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

JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.,	:	Index No. 105573/2011
Plaintiffs,	:	
- against -	:	
THE WASHINGTON POST, *et al.*,	:	
Defendants.	:	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY THE AMERICAN BAR ASSOCIATION, ABAJOURNAL.COM, DEBRA CASSENS WEISS, AND SARAH RANDAG TO DISMISS THE AMENDED COMPLAINT

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Defendants the American Bar Association ("ABA"), abajournal.com,[1] Debra Cassens Weiss, and Sarah Randag (the "ABA Defendants") respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(7).

PRELIMINARY STATEMENT

Plaintiffs, attorney Joseph Rakofsky and his law practice, name approximately eighty defendants in their Amended Complaint, each of which published print or web-based articles or commentary concerning Mr. Rakofsky's defense of a felony murder trial that began in late March 2011 and ended a few days later in a mistrial. Although plaintiffs dispute the reason why the judge declared the mistrial, they claim that the judge "slandered RAKOFSKY's knowledge of courtroom procedure," Am. Cmplt. at ¶ 117;[2] admit that the judge stated that "he was 'astonished' at RAKOFSKY's willingness to represent a person charged with murder and at his (Rakofsky's) 'not having a good grasp of legal procedures,'" *id*. at ¶ 118; and admit that the judge referred to an email from Mr. Rakofsky that "raises ethical issues," *id*. at ¶ 128. Plaintiffs also admit that a journalist from *The Washington Post* was in the courtroom, *id*. at ¶118; and admit that the paper published its article ("*The Washington Post* Article") on the proceedings on its Internet website on April 1, 2011, *id*. at ¶132.

Given the gravity of the events – even as plaintiffs describe them in their Amended Complaint – that occurred during a judicial proceeding and within an area of legitimate public concern, many legal news organizations and legal blogs picked up *The Washington Post* Article.

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[1] In the Amended Complaint, plaintiffs refer to abajounal.com as "ABAJOURNAL.COM" and "ABA JOURNAL." abajournal.com is not a legal entity; it is a web address that the ABA owns and uses to publish an online legal blog. March 29, 2012 Affidavit of Patricia J. Larson, ¶¶ 2-3. Because "abajournal.com" lacks any legal existence, it is neither subject to judicial process nor a proper defendant in this case, and dismissal as to this "defendant" is warranted. *See*, *e.g.*, *Westside Fed. Sav. & Loan Ass'n of New York City v. Fitzgerald*, 524 N.Y.S.2d 54 (2d Dep't 1988) (dismissing action because party did not exist as legal entity).

[2] A copy of the Amended Complaint ("Am. Cmplt.") is attached as Exhibit 1 to the March 30, 2012 Affirmation of Jennifer L. Jones ("Jones Aff.")

Based on two such articles that were published on defendant ABA's online journal, abajournal.com, plaintiffs assert claims against the ABA Defendants for defamation, intentional infliction of emotional distress, intentional interference with a contract, and improper use of Mr. Rakofsky's name for purposes of trade. Each of these claims, however, must fail. First, the factual allegations that are asserted against the ABA Defendants are inconsistent with admissions made by the plaintiffs in the Amended Complaint itself, as well as the transcript of the proceeding that plaintiffs reference in their Amended Complaint. Second, the articles were absolutely privileged under New York Civil Rights Law Section 74, and moreover, the ABA Defendants are entitled to a qualified privilege as republishers. Third, plaintiffs have not, and cannot, assert facts that might support the elements of any of their claims. Accordingly, the ABA Defendants request that plaintiffs' Amended Complaint be dismissed with prejudice as to them.

STATEMENT OF FACTS

The facts as alleged in plaintiffs' Amended Complaint and as set out in the documents to which plaintiffs refer in their claims against the ABA Defendants are as follows:[3] plaintiff Joseph Rakofsky is a New Jersey-licensed attorney. Am. Cmplt. ¶¶ 85-86. Less than a year after Mr. Rakofsky graduated from law school, he agreed to represent an individual indicted on felony murder charges in the District of Columbia. *Id*. ¶¶ 85, 88-89. The trial commenced at the end of March 2011 before Judge William Jackson. *Id*. ¶¶ 100-02. Following Mr. Rakofsky's opening statement, Judge Jackson conducted an *ex parte* "conversation" with the defendant and inquired

[3] On a motion to dismiss, this Court may consider documentary evidence referenced in a complaint, even if it is not attached thereto. *Pullman Group, LLC v. Prudential Ins. Co.*, 733 N.Y.S.2d 1, 2 (1st Dep't 2001). Further, in a defamation action, courts compare the allegedly defamatory statement with the "precise truth," *see Cholowsky v. Civiletti*, 887 N.Y.S.2d 592, 596 (2d Dep't 2009), and evaluate truthfulness in the context of the entire article, *see Miller v. Journal-News*, 620 N.Y.S.2d 500, 501 (2d Dep't 1995).

whether he wished to continue to be represented by Mr. Rakofsky. *Id*. ¶ 104. Judge Jackson "repeated the question" to the defendant on the following day but, each time, the defendant "unequivocally expressed his desire to continue to be represented by RAKOFSKY as his lead counsel." *Id*. During the testimony of a government confidential informant, the defendant passed written questions to Mr. Rakofsky. *Id*. ¶ 108. Mr. Rakofsky did not want to ask the questions and allegedly formed the belief that the resulting conflict with the defendant on whether to ask the questions required him to seek to withdraw as counsel. *Id*. ¶¶ 108-09. In arriving at this conclusion, Mr. Rakofsky considered that the inevitable mistrial would be beneficial to his client, in that Judge Jackson had formed a "blatant 'alliance'" with the prosecution, which had resulted in the "gutting" of Mr. Rakofsky's defense of his client. *Id*. ¶ 109. When Mr. Rakofsky moved to withdraw as counsel "on the grounds that the client's insistence on asking certain questions the client proposed caused a conflict between RAKOFSKY and the client," Judge Jackson reserved decision on his motion until the following day, April 1, 2011. *Id*. ¶¶ 112, 114.

At that proceeding ("the April 1 Proceeding"), plaintiffs allege that "[a]fter stating that RAKOFSKY's motion for withdrawal as lead counsel for the defendant was precipitated by a conflict with the defendant which the defendant confirmed, Judge Jackson next uttered several statements in open court that slandered RAKOFSKY's knowledge of courtroom procedure." *Id*. ¶ 117. Plaintiffs also allege that Judge Jackson knew that a reporter for *The Washington Post* was in the courtroom and "knowing full well that both news reporters and others would publish his slanderous and defamatory words, Judge Jackson . . . gratuitously published on the record . . . that he was 'astonished' at RAKOFSKY's willingness to represent a person charged with murder and at his (RAKOFSKY's) 'not having a good grasp of legal procedures.'" *Id*. ¶ 118.

Plaintiffs further allege that, *after* granting the withdrawal motion, Judge Jackson "referred to a 'motion' that had been submitted (but not formally filed) that very day by [an investigator], whom RAKOFSKY had previously discharged for incompetence." *Id*. ¶ 119. Plaintiffs also quote a portion of the transcript of the April 1 Proceeding, in which Judge Jackson stated: "There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues." *Id*. ¶ 128.

This investigator, plaintiffs allege, "sought to exploit, for the purpose of receiving compensation that was not due him, an email, which had been hastily typed by RAKOFSKY on a mobile device, that used an unfortunate choice of the word 'trick' . . . ." *Id*. ¶ 120. Plaintiffs allege that the investigator "knew only too well [that 'trick'] was a shorthand word that meant only that [the investigator] should underplay the fact that he worked for the defense . . . ." *Id*. Plaintiffs allege that this e-mail memorialized an earlier conversation, and that the intent was not for the investigator to get a non-witness to change anything she had already admitted, but rather, to repeat what she had already admitted, including that she had already told two lawyers and defendant's mother that she was not present during the shooting. *Id*.

Plaintiffs also allege that this investigator undertook to "blackmail" Mr. Rakofsky. *Id*. ¶ 122. However, neither the Amended Complaint nor the transcript of the April 1 Proceeding reflect that Mr. Rakofsky offered these explanations to the court. *See* Jones Aff., Ex. 2 (copy of the transcript of April 1 Proceeding). Instead, in their Amended Complaint, plaintiffs complain that Judge Jackson "refused to speak with RAKOFSKY in private," and that neither Judge Jackson nor *The Washington Post* reporter inquired about what actually occurred "because they refused to reasonably investigate the facts to learn the truth." Am. Cmplt. ¶ 133. Plaintiffs

admit, nevertheless, that when *The Washington Post* reporter asked Mr. Rakofsky in the hallway about the investigator, Mr. Rakofsky refused to comment. *Id*. ¶¶ 130-31.

Later that day, *The Washington Post* Article entitled "D.C. Superior Court judge declares mistrial over attorney's competence in murder case" was published online. *Id*. ¶ 137. *See also* March 29, 2012 Affidavit of Debra Cassens Weiss ("Weiss Aff."), Ex. 2 (copy of *The Washington Post* Article). As pertinent to plaintiffs' allegations against the ABA Defendants, *The Washington Post* Article included the following statements:

- "A D.C. Superior Court judge declared a mistrial Friday in a 2008 murder case and allowed the defendant to fire his New York-based attorney, who exhibited what the judge said were numerous signs that he lacked knowledge of proper trial procedure, including telling the jury during his opening statements that he had never tried a case before."
- "Judge William Jackson told attorney Joseph Rakofsky during a hearing Friday that he was 'astonished' at his performance and at his 'not having a good grasp of legal procedures' before dismissing him."
- "What angered Jackson even more was a filing he received early Friday from an investigator hired by Rakofsky in which the attorney told the investigator via an attached e-mail to 'trick' a government witness into testifying in court that she did not see his client at the murder scene."
- "The filing included an e-mail . . . , saying, 'Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting.'"

- "The judge . . . told Rakofsky that his performance in the trial was 'below what any reasonable person would expect in a murder trial.'"

The Washington Post Article spawned several online articles and commentary in legal blogs, including two articles published on abajournal.com (collectively, the "ABA Articles"). Am. Cmplt. ¶¶ 144, 145.

Specifically, on April 4, 2011, defendant Debra Cassens Weiss wrote an article entitled "'Astonished' Judge Declares Murder Mistrial Due to Defense Lawyer Who Never Tried a Case" (the "April 4 Article"). Am. Cmplt. ¶ 144; *see also* Weiss Aff., Ex. 1 (copy of April 4 Article). The article included a hyperlink to *The Washington Post* Article. Plaintiffs allege that the April 4 Article was defamatory because it included the following statement:

> The judge declared a mistrial after reviewing a court filing in which an investigator had claimed that Rakofsky fired him for refusing to carry out the lawyer's emailed suggestion to "trick" a witness, the story says. Rakofsky's suggestion allegedly read: "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting."

Am. Cmplt. ¶ 144. Plaintiffs assert that the April 4 Article "was and is a complete fabrication that is factually untrue in all respects." *Id.* Rather, plaintiffs insist:

> [T]he record is clear that RAKOFSKY moved to withdraw as lead counsel for the defendant because a conflict existed between him and his client and that the only action taken by Judge Jackson with respect to RAKOFSKY was to permit RAKOFSKY to withdraw as lead counsel for the defendant for reasons entirely unrelated to any claims of the "investigator" referred to by the ABA and its employees. At no time did Judge Jackson grant a mistrial after reviewing any "court filing in which an investigator had claimed Rakofsky fired him for refusing to carry out the lawyer's emailed suggestion to 'trick' a witness" as ABA, ABA JOURNAL, and WEISS maliciously published.

Id.

A second article, written by defendant Sarah Randag, was published on April 8, 2011 online at abajournal.com as part of a blog review, and was entitled, "Around the Blawgosphere:

Joseph Rakofsky Sound Off; Client Poachers; and the End of Blawg Review?" (the "April 8 Article"). Am. Cmplt. ¶ 145; *see also* March 29, 2012 Affidavit of Sarah Randag ("Randag Aff."), Ex. 1 (copy of April 8 Article). This article included summaries of articles and commentary from legal blogs, with hyperlinks to those blogs. It also included a hyperlink to the April 4 Article. Plaintiffs allege that the April 8 Article was defamatory because it included the following statement:

> If anything had the legal blogosphere going this week, it was Joseph Rakofsky, a relatively recent law grad whose poor trial performance as defense counsel in a murder trial prompted the judge to declare a mistrial last Friday.

Am. Cmplt. ¶ 145. Plaintiffs, however, assert that "the record is clear that RAKOFSKY moved to withdraw as lead counsel for his client and was so permitted, and that Judge Jackson granted RAKOFSKY's motion *solely* because RAKOFSKY moved for his own withdrawal because a conflict existed between him and his client. Judge Jackson never granted a mistrial based upon RAKOFSKY's trial performance, which was not 'poor.'" *Id*. (emphasis added).

Based on the April 4 and April 8 Articles, plaintiffs assert claims against the ABA Defendants for defamation, intentional infliction of emotional distress, tortious interference with contract, and violation of New York's right to privacy under Civil Rights Law Sections 50 and 51, allegedly for misappropriation of Mr. Rakofsky's name in the April 4 and April 8 Articles. Am. Cmplt. ¶¶ 195-216.

ARGUMENT

I. Because Plaintiffs' Claims Against the ABA Defendants Are Contradicted by the Amended Complaint and Documents Incorporated Therein, Plaintiffs Fail to State a Cause of Action Against the ABA Defendants and the Amended Complaint Should Be Dismissed with Prejudice As to Them.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to determine whether the complaint states a cause of action cognizable in law. *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 730 N.Y.S.2d 48, 54 (1st Dep't 2001) (modifying trial court order and directing dismissal of complaint in its entirety). Although the well-pleaded factual allegations are presumed to be true, bare legal conclusions and contradictory assertions of fact are not entitled to any weight. *Caniglia v. Chicago Tribune-New York News Syndicate*, 612 N.Y.S.2d 146, 147 (1st Dep't 1994) ("[A]llegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration."). Where the factual allegations of a complaint are contradicted by documentary evidence, the court looks to whether a plaintiff's claims remain viable, and not whether plaintiff has stated a claim. *See Ark Bryant Park Corp.,* 730 N.Y.S.2d at 54.

In the Amended Complaint, plaintiffs assert the ABA Defendants should be liable to them because, they claim, Judge Jackson declared a mistrial based solely on Mr. Rakofsky's request to withdraw. As to the April 4 Article, they state, "[T]he record is clear that . . . RAKOFSKY moved to withdraw . . . because a conflict existed between him and his client and that the only action taken by Judge Jackson . . .was to permit RAKOFSKY to withdraw . . . for reasons entirely unrelated to any claims of the "investigator" referred to by the ABA and its employees." As to the April 8 Article, they state, "[T]he record is clear that . . . Judge Jackson granted RAKOFSKY's motion solely because RAKOFSKY moved for his own withdrawal

because a conflict existed between him and his client. Judge Jackson never granted a mistrial based upon RAKOFSKY's trial performance, which was not 'poor.'" Am. Cmplt. ¶ 145.

Plaintiffs thus necessarily claim that the following facts, which plaintiffs themselves admit in the Amended Complaint, are irrelevant: during the April 1 Proceeding at which Judge Jackson granted Mr. Rakofsky's motion to withdraw, Judge Jackson stated on the record, *inter alia*, that he was "'astonished' at RAKOFSKY's willingness to represent a person charged with murder and at his (RAKOFSKY's) 'not having a good grasp of legal procedures,'" and that "[t]here's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues." Am Cmplt. ¶¶ 118, 128.

Moreover, plaintiffs' construction of the April 1 Proceeding is not consistent with the transcript of the proceedings itself. First, the transcript shows that Judge Jackson stated, "So I'm *going to grant* the motion," immediately *before* discussing the "trick" e-mail. Jones Aff., Ex. 2 (Transcript at 5, line 2) (emphasis added). The transcript also shows that Judge Jackson again stated, "So I'm *going to grant* the motion," *after* discussing the "trick" e-mail. *Id.* (Transcript at 5, line 20) (emphasis added). Moreover, Judge Jackson also stated, "So I am *going to grant* [defendant's] request for new counsel," *id*. (Transcript at 4, line 18), immediately *after* Judge Jackson made the following statement:

> It was apparent to the Court that there was a – not a good grasp of legal principles and legal procedure . . . that inured, I think, to the detriment of [the defendant]. 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. (Transcript at 4, lines 10-17). That is, Judge Jackson's several statements that he was *going* to grant the withdrawal request were intertwined with his discourse on many issues, including the "trick" e-mail and the quality of Mr. Rakofsky's performance as trial counsel.

Because the factual allegations of the Amended Complaint asserted against the ABA Defendants are contradicted either within the Amended Complaint itself or by the transcript of the April 1 Proceeding that is incorporated by reference into plaintiffs' pleading, the ABA Defendants assert that none of plaintiffs' claims against them can be maintained and each should be dismissed with prejudice.

A. Plaintiffs' Cause of Action for Defamation Also Fails Because the Statements in the ABA Articles Were Privileged.

1. The ABA Defendants' Statements Were Absolutely Privileged As a "Fair Report" of Judicial Proceedings.

The "fair report" privilege is codified in Section 74 of the New York Civil Rights Law, which provides in pertinent part:

> A civil action cannot be maintained against any person, firm or Corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

NY Civ. Rights § 74 (McKinney's 2011). The privilege afforded by Section 74 is "absolute" and is appropriate for resolution on a motion to dismiss. *GS Plasticos Limitada v. Bureau Veritas*, 922 N.Y.S.2d 365, 366-67 (1st Dep't 2011) (affirming dismissal of a defamation claim on the ground that it was protected by Section 74's absolute privilege); *Saleh v. New York Post*, 78 A.D.3d 1149, 1151 (2d Dep't 2010) (same).

The privilege applies when a two-part showing is made: first, that the publication is a comment on a judicial, legislative, or other official proceeding; and second, that the publication is "fair and true." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 (1979); *Saleh*, 78 A.D.3d at 1151 (2d Dep't 2010). For the publication "to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be

substantially accurate." *Holy Spirit*, 49 N.Y.2d at 67. Moreover, "[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," but rather, there must be "some degree of liberality." *Id*. at 68.

Both elements are plainly met here. First, the April 4 and 8 Articles reported on the presiding judge's comments at a murder trial, squarely meeting the definition of a "judicial proceeding." Second, the articles are "fair and true" because "the substance of the article[s]" is "substantially accurate." *Holy Spirit*, 49 N.Y.2d at 67. While plaintiffs assert that the ABA Articles are "factually untrue," *see* Am Cmplt. ¶ 144, because the sole reason why the presiding judge declared a mistrial was supposedly Mr. Rakofsky's request for withdrawal, plaintiffs themselves admit in the Amended Complaint that Judge Jackson also raised concerns regarding Mr. Rakofsky's poor performance and ethics. *Id*. ¶ 118 (alleging "that [the judge] was 'astonished' at RAKOFSKY's willingness to represent a person charged with murder and at his (RAKOFSKY's) 'not having a good grasp of legal procedures."); ¶ 128 (reciting the transcript where the judge notes that Mr. Rakofsky's email "raises ethical issues."); *see also* discussion in Part I, above. Therefore, even if it were inaccurate to report Judge Jackson's concerns as reasons for granting the mistrial – a point that the ABA Defendants dispute – such inaccuracy would not change the fact that the April 4 and 8 Articles fairly reported the substance of the judicial proceedings. Accordingly, the articles were absolutely privileged under Section 74 and plaintiffs' first cause of action for defamation as to the ABA Defendants should be dismissed with prejudice.

2. As Republishers, the ABA Defendants Were Qualifiedly Privileged to Rely on *The Washington Post*.

New York law has long recognized that in order to be liable for defamation of a private individual regarding a matter of public concern, the plaintiff must prove that a 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 (1975). Where, as here, the publisher has relied upon a prior publisher in making the statement, New York courts apply a broad privilege under which the republisher – here, the ABA Defendants – is entitled to "place its reliance upon the research of the original publisher" and is not responsible for the libelous publication "absent a showing that [it] 'had or should have had, substantial reasons to question the accuracy of the articles or the bonafides of [the] reporter.'" *Karaduman v. Newsday, Inc.*, 51 N.Y. 2d 531, 550 (1980) (citation omitted).

It is apparent from the faces of the April 4 and 8 Articles that the ABA, in publishing the ABA Articles, was acting as a republisher. For the April 4 Article, ABA Defendant Weiss relied solely on *The Washington Post* Article, and included a hyperlink to that article within the body of the April 4 article. *See* Weiss Aff., Ex. 1. For the April 8 Article, ABA Defendant Randag relied on *The Washington Post*, in placing a hyperlink back to the ABA's April 4 Article, and also summarized other blog articles that had picked up the story, placing hyperlinks to each of these blog articles. *See* Randag Aff., Ex. 1.[4]

Each of the ABA Articles therefore "alert[ed] its audience of the existence of the newspaper article without vouching for its veracity, quality of research, or the bona fides of the

[4] Specifically, ABA Defendant Randag summarized and placed hyperlinks to articles on the blogs JDs Rising, Koehler Law, Defending People, Criminal Defense, Simple Justice, Above the Law, Litigation & Trial, Blonde Justice, and Not Guilty. *See* Randag Aff. ¶¶ 3.a. – 3.m. & Exs. 2-15.

reporters." *Rivera v. NYP Holdings, Inc.*, 16 Misc. 3d 1121A, 847 N.Y.S.2d 904, 2007 N.Y. Misc. LEXIS 5684, at *11 (Sup. Ct. N.Y. Cty. Aug. 2, 2007) (dismissing defamation claim), *aff'd*, 56 A.D.3d 298 (1st Dep't 2008).

Further, there is no suggestion in the Amended Complaint that either Weiss or Randag had any reason to question the integrity of the reporters or bloggers they relied upon or to doubt the veracity of the statements in the articles. Accordingly, plaintiffs' first cause of action for defamation should be dismissed with prejudice because the ABA Defendants are entitled to New York's qualified privilege for republishers.

B. **Plaintiffs Have Not and Cannot Adequately Allege a Violation of NY Civil Rights Law §§ 50-51 Because the Newsworthiness Exception Applies.**

New York's narrow recognition of the common law right to privacy is codified at N.Y. Civil Rights Law § 50. *See also* Civil Rights Law § 51 (providing civil remedies for violation of § 50). New York courts have long held that the statute does not apply to publication of newsworthy events or matters of public interest. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 123 (1993) (reciting authority). Accordingly, a plaintiff whose name (or photograph) appears in a newspaper article must demonstrate that his identity "bore no real relationship to the article, or that the article was an advertisement in disguise." *Id*. at 124 (affirming dismissal of §§ 50-51 claims pursuant to CPLR 3211(7)).

The few paragraphs plaintiffs dedicate to their fourth cause of action (Am. Cmplt. ¶¶ 214-216) do not attempt to make this showing, while a review of the April 4 and 8 Articles (Weiss Aff., Ex. 1; Randag Aff., Ex. 1) demonstrates as a matter of law that plaintiffs cannot do so. There can be no question that the subject matter of the articles – the performance of an attorney at a public murder trial – was newsworthy and in the public interest. Indeed, given the sheer number of reporters and bloggers who find themselves now defendants in this case,

plaintiffs would be hard-pressed to deny it. As the subject of the story, Mr. Rakofsky cannot claim that his identity "bore no real relationship" to the April 4 and 8 Articles, or that the latter were mere "advertisements in disguise." *See Howell*, 81 N.Y.2d at 124.[5] Because plaintiffs cannot state a cause of action for violation of the New York Civil Rights Law §§ 50-51, plaintiffs' fourth cause of action as against the ABA Defendants should be dismissed with prejudice.

C. Plaintiffs Have Not and Cannot Adequately Allege a Claim for Intentional Infliction of Emotional Harm Because the ABA Defendants' Actions Fall Within the "Privileged-Conduct" Exception.

The New York Court of Appeals has recognized a "privileged-conduct" exception to the tort of intentional infliction of emotional harm, pursuant to which conduct, even if the actor knows it is likely to cause emotional distress, may be privileged if the actor is merely acting upon his legal rights in a permissible way. *Howell*, 81 N.Y.2d at 125-126. This exception applies to protect a newspaper's publication of newsworthy information. *Id*. In order to avoid application of the exception, a plaintiff must allege facts tending to show that the manner in which the newspaper conducted its newsgathering was sufficient to put it outside the protections of the privilege. *Id*. No such facts have been – or can be – alleged here.

Plaintiffs' second cause of action asserts that the ABA Defendants "engaged in intentional or reckless conduct, which was extreme and outrageous and exceeding all bounds acceptable in a civilized society." Am. Cmplt. ¶ 196. However, there is not one fact alleged that would tend to support this assertion. The sole act the ABA Defendants are alleged to have committed is the mere publishing of the April 4 and 8 Articles. Am. Cmplt. ¶¶ 144, 145. The Amended Complaint is entirely devoid of any allegation regarding the ABA Defendants'

[5] Although at issue in *Howell* was the use of plaintiff's photograph, not just his name, the case is even stronger here where only Mr. Rakofsky's name was used.

newsgathering methods, much less any actions that might possibly be construed to be "atrocious, indecent and utterly despicable conduct . . . ." *See Howell*, 81 N.Y.2d at 126 (affirming dismissal of complaint where the newsgathering methods alleged did not suggest the privilege had been abused). Accordingly, dismissal of plaintiffs' second cause of action with prejudice is appropriate.

D. Plaintiffs Have Not and Cannot Adequately Allege a Claim for Intentional Interference with Contract.

Plaintiffs' third cause of action is for "intentional interference with a contract," pursuant to which plaintiffs claim that defendants have interfered with plaintiffs' "existing and prospective contracts." Am. Cmplt. ¶ 213. Plaintiffs here attempt to plead two distinct causes of action – tortious interference with an existing contract and tortious interference with prospective business relations – but the Amended Complaint fails to state a cause of action under either theory.

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. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 (1956). Plaintiffs have failed to plead any facts to support their tortious interference with contract claim, and instead assert in conclusory fashion that "[plaintiffs] had valid business contracts with existing clients; however Defendants interfered with their ability to satisfy the terms of such contracts . . . ." Am. Cmplt. ¶¶ 209. Plaintiffs failure to allege (1) a single valid contract, (2) that the ABA Defendants had knowledge of such a contract, (3) that ABA Defendants intentionally and improperly acted to procure the breach of such a such contract, or (4) the damage allegedly

incurred by the plaintiffs as a result of such a breach, amounts to four pleading defects, each of which independently requires dismissal of the Amended Complaint.

Plaintiffs face an even greater hurdle in their attempt to plead a cause of action for tortious interference with *prospective* contracts. *See* Am. Cmplt. ¶¶ 209-12. As the New York Court of Appeals has repeatedly held, the protection accorded to a mere hope that a business relationship will be formed is lower than the protection accorded to valid, binding contracts, and the law therefore places a higher burden on a plaintiff who seeks to plead the former cause of action. *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980) ("[G]reater protection is accorded an interest in an existing contract . . . than to the less substantive, more speculative interest in a prospective relationship . . . ."); *NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 621 (1996) ("Where there has been no breach of an existing contract, but only interference with prospective contract rights, . . . plaintiff must show *more culpable conduct* on the part of the defendant.") (emphasis added). Specifically, to succeed on a claim for interference with prospective contracts, a plaintiff must also make a showing that defendant employed "wrongful means," which includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions and some degrees of economic pressure . . . ." *Guard-Life,* 50 N.Y.2d at 191. Such allegations, too, are entirely absent from the Amended Complaint.

Because plaintiffs have failed to set out any basis for their third cause of action, this claim must also fail and should be dismissed with prejudice.

CONCLUSION

For the reasons set forth above, the ABA Defendants respectfully request that this Court dismiss the Amended Complaint in its entirety with prejudice. The ABA Defendants also request that this Court enter such other and further relief as may be just and proper.

Dated: March 30, 2012
New York, NY

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