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

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

In his response, Plaintiff does not address the ATL Defendants' arguments. Instead, in an attempt to prop up his meritless case, he misstates the law and mischaracterizes the contents of the Post. Although he may (for obvious reasons) wish to hide aspects of his past, he cannot manufacture a lawsuit against the ATL Defendants simply because they accurately reported on his trial for criminal sexual assault. No amount of repleading can change this fact. Accordingly, the Court should dismiss this case with prejudice.[1]

[1] The Court should disregard the numerous facts and exhibits in Plaintiff's response that he did not plead in the Fourth Amended Complaint ("Complaint"). *See Rutherford v. Judge & Dolph Ltd.*, 707 F.3d 710, 2013 U.S. App. LEXIS 2407, at *6-7 (7th Cir. 2013).

ARGUMENT

I. PLAINTIFF HAS FAILED TO PLEAD HIS DEFAMATION AND FALSE LIGHT CLAIMS

A. The Fair Report Privilege Applies

Contrary to Plaintiff's argument, the ATL Defendants satisfied the requirements of the fair report privilege. The Post is a fair abridgment of an official proceeding. (Resp. at 3 (citing *Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 588 (2006).) The Post presents the victim's testimony from the first day of Plaintiff's criminal trial, as reflected in the actual trial transcript. (Memo. at 5 (comparing portions of the Post with the trial transcript).) *See Solaia*, 221 Ill. 2d at 585 (noting that a judicial proceeding is a protected official proceeding). Even if the victim testified falsely, the Post is privileged from liability. *O'Donnell v. Field Enters., Inc.*, 145 Ill. App. 3d 1032, 1036 (1st Dist. 1986).

1. Plaintiff misunderstands the fair report privilege.

In his response, Plaintiff confuses several concepts about the fair report privilege. For example, Plaintiff mistakes the "reporter's privilege," which allows a reporter to protect confidential sources, for the "fair report privilege," which immunizes fair reports of official proceedings. (*See* Resp. at 4-5.) He asserts that the ATL Defendants are not reporters and therefore cannot claim the fair report privilege. (Resp. at 4-5.) Although the ATL Defendants dispute Plaintiff's characterization that they are not reporters, it is of no relevance. The fair report privilege protects *both* reporters *and* non-reporters. *Missner v. Clifford*, 393 Ill. App. 3d 751, 761 (1st Dist. 2009). The reporter's privilege is not at issue in this motion.

Plaintiff misunderstands another important facet of the fair report privilege. Even if the victim's testimony in the criminal proceeding was defamatory, the ATL Defendants were 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). Contrary to Plaintiff's argument (Resp. at 12.), the law does not require ATL to copy information directly from a state record. *See Bannach v. Field Enters. Inc.*, 5 Ill. App. 3d 692, 693 (1st Dist. 1972) (finding fair report privilege applied where newspaper's source was a wire service reporting on an official proceeding). *See also Howell v. Enter. Publ'g Co., LLC*, 920 N.E.2d 1, 18 (Mass. 2010) ("The privilege to report official actions would mean very little . . . if to qualify for its protection, the media were limited to reporting such actions solely on the basis of on-the-record statements by high-ranking (authorized to speak) officials or published official documents. Consequently, the privilege extends to reports of official actions based on information provided by nonofficial third-party sources."); *Beary v. West Pub. Co.*, 763 F.2d 66, 69 (2d Cir. 1985) ("[S]ince the published West report was 'fair and true' the route by which it reached West is immaterial.").

Finally, Plaintiff erroneously argues that *abuse* of the privilege is a question of fact for a jury. (Resp. at 12.) Case law has long established that whether the fair report privilege applies is a question of law. *Solaia*, 221 Ill. 2d at 587. *See, e.g.*, *Eubanks v. Nw. Herald Newspapers*, 397 Ill. App. 3d 746, 751 (2d Dist. 2010). Unlike other privileges, which can be overcome by a showing of actual malice, "the only way the fair-report privilege can be abused is if the report published was not an accurate or fair abridgement of the official proceeding," which is not the case here. *Id.* (citing *Solaia*, 221 Ill. 2d at 588). The proper analysis involves the court's comparison of the official proceeding with the media account. *Maple Lanes, Inc. v. News Media Corp.*, 322 Ill. App. 3d 842, 844 (2d Dist. 2001). As the ATL Defendants demonstrate in their opening memorandum, the summary in the Post can be traced back to the trial transcript and

captures the gist of the events that day; therefore, the privilege applies. (*See, e.g.*, Memo. at 5, 13, & attached chart.)[2]

The cases Plaintiff cites are easily distinguishable. At the time that *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983), was decided, whether actual malice could overcome the fair report privilege was an open question. *Id.* at 272. Now, thirty years after that case was decided, cases like *Solaia* have made it clear that actual malice cannot overcome the privilege. In *Maple Lanes*, a question of fact existed regarding what was actually said at the proceeding. *Maple Lanes, Inc.*, 322 Ill. App. 3d at 844. That situation does not exist here; the ATL Defendants have produced a trial transcript. Finally, *Cook* applied Ohio law to determine whether a statement was opinion and would be afforded an absolute privilege; it did not involve the fair report privilege. *Cook v. Winfrey*, 141 F.3d 322, 330 (7th Cir. 1998).

In sum, none of the legal arguments Plaintiff offers overcomes the fair report privilege.

2. <u>Plaintiff mischaracterizes or misstates the facts</u>.

In addition to inaccurately stating the law, Plaintiff mischaracterizes the contents of the Post. (*See, e.g.*, Resp. at 9-10 (asserting that the Post characterizes him as a rapist).) The ATL Defendants *never* wrote that Plaintiff is a rapist or that he has been convicted of rape. Rather, the Post notes that *allegations* exist against him and recounts both the victim's version of events and Plaintiff's criminal attorney's assessment of what occurred. (*See, e.g.*, Memo. Ex. C at 1-3 (citing victim's account of alleged crime and Plaintiff's attorney's position that the evening was social and consensual in nature).)

[2] The ATL Defendants included a chart with their memorandum that outlined their arguments in response to each of the numerous allegations in the Complaint. Ironically, Plaintiff accuses the ATL Defendants of "lifting words and sentences out of context," (Resp. at 24), when the Complaint itself merely listed the allegedly defamatory phrases. By contrast, the chart provides direct quotes from the Complaint and then supplies the Court with context by cross-referencing both the Post and the trial transcript—thus providing far more context than the pleadings.

Plaintiff also erroneously summarizes the Post in the Fourth Amended Complaint. The ATL Defendants pointed out these discrepancies in their memorandum, (*see, e.g.*, Memo. at 11-12), yet Plaintiff fails to counter these arguments. He ignores the trial transcript and merely repeats the baseless allegations of his complaint.[3] For example, Plaintiff alleges that the Post is improper because the issue of whether the alleged victim consented was ultimately never presented to the jury. (Compl. ¶ 72(b); Resp. at 11.) The alleged victim, however, was specifically asked about consent on the first day of trial. (Memo. Ex. B at 248:20-22.) In fact, Plaintiff's own attorney—whom the Post cites—raised the issue of consent in opening statements. (*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.").) Plaintiff does not address these citations to the record and dismisses facts from the official record as "fiction." (Resp. at 11.)

In addition, the Post accurately describes the nature of the crime. (Memo. Ex. C at 2.) Notably, Plaintiff does not challenge that he was charged with two counts of sexual assault. (*See* Memo. Ex. A at 178:6-15.) The Illinois Rules of Evidence define criminal sexual assault as rape. *See, e.g.*, 735 ILCS 5/8-802.1 ("On or after July 1, 1984, 'rape' means an act of forced *sexual penetration* or *sexual conduct*, as defined in Section 11-0.1 of the Criminal Code of 2012 including acts prohibited under Sections *11-1.20* through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012) (emphases added)[4]; 720 ILCS 5/11-1.20

[3] *Compare* Compl. ¶ 59 ("What can be more wanton and depraved than raping a 15 year-old [*sic*] girl?") *with* Resp. at 10 ("What is more wanton and depraved than raping a 15 year old [*sic*] girl?").)

[4] Sexual conduct is defined as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1

(defining criminal sexual assault). Plaintiff's citation to an FBI press release is not controlling on this question. (Resp. at 7 n.17.)

Moreover, rape was suggested on the first day of the trial. The police uncovered searches that Plaintiff conducted for the word "rape" on his computer (intimating that Plaintiff was trying to research the alleged behavior), and Plaintiff's own attorney stated that the victim would cry "rape." (Memo. Ex. B at 147:11-15, 157:6-7, 10-12, 158:14-17.) Referring to Plaintiff as an alleged rapist is therefore consistent with the actual discourse from the trial. Read in the context of the article, the average person would have understood the gist of the allegations against Plaintiff. *Harrison v. Chi. Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (1st Dist. 2003) (citations omitted).

B. The Post Expresses Constitutionally-Protected Opinion

Plaintiff tries to refute that the Post contains protected opinion. Although his response is not clear on this point, Plaintiff suggests that the ATL Defendants are trying to couch the entire Post as opinion. (Resp. at 13-15). He is incorrect. The ATL Defendants have always been clear that the Post does two things: it provides a fair report of the first day of Plaintiff's criminal trial and offers commentary on the case.[5] (Memo. at 2.) Plaintiff confuses the two.

For example, Plaintiff states that "when someone is charged with committing a crime, that statement is a fact, not an opinion." (Resp. at 13.) But the public record is clear that he was charged with *two* counts of sexual assault, and Plaintiff *admits* that he *was* charged with a crime.

Sexual penetration is defined as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/11-0.1

[5] Of course, "[t]o the extent that the editorial makes disclosed factual statements, the statements are privileged" as a fair report, as described *supra*. *O'Donnell*, 145 Ill. App. 3d at 1040.

(Memo. Ex. A at 178:6-15; Resp. at 9.) Not only are the ATL Defendants' statement that Plaintiff was charged with a crime protected by the fair report privilege, they are also substantially true, and therefore not actionable. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 42 (holding that the "gist" or "sting" of the allegedly defamatory material is true, even if "not technically accurate in every detail").[6]

To the extent that Plaintiff means to argue that the ATL Defendants' color commentary is not protected opinion, he is wrong. Case law has long established that 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"). Rather, the law states that fact cannot be hidden under the *cloak* of opinion. *See Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 99-100 (1996) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)) ("simply couching the statement 'Jones is a liar' in terms of opinion—'In my opinion Jones is a liar'—does not dispel the factual implications contained in the statement"). The ATL Defendants have done the opposite. They provided citations to the trial transcript to support the accuracy of their summary of the trial and cited the *Belleville News-Democrat* at the end of the Post. (*See* Memo. Ex. C. at 3; *see generally* Memo. chart.)[7]

[6] Substantial truth can be determined as a matter of law on a motion to dismiss if "no reasonable jury could find that substantial truth had not been established." *Coghlan*, 2013 IL App (1st) 120891, ¶ 42.

[7] Plaintiff also fails to respond to the ATL Defendants' argument that the post is susceptible to a reasonably innocent construction. *Harrison*, 341 Ill. App. 3d at 569. (Resp. at 16-18.) Instead, he accuses the ATL Defendants categorically of lying. (Resp. at 18.)

C. Plaintiff Does Not Address The Defects In His Defamation *Per Se* And *Per Quod* Claims

1. Plaintiff fails to to plead defamation *per se*.

Plaintiff largely does not address the ATL Defendants' challenge to his claim of defamation *per se*. As the ATL Defendants explained, the Court must "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." (Memo. at 8-9 (quoting *Gist v. Macon Cnty. Sheriff's Dep't*, 284 Ill. App. 3d 367, 371 (4th Dist. 1996) (internal quotation marks and citation omitted).[8]) As set forth in the chart, the alleged inaccuracies cited by Plaintiff are not defamatory. The Post is substantially true and provides an accurate summary of Plaintiff's trial. (Memo. at 5-6, 8-9; *see generally* Memo. chart.)

Plaintiff cannot revive his claim for defamation *per se* on the erroneous premise that the ATL Defendants refer to him as a serial rapist. The Post does not say that Plaintiff has ever been convicted of any crime, rape or otherwise; it only notes that he has been charged. (*See generally* Memo. Ex. C.) Qualifying the charges as "alleged" crimes "temper[s] the [Post] so that readers would be alerted that the statements were unproven assertions and not proven facts." *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 393 (1st Dist. 1995) (citing *Lowe v. Rockford Newspaper, Inc.*, 179 Ill. App. 3d 592, 596 (2d Dist. 1989)). Moreover, Plaintiff *was* charged with a crime: two counts of sexual assault. (*See* Memo. Ex. A at 178:6-15.)[9] Even if the Post could be read to suggest that Plaintiff had been accused of sexual assault more than one time, the gist of the Post was accurate; its sting is not affected. "[F]alsehoods which do no incremental

[8] Only portions of *Gist* were unpublished. The ATL Defendants cited to the published and precedential portions of that opinion.

[9] For this reason, *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 297 Ill. App. 3d 304 (1st Dist. 1998) is distinguishable. (Resp. at 10.) In that case, the "allegations" reported upon were not found in the public record. *Id.* at 314-15. Here, the public record reflects that Plaintiff was, in fact, arrested.

damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects." *Gist*, 284 Ill. App. 3d at 371.

2. Plaintiff has not shown that he has pled special damages.

To maintain a defamation *per quod* claim, Plaintiff must plead special damages. (Memo. at 9 (citing *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 733 (1st Dist. 1990).) Plaintiff does not directly respond to that argument. Instead, he reiterates his claim of lost business revenue because the Post harmed his professional standing and reputation. (Resp. at 21 n.22.) General allegations of harm to reputation are not sufficient to plead special damages, however. *See*, *e.g.*, *Doctor's Data, Inc. v. Barrett*, 10 C 3795, 2011 U.S. Dist. LEXIS 134921, at *30 (N.D. Ill. Nov. 22, 2011) (finding that bare allegations that statements will cause damage or have harmed plaintiff's reputation are insufficient to show "actual damages of a pecuniary nature"); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 530-31 (2d Dist. 1989) (alleging that a customer "intended" to no longer do business with plaintiff does not allege special damages).

The cases Plaintiff relies upon are distinguishable because those plaintiffs pled with particularity how their businesses were affected. (*See* Resp. at 21 (quoting cases that specifically note their damages).) In *Continental Nut Company v. Robert L. Berner Company*, 345 F.2d 395 (7th Cir. 1965), the plaintiff "listed specific figures of its gross sales before and after the publication and averred that the decrease in sales was the 'natural and proximate result' of the letter." *Id.* at 397. In *Fleck Brothers Company v. Sullivan*, 385 F.2d 223 (7th Cir. 1967), the plaintiff lost the ability negotiate normal credit terms, which created a monetary loss. *Id.* at 225.

II. PLAINTIFF CANNOT MAINTAIN AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Plaintiff has also failed to address the defects in his intentional infliction of emotional distress ("IIED") claim. He cannot recover for the alleged distress caused by the substantially true reporting about his criminal case. Moreover, 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, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). His case is not like *Kolegas v. Heftel Broadcasting Corporation*, 154 Ill. 2d 1 (1992), as he claims. (Resp. at 27.) *See Kolegas*, 154 Ill. 2d at 7-8 (summarizing facts of case, where disc jockeys call a fundraiser's charitable cause a "scam," hang up on the fundraiser, and insult the appearance of the fundraiser's wife). No such constitutionally-protected reporting occurred in that case.

In addition, the fact that the ATL Defendants had "access to channels of communication" alone is not sufficient to sustain an IIED claim. (Resp. at 27.) Courts have denied relief even where a defendant has had an expansive audience, suggesting that such "access to channels of communication" is not sufficient to make conduct extreme and outrageous. *See, e.g.*, *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 908 (7th Cir. 2007) (allegedly false portrayal of plaintiff in movie not extreme and outrageous); *Cook*, 141 F.3d at 330-31 (applying Illinois law to affirm dismissal of IIED claim regarding statements uttered on a nationally syndicated television program). Without alleging any other conduct that is both substantially incorrect and extreme and outrageous, Plaintiff cannot maintain an IIED claim. *See Berkos v.*

Nat'l Broad. Co., 161 Ill. App. 3d 476, 496-97 (1st Dist. 1987) (requiring an action so extreme and outrageous as to exceed all possible bounds of decency to state a claim for IIED).

III. PLAINTIFF'S REMAINING CLAIMS ARE DEFICIENT

The remainder of Plaintiff's response does not merit a reply because he does not respond to *any* of the legal arguments of the ATL Defendants. He simply restates what he set forth in his complaint. Plaintiff cannot avoid the protections of the First Amendment, however, simply by trying to plead his defamation claim as different torts. *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)) Moreover, Plaintiff fails to address the following deficiencies in his claims:

- Intrusion Upon Seclusion: Intrusion upon seclusion involves "[o]ne who intentionally *intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns*, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Lawlor v. N. Am. Corp. of Ill.*, 2012 IL 112530, 983 N.E.2d 414, 424 (2012) (quoting Restatement (Second) of Torts § 652B (1977)) (emphasis supplied). No claim can lie without an allegation that there was an intrusion in Plaintiff's *private* affairs. *Lawlor*, 983 N.E.2d at 424-25. *See Busse v. Motorola Inc.*, 351 Ill. App. 3d 67, 72 (1st Dist. 2004) (holding that a plaintiff must "allege private facts, [otherwise] the other three elements of the tort need not be reached"). The ATL Defendants did not intrude upon Plaintiff's *private* affairs but rather reported on *public* facts from his criminal trial. As a result, Plaintiff cannot maintain an action for intrusion upon seclusion.
- Tortious Interference with an Economic Advantage: Plaintiff makes the same general assertions in his response that he did in his Complaint, without addressing the flaw in his

pleadings. He assumes that the publication of the Post had a negative impact on his economic expectancies, but he fails to plead that he lost any specific business opportunities as a result of the Post. *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill. App. 3d 510, 514-15 (1st Dist. 1991) (citation omitted). (*Compare* Compl. ¶ 263 *with* Resp. at 28-29.)

- Civil Conspiracy: In addition to his failure to plead an underlying tort, Plaintiff has not demonstrated how his Complaint meets the critical requirement for a conspiracy: showing that there is a common agreement or scheme. *Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 823 (5th Dist. 2001). In his response, Plaintiff describes the position of each defendant involved in publishing AboveTheLaw.com. (Resp. at 29-30.) Yet, "a civil conspiracy cannot exist between a corporation's own officers or employees." *Van Winkle v. Owens-Corning Fiberglass Corp.*, 291 Ill. App. 3d 165, 173, 683 N.E.2d 985, 991 (Ill. 4th Dist. 1997). *See Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 24, 694 N.E.2d 565, 571 (Ill. 1998) ("[B]ecause the acts of an agent are considered in law to be the acts of the principal, there can be no conspiracy between a principal and an agent.").
- Cyberstalking[10]: Plaintiff does not address the ATL Defendants' argument that the cyberstalking statute does not apply in this case and its application here would controvert the First Amendment.[11] (Memo. at 16-17.) Logically, if the criminal statute is inapplicable, Plaintiff cannot plausibly plead that a civil cause of action can be implied.

[10] Plaintiff incorporated by reference his argument in his response to the Jezebel Defendants' Motion to Dismiss. (Resp. at 30; *see* Resp. to Jezebel Defs.' Mot. to Dismiss at 15-16.)
[11] 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

IV. THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS WITH PREJUDICE

The Court should dismiss Plaintiff's claims with prejudice. This Court need not grant leave to amend a complaint where amendment would be futile. *Bogie v. Rosenberg*, 705 F.3d 603, 608 (7th Cir. 2013). Plaintiff filed this lawsuit in May 2011. This is his fifth version of the complaint. The ATL Defendants published the Post in May 2010. Plaintiff could have alleged any damages resulting from that publication in the first version of his complaint. His mere repetition of the allegations in his complaint, without any substantive arguments to back up his claims, indicates that he cannot fix the defects in his pleadings.

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: April 11, 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
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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).

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **REPLY IN SUPPORT OF ABOVE THE LAW DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED COMPLAINT** has been served on April 11, 2013 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

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