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.,	:	
Defendants.	:	

MEMORANDUM OF LAW
IN SUPPORT OF O'HALLERAN DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT

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TABLE OF CONTENTS

TOA GOES HERE

TABLE OF AUTHORITIES

Page(s)

CASES

*Unpublished opinions attached as Appendix A

*Unpublished opinions attached as Appendix A

*Unpublished opinions attached as Appendix A

*Unpublished opinions attached as Appendix A

*Unpublished opinions attached as Appendix A

STATUTES AND OTHER AUTHORITIES

*Unpublished opinions attached as Appendix A

Defendants Jeanne O'Halleran and The Law Office of Jeanne O'Halleran, LLC (incorrectly sued as "O'Halleran Law"), respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(1), (7) and (8), to dismiss the Amended Complaint (the "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 for an award of sanctions based upon the commencement of a frivolous action.

PRELIMINARY STATEMENT

This lawsuit is a misguided attempt by plaintiff Joseph Rakofsky to salvage his reputation after his inexperienced and inept handling of the murder trial of a client, Dontrell Deaner, led to a mistrial in Washington, D.C. Superior Court. In filing a libel suit against 81 defendants, Rakofsky lashes out against seemingly every publication or person who has ever described his role in the Deaner trial, from *The Washington Post*'s first-hand report to a stray comment by defendant Jeanne O'Halleran on a "hyperlocal" community website in Paulding County, Georgia. Mr. Rakofsky's efforts to sue a Georgia resident in New York based on an accurate post about the Deaner proceedings violate bedrock principles of jurisdiction, free speech and New York tort law, and they should be rejected.

Initially, there is no need for this Court even to address the merits of Mr. Rakofsky's claims, given the obvious lack of personal jurisdiction over Ms. O'Halleran and her law firm. O'Halleran resides in Georgia, representing clients from Georgia in Georgia court cases. She made the alleged comment about Rakofsky in Georgia, on a website targeted exclusively to her fellow Paulding County residents. Sanctions are manifestly appropriate for Rakofsky's assertion of claims in this Court against a non-domiciliary defendant so patently lacking the slightest connection to New York.

Moreover, even if the Court were to examine the merits, Rakofsky's Complaint fails to state any cognizable claim. Plaintiffs cannot base a defamation claim on O'Halleran's characterization of the Washington criminal trial, a fair and accurate report of judicial proceedings which is absolutely privileged under New York Civil Rights Law Section 74. Nor can Plaintiffs dress up this failed defamation claim in the garb of other torts. Plaintiffs have alleged ***no*** "outrageous" conduct to sustain an intentional infliction claim, ***no*** contract or business relationship on which to base a tortious interference claim and ***no*** reference to Rakofsky for advertising or trade purposes as required to state a commercial misappropriation claim under Sections 50 and 51 of the Civil Rights Law. Whether cast as libel claims or otherwise, Plaintiffs' claims fail.

O'Halleran and her law firm respectfully submit that the Court should dismiss each of plaintiffs' claims against them with prejudice, and impose sanctions on Plaintiffs for haling them into New York court without any conceivable jurisdictional basis.

STATEMENT OF FACTS[1]

The Parties

Plaintiff Joseph Rakofsky is a member of the New Jersey Bar who graduated from Touro Law Center in 2009. Amended Complaint ("Cplt.") attached to the Rosenfeld Affirmation ("Rosenfeld Aff.") as Ex. A ¶¶ 85-86. Rakofsky practices law through his New Jersey law firm, Plaintiff Rakofsky Law Firm ("RLF"). Cplt. ¶ 87. Rakofsky alleges that he is a resident of New York. Cplt. ¶ 1.

[1] Solely for purposes of this motion, the allegations in the complaint are assumed to be true. However, consideration of documentary evidence and the relevant jurisdictional facts is appropriate on a motion to dismiss. *See* CPLR § 3211(a)(1) (authorizing dismissal based on documentary evidence) and (a)(8) (authorizing dismissal based on lack of personal jurisdiction). For that reason the O'Halleran defendants submit herewith the Affirmation of James Rosenfeld ("Rosenfeld Aff.") (submitting certain documentary evidence) and the Affidavit of Jeanne O'Halleran ("O'Halleran Aff.") (providing jurisdictional facts).

Defendant Jeanne O'Halleran is an attorney admitted to the State Bar of Georgia and the sole principal of defendant The Law Office of Jeanne O'Halleran, LLC. Cplt. ¶¶ 74-75; O'Halleran Aff. ¶¶ 2-3. Ms. O'Halleran has resided in Georgia for her entire adult life. O'Halleran Aff. ¶ 4. Her law offices are located in the town of Dallas, in Paulding County, Georgia. She is not admitted to practice in any state other than Georgia and does not maintain an office in any other state. O'Halleran Aff. ¶ 3. Ms. O'Halleran handles a variety of civil and criminal matters in Georgia state and local courts. Her clients are natural persons who reside in or around Paulding County, Georgia, or businesses that conduct business in or around Paulding County, Georgia. O'Halleran Aff. ¶ 6. She has never represented a client from outside of Georgia, with the exception of one client from Illinois involved in a Georgia-based custody dispute. O'Halleran Aff. ¶ 7.

Ms. O'Halleran has no connection to New York. She has never practiced law in New York, represented any clients from New York, had an office or other place of business in New York, or traveled to New York in connection with her work as an attorney. O'Halleran Aff. ¶¶ 8, 10, 11, 12. She has never resided in New York, and has only visited the state about four times in her life, all on non-business-related vacations. O'Halleran Aff. ¶¶ 9, 10. Ms. O'Halleran has never owned or leased real property in New York or employed any individuals in New York, nor does she maintain any accounts in New York. O'Halleran Aff. ¶¶ 13-15.

The Deaner Criminal Trial

The dispute arises out of Mr. Rakofsky's representation of Dontrell Deaner, who was prosecuted for felony murder in an unrelated proceeding in Washington, D.C. Superior Court. Cplt. ¶ 88. Mr. Rakofsky took on the representation of Mr. Deaner approximately one year after graduating from law school and before he had ever tried a case, much less a serious felony criminal case. Cplt. ¶¶ 88-89. Because Mr. Rakofsky was not licensed to practice law in the

District of Columbia, he sought admission *pro hac vice* for the Deaner case and "associated himself" with Sherlock Grigsby, who was admitted to practice in D.C. Cplt. ¶¶ 93. Mr. Rakofsky also hired an investigator, Adrian Bean, to assist him in connection with the Deaner trial. Cplt. ¶ 90. Rosenfeld Aff., Ex D.

The Deaner case went to trial before Judge William Jackson. Judge Jackson appears to have been concerned about Mr. Rakofsky's competence to represent Mr. Deaner from very early on in the case. Following Rakofsky's opening statement, Judge Jackson summoned Mr. Deaner to the bench and "inquired of the defendant whether he wished to be continued to be represented by Rakofsky as his lead counsel." Cplt. ¶ 104. "On a subsequent occasion the following day, Judge Jackson repeated the question to the client." Cplt. ¶ 104.

On March 31, 2011, during the testimony of a prosecution witness, a disagreement allegedly arose between Mr. Rakofsky and Mr. Deaner. Cplt. ¶¶ 107-8. According to the Complaint, Mr. Deaner passed notes to Mr. Rakofsky suggesting questions he wanted Rakofsky to ask the witness, which Mr. Rakofsky thought would be harmful to ask. Cplt. ¶ 108. The Complaint alleges that Mr. Rakofsky "determined that the conflict with the client . . . required him to seek to withdraw as lead counsel for the client." Cplt. ¶ 109. Rakofsky also allegedly viewed this as a tactical opportunity for his client because a mistrial would help break the "blatant 'alliance' between Judge Jackson and the AUSA" and give subsequent defense counsel an upper hand in a second trial. Cplt. ¶ 109.

On March 31, Mr. Rakofsky orally requested permission from Judge Jackson to withdraw from the case on grounds of the alleged "conflict" between himself and Mr. Deaner. Cplt. ¶ 112. Judge Jackson resisted this request, stating, "We're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial." Cplt. ¶ 112. Nevertheless, Judge Jackson

summoned Mr. Deaner to the bench, and the Complaint alleges that Deaner "signified his agreement with Rakofsky's withdrawal." Cplt. ¶ 112. During Judge Jackson's exchange with Mr. Deaner, Mr. Deaner made clear that he wanted "another lawyer," Rosenfeld Aff., Ex. B, at 7, and Judge Jackson explained to Mr. Deaner that his request for new counsel would require granting a mistrial, waiver of his rights under the Double Jeopardy clause, and his continued detention until the new trial. See Rosenfeld Aff., Ex. B, at 11. During the March 31 hearing, Judge Jackson took note of the claimed conflict between Mr. Rakofsky and his client, but emphasized that the conflict was not a matter of manifest necessity requiring a mistrial (Cplt. ¶ 112) and deferred any ruling. Rosenfeled Aff, Ex. B, at 12.

The following day, Judge Jackson ruled on whether to grant a mistrial. As set forth in the Transcript from the April 1, 2011 hearing (Rosenfeld Aff., Ex. C), Judge Jackson began the hearing by inquiring of Mr. Deaner whether he "wanted a new lawyer." Rosenfeld Aff., Ex. C at 2-3. After receiving an affirmative response, Judge Jackson stated on the record, in open court, his reasons for granting a mistrial and allowing Mr. Deaner to obtain a new lawyer:

> I must say that even when I acquired [sic] of Mr. Deaner, I – as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some length for over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky – put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.
>
> It appeared to the court that there were theories out there – defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a – not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think to the detriment of Mr. Deaner. And had there been – if there had been a conviction in

> this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.[2]
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity [sic]. I believe that the performance was below what any reasonable person could expect in a murder trial.
>
> So I am going to grant the motion for new trial. And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an email in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation that by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.
>
> So that's where we are. And I'll figure out what to do about that case. But it just seems to me that – so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the – As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.
>
> So I'm going to grant the motion.

Rosenfeld Aff., Ex. C, at 3-5. Judge Jackson then addressed Rakofsky directly about the email attached to the investigator's motion: "There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises *ethical issues*." Rosenfeld Aff., Ex. C at 7 (emphasis added).

The investigator's motion referred to by Judge Jackson is attached as Exhibit D to the Rosenfeld Affirmation. In it, Mr. Rakofsky's former investigator, Mr. Bean, accuses Rakofsky of unethical behavior and attaches an email in which Mr. Rakofsky asked Mr. Bean to "trick" a

[2] D.C. Code § 23-110 provides a prisoner in custody with the right to move to vacate, set aside, or correct a sentence imposed "in violation of the Constitution of the United States or the laws of the District of Columbia." In this case, Judge Jackson was presumably referring to a violation of the Sixth Amendment based on ineffective assistance of counsel.

government witness. The motion also contains an investigative report from Mr. Bean to Messrs. Rakofsky and Grigsby, which states in relevant part:

> In an E-mail dated October 6, 2010, I was instructed by Mr. Rakofsky to perform the following services in connection with the case:
>
> **(A) "Trick Leigh (Old Lady)" Into Making Certain Admissions.** I was asked to get this prospective witness to say that she told two attorneys that: (1) she did not see the shooting; and (2) she did not provide the Government any information about the shooting. I respectfully decline to perform this assignment for several reasons: **(1) I do not know what the term, 'trick", means in this context; (2) I am in the investigative business, not the trickery business; (3) I will not risk exposing myself to obstruction of justice or conspiracy charges; and (4) the implication of such a request appear to [be] inherently unethical.**

Rosenfeld Aff., Ex. D, at 11 (emphasis in original). The Complaint admits that Rakofsky wrote this email and that his choice of the word "trick" was "unfortunate." Cplt. ¶ 120.

Coverage of and Commentary on the Deaner Trial

The Deaner trial received some press coverage and became a topic of on-line commentary. *The Washington Post* published an article entitled "D.C. Superior Court Judge declares mistrial over attorney's competence in murder case." (A copy of the *Washington Post* article is attached as Exhibit E to the Rosenfeld Affirmation.). The story described Judge Jackson's rationale for granting the mistrial and reported a number of Judge Jackson's critical statements about Mr. Rakofsky's inexperience and incompetence. The *Washington Post* article also reported that "[w]hat 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 email to "trick" a government witness." Rosenfeld Aff., Ex.E.

Subsequently, a variety of news outlets, bloggers, and lawyers published articles, blog posts, and commentary on the events described in the *Washington Post* article. On April 4, the

ABA Journal, a publication of the American Bar Association, published an article on its website entitled "'Astonished' Judge Declares Murder Mistrial Due to Defense Lawyer Who Never Tried a Case." Cplt. ¶ 144. (A copy of the *ABA Journal* article is attached to the Rosenfeld Aff. at Ex. F.)

On April 8, Ms. O'Halleran posted a short comment about and a link to the *ABA Journal* article on a forum section of Paulding.com, a hyperlocal news website operated out of Paulding County, Georgia, which publishes a mix of original content and user-generated commentary relating to news and events in Paulding County. O'Halleran Aff. ¶ 17. (A copy of Ms. O'Halleran's posting on Paulding.com is attached to the O'Halleran Aff. as Exhibit A.). In posting her comment on Paulding.com, Ms. O'Halleran was participating in what she considered to be a purely local conversation among local residents of Paulding County, Georgia, and she had no intention of reaching or speaking to a wider audience. O'Halleran Aff. ¶ 18. She did not learn that the plaintiff Joseph Rakofsky was a resident of New York State until the filing of this lawsuit. O'Halleran Aff. ¶ 19.

This Action

In the Complaint, Rakofsky and RLF sue 79 named defendants and two "John Does" for reporting on events that transpired on the record in open court. Plaintiffs assert claims for defamation, intentional infliction of emotional distress, tortious interference with contract, and violation of New York Civil Rights Law Sections 50 and 51.

The Complaint challenges only a single statement that appeared in Ms. O'Halleran's posting—specifically, that "A judge recently declared a mistrial in a murder case because of the defense attorney's incompetence. [sic]" Cplt. ¶ 189. The Complaint alleges that this statement from the posting is false because "the record is clear that RAKOFSKY requested that he be permitted to withdraw as counsel 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 and that no mistrial was ever granted by Judge Jackson, either in whole or in part, 'because of the defense attorney's incompetence, [*sic*]' . . . ." *Id.*

ARGUMENT

I.

THIS COURT HAS NO PERSONAL JURISDICTION OVER MS. O'HALLERAN OR HER LAW FIRM

As a threshold matter, Ms. O'Halleran and her law firm must be dismissed from this action because this Court lacks personal jurisdiction over them under New York law. Neither general nor specific jurisdiction can be asserted over Ms. O'Halleran in this case. The assertion in this Court of a claim against defendants who reside and work in Georgia, uttered their statements in Georgia and have no ties whatsoever to New York is frivolous as a matter of law and a needless waste of judicial resources, warranting sanctions.[3]

A. CPLR 301 Does Not Confer General Jurisdiction Over Ms. O'Halleran or Her Law Firm

First, Ms. O'Halleran is not doing business in New York at all, let alone continuously and systematically, so general jurisdiction does not exist.

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[3] 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. *Patane v. Brooks*, 164 A.D.2d 192, 562 N.Y.S.2d 1005 (3d Dep't 1990) (granting sanctions against plaintiff for bringing frivolous defamation and tort claims). In order to find the action to be frivolous, the court must rule that the action was commenced or continued in bad faith, either to delay or harass, or without any reasonable basis in law or fact. *See* CPLR 8303-a(c)(i) and (ii); *see also Entertainment Partners Group v. Davis*, 198 A.D.2d 63, 64, 603 N.Y.S.2d 439, 440 (1st Dep't 1993) (affirming award of $10,000 in costs and attorneys' fees as against the plaintiff to each of the individual defendants for bringing frivolous defamation claims). Once there is a finding of frivolousness, sanctions are mandatory, "especially in the wake of frivolous defamation litigation." *Nyitray v. New York Athletic Club in City of New York*, 274 A.D.2d 326, 327, 712 N.Y.S.2d 89 (1st Dep't 2000), *citing Mitchell v. Herald Co.*, 137 A.D.2d 213 (4th Dep't 1988). Here, even the most minimal research would have revealed that there was "no basis in law or fact" for asserting personal jurisdiction over Ms. O'Halleran and her law firm. Accordingly, Plaintiffs' should be sanctioned and the O'Halleran Defendants should be awarded reasonable attorneys' fees.

CPLR 301, New York's general jurisdiction provision, empowers a court to "exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." Under Section 301, general jurisdiction over a non-domiciliary is permitted only if the non-domiciliary is so regularly "doing business" in New York that it can fairly be said to be "present" in New York. *ABKCO Indus., Inc. v. Lennon*, 52 A.D.2d 435, 440, 384 N.Y.S.2d 781, 784 (1st Dep't 1976). This high threshold requires that the non-domiciliary defendant be "engaged in such a continuous and systematic course of 'doing business'" so as to "warrant a finding of its 'presence' in [this jurisdiction]." *Landoil Resources Corp. v. Alexander & Alexander Servs. Inc.*, 77 N.Y.2d 28, 33, 563 N.Y.S.2d 739, 742 (1990). In other words, the "court must be able to say from the facts that the corporation is 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Landoil Resources Corp,* 77 N.Y.2d at 33-34, 563 N.Y.S.2d at 741 ; *see also Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 449 N.Y.S.2d 456 (1982).

Plaintiffs utterly fail to satisfy this standard. Plaintiffs concede that Ms. O'Halleran's law firm is in Georgia and fail to allege that either Ms. O'Halleran or her firm has any ties to New York. Cplt. ¶¶ 74-75. In addition, Ms. O'Halleran's affidavit sets forth in detail the undisputed facts that she and her law firm have absolutely no ties to New York, much less continuous and systematic ones. *See* O'Halleran Aff. ¶¶ 3-16. She is a member of the Georgia bar with Georgia offices, representing Georgia clients in Georgia courts. There is no basis whatsoever for asserting personal jurisdiction over Ms. O'Halleran or her law firm under CPLR § 301.

B. CPLR 302 Does Not Confer Long-Arm Jurisdiction Over Ms. O'Halleran or Her Firm

Specific jurisdiction is just as lacking. CPLR § 302 extends long-arm jurisdiction to non-residents only when they have engaged in some purposeful activity in New York in connection with the "'matter in suit.'" *Murdock v. Arenson Int'l USA, Inc.*, 157 A.D.2d 110, 113, 554

N.Y.S.2d 887, 889 (1st Dep't 1990), *citing Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13, 16, 308 N.Y.S.2d 337, 339 (1970). As shown below, neither Ms. O'Halleran nor her law firm have engaged in purposeful activity in New York which could possibly justify long-arm jurisdiction under CPLR 302, and Plaintiff's allegations utterly fail to plead facts that would indicate otherwise.

As an out-of-state resident, Ms. O'Halleran cannot be subjected to personal jurisdiction in New York unless Plaintiffs establish that New York's long-arm statute confers jurisdiction over her by reason of her suit-related contacts with the State. *Copp v. Ramirez*, 62 A.D.3d 23, 28, 874 N.Y.S.2d 52, 57 (1st Dep't), *appeal denied*, 21 N.Y.3d 711, 882 N.Y.S.2d 397 (2009). Section 302 provides:

> (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.

NY CPLR § 302(a) (emphasis added).

Sections 302(a)(2) and (3) expressly exempt causes of action for defamation from their scope, regardless of whether such jurisdiction would be consistent with due process. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244-45 (2d Cir. 2007) (applying New York law). The defamation exception is aimed at protecting out-of-state publishers from lawsuits exactly like this one:

> [T]he Advisory Committee intended to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them. It did not wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests, as the New York Times was forced to do in Alabama.

Legros v. Irving, 38 A.D.2d 53, 55, 327 N.Y.S.2d 371, 373 (1st Dep't 1971).

Plaintiffs therefore may only proceed under Section 302(a)(1), which requires the Court to decide (1) whether the defendant "transacts any business" in New York and, if so, (2) whether the plaintiff's cause of action "aris[es] from" such business transaction. *Walker*, 490 F.3d at 246. Under prong one, courts look to the "'totality of the defendant's activities within the forum' to determine whether a defendant has 'transact[ed] business in such a way that it constitutes 'purposeful activity'" in the state. *Epstein v. Thompson*, No. 09 Civ. 8696, 2010 WL 3199838, at * 3 (S.D.N.Y. Aug. 12, 2010) (applying New York law) (quoting *Walker*, 490 F.3d at 246). "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in ... other sorts of litigation." *Walker*, 490 F.3d at 248; *accord SPCA of Upstate New York v. Amer. Working Collie Assoc.*, 74 A.D.3d 1464, 1465, 903 N.Y.S.2d 562, 564 (3d Dep't 2010)..

Under prong two of Section 302(a)(1), New York courts require an "articulable nexus" or "substantial relationship" between the defendant's in-state activities and the cause of action asserted. *McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645 (1981). *See also*

Lancaster v. Colonial Motor Freight Line, 177 A.D.2d 152, 158, 581 N.Y.S.2d 283, 287 (1st Dep't 1992) ("crucial to the maintenance of a suit against a nondomiciliary under § 302(a)(1) is the establishing of a substantial relationship or nexus between the business transacted by defendant in this state and the plaintiff's cause of action.").

Critically, "New York courts do not interpret 'transacting business' to include mere defamatory utterances sent into the state." *Walker*, 490 F.3d at 248. "In other words, when the defamatory publication itself constitutes the alleged 'transaction of business' for purposes of section 302(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." *Id. Accord Kim v. Dvorak*, 230 A.D.2d 286, 658 N.Y.S.2d 502 (3d Dep't 1997) (sending of four allegedly defamatory letters into the state did not constitute transaction of business); *Pontarelli v. Shapero*, 231 A.D.2d 407, 647 N.Y.S.2d 185 (1st Dep't 1996) (sending two allegedly defamatory letters and one facsimile into New York did not constitute transaction of business for purposes of Section 302(a)(1)); *Strelsin v. Barrett*, 36 A.D.2d 923, 320 N.Y.S.2d 885 (1st Dep't 1971) (no personal jurisdiction over newscaster who made allegedly defamatory statements in broadcast in California that was subsequently broadcast in New York).

In the Internet context, the law could not be more clear: "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." *Henderson v. Phillips*, 2010 NY Slip Op 31654, at *8 (Sup. Ct. N.Y. Co., June 28, 2010) (finding no personal jurisdiction under CPLR § 302(a)(1) over a Virginia resident who had posted allegedly defamatory statements about a New York resident on a website in Virginia).

Thus, in one of many on-point examples, the Second Circuit Court of Appeals held that Section 302(a)(1) did not confer jurisdiction over an Iowa resident who allegedly posted defamatory statements about a New York moving company on his Iowa-based website. *Walker*, 490 F.3d at 253-55. The court explained: "New York case law establishes that making defamatory statements outside of New York about New York residents does not, without more, provide a basis for jurisdiction, even when those statements are published in media accessible to New York readers." *Id.* at 253.[4] In addition, the court emphasized that "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. *Id.*

More recently, in *SPCA of Upstate New York,* 74 A.D.3d 1464, 903 N.Y.S.2d 562, a New York organization sued a Vermont resident and non-profit organization over allegedly defamatory statements posted to the organization's website in Vermont. The trial court denied the defendants' motion to dismiss for lack of personal jurisdiction, finding that the plaintiff had established long-arm jurisdiction under CPLR § 302(a)(1). The Third Department reversed. *Id.* at 1465-66, 903 N.Y.S.2d at 564. Agreeing with *Walker*, the appellate court emphasized that "[t]he comments about which plaintiffs complain were not made in this state but were made in Vermont," and that the statements were placed on the defendant's website "with no effort to direct the comments toward a New York audience." *Id.* at 1466, 903 N.Y.S.2d at 564. Notably,

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[4]*See also Knight-McConnell v. Cummins*, 03 Civ. 5035, 2005 WL 1398590, at *3 (S.D.N.Y. June 13, 2005) (applying New York law) ("The mere fact that the allegedly defamatory postings may be viewed in New York is ... insufficient to sustain a finding of jurisdiction.") (internal quotation marks omitted); *Realuyo v. Villa Abrille*, No. 01 Civ. 10158, 2003 WL 21537754, at *6 (S.D.N.Y. July 8, 2003) (no jurisdiction under CPLR § 302(a)(1) where defamatory article by foreign newspaper was posted on website which users "in New York or throughout the world could view and download"); *Starmedia Network, Inc. v. Star Media, Inc.*, 00 Civ. 4647, 2001 WL 417118, at *3 (S.D.N.Y. Apr. 23, 2001) (applying New York law) ("[I]t is now well established that one does not subject himself to jurisdiction of the courts in another state simply because he maintains a website which residents of that state visit.") (citation and quotation marks omitted).

the court found no personal jurisdiction over the individual defendant even though she made two short visits to New York to meet with the plaintiff before posting the allegedly defamatory statements. The court also found that it lacked personal jurisdiction over the Vermont organization operating the website in question, noting that it had "no offices in New York and only about a dozen members in the state." *Id.*

It is hard to imagine a less compelling case for asserting personal jurisdiction under CPLR § 302(a)(1) than this one. Plaintiffs have not (and cannot) allege that Ms. O'Halleran transacts any business in New York. *See* O'Halleran Aff. ¶¶ 3-16. The only possible basis for jurisdiction is her website posting. But, as explained above, New York courts reject this as a basis for asserting jurisdiction under CPLR 302(a)(1). *See SPCA of Upstate New York*, 74 A.D.3d at 1465-66, 903 N.Y.S.2d at 564; *Henderson,* 2010 NY Slip Op 31654; *Walker*, 490 F.3d at 253.

Plaintiffs' defamation claim therefore must be dismissed for lack of personal jurisdiction over Ms. O'Halleran and her law firm because the requirements of CPLR § 302(a)(1) have not (and cannot) be met. Plaintiffs' remaining causes of action repackage their defamation claim under different tort labels and likewise must be dismissed for failing to meet the requirements of the long-arm statute. *See, e.g., American Radio Ass'n v. A. S. Abell. Co.*, 58 Misc.2d 483, 485, 296 N.Y.S.2d 21, 25 (Sup. Ct. N.Y. Co. 1968) (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"); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 (2d Cir. 1996) (applying New York law) (tortious interference and injurious falsehood claims could not provide independent basis for jurisdiction because "the entire complaint sounds in defamation"); *Jolivet v. Crocker*, 859 F. Supp. 62, 65 (E.D.N.Y. 1994) (applying New York law) (tortious

interference claim based on same facts as defamation claim cannot provide independent basis for jurisdiction under CPLR § 302(a)(3)); *Epstein*, 2010 WL 3199838, at * 4 (holding that where "the entire complaint sounds in defamation," additional causes of action "do not independently establish personal jurisdiction"). "[T]o rule otherwise would provide a facile means for plaintiffs . . . to evade the defamation exception in § 302(a)(3)," *Jolivet*, 859 F. Supp. at 65, thereby frustrating the New York legislature's intent to "avoid unnecessary inhibitions on freedom of speech or the press." *Legros*, 38 A.D.2d at 55, 327 N.Y.S.2d at 373.

Lastly, not only do Plaintiffs fail to establish any credible basis for asserting jurisdiction over Ms. O'Halleran or her firm under New York's long-arm statute, any such assertion of jurisdiction would also violate due process under the Fourteenth Amendment of the United States Constitution because Ms. O'Halleran has not purposely targeted any statement to a New York audience and has done nothing more than publish a comment on the Internet that is accessible in every state in the nation and every country in the world. *See Young v. New Haven Advocate*, 315 F.3d 256, 262-64 (4th 2002), *cert. denied* 538 U.S. 1035, 123 S. Ct. 2092 (2003) (holding that personal jurisdiction over Connecticut newspapers based on website articles about Virginia prison warden did not comport with due process when locally-oriented newspapers did not target their stories to a Virginia audience; mere accessibility of the articles in Virginia, as in every other state, was insufficient to satisfy due process); *Revell v. Lidov*, 317 F.3d 467, 473-476 (5th Cir. 2002) (holding that personal jurisdiction in a Texas court over Columbia University and Massachusetts professor who posted an article on a Columbia University message board did not comport with due process when neither website nor professor expressly targeted a Texas audience and author was unaware that plaintiff resided in Texas).

II.

ALL OF PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW

Even if this Court did have personal jurisdiction over Ms. O'Halleran, Plaintiffs' claims against her all fail as a matter of law. Their defamation claim is barred by the absolute privilege of Section 74 of the New York Civil Rights Law because Ms. O'Halleran's comment is a fair and accurate report of the April 1 proceedings before Judge Jackson. Nor do any of Plaintiffs' attempts to repackage their defamation claim in the guise of other torts succeed. They do not – and cannot – allege extreme and outrageous conduct sufficient to support an intentional infliction of emotional distress claim; identify any third-party breach of contract sufficient to support a tortious interference with contract claim; or allege that the mere reference to Rakofsky's name in an online editorial comment is "advertising" or "trade" as required under Section 51 of the New York Civil Rights law.[5]

A. The Statement at Issue is a Fair and True Report of a Judicial Proceeding and Thus Absolutely Privileged Under Section 74

Under the law of this State,

> 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....

New York Civil Rights Law § 74. The absolute privilege of Section 74 "rests upon First Amendment guarantees to the press," *Oliner v. Crain Communications, Inc.*, 14 Med. L. Rep. 1495, 1496 (Sup. Ct. N.Y. Co. 1987); *Gurda v. Orange County Publs. Div.*, 81 A.D.2d 120, 131, 439 N.Y.S.2d 417, 434 (1981), and furthers "the public interest in having proceedings of courts

[5] New York courts recognize that dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379, 625 N.Y.S.2d 477, 480 (1995).

of justice public, not secret," *rev'd on concurring and dissenting op. below*, 56 N.Y.2d 705, 451 N.Y.S.2d 724 (1982); *Lee v. Brooklyn Union Pub. Co.*, 209 N.Y. 245, 248 (1913). A publication reporting a presiding judge's rulings, statements, and opinions falls squarely within the absolute privilege. *See Hanft v. Heller*, 64 Misc.2d 947, 949, 316 N.Y.S.2d 255, 257 (Sup. Ct. N.Y. Co. 1970) ("Publication of [the judge's] opinion itself is the fairest and truest possible report of a judicial proceeding that can be made."). Further, the privilege covers reports concerning the contents of motions, affidavits and other papers submitted to a court in connection with a proceeding. *See Komarov v. Advance Magazine Publishers, Inc.*, 180 Misc.2d 658, 660, 691 N.Y.S.2d 298, 300 (Sup. Ct. N.Y. Co. 1999) ("The privilege established by the Civil Rights Law applies not only to a transcript of the judicial proceeding itself, but also to any pleading made within the course of the proceeding ... and by extension, should also apply to affidavits submitted in the proceedings.") (internal quotation marks omitted); *Posato v. Oken*, 24 Med. L. Rptr. 1285, 1286-87 (Sup. Ct. Monroe Co. 1995) (holding that fair report privilege covers reports based in part on affidavits).

Whether a statement is privileged under Section 74 of the N.Y. Civil Rights Law presents a threshold question of law for the court to determine at the pleading stage, and courts routinely grant pre-answer motions dismissing libel actions on basis of this absolute statutory privilege. *See, e.g., Saleh v. New York Post*, 78 A.D. 3d 1149, 1151, 915 N.Y.S.2d 571, 574 (2d Dep't 2010) (affirming dismissal of libel claim against newspaper under CPLR § 3211(a)(1) and (7) based on fair report privilege).[6]

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[6] *See also Klig v. Harper's Magazine Foundation*, No. 60089/10, 2011 N.Y. Slip Op. 31173(U), 2011 WL 1768878 (Sup. Ct. Nassau Co. Apr. 26, 2011); *Corso v. NYP Holdings, Inc.*, No. 109820/2005, 2007 WL 2815284 (Sup. Ct N.Y. Co. Aug. 30, 2007); *Sprecher v. Dow Jones & Co.*, 88 A.D.2d 550, 551-52, 450 N.Y.S.2d 330, 331-32 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 862, 460 N.Y.S.2d 527 (1983); *Leder v. Feldman*, 173 A.D.2d 317, 569 N.Y.S.2d 702 (1st Dep't 1991); *Palmieri v. Thomas*, 29 A.D.3d 658, 659, 814 N.Y.S.2d 717, 718 (2d Dep't 2006); *Every Drop Equal Nutrition, L.L.C. v. ABC, Inc.*, 5 A.D.3d 536, 537, 772 N.Y.S.2d 865 (2d Dep't 2004); *Branca v. Mayesh*, 101 A.D.2d 872, 476 N.Y.S.2d 187 (Sup. Ct. N.Y. Co. 1984); *Liebgold v. Hofstra Univ.*, 245 A.D.2d 272, 664 N.Y.S.2d

Moreover, to fall within the protective ambit of Section 74's privilege, a report of a judicial proceeding need only be *substantially* accurate. *Leder*, 173 A.D.2d at 318, 569 N.Y.S.2d at 703. As the New York Court of Appeals has held:

> For a report to be characterized as "fair and true" within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate. ... 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.*

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, 167-68 (1979) (citations omitted) (emphasis added); *accord, e.g.*, *Posner v. N.Y. Law Publ'g Co.*, 228 A.D.2d 318, 318, 644 N.Y.S.2d 227, 227 (1st Dep't 1996) (that substantially accurate article about a court decision contained some inaccuracies did not remove it from the protection of the privilege accorded by Section 74); *Becher v. Troy Publ'g Co.*, 183 A.D.2d 230, 233, 589 N.Y.S.2d 644, 646 (3d Dep't 1992) ("The 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.").

Accordingly, New York courts consistently hold that a report is privileged under Section 74 where the language used in the report, despite inaccuracies, does "'not produce a different effect on the reader than would a report of the precise truth.'" *Klig*, 2011 N.Y. Slip Op. 31173(U), at *5 (quoting *Silver v. Kuehbeck*, No. 05 Civ. 35, 2005 WL 2290642, at *16 (S.D.N.Y. Nov. 7, 2005) (applying New York law)). For example, in *Holy Spirit Ass'n*, the Court of Appeals founds the articles at issue to be protected from liability even though they described damaging information contained in intelligence documents as "fact" and as

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831 (2d Dep't 1997); *Hughes Training, Inc. v. Pegasus Real-Time, Inc.*, 255 A.D.2d 729, 680 N.Y.S.2d 721 (3d Dep't 1998); *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 608 N.Y.S.2d 239 (2d Dep't 1994).

"confirmed" when the documents themselves stated that the information was "unevaluated" and unverified. As the Court explained, "the gravamen of plaintiff's allegations is that these articles, by failing to characterize properly the nature of the intelligence reports, distorted the import of these documents to the detriment of plaintiff." 49 N.Y.2d at 65-66, 424 N.Y.S.2d at 166. The Court found that the defendant's "use of the phrases 'stated as fact' and 'confirmed and elaborated' may denote to some degree, a sense of legitimacy which, in hindsight, could be characterized as imprudent." Nonetheless, it ruled that these flaws "[did] not ... render the newspaper articles unfair" for purposes of the Section 74 privilege, and dismissed the case. *Id.* at 68, 424 N.Y.S.2d at 168.[7]

Here, the sole challenged statement—that "A judge recently declared a mistrial in a murder case because of the defense attorney's incompetence" [*sic*]—is indisputably a substantially accurate account of the judicial proceeding before Judge Jackson on April 1, 2011. Judge Jackson repeatedly emphasized Mr. Rakofsky's lack of skill and experience while explaining the several reasons motivating his decision to declare a mistrial and to enable Mr. Deaner to obtain new counsel. The relevant language is underlined below:

> I must say that even when I acquired [sic] of Mr. Deaner, I – as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some

[7] *Accord, e.g., Misek-Falkoff v. Am. Law. Media*, 300 A.D.2d 215, 216, 752 N.Y.S.2d 647, 649 (1st Dep't 2002) (article's misstatement that plaintiff had sued for discrimination based on a "mental disability" when, in fact, she sued based on a "neurological disorder" was "not serious enough to remove defendants' reportage from the protection" of § 74); *Becher*, 183 A.D.2d at 233-37, 589 N.Y.S.2d at 646-48 (newspaper articles and headlines held privileged even though they suggested that plaintiff had been indicted on felony charge of bribing a witness, when in fact he had been charged with misdemeanors); *Komarov*, 180 Misc.2d at 661, 691 N.Y.S.2d at 301 (article reporting that FBI "asserts that [plaintiff] is [a gangster's] main money launderer and extortionist of émigré businessmen" held protected by Section 74, even though documents relied upon actually stated that FBI had "been advised" that plaintiff laundered money and that plaintiff "reportedly control[led]" extortions of Russian émigré businessmen, and did not state that plaintiff was the gangster's "main" money launderer); *Grab v. Poughkeepsie Newspapers, Inc.*, 91 Misc.2d 1003, 1003-05, 399 N.Y.S.2d 97, 97-98 (Sup. Ct. Dutchess Co. 1977) (newspaper article protected by absolute privilege of § 74 even though it inaccurately implied that plaintiff had been convicted of a crime, when in reality he pled guilty, and inaccurately stated that plaintiff had been sentenced to state prison, when in fact he had received youthful offender status).

length for over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky – put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.

It appeared to the court that there were theories out there – defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a – not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think to the detriment of Mr. Deaner. And had there been – if there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.

So I am going to grant Mr. Deaner's request for new counsel. I believe both – it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity [sic]. I believe that the performance was below what any reasonable person could expect in a murder trial.

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

So that's where we are. And I'll figure out what to do about that case. But it just seems to me that – so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the – As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.

So I'm going to grant the motion.

Rosenfeld Aff., Ex. E, at 3-5 (emphasis added).

The Complaint tries to avoid Section 74's absolute immunity with sophistry, maintaining that Mr. Rakofsky moved to withdraw as counsel because of a conflict with his client, and that

the Court supposedly granted his motion for this reason alone. Cplt. ¶ 189. This ploy has two fatal defects.

First, Judge Jackson's statements on the record unmistakably refute Plaintiffs' allegation that "Judge Jackson granted RAKOFSKY'S motion solely because RAKOFSKY moved for his own withdrawal because a conflict existed between him and his client." Cplt. ¶ 189. Indeed, Judge Jackson gave a list of more pressing reasons for his decision, including that Mr. Rakofsky "had never tried a case before," that he failed to grasp "legal principles and legal procedure [to the] detriment of Mr. Deaner," and that his performance was "not up to par under any reasonable standard of competence under the Sixth Amendment." For good measure, Judge Jackson found that there was "manifest necessity" for a mistrial in the case because "the performance was below what any reasonable person could expect in a murder trial."

Second, Ms. O'Halleran's failure to mention that Mr. Rakofsky himself asked to withdraw from the case does not render her statement substantially inaccurate. This is precisely the type of minor inaccuracy and hair-splitting that New York courts consistently refuse to recognize as a basis for stripping a statement of the absolute privilege afforded by Section 74. *See Holy Spirit Ass'n for Unification of World Christianity.*, 49 N.Y.2d at 67, 424 N.Y.S.2d at 167 (reports of judicial proceedings "should not be dissected and analyzed with a lexicographer's precision"). Here, the record indisputably demonstrates that Judge Jackson cited Rakofsky's incompetence as one of the motivating reasons for his decision to grant a mistrial. The fact that Mr. Rakofsky himself asked to withdraw is the type of minor omission that would "not produce a different effect on the reader." *Klig*, 2011 N.Y. Slip Op. 31173(U) at *5. *See also Glendora*, 201 A.D.2d 620; 608 N.Y.S.2d 239 (affirming dismissal based on Section 74; "the accuracy of the report was not altered merely because the article did not contain the plaintiff's 'side of the

Judge's decision'"); *McDonald v. East Hampton Star*, 10 A.D.3d 639, 640, 781 N.Y.S.2d 694, 695 (2nd Dep't 2004) (holding that newspaper article containing condensed but accurate description of judicial decision dismissing federal lawsuit and the court's rationale for doing so was fair and accurate report; "Although the article failed to report that the federal court's decision granted the plaintiff leave to file an amended complaint, and that he thereafter filed an amended complaint, those omissions did not alter the substantially accurate character of the article.").

In short, Ms. O'Halleran's posting is a substantially fair and accurate report that is absolutely privileged by Section 74. Plaintiffs' defamation claim must be dismissed as a matter of law.[8]

B. Plaintiffs' Intentional Infliction of Emotional Harm Claim Fails as a Matter of Law

The Complaint does not remotely allege the element of "extreme and outrageous conduct" required to state a claim of intentional infliction of emotional distress under New York law. Indeed, "[l]iability [for intentional infliction of emotional distress] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 236 (1983). Given these stringent pleading requirements, "[i]t is nearly impossible in New York for a plaintiff to state a viable claim for intentional infliction of emotional distress." *Triano v. Gannett Satellite Information Network, Inc.*, Nos. 09-CV-2497, 09-CV-2533, 2010 WL

[8] To the extent the Amended Complaint seeks to impose liability on Ms. O'Halleran for linking to or republishing the *ABA Journal* article, any such claim is plainly foreclosed by 47 U.S.C. § 230(c)(1). *See Shiamili v. The Real Estate Group of New York*, __ N.E.__, 2011 WL 2313818 (N.Y. June 14, 2011). Moreover, Plaintiffs' libel claim against Ms. O'Halleran and her law firm independently fail in their entirety based on New York's "wire service" defense. The O'Halleran Defendants hereby adopt the argument set forth in the Memorandum of Law in Support of Their Motion by Reuters America, LLC and Dan Slater to Dismiss the Complaint, at pages 23 through 26.

3932334 at *6 (S.D.N.Y. Sept. 29, 2010) (internal quotation marks omitted). As the Court of Appeals has noted, "of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993).

Here, the Complaint contains no allegations of sufficiently outrageous conduct. Ms. O'Halleran's mere posting of an unflattering comment about Mr. Rakofsky does not, as a matter of law, remotely rise to the level of extreme and outrageous conduct. *See, e.g., Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92, 760 N.Y.S.2d 133, 138 (1st Dep't 2003) (statements that plaintiff slept with and was raped by foreign government officials on whom she spied while working for CIA not sufficiently outrageous, even if false: "it is long settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute extreme and outrageous conduct as a matter of law"); *Sarwer v. Conde Nast Publications, Inc.*, 237 A.D.2d 191, 192, 654 N.Y.S.2d 768, 769 (1st Dep't 1997) ("even if defendants knew that publication of the article would embarrass and otherwise distress plaintiff, the act of publication was privileged conduct, and therefore cannot support a cause of action for intentional infliction of emotional distress") (citing *Howell*, 81 N.Y.2d at 125-126, 596 N.Y.S.2d 350); *Triano*, 2010 WL 3932334, at *6 (publishing news story that mistakenly reported that plaintiff had died was not "outrageous" conduct sufficient to support claim for intentional infliction of emotional distress).

Moreover, "New York courts have consistently held that a plaintiff may not maintain a separate claim for intentional infliction of emotional distress grounded in the same facts as a claim for libel." *Idema v. Wager*, 120 F. Supp. 2d 361, 370-371 (S.D.N.Y. 2000), *aff'd*, 29 Fed. Appx. 676 (2d Cir. 2002). *See also Copp v. Ramirez*, No. 109122/06, 2007 WL 6139779, at *2 (Sup Ct. N.Y. Co. Oct. 9, 2007) (dismissing intentional infliction of emotional distress claim that

was "largely duplicative" of defective defamation claim arising out of same allegedly defamatory news program), *aff'd on other grounds*, 62 A.D.3d 23, 27, 874 N.Y.S.2d 52, 56 (1st Dep't 2009); *Ghaly v. Mardiros*, 204 A.D.2d 272, 273, 611 N.Y.S.2d 582, 583 (2d Dep't 1994) (dismissing intentional infliction of emotional distress claim as duplicative of defective defamation claim); *Komarov*, 180 Misc.2d at 662-63, 691 N.Y.S.2d at 302 (same).[9] Because Plaintiffs' emotional distress claim merely duplicates their libel claim, it must be dismissed on this ground as well.

C. Plaintiffs' Tortious Interference Claim Fails as a Matter of Law

Plaintiffs' style their tortious interference claim as "intentional interference with contract," but the Complaint does not identify any specific contract with a third party that was breached by that third party. This shortcoming is fatal to Plaintiffs' claim. Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of contract without justification, actual breach and damages. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 82 (1996). The New York Court of Appeals has stressed that that "[e]ver since tortious interference with contractual relations made its first cautious appearance in the New York Reports ... breach of contract has repeatedly been listed among the elements of a claim of tortious interference with contractual relations." *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").

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[9] *See also Durepo v. Flower City Television Corp.*, 147 A.D.2d 934, 935, 537 N.Y.S.2d 391, 392 (4th Dep't 1989); *Sweeney v. Prisoners' Legal Servs. of New York*, 146 A.D.2d 1, 7, 538 N.Y.S.2d 370, 373-74 (3d Dep't 1989); *Manno v. Hembrooke*, 120 A.D.2d 818, 820, 501 N.Y.S.2d 933, 936 (3d Dep't 1986).

Here, Plaintiffs do not allege that any identifiable third party breached a contract with them, only that "RAKOFSKY and RLF had valid business contracts with existing clients," and that the Ms. O'Halleran's allegedly defamatory statements "interfered with their ability to satisfy the terms of such contracts and with RAKOFSKY's and RLF's establishment of contractual relations with other clients." Cplt. ¶ 209. They also allege that Ms. O'Halleran's (and other defendants') allegedly defamatory statements interfered with their ability to rely on their "internet presence" to gain new clients. Cplt. ¶¶ 211-12. Because they plainly fail to allege any actual breach of contract by any actual, identifiable client, their tortious interference with contract claim must be dismissed.

Plaintiffs may mistakenly be attempting to plead a tortious interference with prospective business relations claim, but any such claim is equally doomed under New York law. A claim for interference with prospective business relations must meet heightened pleading 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).

At a minimum , "a claim for interference with advantageous business relationships must specify some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious behavior." *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995) (granting motion to dismiss where complaint referred only

generally to potential contracts) (citing *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 269 (2d Cir. 1987)); *see also Winner Intern. v. Kryptonite Corp.*, No. 95 Civ. 247 (KMW), 1996 WL 84476 at *4 (S.D.N.Y., Feb. 27, 1996) (granting motion to dismiss claim for tortious interference with prospective economic advantage where plaintiff failed to allege that defendant's conduct interfered with its business relationship with any specific third party). Again, as noted above, Plaintiffs have not identified *any* existing relationship through which they would have done business but for the allegedly tortious behavior of the defendants. Plaintiffs' vague allegations wholly fail to meet the strict requirement of pleading an identified existing business relationship that was harmed.

In addition, Plaintiffs have not satisfied the third element. "To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313, 776 N.Y.S.2d 279, 280, (1st Dep't 2004) (emphasis added). "Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182 190, 785 N.Y.S.2d 359, 362 (2004). Here, O'Halleran obviously had a lawful (and constitutionally protected) interest in commenting on the news of Mr. Deaner's mistrial to the public. Thus, Plaintiffs do not and cannot plead that the O'Halleran Defendants acted for the sole purpose of harming them.

For all these reasons, Plaintiffs' claim of tortious interference must be dismissed.

D. Plaintiffs' Commercial Misappropriation Claim under Section 51 of the New York Civil Rights Law Fails as a Matter of Law

Plaintiff's fourth cause of action, for a violation of New York Civil Rights Law Sections 50 and 51, also cannot survive this motion to dismiss. While Section 51 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent, the New York Court of Appeals has repeatedly made clear that the use of a person's name or likeness in the context, such as here, of commentary on newsworthy events is not a use for advertising or trade purposes. *Messenger v. Grunder + Jahr*, 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52, 55 (2000); *Howell*, 81 N.Y.2d at 123, 596 N.Y.S.2d at 354 (1993).[10] Whether an item is newsworthy depends solely on "the content of the article"—not the publisher's "motive to increase circulation." *Stephano v. News Group Publs.*, 64 N.Y.2d 174, 185, 485 N.Y.S.2d 220, 225 (1984).

"Newsworthiness" is broadly construed and includes coverage of "political happenings, social trends or any subject of public interest." *Messenger*, 94 N.Y.2d at 442, 706 N.Y.S.2d at 55. Here, Ms. O'Halleran's posting obviously addressed a newsworthy topic of legitimate public interest. Not only was the underlying case a felony murder trial, but Mr. Rakofsky's representation of Mr. Deaner and subsequent withdrawal from the case raised important issues about the quality of justice in our nation's courts, a matter of the utmost importance to the public. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions ... are without question events of legitimate concern to the public and

[10] *See also Delan v. CBS, Inc.*, 91 A.D.2d 255, 259, 458 N.Y.S.2d 608, 613 (2d Dep't 1983) ("The reporting of matters of public information or of legitimate public interest ... is a matter of privilege and not within the ambit of the term 'purposes of trade' as used in the Civil Rights Law ... notwithstanding the inclusion of commercials."); *Bement*, 307 A.D.2d at 90, 760 N.Y.S.2d at 136 (Section 51 is generally "inapplicable where the use occurs in the context of a report of newsworthy events or matters of public interest, since in such instance the use 'is not deemed produced for the purposes of advertising or trade' and also as a matter of deference to the constitutional right to free speech").

consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).[11]

Because Ms. O'Halleran made editorial use of Mr. Rakofsky's name in connection with a newsworthy posting on a matter of legitimate public interest, Plaintiffs' commercial misappropriation claim must be dismissed as a matter of law.

CONCLUSION

Making the worst out of an already regrettable situation, Plaintiffs have sued news organizations, reporters, and bloggers from across the nation without any apparent consideration of the basic principles governing personal jurisdiction. Ms. O'Halleran and her law firm should be dismissed from this action and assessed sanctions on that ground alone. But if this Court should reach the merits, Plaintiffs claims all fail as a matter of law. Most importantly, their lawsuit targets commentary that is absolutely privileged under the fair report privilege codified in Section 74 of the New York Civil Rights law, and the remainder of their claims are simply failed defamation claims repackaged under other names, and deficient on their own merits. For all the foregoing reasons, the Complaint against Ms. O'Halleran and her law firm should be dismissed with prejudice and the Court should award sanctions.

[11] Indeed, New York courts have found much less weighty subjects to be newsworthy matters of public interest and, thus, outside the scope of Section 51. *See, e.g., Stephano*, 64 N.Y.2d at 179-186, 485 N.Y.S.2d at 221-226 (picture of plaintiff wearing leather bomber jacket in column about "new and unusual products and services"); *Abdelrazig v. Essence Communications*, 225 A.D. 2d 498, 639 N.Y.S.2d 811(1st Dep't 1996), (picture of plaintiff in "African garb" concerned "newsworthy fashion trends in the Black community"), *Creel v. Crown Publs. Inc.*, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dep't 1985) (picture of plaintiffs illustrating guide to nude beaches); *Lopez v. Triangle Communications*, 70 A.D.2d 359, 360, 421 N.Y.S.2d 57 (1979) ("make-over" pictures in Seventeen magazine). *See also Stern v. Delphi Internet Services Corporation*, 165 Misc.2d 21, 626 N.Y.S.2d 694 (Sup. Ct. N.Y. Co. 1995) (use of radio personality's photograph in advertisement to promote internet bulletin board discussion of radio personality's candidacy for governor protected as "incidental use" not actionable under Section 51).

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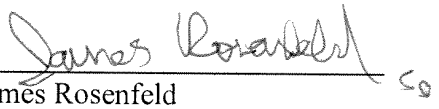
Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: 

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