UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS – EASTERN DIVISION

MEANITH HUON, Plaintiff, v. BREAKING MEDIA, LLC a/k/a BREAKING MEDIA; BREAKING MEDIA, INC. a/k/a BREAKING MEDIA; DAVID LAT; ELIE MYSTAL; JOHN LERNER; and DAVID MINKIN; ("ATL DEFENDANTS"); GAWKER MEDIA, LLC a/k/a GAWKER MEDIA; BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT; GAWKER MEDIA GROUP, INC. a/k/a GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC, NICK DENTON; IRIN CARMON; and GABY DARBYSHIRE ("JEZEBEL DEFENDANTS"), Defendants.	)	Case No. 11-cv-03054 District Judge John J. Tharp, Jr. Magistrate Judge Jeffrey T. Gilbert

MEMORANDUM IN SUPPORT OF ABOVE THE LAW DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED COMPLAINT

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In his lengthy and rambling nine-count Fourth Amended Complaint, Plaintiff Meanith Huon protests that the ATL Defendants'[1] web-based publication, AboveTheLaw.com, unfairly characterized Plaintiff's acquittal on sexual assault charges. Plaintiff believes that the ATL Defendants defamed him and placed him in a false light because the AboveTheLaw.com post referred to a neutral news report of his trial rather than presenting Plaintiff's own view of the case. In his "kitchen-sink" complaint, Plaintiff alleges a host of other flawed, non-cognizable claims, including intrusion upon seclusion, intentional infliction of emotional distress, tortious interference with prospective economic advantage, conspiracy, and cyberstalking and cyberbullying. Although the Fourth Amended Complaint suffers from multiple incurable deficiencies, fundamentally Plaintiff's claims fail because reporting on government proceedings—including his criminal trial—is privileged from liability under the First Amendment. Further, AboveTheLaw.com's commentary in the news article is also protected as an expression of opinion. Plaintiff cannot cure these and numerous other defects in his frivolous Fourth Amended Complaint, and, as a result, all counts against the ATL Defendants should be dismissed with prejudice.

I. STATEMENT OF FACTS

A. Underlying Facts

Plaintiff was a defendant in *People v. Huon*, 08 CF 1496, after being charged with two counts of criminal sexual assault. (Compl.[2] ¶ 52; *see People v. Huon* Trial Tr., May 6, 2010, attached as Ex. A at 178:6-15.[3]) His trial was held from May 4-6, 2010 in Madison County,

[1] The ATL Defendants are Breaking Media, Inc. f/k/a Breaking Media, LLC, David Lat, Elie Mystal, John Lerner, and David Minkin. John Lerner, the CEO of Breaking Media, Inc., was not with the company at the time when the Post at issue was published.

[2] In this memorandum, the "Complaint" or "Compl." refers to the Fourth Amended Complaint.

[3] On a motion to dismiss, courts may take judicial notice of documents in the public record. *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n2 (7th Cir. 2008). *See Venture Assocs. Corp. v. Zenith*

Illinois. (Compl. ¶ 52; *see generally* Ex. A; *People v. Huon* Trial Tr., May 4, 2010, attached as Ex. B.)[4] The trial was covered by the *Belleville News-Democrat*. (*See generally* citation to *Belleville News-Democrat* at Ex. C at 3.)[5]

The ATL Defendants are affiliated with AboveTheLaw.com. AboveTheLaw.com is a blog that covers topics of interest to lawyers and law students[6]—including Plaintiff's trial, because he is an attorney licensed to practice in Illinois. (Compl. ¶ 49.) Accordingly, on May 6, 2010, AboveTheLaw.com posted a report about the first day of Plaintiff's trial (the "Post"). The Post quoted from and linked to the *Belleville News-Democrat*, and it included commentary by the Post's author, Elie Mystal. (*See generally* Ex. C.)

B. Procedural Posture

On May 6, 2011, one year after he was acquitted in his criminal case, Plaintiff filed suit against the ATL Defendants, among others. (Dkt. No. 1; Ex. A at 185:19-24; 186:13-15.) Plaintiff has filed a total of five complaints in this matter. He filed his initial complaint and two amended complaints before the ATL Defendants had an opportunity to respond or otherwise plead. (Dkt. Nos. 1, 12, 22.) On September 21, 2011, the ATL Defendants moved to dismiss Plaintiff's Second Amended Complaint. (Dkt. Nos. 35, 36, 48, 49.) On August 13, 2012, this

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Data Sys. Corp., 987 F.2d 429 (7th Cir. 1993) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."); *United States v. Hope*, 906 F.2d 254, 260 (7th Cir. 1990) (taking judicial notice of state court hearing transcript).

[4] Ex. B omits *voir dire* at pages 7 through 125 but is otherwise a complete transcript of proceedings on May 4, 2010. Per this Court's October 11, 2011 order (Dkt. no. 74), personal identifying information for people who are not parties to this matter has been redacted.

[5] Plaintiff claims the Post at issue is attached to the Complaint as Exhibit 9, while Exhibit 8 was intentionally left blank. (Compl. ¶¶ 42, 60.) The Post is actually attached to the Complaint at Exhibit 8. To avoid further confusion, the Post is attached hereto as Exhibit C in a complete and more easily readable version. This exhibit differs from the version attached to the Complaint because it includes an "update" at the end of the post noting Plaintiff's acquittal; the ATL Defendants are not relying on that update in this motion.

[6] The ATL Defendants dispute Plaintiff's assertion that they are "not reporters or journalists." (Compl. ¶ 54.)

Court dismissed the Second Amended Complaint, *sua sponte*, for lack of subject matter jurisdiction before ruling on the merits of the motion. (Dkt. No. 151.) On September 12, 2012, Plaintiff filed a Third Amended Complaint, which this Court also dismissed, *sua sponte*, two days later for lack of subject matter jurisdiction. (Dkt. Nos. 156-57.) On November 15, 2012, Plaintiff filed the Fourth Amended Complaint. (Dkt. No. 162.)

C. Fourth Amended Complaint

In his latest Complaint, which spans 68 pages and 273 numbered paragraphs, Plaintiff alleges nine claims against the ATL Defendants. The basic thrust of his suit is that the Post is actionable because it both omits and misstates information about his criminal trial. As before, Plaintiff alleges defamation *per se* and *per quod* (Counts I and II), false-light invasion of privacy (Count III), intentional infliction of emotional distress (Count V), conspiracy (Counts VI-VII), and the criminal claim of cyberstalking[7] (Count IX). The alleged conspiracy apparently includes the "Jezebel Defendants,"[8] who operate the blog Jezebel.com. Plaintiff also adds two new counts: intrusion upon seclusion (Count IV) and tortious interference with economic advantage (Count VIII).

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). These motions challenge whether a plaintiff has alleged facts sufficient to "state a claim to relief that is

[7] Although Count IX in the latest Complaint also refers to "cyberbullying," in substance, Plaintiff makes no additional allegations to differentiate cyberstalking from cyberbullying.

[8] The Jezebel Defendants include Gawker Media, LLC a/k/a Gawker Media; Blogwire Hungary Szellemi Alkotast Hasznosito KFT; Gawker Media Group, Inc. a/k/a Gawker Media; Gawker Entertainment, LLC; Gawker Technology, LLC; Gawker Sales, LLC; Nick Denton; Irin Carmon; and Gaby Darbyshire.

plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Complaints require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (citing and quoting *Twombly*, 550 U.S. at 555, 557).

III. ARGUMENT

A. Plaintiff's Defamation *Per Se* And *Per Quod* Claims Fail As A Matter Of Law (Counts I and II)

Plaintiff's defamation counts suffer from numerous deficiencies. First and foremost, the Post provides a fair report of the criminal trial and, therefore, is privileged. In addition, Plaintiff simply has not pled that the statements are defamatory. All of the factual statements are supported by the trial transcript. The remaining statements consist of obvious rhetorical hyperbole or cutting commentary. Moreover, the claims improperly rest on non-defamatory statements that do not even refer to Plaintiff. Finally, as to his claim for defamation *per quod*, Plaintiff fails to plead damages with requisite specificity.

Because of the volume of statements at issue, and for ease of reference, the ATL Defendants provide a summary chart at the end of this brief that indicates which of the following arguments apply to the various allegations in the Complaint. As the chart demonstrates, none of Plaintiff's allegations states a claim for defamation, and the Court should therefore dismiss the defamation claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

1. The Post provides a fair report of judicial proceedings.

The information in the Post that Plaintiff claims is defamatory is protected from liability by the First Amendment as a fair and accurate report of his trial.

Accurate reports of court proceedings are privileged against liability by the First Amendment, even if the information stated in those proceedings is otherwise false or

defamatory. *O'Donnell v. Field Enters., Inc.*, 145 Ill. App. 3d 1032, 1036 (1st Dist. 1986). "The fair report privilege . . . promotes our system of self-governance by serving the public's interest in official proceedings, including judicial proceedings." *Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 585 (2006). "If the news media cannot report what it sees and hears at governmental and public proceedings merely because it believes or knows that the information is false, then self-censorship by the news media would result." *O'Donnell*, 145 Ill. App. 3d at 1036. Thus, "the fair report privilege overcomes allegations of either common law or actual malice." *Solaia*, 221 Ill. 2d at 587.

The trial transcript establishes that the fair report privilege applies to the Post. For example, the newspaper report quoted in the Post accurately states Plaintiff's attorney argued in his opening statement that the Plaintiff's involvement with the alleged victim was consensual, and the trial transcript demonstrates that to be true. (*See* Ex. C at 2-3; Ex. B at 156 (Plaintiff's attorney states, "You are going to hear and see that all of those sex acts were consensual.").) In fact, the alleged victim was specifically asked about consent on the first day of trial. (Ex. B at 248:20-22.) Plaintiff alleges that the Post "intentionally omitted" that "[t]he jury was not allowed to consider the consent defense," (Compl. ¶ 72(b)), but it is clear that the actual statements of the Post reflect an accurate report of what occurred at the trial. Similarly, Plaintiff complains that "[t]here was no evidence of a Craigslist ad for a job for promotional modeling." (Compl. 72(d).) The quoted newspaper account, however, states that the alleged victim had responded to a Craigslist ad that Plaintiff posted seeking promotional models, and again the trial transcript confirms that fact. (*See* Ex. C at 1; Ex. B at 196-200.)

The ATL Defendants did not need to provide a complete "play-by-play" of the trial to preserve the privilege. A report need not be a "complete report of the proceedings" to be

privileged "so long as it is a fair abridgment" or "substantially correct account" of the proceedings. *Solaia*, 221 Ill. 2d at 589 (quoting *Restatement (Second) of Torts* § 611, cmt. f, at 300 (1977)); *O'Donnell*, 145 Ill. App. 3d at 1036. "Such demonstration is made where the defendant shows that the 'gist' or 'sting' of the allegedly defamatory material is true" and does not require technical accuracy in all of the details. *Harrison v. Chi. Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (1st Dist. 2003) (citations omitted). The Post easily surpasses this threshold. Not only does the Post capture the "gist" of the proceedings, but all of the facts can be traced back to the trial transcript.

Moreover, the privilege applies even though the ATL Defendants were not physically present at the trial. Despite Plaintiff's insinuations to the contrary, reprinting material from the *Belleville News-Democrat* did not extinguish the fair report privilege. Even if the material was defamatory, AboveTheLaw.com is entitled to "reprint defamatory information reported by another in the context of public records or proceedings." *Edwards v. Paddock Publ'ns, Inc.*, 327 Ill. App. 3d 553, 563 (1st Dist. 2001).

2. Any commentary in the Post is also protected because it contains opinion or hyperbole.

Further, the Post's commentary on the newspaper report is non-actionable opinion or rhetorical hyperbole. Only statements of *fact*, not opinion, can be defamatory; "[t]here is no such thing as a false idea or opinion." *O'Donnell*, 145 Ill. App. 3d at 1039-40 (affirming dismissal of defamation claim based on editorial concerning criminal investigations and arrests because "it is clear that the ideas and opinions in the editorial do not imply undisclosed defamatory facts as their bases" and "[t]o the extent that the editorial makes disclosed factual statements, the statements are privileged" under the fair report privilege.); *see*, *e.g.*, *Horowitz v. Baker*, 168 Ill. App. 3d 603 (3d Dist. 1988) (affirming dismissal of a defamation claim, holding that statements

in a newspaper article describing a previously-reported transaction as a "cozy little deal" and a "rip off" were "rhetorical hyperbole" and "an average reader would not regard the statements as factual reporting"). Many of the statements that Plaintiff claims are defamatory fall into this category—they are discussion about the newspaper report on the trial that does not assert any additional facts about the trial. (*See*, *e.g.*, Ex. C at 1, 3 ("Our next story from the files of the wanton and depraved"; "Huon's potentially harmless lies allegedly turned dastardly, pretty quickly"; "It seems to me that there is entirely too much (alleged) raping going on in this country. If this keeps up, men and women are going to have to start carrying around sexual consent forms on their persons.").) Such statements are protected opinion or mere rhetorical hyperbole.

3. Any commentary in the Post can be innocently construed as a biting or sarcastic comment and not a literal statement of fact.

Plaintiff also insinuates unreasonable meanings to excerpts within the Post. A statement will not be deemed defamatory if it is reasonably susceptible of an innocent construction. *Harrison*, 341 Ill. App. 3d at 569. Statements must "be considered in context, with the words and the implications therefrom given their natural and obvious meaning." *Id.* at 570 (citing *Chapski v. Copley Press*, 92 Ill. 2d 344, 351 (1982)). To the reasonable reader, Plaintiff's interpretations of the "defamatory" statements in the Post are simply outlandish. For example, while providing background for the underlying case, Mystal wrote that "I [Mystal] once pretended to be an Ostrich rancher from sub-Saharan Africa because I was trying to impress bubble gum princesses at a BU party." (Ex. C at 1.) The natural and obvious implication is *not* that the alleged victim was a minor or bubble gum princess, as Plaintiff alleges. (Compl. ¶¶ 63(t), 72(n).) Rather, this language, and other language like it in the Post, is a jocular parallel to the astonishing testimony from the criminal trial, with Mystal poking fun at himself.

4. Plaintiff has not adequately alleged that the Post is defamatory.

a) Plaintiff does not plead facts that support a claim for defamation *per se.*

A plaintiff alleging defamation *per se* must plead that the statements at issue fall into one or more of five categories: "(1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication." *Solaia*, 221 Ill. 2d at 579-80. Even on his fifth try, Plaintiff does little more than recite the *per se* categories of speech that he believes apply to his claims. (Compl. ¶ 171.) Without more, this claim still fails.

Plaintiff cannot plausibly assert that he has been defamed due to accusations of criminal wrongdoing because he *was* criminally charged. *See Hahn v. Konstanty*, 684 N.Y.S. 2d 38, 39 (N.Y. App. Div. 1999) (holding that alleged inaccuracies in reporting of criminal proceedings were not defamatory *per se*, where plaintiffs were in fact charged with a crime); *Schaefer v. Hearst Corp.*, 5 Media L. Rep. (BNA) 1734, 1736 (Md. Super. Ct. 1979) (same). Plaintiff admits that cyberstalking and harassment charges were filed against him and were not dismissed until seven months after his trial. (Compl. ¶¶ 51, 53.) He also admits there was at least one complainant. (*see*, *e.g.*, Compl. ¶ 50.) Instead, he asserts that the Post inaccurately infers that at the time of the incident, Plaintiff had a criminal record, that there was more than one victim, or that he was otherwise dangerous. (Compl. ¶¶ 63(i); 72(a).)

Nonetheless, the article is substantially true and its overall "gist" is accurate. To make this determination, courts "look at the highlight of the Post, the pertinent angle of it, and not to

items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Gist v. Macon Cnty. Sheriff's Dep't*, 284 Ill. App. 3d 367, 371 (4th Dist. 1996) (internal quotation marks and citation omitted). Unquestionably, the overall thrust of the Post is to describe the events of the first day of Plaintiff's criminal trial, which account is supported by the trial transcripts. Any minor inaccuracies (including, for example, the timing of the availability on the internet of information about Plaintiff's criminal case) are immaterial—particularly when these "inaccuracies" contain substantively correct information already admitted by Plaintiff.

The remaining alleged categories—that Plaintiff cannot perform his employment duties or otherwise is prejudiced in his profession—have no factual support in the pleadings. The Post never mentions or even suggests Plaintiff's ability as an attorney. Although Plaintiff concludes that he was affected professionally, Federal Rule of Civil Procedure 8(a) still requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A claim simply cannot go forward when no facts are alleged. *Iqbal*, 556 U.S. at 678 (citing and quoting *Twombly*, 550 U.S. at 555, 557). Plaintiff fails to allege facts to support his conclusory inference that the Post impugned his ability as a lawyer. Without anything more, Plaintiff cannot sustain a defamatory *per se* claim.

b) Plaintiff has not alleged special damages as required for defamation *per quod*.

Unlike defamation *per se*, defamation *per quod* requires special damages to be "set forth with particularity." *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 733 (1st Dist. 1990). Even on his fifth attempt, Plaintiff still fails to meet this requirement. "[U]nderlying the strict pleading rule in libel *per quod* cases is the need of the courts to be able to dismiss groundless defamation cases at an early stage of the litigation." *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1201-02 (N.D. Ill.

1984). This rule applies in federal court pursuant to Rule 9(g) and should be utilized here. *See Spelson*, 581 F. Supp. at 1201 ("[T]he allegation of special damage must be explicit.") (quotation omitted).

Although the Plaintiff includes more paragraphs related to "damages" in the latest Complaint, (*see* Compl. ¶¶ 184, 186), he simply adds to the laundry list of general allegations that he previously pled. In fact, Plaintiff essentially only pleads that the "special damages" he has incurred are "damage to business, trade, profession and occupation . . . in a sum to be determined at time of trial," and "the loss of his professional reputation." (Compl. ¶¶ 197, 201-02.) "General allegations, such as damage to an individual's health or reputation, economic loss, and emotional distress, are insufficient to support an action *per quod*." *Schaffer*, 196 Ill. App. 3d at 733. *See Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 270 (7th Cir. 1983).

Nor can Plaintiff meet his pleading burden by alleging, for all of his counts, that he "suffered a loss of reputation and business" and, because of the Post, has seen "a decline in prospective business, loss of job or economic opportunity, loss of clients, and business deals." (Compl. ¶¶ 163-65.) These allegations are still too vague to survive. Plaintiff must allege facts which, if proven, would sufficiently show that he suffered concrete, pecuniary harm. *Maag v. Ill. Coal. for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 853 (5th Dist. 2006). Case law is well established that such conclusory allegations of declines in business or opportunities simply are not specific enough to plead special damages. *See*, *e.g.*, *Salamone v. v. Hollinger Int'l, Inc.*, 347 Ill. App. 3d 837, 843-44 (1st Dist. 2004) (collecting cases rejecting similar allegations as insufficient to plead special damages, including loss of professional reputation, livelihood, and potential customers).

Because Plaintiff has not alleged defamation *per se* and has not alleged special damages to support a claim of defamation *per quod*, the Court should dismiss his defamation claims against the ATL Defendants.

5. Plaintiff inappropriately bases his claim on statements that are not defamatory, about him, or actually contained in the Post.

Many of Plaintiff's allegations concerning the Post cannot support a claim for defamation or any other theory of recovery. First, many of the statements that Plaintiff identifies clearly would not "tend[ ] to cause such harm to [Plaintiff's] reputation . . . that [they] lower[] [Plaintiff] in the eyes of the community or deter[] third persons from associating with him." *Parker v. House O'Lite Corp.*, 324 Ill. App. 3d 1014, 1020 (1st Dist. 2001). (*See*, *e.g.*, Compl. ¶ 72(m) (complaining that the Post identifies Plaintiff as a St. Louis-area lawyer when his address is in Chicago).) Additionally, several of the statements that Plaintiff identifies clearly do not relate to him. *See Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 391-92 (1st Dist. 1995) (affirming dismissal where statements could be construed to refer to someone other than plaintiff). (*See*, *e.g.*, Compl. ¶¶ 63(t), 72(n) (inaccurately stating that the Post's author's self-deprecating joke was a statement of fact).)

Finally, many of Plaintiff's allegations do not accurately reflect the statements in the Post. He largely ignores that the Post describes and comments on the testimony of Plaintiff's alleged victim. (*Compare*, *e.g.*, Compl. ¶ 63(y) (claiming that "[s]tating and/or inferring that Plaintiff told complainant that 'other promotional models left' and that Plaintiff 'was going to interview her' thereby inferring that Plaintiff lured complainant under the guise of a job interview" is an actionable statement), *with* Ex. C at 1 ("But the next day, the victim was running late and called Huon. He told her to meet him at another bar, but when she got there, he told her

the other promotional models left, and so he was going to interview her, *the victim said*.") (emphasis added).)

B. Plaintiff's False Light Claim Fails For The Same Reasons As His Defamation Claims (Count III)

Plaintiff's claim for false-light invasion of privacy fails for the same reason as his defamation claims. The protection for reports on government proceedings and statements of opinion described above springs from the First Amendment and is not limited to defamation claims. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 393 (2008) (holding that language protected by the First Amendment "cannot serve as the predicate" for defamation or false-light claims). The requirement of pleading special damages also applies to false-light claims. *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 927 (7th Cir. 2003) ("If the action is based on statements that are not defamatory *per se*, special damages too must be pleaded."). Accordingly, the Court should dismiss Plaintiff's false-light claim.

C. Plaintiff's Intrusion Upon Seclusion Is Barred By The First Amendment And Has Not Been Pled Properly (Count IV)

Like the defamation and false-light claims, the First Amendment precludes an allegation of intrusion upon seclusion. As the Seventh Circuit explained, even "tabloid-style" reporting "is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them *regardless of the name of the tort*...." *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (emphasis added)). Plaintiff's intrusion claim is based on the Post, which, as described *supra*,[9] is a fair report of the proceedings and protected by the First Amendment.

Constitutional issues aside, Plaintiff has not properly pled his claim. To plead intrusion upon seclusion, the Complaint must set forth (1) an unauthorized intrusion or prying into his

[9] *See* Section III.A.1.

seclusion, (2) that is offensive or objectionable to a reasonable person, (3) intrudes on a private matter, and (4) causes anguish or suffering. *Busse v. Motorola Inc.*, 351 Ill. App. 3d 67, 71-72 (1st Dist. 2004). If a plaintiff fails to "allege private facts, the other three elements of the tort need not be reached." *Id.* at 72. Although Plaintiff generally pleads that the ATL Defendants have invaded his privacy, (Compl. ¶ 237), he never indicates *how* they did so. The Complaint is clear that the ATL Defendants obtained their information from the *Belleville News-Democrat*, which in turn obtained all of its information from Plaintiff's public trial. (*See* Ex. C at 3; *see generally* Ex. B.) The very nature of intrusion upon seclusion, however, is the "highly offensive prying into the physical boundaries or affairs of another person. *The basis of the tort is not publication or publicity.* Rather, the core of this tort is the offensive prying into the private domain of another." *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 417 (1989) (emphasis added). Without any allegations that the ATL Defendants published private information—much less that they actively invaded Plaintiff's privacy to do so—Plaintiff cannot sustain this claim.

D. Plaintiff Has Not Alleged Intentional Infliction Of Emotional Distress (Count V)

Similarly, Plaintiff's claim for intentional infliction of emotional distress ("IIED") is barred by the First Amendment and also fails to state a claim. The First Amendment protections for fair reports of government proceedings and statements of opinion that bar Plaintiff's defamation and false light claims apply equally to his IIED claim. *Flip Side, Inc. v. Chi. Tribune Co.*, 296 Ill. App. 3d 641, 656 (1st Dist. 1990) (holding that an emotional distress count based on the same publication as a defamation claim cannot be "treat[ed] separately"; the "same first amendment considerations must be applied") (citing *Hustler Magazine*, 485 U.S. at 56)).

Further, to the extent that the Post is not protected from liability by either constitutional doctrine, the claim should nevertheless be dismissed because Plaintiff has not alleged conduct

that is so extreme and outrageous as to exceed all possible bounds of decency as is required to state a claim for IIED. *See Berkos v. Nat'l Broad. Co.*, 161 Ill. App. 3d 476, 496-97 (1st Dist. 1987) (listing elements of IIED claim). Courts routinely dismiss claims based on publications for failure to allege extreme and outrageous conduct. *See*, *e.g.*, *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899 (7th Cir. 2007) (allegedly false portrayal of plaintiff in movie not extreme and outrageous); *Cook v. Winfrey*, 141 F.3d 322, 330-31 (7th Cir. 1998) (affirming dismissal of IIED claim based on statements that the court held properly stated a claim for defamation). The Court should dismiss Plaintiff's IIED claim.

E. Plaintiff Cannot Plead Any Of The Elements Of Tortious Interference With Prospective Economic Advantage (Count VI)

Plaintiff's new claim for tortious interference with prospective economic advantage is also deficient. To prevail on such a claim, the Complaint should allege that "(1) plaintiff must have a reasonable expectancy of entering into a valid business relationship; (2) defendant must know about this expectancy; (3) defendant must intentionally interfere with the expectancy preventing the expectancy from ripening into a valid business relationship; and (4) defendant's intentional interference must injure the plaintiff." *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill. App. 3d 510, 513-14 (1st Dist. 1991) (citation omitted). "The key issue in the tort of interference with a party's prospective economic advantage is intent. . . . " *Id.* at 515.

Like the other failed claims, the Complaint is both too general and tries to force inferences without actually pleading more than a legal conclusion. In this count, Plaintiff essentially attempts to convert his allegations against ATL Defendants' publication of the Post into intent to disrupt his business. (*See* Compl. ¶ 263.) Such "conversion," however, is improper, because factual allegations regarding publication of the Posts cannot be conflated to create inferences of intent to interfere with business expectancies. *See also id.* at 514-15. Intent

for this tort "is defendant's knowledge of a reasonable business expectancy and defendant's subsequent intentional interference which prevents the expectancy from ripening into a valid business relationship." *Id.* at 515. Plaintiff has not and cannot plead either, much less both of these elements. Instead he assumes that the ATL Defendants dissuaded Plaintiff's prospective business opportunities—but without saying how. Without more than a legal conclusion that the ATL Defendants' publication of the Post harmed him professionally, the Court must dismiss Plaintiff's claim.

F. Plaintiff Does Not Adequately Allege A Conspiracy (Counts VII and VIII)

The Court should also dismiss Plaintiff's claim of conspiracy. As an initial matter, the claim of conspiracy cannot stand because Plaintiff has not properly alleged any other tort. *See Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 823 (5th Dist. 2001) ("Conspiracy is not a separate and distinct tort in Illinois. . . . There is no cause of action unless an overt, tortious, or unlawful act is done that, in absence of the conspiracy, would give rise to a claim for relief.").

Further, the allegations of this count are so vague as to fail to state a claim under *Twombly* and *Iqbal*. Plaintiff generally alleges that each of the twelve named defendants "agreed between and among themselves, and with each other, to publish the actionable and offensive statements on the Internet" in order to invade Plaintiff's privacy and injure his personal and professional reputation, "in furtherance of [a] common scheme." (Compl. ¶¶ 252-53.) That allegation simply states elements for a claim of conspiracy and does not apprise the ATL Defendants of any specific conduct that Plaintiff asserts gives rise to his claim. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual

enhancement.'" *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 557). This type of vague pleading fails to state a claim. The Court should dismiss Plaintiff's conspiracy claim.

G. Illinois's Criminal Statute Concerning Cyberstalking Does Not Apply Here (Count IX)

Plaintiff attempts to allege a claim of cyberstalking under Illinois's criminal stalking law, 720 ILCS 5/12-7.5. The Court should dismiss this claim because the statute does not provide a private cause of action, the statute does not apply to the Post, and fair reports of governmental proceedings are constitutionally protected.

This Court should not allow a private cause of action under this cyberstalking statute. "[T]he judiciary by implying causes of action is assuming policy-making authority, a power more properly exercised by the legislature. The court should exercise such authority with due caution." *Galinski v. Kessler*, 134 Ill. App. 3d 602, 605-06 (1st Dist. 1985) (refusing to allow private cause of action for barratry, a petty offense under Illinois law). The ATL Defendants have been unable to locate any cases involving private claims for cyberstalking or the related criminal offense of stalking. *See id.* at 605 (noting that the court could locate no cases involving private claims for criminal offense at issue in that case). In light of the statute's stiff criminal penalties and the availability of other causes of action for the type of conduct that Plaintiff has inadequately alleged, there is no need for a civil remedy under the law. *See* 720 ILCS 5/12-7.5(b) (Cyberstalking is a Class 4 felony.); *Lane v. Fabert*, 178 Ill. App. 3d 698, 702-03 (4th Dist. 1989) (holding no need for a private remedy under the Illinois Pawnbrokers' Act where the statute already provides large criminal penalties and because many civil causes of action address the same type of conduct).

Additionally, the cyberstalking statute does not apply to the Post. The statute criminalizes "a course of conduct using electronic communication directed at a specific person"

when the actor "knows or should know that [it] would cause a reasonable person to: (1) fear for his or her safety or the safety of a third person; or (2) suffer other emotional distress." 720 ILCS 5/12-7.5(a). The Post was published on a website and is not an "electronic communication directed at a specific person."

Plaintiff also attempts to allege a claim under subsection (a-5)(2) of the statute, alleging that the ATL Defendants created and maintained a website that "contain[ed] harassing statements" and "place[d] [Plaintiff] in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint." (Compl. ¶ 270.) This section of the statute does not apply, as the Post does not "harass" Plaintiff, nor would any apprehension of bodily harm caused by the Post be "reasonable." 720 ILCS 5/12-7.5(a-5)(2); *see* 720 ILCS 5/12-7.5(c)(4) (definition of harass is "to engage in a knowing and willful course of conduct *directed at a specific person* that alarms, torments, or terrorizes that person") (emphasis added).

Finally, the cyberstalking statute should not grant Plaintiff a private right of action in this case because it would controvert the First Amendment protections of fair reports of governmental proceedings and statements of opinion explained above. *See Desnick*, 44 F.3d at 1355 (finding that speech "is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation . . . regardless of the name of the tort . . . ."); *O'Donnell*, 145 Ill. App. 3d at 1036 (cautioning against "self-censorship by the news media" if it "cannot report what it sees and hears at governmental and public proceedings"). Plaintiff's interpretation of the cyberstalking statute would effectively prevent the press from reporting on criminal investigations and charges—just the sort of liability that the fair report privilege is intended to prevent.

IV. CONCLUSION

WHEREFORE, the ATL Defendants respectfully request that the Court dismiss the claims against them in Plaintiff's Fourth Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) with prejudice, and grant such further relief as is just.

Dated: January 7, 2013

Respectfully submitted,

BREAKING MEDIA, INC., f/k/a BREAKING MEDIA, LLC, DAVID LAT, ELIE MYSTAL, JOHN LERNER, and DAVID MINKIN

By: /s/ Steven P. Mandell
One of their attorneys

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This chart lists each of Plaintiff's allegations of defamatory statements, then indicates which of the ATL Defendants' arguments applies to that allegation. The key at the bottom of each page explains the abbreviations. Where applicable, the chart quotes the portion of the Post to which the allegation refers to demonstrate that the Complaint does not accurately describe the Post, or cites to pages of the transcript of Plaintiff's trial that demonstrate the applicability of the fair report privilege.

Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(a)	"Stating and/or inferring that Plaintiff is an attorney rapist."	✓					✓	✓	"We cover the rape allegations of the rich and famous, as well as any alleged attorney rapists near you…"	
63(b)	"Stating and/or inferring that Plaintiff is wanton and depraved."	✓	✓					✓	"Our next story from the files of the wanton and depraved is a little more in our wheelhouse."	
63(c)	"Stating and/or inferring that Plaintiff had an excellent little game to meet women."	✓	✓	✓			✓			
63(d)	"Stating and/or inferring that Plaintiff allegedly listed Craigslist ads where he claimed to be a talent scout for models thereby inferring that Plaintiff is a sexual predator."	✓		✓						194-200
63(e)	"Stating and/or inferring that Plaintiff told lies and is a liar."	✓		✓				✓	"But Huon's potentially harmless lies allegedly turned dastardly, pretty quickly"	194-200
63(f)	"Stating and/or inferring that Plaintiff is dastardly."	✓	✓	✓				✓		

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R = Not tending to harm Plaintiff's reputation
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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(g)	"Stating that the complainant is a 'victim' of Plaintiff thereby inferring that the complainant was actually criminally assaulted by Plaintiff."	✓							Quoting Belleville News-Democrat website: "The victim said she responded to a Craigslist ad posted by Huon in late June, seeking promotional models, sending her resume, her phone number and two pictures of herself…"	
63(h)	"Stating that the complainant responded to a Craigslist ad posted by Plaintiff in late June seeking promotional models thereby inferring that Plaintiff is some kind of sexual predator."	✓		✓						194-200
63(i)	"Stating that if the complainant had Googled Plaintiff's name, she would have found other stories in the Madison County Record and other sites inferring that Plaintiff had a criminal record, that there was more than one woman victim or was otherwise dangerous."			✓						
63(j)	"Stating that Mr. Huon was posing as a supervisor for a company that sets up promotions for alcohol sales at area bars."	✓		✓						e.g., 208
63(k)	"Stating and/or inferring that Plaintiff is a potential rapist and/or 'depraved dude' walking around who is a potential rapist."	✓	✓	✓		✓		✓	"Of course, women shouldn't have to assume that every guy they meet is a potential rapist. But apparently there are a lot of depraved dudes walking around out there that are potential rapists."	
63(*l*)	"Stating and/or inferring that Plaintiff fondled the complainant and forced her to perform oral sex on him."	✓						✓	Quoting Belleville News-Democrat website: "As the car was moving, Huon fondled the woman, then forced her to perform oral sex on him, the victim said."	222-25

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(m)	"Stating that a photograph of the complainant showed bruised knees, skinned feet and cut toes, thereby inferring that Plaintiff caused physical harm to the complainant."	✓		✓						233-36
63(n)	"Stating and/or inferring that Plaintiff lied to the complainant about a job and his intentions to lure her into a car."	✓	✓						"If you can't get a woman to consensually stay in a moving vehicle, can you really get her to consensually agree to sex (insofar as lying to her about your job and your intentions to get her into the car counts as consensual in the first place)?"	
63(o)	"Stating that the complainant hurled herself out of a moving vehicle thereby inferring that she was assaulted and/or in danger of being assaulted by Plaintiff."	✓	✓						"So we're not denying that she hurled herself out of a moving vehicle, we're contending that she jumped out of the car to make it look like she was raped?"	231-32
63(p)	"Stating and/or inferring that Plaintiff has committed rape."	✓						✓		

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(q)	"Stating and/or inferring that Plaintiff is chronically lonely, was desirous of a hot body, sought amorous undulations and has or would have sexual relations with a barnyard animal."		✓			✓	✓	✓	"It seems to me that there is entirely too much (alleged) raping going on in this country. If this keeps up, men and women are going to have to start carrying around sexual consent forms on their persons: I, the undersigned, being of sound mind and hot body, do hereby consent to affixing my ___ to the other party's ____. Such amorous undulations include, but are not limited to, ___, ___, and ___, all proposals will be considered so long as no animals (barnyard or otherwise) are involved. I claim nor rights to future ____, ____, or ____, in exchange for this brief interruption in my chronic loneliness. While I may be quite intoxicated right now, I know damn well what I'm doing."	
63(r)	"Stating and/or inferring that Plaintiff requires a consent form in order to have sex."		✓			✓	✓	✓		
63(s)	"Starting and/or inferring that Plaintiff had raped the complainant in 'breaking rape coverage' on the date that he was acquitted of sexual assault charges."					✓	✓	✓	"Here at ATL, we're your one-stop shop for breaking rape coverage. We cover the rape allegations of the rich and famous, as well as any alleged attorney rapists near you…"	

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(t)	"Stating and/or inferring that the complainant is a minor or bubble-gum princess."			✓	✓	✓	✓	✓	"I once pretended to be an Ostrich rancher from sub-Saharan Africa because I was trying to impress bubble gum princesses at a BU party."	
63(u)	"Stating and/or inferring that Plaintiff's acts or conduct was more depraved and wanton than raping a 15 year-old girl."					✓		✓	The Post contains two stories about rape allegations. The first involves New York Giants linebacker Lawrence Taylor's alleged rape of a fifteen-year-old girl.	
63(v)	"Stating and/or inferring that Plaintiff was a sex offender or sexual predator."	✓						✓		
63(w)	"Stating and/or inferring that Plaintiff was a pedophile."							✓		
63(x)	"Stating and/or inferring that Plaintiff used the Internet to meet women for sex."	✓		✓	✓					194-200
63(y)	"Stating and/or inferring that Plaintiff told complainant that 'other promotional models left' and that Plaintiff 'was going to interview her' thereby inferring that Plaintiff lured complainant under the guise of a job interview."	✓		✓	✓				Quoting Belleville News-Democrat website: "But the next day, the victim was running late and called Huon. He told her to meet him at another bar, but when she got there, he told her the other promotional models left, and so he was going to interview her, the victim said."	e.g., 201, 204, 207
63(z)	"Stating and/or inferring that 'This is gonna end badly' thereby inferring that the allegations of rape are credible."	✓	✓							

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
63(aa)	"Stating and/or inferring that 'Oh, come on. If somebody was driving and tried to "force" me to perform oral sex on them, I'd just get out of the stupid car. Which is to say, I'd do *exactly* what the victim did in this case,' thereby improving the credibility of the defamation."	✓	✓	✓						222-25
63(bb)	"Stating and/or inferring that the jury was allowed to consider the defense of rape in their deliberations: 'Damn. If you can't get a woman to consensually stay in a moving vehicle, can you really get her to consensually agree to sex (insofar as lying to her about your job and your intentions to get her into the car counts as consensual in the first place)? Obviously, Huon sees things differently.'"	✓	✓					✓		156
63(cc)	"Stating and/or inferring that 'It seems to me that there is entirely too much (alleged) raping going on in this country,' thereby inferring that Plaintiff got away with rape and improving the credibility of the rape charges on the date of Mr. Huon's acquittal."		✓							
72(a); *see* 82, 85	Omitted that "[t]he complainant that is the subject of all the news articles is the same woman."			✓	✓					

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
72(b)	Omitted that "[t]he jury was not allowed to consider the consent defense, because Mr. Huon did not testify and the trial judge barred the consent defense before closing arguments. Thus, the jury had to have found that no sexual contact took place."	✓		✓	✓					156
72(c)	Omitted that "[t]he complainant sustained minor injuries from walking or running in a cornfield."	✓		✓						
72(d)	Omitted that "[t]here was no evidence of a Craigslist ad for a job for promotional modeling."	✓		✓	✓					196
72(e)	Omitted that "[t]here was no evidence that Mr. Huon represented himself as a talent scout."	✓		✓						194-200
72(f)(1)[1]	Omitted that "[t]he video evidence at trial showed Mr. Huon, dressed in shorts, on a Sunday afternoon with the complainant, in a bar."	✓		✓	✓					
72(f)(2)	Omitted that "[t]here was no DNA evidence of semen and the complainant never went to the hospital."	✓		✓	✓					
72(g)	Omitted that "[t]he detectives never interviewed the two key witnesses at the scene who testified at trial that the complainant gave different versions of the alleged incident."	✓		✓	✓					

[1] Plaintiff has two paragraphs marked as 72(f). Therefore, in the chart, the first one has been marked as 72(f)(1) and the second as 72(f)(2).

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
72(h)	Omitted that "[t]he detectives asked the complainant to call Mr. Huon to arrange a private meeting and to ask for money."	✓		✓	✓					
72(i)	Omitted that "[t]he complainant had gone drinking with Mr. Huon at several bars for hours."	✓		✓	✓					
72(j)	Omitted that "[t]here was no physical evidence presented that the complainant jumped out of a moving car."	✓		✓	✓					231-32
72(k)	Omitted that "[t]here was no evidence of force presented at trial. The police report stated that complainant alleged that Mr. Huon raised his voice but that Mr. Huon never threatened the complainant."	✓		✓	✓					e.g., 224, 231
72(*l*)	Omitted that "[t]he photograph of the complainant showed no injuries (besides from her walking in a cornfield barefoot) and showed her clothes to be completely intact with no tears."	✓		✓	✓					233-36
72(m)	Omitted that "Mr. Huon is not a St. Louis-area lawyer. He was a financial advisor for St. Louis-based Edward Jones Investments at the time of the alleged incident."			✓	✓					
72(n)	Omitted that "[t]he complainant was 26 years old at the time of the alleged incident and not a minor or bubble gum princess."			✓	✓	✓				

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72(o)	Omitted that "[t]he complainant's boyfriend was arrested in 2008 and convicted and sentenced in 2009 in Federal Court in St. Louis, Missouri for possession and intent to distribute cannabis."			✓	✓	✓				
72(p)	Omitted that "Mr. Huon was not charged with 'rape' to the extent that he was not charged with forcing the complainant to have vaginal sexual intercourse by penile penetration."	✓								
72(q)	Omitted that "[t]he complainant made conflicting statements to two key witnesses—who were never interviewed by the detectives."	✓			✓	✓				
72(r)	"Defendants omitted that Mr. Huon had been acquitted on May 6, 2010."	✓								
73	"Defendants defamed Mr. Huon and placed him in a false light by inaccurately reporting his defense attorney's opening argument. Defendants omitted that Mr. Huon's defense counsel was relying on information contained in the police report that was replete with false statements and that opening argument is not a statement of the facts."	✓								149-161

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
74	"Defendants created the following consent form which further defamed Mr. Huon and placed him in a false light: 'I, the undersigned, being of sound mind and hot body, do hereby consent to affixing my ___ to the other party's ____. Such amorous undulations include, but are not limited to, ___, ___, and ___, all proposals will be considered so long as no animals (barnyard or otherwise) are involved. I claim nor rights to future ____, ____, or ____, in exchange for this brief interruption in my chronic loneliness. While I may be quite intoxicated right now, I know damn well what I'm doing."		✓			✓	✓		The consent form is preceded by the following: "It seems to me that there is entirely too much (alleged) raping going on in this country. If this keeps up, men and women are going to have to start carrying around sexual consent forms on their persons."	
75	"The consent form defames Mr. Huon and places him in a false light in that it suggests that he has 'chronic loneliness,' was seeking a 'brief interruption' for a 'hot body' from anyone other than a 'barnyard' animal."		✓			✓	✓	✓		
76	"The consent form defames Mr. Huon and places him in a false light in that he is intimated as a rapist who needs to use a consent form."		✓			✓	✓	✓		

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Paragraph	Allegation	F	O	P	R	OC	I	X	The Post actually states...	Trans.
77	"The consent form defames Mr. Huon and places him in a false light in that the trial judge barred the consent defense and Mr. Huon's defense attorneys were barred from arguing consent. Consent was not a defense submitted to the jury for their deliberation."	✓				✓	✓	✓		
80	"Defendants omitted that when Mr. Huon asked the newspapers to remove the false and defamatory statements, a reporter contacted Mr. Huon's defense attorneys to complain during trial, adversely affecting relationship with his defense attorney."			✓	✓	✓				

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF ABOVE THE LAW DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED COMPLAINT** has been served on January 7, 2012 via the Court's CM/ECF system on all counsel of record who have consented to electronic service.

Any other counsel of record will be served by electronic mail and regular mail.

/s/ Steven P. Mandell

#201852.7