it had conducted an investigation of the Department of Environment-

al Conservation's Law Enforcement Division and its subsequent report, allegedly containing defamatory statements about the Division's former director, was later published on the Internet. (*Id.* at 907, 785 N.Y.S.2d 755). The court explained that "[a]n executive order created OSIG to fulfill the Governor's statutory duty to investigate agencies of defendant to assure their proper management ... rendering OSIG a delegatee of the Governor." (*Id.* at 908, 785 N.Y.S.2d 755, *citing* Executive Order [Pataki] No. 39, 9 NYCRR 5.39; Executive Law § 6). The Court also noted that, even if OSIG had not been a delegatee of the governor, its power to, *inter alia,* subpoena witnesses; administer oaths; require production of documents; compel agency employees and officers to submit to questions; remove individuals for refusal to cooperate in its investigations; recommend remedial action; and recommend amendment of policies and procedures, makes OSIG more than a mere investigatory agency, like a police force. Rather, OSIG's "policy-making responsibilities of considerable dimension" are sufficient to warrant absolute privilege. (*Firth v. State of New York,* 12 A.D.3d 907, 908, 785 N.Y.S.2d 755 [3d Dept 2004], *quoting Stukuls v. State of New York,* 42 N.Y.2d 272 [1977]).

Plaintiff argues that defendants seek to extend the law of absolute immunity far beyond what is warranted, and beyond that supported by precedent. According to plaintiff, absolute immunity is afforded only to judges and the highest government officials, or to government officials who have been delegated judicial or quasi-judicial functions. However, the cases relied on by plaintiff for this proposition are distinguishable and do not support a finding that the DOI's reports are not protected by immunity.

Plaintiff equates DOI investigations with police-like investigations, which have not been afforded absolute immunity. In support of his position, plaintiff cites the decision in *Mahoney v Temporary, Comm. of Investigation of the State of New York* (165 A.D.2d 233, 565 N.Y.S.2d 870 [3d Dept 1991]), which, according to plaintiff, stands for the proposition that because DOI does not, itself, adjudicate the results of its investigations and does not have the power to mandate or oversee its policy recommendations, it is merely an investigatory body that should not be afforded absolute privilege. In *Mahoney,* however, the court specifically emphasized that the defendant there was a *temporary* commission, whose role was limited to investigating and reporting organized crime and racketeering, a role "essentially similar to those of a police force." (165 A.D.2d at 238, 565 N.Y.S.2d 870). The Commissioner of DOI, on the other hand, is delegated the role of investigating, either on his or her own initiative or by request of the mayor's office or city council, *inter alia,* "the affairs, functions, accounts, methods, personnel or efficiency of any [City] agency," (NYC Charter § 803[a]). And no other officer or employee of the City may conduct such investigations without prior approval of the DOI (EO No. 16). Furthermore, the DOI is required to prepare a written report or statement of its findings, and provide such report or statement to the requesting party. (NYC Charter § 803[c]).

In addition to having all of the investigatory powers held by the OSIG in *Firth (supra),* the DOI is also charged with assisting agency heads in establishing and maintaining standards of conduct and an efficient disciplinary system (EO No. 78 [1984] [amending EO No. 16]), advising each agency on establishment of formal and informal disciplinary proceedings, and has the power to force an agency to suspend such proceedings if it might interfere with its own investigations [EO No. 105 [1986] [amending EO Nos. 16 and 78]). This power goes far beyond merely investigatory functions consistent with that afforded a police force, and evidences the intent of the mayor to delegate "administrative or executive policy-making duties". (*Stukuls v. State of New York,* 42 N.Y.2d 272 [1977]).

Plaintiff's reliance on *Anemone v Metropolitan Transit Authority,* (410 FSupp2d 255 [SDNY 2006]), is also misplaced. Plaintiff argues that the court in *Anemone* rejected absolute immunity for the MTA Inspector General because he " 'does not functionally resemble a judge or prosecutor,' " (410 FSupp2d at 272). This finding, however, was made in the context of a federal civil rights claim under 42 USC § 1983. The plaintiff in *Anemone* had no claim for libel or defamation, as in the instant case. In fact, in a footnote, the court expressly rejected the defendant's reliance on cases extending absolute immunity for state law defamation claims, explaining that the doctrine of federal absolute immunity at issue in that

case is derived from Congress's original intent when it enacted § 1983. (410 FSupp2d at 272, n. 7 [internal citation omitted]). The issue of absolute immunity under *state* law was not presented nor addressed in *Anemone.*

Finally, plaintiff argues that defendants have erroneously relied upon and mischaracterized the Appellate Division, First Department's decision in *Aquilone v City of New York, et al.,* (262 A.D.2d 13 [1st Dept 1999], *lv denied,* 93 N.Y.2d 819 [1999]). The plaintiff in *Aquilone* was the Executive Director of Personnel of the Board of Education. After his retirement in 1999, the Deputy Commission of Investigation issued a report which concluded Aquilone had participated in a sham hearing and coverup of the felony sex crime conviction of a former co-employee. Plaintiff characterizes the court's holding in *Aquilone* as "premised on the fact that the Chancellor's statement's [sic] about the report were made in the discharge of responsibilities within the ambit of his duties as the highest official of the Board of Education. It is a quasi-judicial delegation by the highest official so that the publication was supported by prior precedents... No similar authorization and delegation is involved in the case at bar." (Plaintiffs memorandum in opposition, p. 9).

The First Department's decision in *Aquilone,* however, makes absolutely no mention of "quasi-judicial delegation," and there is no discussion of any statements made by the Chancellor. Rather, the court's holding focuses solely on the report issued by the Deputy Commissioner of Investigation, and states without equivocation that "absolute privilege applies .... to the results of an official investigation into coverup of a sex crime committed by a public employee." (262 AD2d at 14). In addition, as defendants point out, the Deputy Commissioner of Investigation in *Aquilone,* whose report was determined to be absolutely privileged, is an appointee of the Commissioner of the DOI and derives his authority from the same delegated executive authority as is at issue in the instant matter. (See EO No. 11 [1990]; EO No. 34 [1992] [amending EO 11]; EO No. 15 [2002] [amending EO Nos. 11 and 34]). This Court's finding, then, that reports issued by the DOI in furtherance of its executive and statutory mandate are cloaked in absolute immunity from suit sounding in defamation, is wholly consistent with the First Department's holding in *Aquilone.*[FN3] As such, the DOI defendants have met their burden of establishing entitlement to judgment as a matter of law on this issue. As plaintiff has failed to raise an issue of fact, the DOI defendants are entitled to judgment in their favor on this cause of action.

> FN3. Plaintiff, in his memorandum of law, argues that "Green published the report to defendant Stark, who published it to the defendants Board of Trustees." As NYC Charter § 803(c) *requires* that DOI provide a copy of its report and/or findings to the party requesting the investigation, and Stark requested the investigation as Chair of the Board of Trustees, plaintiffs contention that, by providing the Trustees a copy of the report, Stark engaged in a separate defamatory publication, is unsupported by the law.

Defamation Claims Against Non-DOI Defendants

While the case law makes it clear that neither the DOI nor defendant Green, an investigator for DOI, can be liable to plaintiff for allegedly defamatory statements contained in the official report produced as a result of its investigation, the parties have cited to no case that directly addresses whether a third-party can be held liable for *re-publication* of a report for which the DOI has absolute immunity. The Court need not address this issue, as plaintiff is unable to establish all of the elements of defamation.

To succeed in a claim for defamation not involving a public figure, whether libel or slander, plaintiff must be able to prove the following: 1) a false statement; 2) published to a third party; 3) negligently; and 4) which either causes special damages to plaintiff or constitutes defamation *per se. (Dillon v. City of New York,* 261 A.D.2d 34 [1st Dept 1999]). In the case of an action brought by a public figure, the plaintiff must also show that the allegedly defamatory statements were published with actual malice, not just negligence. (*Blum v. State,* 255 A.D.2d 878 [4th Dept 1998], *lv denied,* 93 N.Y.2d 802 [1999]). Plaintiff must plead "the particular words complained of... in the complaint," (CPLR § 3016[a]), and allege

"the time, manner and persons to whom the publication was made." *Geddes v. Princess Properties International, Ltd.*, 88 A.D.2d 835 [1st Dept 1982]).

In this case, plaintiff has alleged in his complaint five specific statements, taken verbatim from the DOI report, which he claims are libelous. However, he fails to identify the "time, manner and persons to whom the publication was made." Rather, he alleges that "[o]n or about March 10, 2005 the DOI Report and the anonymous letter were leaked to the press by defendants." While plaintiff alleges here that the anonymous letter, which was initially sent to DOI, was "leaked" to the press at the same time as the DOI Report, plaintiff has not included any allegedly defamatory statements made in the anonymous letter and does not state a claim for defamation based on the contents of the anonymous letter in his complaint. Plaintiff also fails to allege which of the defendants actually published the DOI Report and to whom it was published. Even if this Court were to overlook plaintiffs lack of specificity in his complaint, in his opposition to this motion, plaintiff has failed to adduce any evidence that any of the defendants published the report and has submitted no evidence indicating to whom the defendants allegedly published it. Because the DOI defendants are cloaked in immunity, as discussed above, this element is particularly important. It is not sufficient for purposes of a defamation claim to make a blanket statement that one of the defendants published the report, because the defendants are different individuals and entities, some being protected by absolute immunity and others not.

Despite this lack of evidence of publication, plaintiff argues that the issue of publication has been decided in prior proceedings and cannot, therefore, be relitigated here. Plaintiff brought a separate Article 78 proceeding, before Hon. Doris Ling-Cohan, seeking, *inter alia,* a judgment declaring the defendants' actions a deprivation of a liberty interest under the Due Process Clause, entitling plaintiff to a name-clearing hearing. In her decision, declaring plaintiff entitled to a name-clearing hearing, Justice Ling-Cohan stated that the respondents did not challenge the fact that the DOI report had been "widely disseminated, which satisfies the publication requirement." (*Matter of Murphy v City of New York, et al.,* Index No. 109352/05 [Sup Ct, April 10, 2006], *aff'd* 35 A.D.3d 319 [1st Dept 2006]). On appeal, the Appellate Division, First Department found that respondents "concede[d] that the element of dissemination" was satisfied. Plaintiff nonetheless argues that the findings of Justice Ling-Cohan and the Appellate Division that the element of dissemination, in an action seeking a name-clearing hearing, means defendants cannot now challenge plaintiff's proof of publication in an action for defamation, under a theory of collateral estoppel. This Court disagrees.

As plaintiff points out in his memorandum of law in opposition to the motion, collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding, an issue clearly raised and decided in a prior action or proceeding, where there is an identity of issue and the issue was material in the first action or proceeding. (*Ryan v. NY Telephone Co.*, 62 N.Y.2d 494 [1984]). That is clearly not the case here. While "dissemination" is an element of a cause of action seeking a name-clearing hearing, the issue of dissemination is not identical to the issue of publication in a defamation action. The element of dissemination may be satisfied merely by showing that the false, stigmatizing information is in wide circulation or that "even the *likelihood* of dissemination" exists. (*Matter of Murphy v City of New York, et al.,* Index No. 100352/05, at p.. 13, 827 N.Y.S.2d 46; *citing to Matter of Swinton v. Safir,* 93 N.Y.2d 758, 765 [1999]). While plaintiff proved, in the prior proceeding, that the DOI Report was in wide circulation, plaintiff was not required to prove "the time, manner and persons to whom the publication was made." *Geddes v. Princess Properties International, Ltd.*, 88 A.D.2d 835 [1st Dept 1982]). In fact, to succeed on a claim of entitlement to a name-clearing hearing, plaintiff was not required to make a showing as to which of the defendants made the alleged publication, which is an important issue in the instant litigation. On the other hand, to succeed in his defamation claim against Stark or Green, individually, he must establish that he or she provided the report to a specific member of the media. To hold NYCERS or the City of New York liable under a theory of *respondent superior,* plaintiff must also prove that the publication was made by an employee acting within the scope of his employment. (*Davis v. City of New York,* 226 A.D.2d 271 [1st Dept 1996]). Plaintiff's argument that a jury should be allowed to determine who published the report, based solely on the fact that defendants

and plaintiff were the only individuals who possessed the report, is unpersuasive. In opposition to a motion for summary judgment, the plaintiff is required to "lay bare his proof," and an issue of fact will not be determined to exist based solely on surmise, conjecture or suspicions not supported by the admissible evidence. (*Shapiro v. Health Ins. Plan of Greater New York*, 7 N.Y.2d 56 [1959]).

As collateral estoppel does not apply in this instance, and as plaintiff has failed to properly plead his cause of action for defamation and has adduced no evidence to raise an issue of fact as to the "the time, maimer and persons to whom the publication was made," (*Dillon v City of New York, supra; Geddes v Princess Properties International, Ltd., supra*), the defendants are entitled to summary judgment dismissing this cause of action.

Violation of New York City Charter §§ 803 and 805

Defendants seek summary judgment dismissing plaintiffs claim that they violated the New York City Charter §§ 803 and 805 by "leaking" the DOI's report to the public and to media sources. Section 803 enumerates the powers and duties of the commissioner of the DOI. Section 803(c) provides, *inter alia,* "For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any."[FN4] Section 805 governs the conduct of investigations, and authorizes the DOI to compel attendance of witnesses, administer oaths, and examine witnesses, in association with an investigation or a hearing.[FN5] Plaintiff alleges in his complaint that, by publicly disseminating the DOI report, defendants violated a duty imposed by NYC Charter §§ 803 and 805 to keep the report confidential. Defendants move for summary judgment on the basis that neither section of the NYC Charter imposes a duty on it to keep its reports confidential, nor does either section provide for a private right of action to enforce their provisions.

FN4. NYC Charter § 803, "Powers and duties", provides:
a. The commissioner shall make any investigation directed by the mayor or the council,

b. The commissioner is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency.

c. For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any. In the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall also forward a copy of his written report or statement of findings to the appropriate prosecuting attorney, or, in the event the matter investigated involves or may involve a conflict of interest or unethical conduct, to the board of ethics.

d. The jurisdiction of the commissioner shall extend to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or any agency of the city.

e. The commissioner shall forward to the council and to the mayor a copy of all reports and standards prepared by the corruption prevention and management review bureau, upon issuance by the commissioner.

FN5. NYC Charter § 805, "Conduct of investigations", states:
a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter,

> the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary.
>
> b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearing, receive evidence and preside at or conduct any such study or investigation.

Nothing on the face of either § 803 or § 805 imposes a duty upon the DOI to ensure the confidentiality of its final investigation reports.[FN6] Plaintiff argues, however, that case law supports his claim that there is a duty to protect the contents of such report from being made public. Although there is some case law finding that the DOI's investigatory materials and reports are "not open for public inspection," (*Blaikie v. Borden Co.*, 47 Misc.2d 180, 262 N.Y.S.2d 8 [Sup Ct, New York 1965]), such cases were issued prior to the enactment of New York's modem Freedom of Information Law (Public Officers Law § 84 et seq., eff. January 1, 1978) ("FOIL"). The modern FOIL dramatically altered the responsibilities of government for making documents available for public inspection when it was enacted in 1977. As the court in *Sheehan v City of Binghamton*, (59 A.D.2d 808 [3rd Dept 1977]), made clear, while the earlier FOIL law enumerated only nine categories of documents required to be made available for public inspection, thereby limiting public access, the 1977 enactment provides that "[e]ach agency shall make available for public inspection and copying *all records,* except" those records falling under a limited number of exemptions. (Emphasis added.).

> FN6. Although plaintiff refers to the defendants collectively in his papers, as mentioned above, the defendants are not all under the same legal obligations nor are they protected by the same privileges or immunities. As plaintiff, i his opposition, does not make the argument that the non-DOI defendants had a duty to keep the report confidential pursuant to the NYC Charter, the Court addresses only the DOI's obligations under those provisions.

That the DOI is an agency subject to the provisions of New York's FOIL law is undisputable. The New York Department of State Committee for Open Government regularly issues advisory opinions regarding agencies' obligations under FOIL and has concluded, *inter alia,* that unless exempted under FOIL, the DOI must reveal the names of DOI employees who conducted an investigation once it has concluded (FOIL-AO-9399), communications between the DOI and the Department of State are subject to disclosure (FOIL-AO-4766), "closing memoranda" prepared by the DOI as a result of an investigation are presumptively accessible to the public (FOIL-AO-9399), and the DOI must disclose all written documents, including reports and memoranda if sought pursuant to a FOIL request (FOIL-AO-3656). As such, not only is plaintiff mistaken in his claim that the DOI has a duty to him to ensure the confidentiality of its investigative reports, but, as a matter of law, the DOI is obligated to make available for public inspection all documents not specifically exempted under FOIL. Accordingly, as defendants have sufficiently demonstrated that, as a matter of law, the DOI owes plaintiff no duty of confidentiality, and plaintiff has failed to raise an issue of fact requiring trial, defendants are entitled to summary judgment on this cause of action.

Tortious Interference with Employment/Prospective Business Relations

Plaintiff's final cause of action alleges that defendants maliciously and wrongfully interfered with plaintiff's employment and profession through the illegal and wrongful public dissemination of the DOI report, which plaintiff contends was false and known to be false by defendants. Specifically, plaintiff alleges that he was in discussions with the MTA for a position as Pension Manager, a position he claims he could not obtain after the public dissemination of the DOI report. In November 2004, prior to the DOI report being issued, plaintiff met with two individuals from the MTA about the position, but states in his affidavit that he decided not to pursue the job because "it was clear that they were not contemplat-

ing a salary akin to that which I was receiving at NYCERS." On March 11, 2005, after meeting with the Board of Trustees on March 10, plaintiff contacted the MTA and discovered that the position was still open. When plaintiff expressed his continued interest in the job, he was told to send his resume, which he did. There was no communication between plaintiff and the MTA between the time he sent his resume and the time stories about him began appearing in the media. Plaintiff submits the EBT testimony of his brother, Martin Murphy, in support of his contention that he lost the MTA opportunity as a result of the DOI report becoming public. Martin Murphy testified to statements made to him by an employee of the MTA, which plaintiff claims can be "inferred" to mean the MTA decided not to pursue his application because of his recent "notoriety". However, such statements are hearsay evidence and not admissible. After the media reports came out, however, plaintiff claims his calls weren't returned and a follow-up letter was not responded to. Plaintiff further states that, despite sending out hundreds of resumes, even for entry-level positions, he has been unable to secure employment.

To establish a claim of tortious interference with prospective economic advantage, "plaintiff must demonstrate that the defendant's interference with [his] prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." (*Snyder v. Sony' Music Entertainment, Inc.*, 252 A.D.2d 294 [1st Dept 1999], quoting *Glen Cove Assocs. V. North Short Univ. Hosp.*, 240 A.D.2d 701, 702, 659 N.Y.S.2d 316 [2d Dept 1997], *lv, denied* 91 N.Y.2d 801 [1997]). " 'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure....." (*Id.* at 300, 666 N.Y.S.2d 563, 689 N.E.2d 533).

Plaintiff argues that defendants' interference was accomplished through allegedly defamatory publication of the DOI report, and offers no evidence of any other tortious means by which defendants interfered with his prospective business relations. However, as defendants have established as a matter of law, through submission of admissible evidence, that plaintiff cannot establish a cause of action for defamation and plaintiff failed to raise a triable issue of fact, plaintiff can point to no "wrongful means" by which defendants interfered. (See *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d at 300, 684 N.Y.S.2d 235). Likewise, while plaintiff alleges that he was unable to secure a position with the MTA after the DOI investigation became public, he has failed to submit admissible evidence that "but for" the defendants' actions, he would have secured the position. (*Snyder v Sony Music Entertainment, Inc., id.*). The fact that plaintiff had submitted his resume to the MTA and that they had expressed some level of interest in the past, is not sufficient to satisfy plaintiffs burden of raising a triable issue of fact to defeat defendants' motion for summary judgment.

This Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is;

ORDERED that this motion by defendants the City of New York, the Board of Trustees of the New York City Employees Retirement System, Martha Stark, Department of Investigation, and Vincent E. Green, is granted; it is further

ORDERED that, upon service of this decision and order, with notice of entry, the Clerk of the Court is directed enter judgment in favor of defendants; it is further

ORDERED that movant serve a copy of this decision and order, together with notice of entry, upon all parties, and upon the Clerk of the Court (60 Centre Street), the Clerk of the Trial Support Office (60 Centre Street), and the Clerk of the DCM Part (80 Centre Street)

The foregoing constitutes the decision and order of this court.

Dated: July 2, 2008

ENTER:

<<signature>>

Hon. Karen S. Smith, J.S.C.

Murphy v. City of New York
2008 WL 2789093 (N.Y.Sup.) (Trial Order)

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Supreme Court, New York.
New York County
Jesse WILLMS, an individual, and 1021018 Alberta Ltd., a numbered Alberta, Canada corporation, d/b/a Just Think Media, Plaintiffs,
v.
CTVGLOBEMEDIA, INC., an Ontario, Canada Corporation, and Does 1 through 10, inclusive, Defendants.
No. 111988/10.
June 22, 2011.

West Headnotes
Courts 106 ⚖13.5(9)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.5 Particular Contexts and Causes of Action
106k13.5(9) k. Defamation. Most Cited Cases
Canadian television company was not subject to jurisdiction in New York under the "transaction of business" provision of the New York long-arm jurisdiction statute based on company producing and airing a news story, which focused on plaintiffs' allegedly questionable business practices, that was available on the internet and company reporter visiting New York for one day to conduct two interviews; the one-day visit to New York made by reporter, in which two persons were interviewed, one of whom was not even New York based, presented an insufficient ground upon which to base long-arm jurisdiction, and the fact that the broadcast was available on the internet did not subject company to jurisdiction in state. McKinney's CPLR 302(a) (1).

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

Emily Jane Goodman, Judge.
[illegible text] this motion to/for _

PAPERS NUMBERED

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

Cross-Motion: X Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and [illegible text] decided for attached

Dated: 6/16/11

<<signature>>

J.S.C.

Emily Jane Goodman, J.S.C.:

In this defamation action, defendant CTVglobemedia, Inc., an Ontario, Canada corporation (CTV)[FN1] moves to dismiss the complaint pursuant to CPLR 3211 (a) (8) and 327,[FN2] for lack of long-arm jurisdiction and on the ground of forum non conveniens. Plaintiffs Jesse Willms (Willms) and 1021018 Alberta Ltd., a numbered Alberta, Canada Corporation d/b/a Just Think Media, cross-move to amend the complaint to bring the action against CTV Inc. (CTV Inc.), a subsidiary of CTV.

FN1. None of the Doe defendants has been identified.

FN2. The notice of motion cites to CPLR 3211 (a) (7) and 3211 (c) as well, but no grounds are raised to advance arguments under these sections.

I. Background

CTV, a Canadian corporation, "amalgamated" under the laws of Canada (Pearce Aff, ¶ 4), is Canada's largest privately owned television network, operating 27 television stations in Canada, with interests in 30 cable channels, also in Canada. Both CTV and CTV Inc. have their principal places of business in Ontario, Canada.

Plaintiffs bring this action alleging defamation, trade libel and tortious interference with prospective economic advantage arising from the broadcast, and resulting internet availability, of a news program created by CTV Inc.'s news show *W5*, which focused on plaintiffs' allegedly questionable business practices, and the attention plaintiffs were receiving from Canadian authorities as a result of plaintiffs' allegedly unsavory actions.

For the program, *W5* reporter Paula Todd (Todd) traveled to plaintiffs' offices in Alberta, Canada, in a failed attempt to interview Willms. Todd interviewed a member of the Canadian Mounted Police Anti-Fraud Center in North Bay, Ontario. She interviewed seven of plaintiffs' customers worldwide, via webcam, including one in New York, all who claimed to have been deceived by CTV.

Todd also traveled to New York for one day to interview two parties suing CTV, Dr. Mehmet Oz, suing over an allegedly false endorsement, and Roger FeFevre, the CEO of a Utah company, who happened to have been in New York that day. At least one other interview, that of a Californian party, was part of the broadcast.

Plaintiffs claim that they have been grievously wronged by the broadcast, which they claim is "nothing more than a piece of lurid sensationalism masquerading as journalism" (Memorandum in Opp., at 1), and that the broadcast has caused them to lose many customers and prospective customers.

CTV argues that this court lacks jurisdiction over it, as there is a lack of sufficient nexus between CTV's actions and the State of New York. Regardless of the question of jurisdiction, CTV claims that the action should be dismissed under the doctrine of forum non conveniens, arguing that this is an action which should be brought, if anywhere, in Canada.

II. Discussion

A. Long-Arm Jurisdiction

Jurisdiction is a threshold issue (*Elm Management Corp. v. Sprung*, 33 A.D.3d 753, 823 N.Y.S.2d 187 [2d Dept 2006])

which must be resolved before a forum non conveniens argument many be entertained. *Wyser-Pratte Management Co., Inc. v. Babcock Borsig AG*, 23 A.D.3d 269, 808 N.Y.S.2d 3 (1st Dept 2005); *see also Edelman v. Taittinger, S.A.*, 298 A.D.2d 301, 751 N.Y.S.2d 171 (1st Dept 2002).

Proving jurisdiction rests on the plaintiffs. *Stardust Dance Productions, Ltd. v. Cruise Group International, Inc.*, 63 A.D.3d 1262, 881 N.Y.S.2d 192 (3d Dept 2009); *Copp v. Ramirez*, 62 A.D.3d 23, 874 N.Y.S.2d 52 (1st Dept 2009). Initially, jurisdiction is not available to plaintiffs based on either CPLR 302 (a) (2) or (3), by virtue of the language of these sections, which specifically except defamation actions. *See Pontarelli v. Shapero*, 231 A.D.2d 407, 647 N.Y.S.2d 185 (1st Dept 1996). CPLR 302 (a) (1), however, provides that:
[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non domiciliary ... who in person or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state ...

"Essential to the maintenance of this action ... are some purposeful activities within the State and a substantial relationship between those activities and the transaction out of which the action arose [internal quotation marks and citation omitted]." *Talbot v. Johnson Newspaper Corporation*, 71 N.Y.2d 827, 829, 527 N.Y.S.2d 729, 522 N.E.2d 1027 (1988). There must be a showing of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York][internal quotation marks and citation omitted]." *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508, 851 N.Y.S.2d 381, 881 N.E.2d 830 (2007). That is, there must be a "nexus" between the "purposeful" business activities and the defamation alleged. *Talbot v. Johnson Newspaper Corporation*, 71 N.Y.2d at 829, 527 N.Y.S.2d 729, 522 N.E.2d 1027; *see also Pontarelli v. Shapero*, 231 A.D.2d at 410, 647 N.Y.S.2d 185 (transaction of business in the State must bear "a substantial relationship to the subject matter of the lawsuit ...").

Both prongs of the statute must be met before jurisdiction can be found. See *also Johnson v. Ward*, 4 N.Y.3d 516, 797 N.Y.S.2d 33, 829 N.E.2d 1201 (2005); *Copp v. Ramirez*, 62 A.D.3d 23, 874 N.Y.S.2d 52, *supra*. By so acting, the defendant, "invok[es] the benefits and protection of [our] laws [internal quotation marks anc citation omitted]." *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d at 508, 851 N.Y.S.2d 381, 881 N.E.2d 830. Whether a court can find jurisdiction over a non-domiciliary "requires consideration of the totality of the circumstances." *SPCA of Upstate New York, Inc. v. American Working Collie Association*, 74 A.D.3d 1464, 1465, 903 N.Y.S.2d 562 (3d Dept 2010), citing *Wimmer Canada v. Abele Tractor & Equipment Company*, 299 A.D.2d 47, 49-50, 750 N.Y.S.2d 331 (3d Dept 2002). And, as noted in *SPCA of Upstate New York, Inc.*, "New York courts construe transacts any business within the state more narrowly in defamation cases than they do in the context of other sorts of litigation [interior quotation marks and citation omitted]." *Id.* at 1465, 903 N.Y.S.2d 562; *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2d Cir.2007). The courts' concerns with long-arm jurisdiction in defamation cases are "grounded in 'an intent to avoid unnecessary inhibitions on freedom of speech or the press.' " *SPCA of Upstate New York, Inc. v. American Working Collie Association*, 74 A.D.3d at 1466, 903 N.Y.S.2d 562, quoting *Kim v. Dvorak*, 230 A.D.2d 286, 290, 658 N.Y.S.2d 502 (3d Dept 2007). The broadcast in issue was created in Canada, by Canadian parties about a Canadian company and its Canadian owner. The "purposeful activities" allegedly conducted within this State by defendant are the single one-day visit in which Todd interviewed two persons in New York, and the fact that the broadcast is available over the internet throughout the world, including New York. There is note that *W5's* broadcast can be heard in Buffalo, New York, due to the proximity of that part of this State to Canada. Plaintiffs also claim that CTV's broadcasts are available on cable in New York, a claim CTV denies.

Plaintiffs make much ado of Todd's single visit to New York, by speculating about possible hotel stays, restaurant meals, even hairdressing and makeup appointments which may have been involved, apparently intending to inflate the purposeful nature of the one-day visit. While this approach is creative, the court is not convinced that the incidental trappings of a visit to the State can transform one in-state visit into more "purposeful" action, and certainly, no discovery on these de-

tails is necessary.

Plaintiffs rely on two cases to establish that CTV' contacts with New York are sufficient to establish a significant nexus with the subject matter of the action. However, both *Davis v Costa-Gavras* (595 F.Supp. 982 [SD NY 1984]) (which involved the dissemination of a book and movie) and *Montgomery v Minarcin* (263 A.D.2d 665, 693 N.Y.S.2d 293 [2d Dept 1999])(which involved a broadcast) involve situations where it is unquestionable that substantial parts of the writing and production of the allegedly defamatory material were conducted in this State. *See also Legros v. Irving,* 38 A.D.2d 53, 56, 327 N.Y.S.2d 371 (1st Dept 1971)(jurisdiction found where "virtually all the work attendant upon publication ... occurred in New York"). Such is not the case here.

In *SPCA of Upstate New York, Inc. v American Working Collie Association* (74 A.D.3d 1464, 903 N.Y.S.2d 562, *supra*), plaintiff sought to base jurisdiction against the Vermont-based defendant for allegedly defamatory remarks made in Vermont, which were then broadcast on a website. Jurisdiction was claimed to be had based on three phone calls defendant had made to New York, along with two short visits, as well as the website. The Court found that "we are unpersuaded that extending jurisdiction on these facts would be consistent with this state's narrow approach to long-arm jurisdiction in defamation cases." *Id.* at 1466, 903 N.Y.S.2d 562.

In the present case, the court finds that the one-day visit to New York made by Todd, in which two persons were interviewed, one of whom was not even New York based, presents an insufficient ground upon which to base long-arm jurisdiction, even though the interviews made up three minutes of a 22-minute broadcast, out of what CTV claims were scores of witness complaints. As such, CTV did not "purposely avail [itself] of the privilege of conducting activities within New York and thereby invok[ing] the benefits and protections of its laws ... [internal quotation marks and citations omitted]." *Davis v. Costa-Gavras,* 595 F.Supp. at 986.

The fact that the broadcasts were available on the internet is nonavailing. "[T]he mere maintenance of a web site in a distant state that was visited by people in New York [does] not subject the defendant to jurisdiction in New York." *National Football League v. Miller,* 2000 WL 335566 *2 , 2000 US LEXIS 3929 *3-4 (S.D.N.Y.2000). Further
the "single act" of uttering a defamation, no matter how loudly, is not a "transact[ion of] business" that may provide the foundation for personal jurisdiction. In other words, when the defamatory publication itself constitutes the alleged "transact[ion of] business" for the purposes of section 301 (a) (1), more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it.

Best Van Lines, Inc. v. Walker, 490 F.3d at 248; see *also SPCA of Upstate New York, Inc. v. American Working Collie Association,* 74 A.D.3d at 1466, 903 N.Y.S.2d 562 (while allegedly defamatory statements placed on website for persons located throughout the country, "with no effort to direct the comments toward a New York audience," no long-arm jurisdiction arises); *see also Gary Null & Associates, Inc. v. Phillips,* 29 Misc.3d 245, 251, 906 N.Y.S.2d 449 (Sup Ct, New York County 2010)(postings on website not "specifically targeted to New York viewers," but to a "nationwide audience" not sufficient basis for long-arm jurisdiction). Thus, here, the broadcast itself, the "act" of defamation, is not, as plaintiffs claim, a transaction of business in the State.

Plaintiffs rely on a line of cases discussing non-defamation actions in which an "interactive" website is ground for long-arm jurisdiction, because business is actively pursued therein (*see e.g. Baggs v. Little League Baseball, Inc.,* 17 Misc.3d 212, 215, 840 N.Y.S.2d 529 [Sup Ct, Richmond County 2007]), with "passive" sites which cannot confer jurisdiction. *See e.g. Grimaldi v. Guinn,* 72 A.D.3d 37, 48, 895 N.Y.S.2d 156 (2d Dept 2010). Plaintiffs claim that CTV' website is "interactive" because visitors must push a button that says "play" in order to see the broadcast.

These cases do not involve defamation actions, or CPLR 302 (a) (1). They are concerned with the transaction of sales via

the internet as grounds to confer jurisdiction in cases where products were the cause of injury to plaintiffs. These cases have no value to the present discussion, and plaintiffs' suggestion that making people push "play" before viewing the broadcast is enough in-state contact to confer jurisdiction on CTV is not persuasive. In sum, plaintiffs have failed to prove that they have personal jurisdiction over the defendant in this action, and the action must be dismissed. This court finds that the other causes of action in the complaint, for trade libel and tortious interference with prospective economic advantage, are both completely dependant on the cause of action for defamation, and so, must also be dismissed.

B. Forum Non Conveniens

Even had jurisdiction been found, the action would be dismissed on the ground of forum non conveniens. *See Sarfaty v. Rainbow Helicopters, Inc.*, 221 A.D.2d 618, 634 N.Y.S.2d 164 (2d Dept 1995)(a discussion of forum non conveniens presumes jurisdiction). The burden to show that an action should be dismissed on the ground of forum non conveniens rests on the defendant. *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 810 N.Y.S.2d 172 (1st Dept 2006).

"Founded upon the equitable principles of justice, fairness and convenience, the common-law doctrine of forum non conveniens, as codified in CPLR 327, is a highly flexible concept whereby a court, after considering and balancing certain competing factors, may entertain or decline to entertain jurisdiction over an action." *Intertec Contracting A/S v. Turner Steiner International, S.A.*, 6 A.D.3d 1, 4, 774 N.Y.S.2d 14 (1st Dept 2004), citing to *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert denied* 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985). "Among the factors the court must weigh are 'the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling.' " *Salzstein v. Salzstein*, 70 A.D.3d 806, 807, 894 N.Y.S.2d 510 (2d Dept 2010), quoting *Prestige Brands, Inc. v. Hogan & Hartson, LLP*, 65 A.D.3d 1028, 1029, 885 N.Y.S.2d 501 (2d Dept 2009). "[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York [interior quotation marks and citations omitted]." *Shin-Etsu Chemical Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 176, 777 N.Y.S.2d 69 (1st Dept 2004).

This action has no substantial nexus to this State. All of the actors, including CTV, are Canadian, most of the witnesses and documents are in Canada, and Canada is a perfect and natural forum for the resolution of this matter. Plaintiffs argue that it is a shorter distance from Toronto, Ontario, where CTV is located, to New York, to Edmonton, Alberta, where, presumably, the action would be tried, nullifying the problem of the convenience of witnesses. However, CTV claims to have a corporate presence in Edmonton, if that is where the action is filed, and so, convenience is assured. This discussion is of no matter. The entirety of the factors raised show that the nexus to New York is attenuated, not substantial, and CTV should not be required to cross national lines just to litigate a matter which would better be brought elsewhere. Therefore, the action would be dismissible on the ground of forum non conveniens, even were there jurisdiction over the CTV.

C. Cross Motion to Amend Complaint to Add CTV Inc.

This cross motion is denied as moot. Although leave to amend should be freely given in the absence of prejudice (*Vue Management, Inc. v. Photo Associates*, 81 A.D.3d 569, 917 N.Y.S.2d 569 [1st Dept 2011]), and the addition of CTV Inc. to this action would be reasonable, amendment to add CTV Inc. would require a directive to serve this party to add them to the action within a certain amount of time, in a manner comporting with the CPLR. Such a directive would be impracticable, as the action is being dismissed.

III. Conclusion

Plaintiffs have failed to prove that this court has personal jurisdiction over the CTV, requiring the dismissal of the action. Even were jurisdiction to exist, the action should be dismissed on the ground of forum non conveniens.

Accordingly, the motion to dismiss the complaint brought by defendant CTVglobemedia, Inc. is granted, and the complaint is hereby dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion is denied as moot.

Dated: June 16, 2011

ENTER:

<<signature>>

J.S.C.

Willms v. CTVglobemedia, Inc.
2011 WL 2941336 (N.Y.Sup.) (Trial Order)

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AFFIDAVIT OF SERVICE

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

I, MEGAN DUFFY, being sworn, say: I am not a party to the action, am over 18 years of age and reside in New York, New York. On June 8, 2012, I caused to be served the annexed MEMORANDUM OF LAW IN FURTHER SUPPORT OF O'HALLERAN DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION TO FURTHER AMEND THE COMPLAINT on the following and placing copies thereof in envelopes with sufficient postage into an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to:

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Attorney for Defendant CL Washington, Inc., Creative Loafing, Inc. and Rend Smith

Sworn to before me this
8th day of June, 2012

Notary Public

LORETTA E. PERRY
NOTARY PUBLIC, State of New York
No. 24-4931617
Qualified in Kings County
Commission Expires August 1, 2014

Megan Duffy