UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOSHUA BRINN, Index No.: 09 CV 1151

Plaintiff,

-against-

SYOSSET PUBLIC LIBRARY, MORRIS DUFFY ALONSO & FALEY, UTICA NATIONAL INSURANCE COMPANY, JUDITH LOCKMAN, Director of the SYOSSET PUBLIC LIBRARY in her individual and professional capacities, ROBERT GLICK, Trustee of the SYOSSET PUBLIC LIBRARY in his individual and professional capacities,

Defendants.
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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of defendant UTICA NATIONAL INSURANCE COMPANY's ("Utica") motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and (6) based on the following:

1. Plaintiff's allegations against Utica are mere conclusions which fail to meet the federal pleading standards and, as such, every claim against Utica must be dismissed;

2. Plaintiff cannot establish that Utica, a private insurance company, is a state actor or conspired with a state actor and as such, the First and Second Counts of the complaint, brought pursuant to 42 U.S.C. §1983 alleging that Utica violated the U.S. Constitution, must be dismissed;

3. Plaintiff's claims alleging violation of the First Amendment in the First Count also fail because the First Notice of Claim does not raise matters of public concern;

4. Plaintiff's claims alleging violation of the Fourteenth Amendment Due Process Clause in the First and Second Count also fail, since Plaintiff had no property right to continued at-will employment;

5. Because Plaintiff's federal claims must be dismissed, this Court should exercise its discretion, deny jurisdiction over the State law claims, and dismiss Plaintiff's remaining State law claims;

6. Assuming this Court entertains jurisdiction over the State law claims, for the same reasons that Plaintiff's Federal claims fail, so too must Plaintiff's State Constitutional claim for retaliation contained in the Sixth Count fail;

7. Assuming this Court entertains jurisdiction over the State law claims, the Plaintiff has failed to state a claim for intentional interference with contractual relations or "business opportunity" and, as such, the Third Count must be dismissed;

8. Assuming that this court entertains the State law claims, as an at-will employee, Plaintiff cannot state a claim for breach of the covenants of good faith and fair dealing and, as such, the Fifth Count must be dismissed;

9. Finally, assuming that this court entertains the State law claims, the Plaintiff has failed to meet the strict criteria for pleading the tort of intentional infliction of emotional distress and, as such, the Fourth Count must be dismissed.

STATEMENT OF FACTS

By way of the complaint, Plaintiff JOSHUA BRINN ("Brinn") seeks money damages arising out of allegations that the SYOSSET PUBLIC LIBRARY ("the Library"), JUDITH LOCKMAN ("Lockman"), ROBERT GLICK ("Glick"), MORRIS DUFFY ALONSO & FALEY ("Morris Duffy") and Utica retaliated against him because of his alleged exercise of rights protected by the First Amendment.

Utica is an insurance company which issued a policy of insurance to the Library. Nelson Affidavit ¶3. Brinn alleges that on January 9, 2008, he filed a Notice of Claim (referred to in the Complaint as the "First Notice of Claim") against the Library. Complaint ¶13. Although Brinn does not attach the First Notice of Claim to his Complaint, that Notice of Claim, annexed to the Nelson Affidavit as Exhibit 1, alleges that via a letter dated October 15, 2007, annexed to the Nelson Affidavit as Exhibit 2, the Library suspended Brinn's library privileges without good cause and without the due process of a hearing. [1] See Nelson Affidavit ¶3, 4. The Library forwarded the Notice of Claim to Utica seeking coverage. See Nelson Affidavit ¶3, 4. Brinn, in a conclusory manner, claims in his Complaint that this First Notice of Claim raised matters of public concern. Complaint ¶15.

At the time Brinn filed the First Notice of Claim, he was employed as an associate attorney with Morris Duffy. Complaint ¶19. From time to time, Utica retained Morris Duffy to provide legal services on behalf of Utica insureds. Complaint ¶22. Plaintiff claims that the Library Defendants and Utica "contacted partners of [Morris Duffy] to exert pressure on Plaintiff to withdraw his First Notice of Claim." Complaint ¶ 29. More specifically, the

[1] Because the First Notice of Claim is referenced in the Complaint it, and the October 15, 2007 letter to which it refers, are incorporated by reference in the complaint and therefore must be considered by this Court when considering the within Motion. *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2nd Cir. 2008); *See also, Faulkner v. Beer*, 463 F.3d 130, 134 (2nd Cir. 2006), *citing, Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2nd Cir. 1995).

complaint alleges that on March 19, 2008, at the direction of her supervisor Robyn Nelson, Betty Winkler, a claims handler at Utica, contacted "partners" at Morris Duffy "to exert pressure on" Plaintiff to withdraw his First Notice of Claim. Complaint ¶29. This is the only specific allegation detailing Utica's alleged involvement with the First Notice of Claim.

Brinn claims that he withdrew his First Notice of Claim due to "threats regarding his employment" Complaint ¶31. Brinn claims that after withdrawing the First Notice of Claim, Morris Duffy demanded that he sign a general release, Complaint ¶32 and, when he refused, Morris Duffy terminated him. Complaint ¶34.

These facts are alleged to form the basis of six counts, all of which seek economic and non-economic damages including back pay, prejudgment interest, compensatory damages in the amount of $1 million; punitive damages in the amount of $5 million; attorney's fees and a permanent injunction restraining further constitutional violations.

In the First Count, Brinn claims that "all defendants", including Utica, who was not his employer, terminated him in violation of his rights under the First and Fourteenth Amendments of the United States Constitution, causing him economic and non-economic damages. In the Second Count, Brinn claims that all defendants terminated Plaintiff without due process, in violation of the Fourteenth Amendment.

In the Third Count, Brinn claims that Utica intentionally interfered with his business opportunity. In the Fourth Count, Brinn claims defendants intentionally inflicted emotional distress. In the Fifth Count, Brinn claims that Utica breached a covenant of good faith and fair dealing regarding his employment.

Finally, in the Sixth Count, Brinn claims that Utica, acting under color of law, retaliated against him for exercising his rights of free speech.

ARGUMENT

POINT I

PLAINTIFF'S ALLEGATIONS AGAINST UTICA ARE MERE CONCLUSIONS WHICH FAIL TO MEET THE FEDERAL PLEADING STANDARDS AND AS SUCH, EVERY CLAIM AGAINST UTICA MUST BE DISMISSED

When faced with a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6), federal district courts are obligated to dismiss the complaint if it does not meet the "flexible plausibility standard" set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 554-55, 127 S.Ct. 1955, 1964-65 (2007). Pursuant to this standard, if the complaint does not, on its face, allege a plausible claim for relief, it must be dismissed:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . .a Plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level. . . [T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action", on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombley, 550 U.S. 544, 554-55, 127 S.Ct. 1955, 1964-65 (2007); *See also, Ashcroft v. Iqbal*,___U.S.___, 129 S.Ct. 1937, 1950 (2009). In other words, "[p]leadings that 'are no more than conclusions. . . are not entitled to the assumption of truth.'" *Argeropoulos v Exide Technologies*, 2009 WL 2132443, *3 (E.D.N.Y.), *quoting Ashcroft*, 129 S. Ct. at 1951. Pursuant to this standard, Brinn must allege more than the conclusory allegation he asserted against Utica to state a viable cause of action.

As noted above, in support of Six Counts, including violations of the First and Fourteenth Amendments; intentional infliction of emotional distress; intentional interference with plaintiff's business opportunity; breach of the covenant of good faith and fair dealing; and retaliation,

Plaintiff's complaint contains a single allegation as against Utica—that Betty Winkler, a claims examiner employed by Utica, at the direction of her supervisor, Robyn Nelson, "contacted partners at Morris Duffy to exert pressure on Plaintiff to withdraw his First Notice of Claim." Plaintiff does not allege any conduct, actions or activities by Utica that ties any alleged cause of action to his conclusory assumption that Utica, which, as an insurance company, was investigating, adjusting and defending Plaintiff's claim against the Library, asked Morris Duffy to pressure Plaintiff to withdraw his Notice of Claim. Plaintiff completely fails to assert any allegation to support his conclusion that Utica was at any time acting under color of law; took any action to terminate plaintiff from his employment at Morris Duffy; deprived Plaintiff of due process under the Fourteenth Amendment; intentionally interfered with Plaintiff's business opportunity; intentionally inflicted emotional distress; or owed any duty to the plaintiff much less breached any such duty. In other words, plaintiff:

1. does not allege that Utica: (a) had any agreement with anyone, much less the Library, the only possible state actor, to (b) prevent Plaintiff from exercising his alleged Constitutional right to free speech on (c) a matter of public concern as contrasted with his alleged private right to use the Library's facilities (First Count) (*see infra, Points II and III)*;

2. does not allege that Utica (a) had any agreement with anyone to terminate Plaintiff or directly terminated plaintiff and (b) somehow thereby violated Plaintiff's alleged due process rights, (c) breached a duty of good faith and fair dealing or (d) retaliated against Plaintiff (Second, Fifth and Sixth Counts) (*see infra, Points II, IV, V and VII)*;

3. does not allege conduct by Utica that exerted extreme and unfair economic pressure on Plaintiff sufficient to interfere with his job with Morris Duffy (Third Count) (*see infra, Point VII*);

4. does not allege (a) any outrageous conduct by Utica that (b) Utica intended to inflict and result in emotional distress or utterly disregarded the consequence that emotional distress would result (Fourth Count) (*see infra Point IX).*

The standard for pleading set forth by the Supreme Court in *Ashcroft* and *Twombley* requires that Plaintiff allege more than a conclusion that Utica asked Morris Duffy to pressure Plaintiff to withdraw the First Notice of Claim. Rather, Plaintiff must provide some facts to support his conclusion and the causes of action he alleges. Plaintiff has not and indeed cannot assert any cause of action against Utica, whose only involvement in this dispute derives out of its contractual obligation to investigate the validity of Plaintiff's First Notice of Claim against the Library. Since Plaintiff has not provided even the bare minimum, regardless of what cause of action he seeks to allege, all such claims as against Utica fail to meet the minimum pleading standards. As such, it is respectfully submitted that Plaintiff's entire complaint, as against Utica, fails to meet the necessary pleading rules and therefore must be dismissed.

POINT II

PLAINTIFF CANNOT ESTABLISH THAT DEFENDANT UTICA, A PRIVATE INSURER, IS A STATE ACTOR OR CONSPIRED WITH A STATE ACTOR AND AS SUCH, THE FIRST AND SECOND COUNTS OF THE COMPLAINT, BROUGHT PURSUANT TO 42 U.S.C. §1983, ALLEGING THAT UTICA VIOLATED THE U.S. CONSTITUTION, MUST BE DISMISSED

It is well settled that in order to bring a claim that a defendant violated 42 U.S.C. §1983, a Plaintiff must establish that the defendant acted under color of law:

> To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful,' "

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, 119 S.Ct. 977, 985 (1999), *quoting Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777 (1982). Private conduct by a private actor will only be actionable under §1983:

> if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."

Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295,121 S.Ct. 924, 930 (2001), *quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449 (1974). Private conduct by a private actor will be deemed to be a state action when one of three elements can be established

> (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test");
>
> (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or
>
> (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255, 257 (2008), *quoting Brentwood, supra; See also, Turturro v. Continental Airlines,* 334 F.Supp.2d 383 (S.D.N.Y. 2004); *Carlucci v. Kalsched,* 78 F.Supp.2d 246 (S.D.N.Y. 2000). The mere fact that a private corporation, such as an insurer, is subject to federal and/or state regulations does not, in and of itself, satisfy the nexus. *Sullivan, supra.* Similarly, private corporations that contract with the state are not state actors due to their mere contracting. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-841, 102 S.Ct. 2764 (1982); *Hamlin ex rel. Hamlin v. City of Peekskill Bd. of Educ.*, 377 F.Supp.2d (S.D.N.Y. 2005). In fact, even

> action[s] taken by private entities with the mere approval or acquiescence of the State is not state action.

Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 313 (2d Cir 2003) (citations omitted).

Here, under any test—the compulsory test, the joint action test, or the public function test—Utica is clearly not a state actor. Utica is a private insurer and the mere fact that some of its conduct is regulated by the state does not turn Utica into a state actor. Plaintiff clearly recognizes his inability to label Utica a "state actor" since his focus is not on Utica alone, but rather, on Utica as an alleged co-conspirator with a state actor, when, in paragraph 10, Plaintiff alleges that Utica acted under color of law by "participating and/or conspiring in joint activity with the Syosset Public Library and its agents."

Assuming, without conceding, that the Library is a state actor, for Plaintiff to properly plead that Utica acted pursuant to color of law as a conspirator with a state actor, he must establish:

> (1) an agreement between . . . a state actor and a private entity;
> (2) to act in concert to inflict an unconstitutional injury; and
> (3) an overt act done in furtherance of that goal causing damages.

Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir.1999). *See also, Ciambriello v. County of Nassau,* 292 F.3d 307 (2d Cir. 2002); *Blake v. Race*, 487 F.Supp.2d 187 (E.D.N.Y. 2007); *Celestin v. City of New York*, 581 F.Supp.2d 420 (E.D.N.Y. 2008).

Thus, in order to properly allege a conspiracy, Plaintiff must allege more than mere conclusory allegations that the defendants were conspirators. *Mione v. McGr*ath, 435 F.Supp.2d 266, (S.D.N.Y. 2006); *Prowisor v. Bon-Ton, Inc.*, 426 F.Supp.2d 165, (S.D.N.Y. 2006). Rather, it "is incumbent upon him to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." *Powell v. Workmen's Compensation Bd. of State of N. Y.*, 327 F.2d 131, 137 (2d Cir. 1964); *See also, Williams v. Town of Greenburgh,* 535 F.3d 71 (2d Cir. 2008); *Bertucci v. Brown*, 663 F.Supp. 447, 454 (E.D.N.Y. 1987); *Boracci v. Malloy,* 643 F.Supp. 1015 (S.D.N.Y. 1986). Where a Plaintiff fails to allege the necessary facts to support a conspiracy to violate his

civil rights, his complaint is subject to dismissal on a 12(b)(6) motion. *Kashelkar v. Bluestone*, 306 Fed.Appx. 690 (2d Cir. 2008).

Here, the only act that Plaintiff specifically alleges with regard to Utica is that on March 19, 2008, at the direction of her supervisor Robyn Nelson, Betty Winkler, a claims handler at Utica, contacted "partners" at Morris Duffy "to exert pressure on Plaintiff to withdraw his First Notice of Claim." Complaint ¶29. Plaintiff then seeks damages because he was allegedly fired by Morris Duffy in retaliation for refusing to sign a release. (Complaint ¶34, 36, 38 and 46). Notably absent from these allegations is any claim that Utica had any agreement with the Library (the only possible state actor defendant) to act in concert to inflict an unconstitutional injury. Also notably absent is any tie between the pressure that Utica allegedly exerted to withdraw the First Notice of Claim and the basis for the alleged termination, which is alleged to be Plaintiff's refusal to sign a release. Plaintiff cannot rely on his general allegations that "all defendants conspired" against him as such allegations are, as a matter of law, insufficient to state a valid cause of action against Utica.

Plaintiff, clearly displeased with his termination by Morris Duffy, is trying to drag Utica, which did nothing but issue an insurance policy to the Library pursuant to which Utica defended the Library as a result of Plaintiff's First Notice of Claim, into a baseless lawsuit. Plaintiff has not and cannot allege facts sufficient to turn Utica, a private corporation, into a state actor simply because Utica had a relationship with Plaintiff's previous employer, Morris Duffy. In sum, Plaintiff cannot allege a valid cause of action against Utica sounding in constitutional violations. As a result, it is respectfully submitted that both the First and Second Counts of Plaintiff's complaint must be dismissed as against Utica.

POINT III

PLAINTIFF'S CLAIMS ALLEGING A VIOLATION OF THE FIRST AMENDMENT FAIL BECAUSE THE FIRST NOTICE OF CLAIM DOES NOT RAISE MATTERS OF PUBLIC CONCERN AND AS SUCH, THE FIRST COUNT MUST BE DISMISSED

In addition to the requirement that the Plaintiff must establish that the defendant acted under color of law in order to allege constitutional violations, the Plaintiff must also allege that a federally protected right was violated. Here, Plaintiff's allegations relate to and arise out of the alleged protected right of free speech. More specifically, Plaintiff claims that defendants fired him in retaliation for filing the First Notice of Claim.

A Plaintiff alleging retaliation for exercising rights protected by the First Amendment must allege that:

1. he has an interest protected by the First Amendment;
2. the defendant's actions were motivated by or substantially caused by the Plaintiff's exercise of that right; and
3. the defendant's action effectively chilled the exercise of the Plaintiff's First Amendment rights.

Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998) (citations omitted); *See also, Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001).

Here, the question is whether Plaintiff's right to bring a Notice of Claim is an interest protected by the First Amendment. This requires an analysis of whether the speech relates to a matter of public concern or to a personal complaint. *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2897 (1987); *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct., 1684, 1689 (1983); *Sussman v. New York City Health and Hospitals Corp.*, 1997 WL 334964, 9 (S.D.N.Y. 1997). *Reuland v. Hynes*, 53 Fed.Appx. 594, 595, 2002 WL 31875655, 1 (2d Cir. 2002). *Cahill v. O'Donnell*, 75 F.Supp.2d 264, 272+ (S.D.N.Y. Dec 07, 1999); *Mishk v. Destefano*, 5 F.Supp.2d 194, 200 (S.D.N.Y. May 20, 1998); *Valentin v. New York City*, 1997 WL 33323099,

*8 (E.D.N.Y. Sep 09, 1997). "In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis v. Cowen,* 165 F.3d 154, 163-64 (2d Cir. 1999), *cert. den.*, 528 U.S. 823, 1205 S.Ct. 70 (1990).

Plaintiff baldly alleges, in conclusory fashion, that his First Notice of Claim raised a matter of public concern. Complaint ¶¶ 14, 15. A careful review of the First Notice of Claim, however, quite clearly reveals that Plaintiff was personally aggrieved when the Library suspended his privileges allegedly without due process. There is no allegation that the Library suspended the privileges of others similarly situated without the necessary due process. Regardless of whether the allegations in the First Notice of Claim are true, the fact remains that Plaintiff's claims are personal in nature.

As a private matter, therefore, the Notice of Claim upon which Plaintiff's First Amendment violations are based does not raise issues of public concern. As such, it is respectfully submitted that for this reason as well, the First Count against Utica must be dismissed.

POINT IV

PLAINTIFF'S CLAIMS ALLEGING VIOLATION OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE FAIL, SINCE PLAINTIFF HAD NO PROPERTY RIGHT TO CONTINUED AT-WILL EMPLOYMENT AND AS SUCH, THE FIRST AND SECOND COUNTS MUST BE DISMISSED

The Second Count alleges that "Defendants terminated Plaintiff without due process of law, in violation of the Fourteenth Amendment to the United States Constitution" causing damages. Complaint ¶ 38. At the outset, this allegation is confusing, at best, as leveled against Utica since Utica was not Plaintiff's employer. Utica had no way of determining how or when Plaintiff was to be terminated and no way of participating in such determination. As a result,

Utica does not even know, much less have the power to control, whether Morris Duffy violated or protected Plaintiff's due process rights.

Just as importantly, as an at-will employee, Plaintiff has no valid due process claim. "Employees at will have no protectable property interest in their continued employment." *Abramson v. Pataki,* 278 F.3d 93, 99 (2d Cir. 2002), *as quoted in Johnson v. Rowley*, --- F.3d ---, 2009 WL 1619401 (2d Cir. June 11, 2009); *See also*, *Bishop v. Wood*, 426 U.S.341, 96 S. Ct. 2074 (1976). As such, Plaintiff cannot allege that a violation of his due process rights arose out of his termination, regardless of who he believes participated in the actions that led to his termination.

It is, therefore, respectfully submitted that Plaintiff's Second Count fails to state a valid claim and must be dismissed.

POINT V

BECAUSE PLAINTIFF'S FEDERAL CLAIMS MUST BE DISMISSED, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DISMISS PLAINTIFF'S REMAINING STATE LAW CLAIMS

A federal court has subject matter jurisdiction over, *inter alia*, claims arising out of violations of the Constitution. 28 U.S.C. §§1331. This is the basis for Plaintiff's assertion that this Court has jurisdiction over this suit. Complaint ¶2. Plaintiff further claims the right to supplemental jurisdiction by this Court over his state law claims pursuant to 28 U.S.C. §1367. Complaint ¶2. However, pursuant to 28 U.S.C. §1367:

> c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if:
>
> . . .
>
> (3) the district court has dismissed all claims over which it has original jurisdiction.

Recently, the Supreme Court reaffirmed that once the claims that form the basis for federal subject matter jurisdiction are dismissed, the federal district court has discretion to refuse to continue to exercise supplemental jurisdiction over the state law claims which remain. *Carlsbad Technology, Inc. v. HIF Bio, Inc.* --- U.S. ---, 129 S.Ct. 1862 (2009). Whether to exercise discretion depends upon a balancing of factors including "judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, (1988). Generally, however, where the federal law claims are dismissed before discovery occurs, the federal district court should decline jurisdiction. In fact, "in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill, supra. See also, Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118 (2d Cir. 2006); *Cintas Corp. v. Unite Here*, 601 F.Supp.2d 571 (S.D.N.Y. 2009); *Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F.Supp.2d 330, 369 (S.D.N.Y. 2009); *Harborview Master Fund, LP v. Lightpath Technologies, Inc.*, 601 F.Supp.2d 537 (S.D.N.Y. 2009); *Ambrose v. Korines*, 2005 WL 1962027 (E.D.N.Y. 2005); *Livant v. Clifton*, 334 F.Supp.2d 321 (E.D.N.Y. 2004); *Gilmore v. Amityville Union Free School Dist.*, 305 F.Supp.2d 271 (E.D.N.Y. 2004); *Mangaroo v. Boundless Technologies, Inc.*, 253 F.Supp.2d 390 (E.D.N.Y. 2003).

Accordingly, upon dismissal of the federal law claims, this Court should decline to exercise its supplemental jurisdiction, and should dismiss the state law claims as well.

POINT VI

ASSUMING THAT THIS COURT ENTERTAINS JURISDICTION OVER THE STATE LAW CLAIMS, FOR THE SAME REASONS THAT PLAINTIFF'S FEDERAL CLAIMS FAIL, SO TOO MUST PLAINTIFF'S STATE CONSTITUTIONAL CLAIM, CONTAINED IN THE SIXTH COUNT, FAIL

In the Sixth Count, Plaintiff alleges "Defendants, acting under color of law, also retaliated against Plaintiff for the exercise of his rights to free speech under the New York State Constitution." Complaint, ¶ 46. This claim must be dismissed for the same reasons that the first two counts must be dismissed, since the analysis regarding whether the Plaintiff can validly state claims against Utica pursuant to 42 U.S.C. §1983 is identical to the analysis regarding the validity of claims brought pursuant to the New York State Constitution. *See, e.g., SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985); *Kenney v. Genesee Valley Bd. of Cooperative Educational Services*, 2008 WL 343110, 3 (W.D.N.Y. 2008); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F.Supp.2d 289 (E.D.N.Y. 2000).

It is, therefore, respectfully requested that this Court dismiss the Sixth Count.

POINT VII

ASSUMING THIS COURT ENTERTAINS JURISDICTION OVER THE STATE LAW CLAIMS, THE PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS OR "BUSINESS OPPORTUNITY" AND AS SUCH, THE THIRD COUNT MUST BE DISMISSED

The Third Count alleges that "Defendants SYOSSET PUBLIC LIBRARY and UTICA NATIONAL INSURANCE COMPANY intentionally interfered with Plaintiff's business opportunity, causing his termination," and resulting in damages. Complaint ¶ 40. The business opportunity to which Plaintiff refers is his employment as an associate with Morris Duffy. Complaint, ¶19, 30, 34.

Plaintiff does not allege that he had any written contract with Morris Duffy and, thus, is fairly characterized as an at-will employee. "As an at-will employee with no written contract, Plaintiff could only succeed on his tortious interference claim if he established that [defendants] acted solely to harm him or used wrongful means to achieve the interference." *Hoesten v. Best*, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40, 52 (1 Dept. 2006), *citing*, *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 194, 428 N.Y.S.2d 628 (1980). "Wrongful means" has been interpreted to mean physical violence, fraud, civil suits and criminal prosecution, or undue and unfair economic pressure. *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980). More recently, wrongful means has been refined as requiring:

> (1) that conduct must amount to an independent crime or tort;
> (2) that conduct must have been taken solely out of malice; or
> (3) that conduct must amount to "extreme and unfair" economic pressure.

Friedman v. Coldwater Creek, Inc., 551 F.Supp.2d 164, 170 (S.D.N.Y. 2008), *aff'd*, 2009 WL 932546 (2nd Cir. 2009), *citing Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 785 N.Y.S.2d 359 (2004).

In *Friedman*, a vendor requested that the Plaintiff be removed from their account and threatened to move its business if a new account representative was not assigned. This request, coupled with other problems, resulted in the employee's termination. The employee then sued the vendor, asserting that the vendor tortiously interfered with his prospective economic development. In dismissing the claims, however, the court held that the vendor's conduct was insufficient to constitute the "extreme and unfair" economic pressure necessary to establish the tort:

> In this case, Coldwater Creek threatened to take its business elsewhere unless it was given an account representative who was, in its estimation, courteous and professional. There may be a day when requiring such basic business behavior exposes one to civil

> liability, but that day must await the New York Court of Appeals' overturning of *Carvel*, for the action complained of here cannot constitute the kind of "extreme and unfair" economic pressure envisioned by the *Carvel* Court.

Friedman, 551 F. Supp.2d 172.

Here, Utica disputes the truth of Plaintiff's implication that Utica somehow threatened that it would pull business from Morris Duffy if Plaintiff did not withdraw its Notice of Claim. Even assuming the truth of this allegation, however, it is clearly insufficient to constitute the type of conduct necessary for a claim of tortious interference. *See, also, Lawrence v. Union of Orthodox Jewish Congregations of America*, 32 A.D.3d 304, 820 N.Y.S.2d 60 (1st Dept 2006) (First Department upheld the dismissal of a terminated at-will employee's claim that an organization which certified whether kosher laws were being followed by an employer interfered with his employment and business by threatening to boycott the slaughterhouse if the employee was not terminated, holding "[c]ontrary to Plaintiff's contention, the memo he claims as support does not "amount to the sort of extreme and unfair 'economic pressure' that might be 'wrongful'"); *Snyder v. Sony Music Entertainment*, 252 A.D.2d 294, 684 N.Y.S.2d 234 (1st Dept 1999) (Opposing attorney's call to associate attorney's employer advising that the associate was improperly prosecuting a lawsuit independent of his firm, did not constitute the type of wrongful means or sole desire to hurt the Plaintiff necessary to support a claim of tortious interference); *Taylor v. New York University Medical Center*, 7 A.D.3d 401, 776 N.Y.S.2d 474 (1st Dept 2004); *Treppel v. Biovail Corp.*, 2005 WL 427538 (S.D.N.Y. 2005).

Just as importantly, in order to allege a tortious interference claim, the complaint must allege that the defendants' sole purpose was to harm the Plaintiff. *Lobel v. Maimonides Medical Center*, 39 A.D.3d 275, 276-277, 835 N.Y.S.2d 28, 30 (1st Dept 2007) (tortious interference claim dismissed since it is clear that any motivation on defendant's part was "based on economic

self-interest and not for the sole purpose of harming Plaintiff"). Here, not only does the complaint fail to allege that Utica's sole purpose was to harm Plaintiff, the entire Complaint is rather premised on the theory that the purpose of Utica's conduct was to obtain a withdrawal of the Notice of Claim. As such, Plaintiff clearly has not alleged the necessary elements of a tortious interference claim. It is, therefore, respectfully requested that this Court dismiss the Third Count.

POINT VIII

ASSUMING THAT THIS COURT ENTERTAINS THE STATE LAW CLAIMS, AS AN AT-WILL EMPLOYEE, PLAINTIFF CANNOT STATE A CLAIM FOR BREACH OF THE COVENANTS OF GOOD FAITH AND FAIR DEALING AND, AS SUCH, THE FIFTH COUNT MUST BE DISMISSED

The Fifth Count alleges that "Defendants breached covenants of good faith and fair dealing regarding Plaintiff's employment, causing his termination," causing damages. Complaint ¶ 44. Again, since Utica was not Plaintiff's employer, and had no relationship with Plaintiff at all, Utica could not have breached any agreement with Plaintiff regarding his employment with Morris Duffy that somehow resulted in his termination. Just as importantly, as an at-will employee, Plaintiff has no claim for breach of the covenants of good faith and fair dealing and as such, this claim must be dismissed. *Guary v. Upstate Nat. Bank*, ---F.Supp.2d---, 2009 WL 1497185, 3 (W.D.N.Y. 2009), *citing, Chimarev v. TD Waterhouse Investor Services, Inc.*, 99 Fed.Appx. 259, 262 (2d Cir. 2004), *citing Horn v. New York Times,* 100 N.Y.2d 85, 96-97, 760 N.Y.S.2d 378 (2003) ("Because New York recognizes no covenant of good faith and fair dealing in an at-will employment relationship, that claim must be dismissed."). *See also, Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 305, 461 N.Y.S.2d 232, 237 (1983).

It is, therefore, respectfully requested that this Court dismiss the Fifth Count of the Complaint.

POINT IX

ASSUMING THAT THIS COURT ENTERTAINS THE STATE LAW CLAIMS, THE PLAINTIFF HAS FAILED TO MEET THE STRICT CRITERIA TO PLEAD THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND AS SUCH, THE FOURTH COUNT MUST BE DISMISSED

The Fourth Count alleges that "Defendants intentionally inflicted emotional distress upon Plaintiff," causing damages. Complaint,¶ 42.

> In order to make a showing of intentional infliction of emotional distress, a Plaintiff must demonstrate that: (1) defendant's conduct toward Plaintiff was so outrageous and shocking that it exceeded all reasonable bounds of decency as measured by what the average member of the community would tolerate; (2) Plaintiff suffered severe emotional distress; (3) defendant's conduct caused such distress; and (4) defendant acted either (a) with the desire to cause such distress to Plaintiff, (b) under circumstances known to defendant which made it substantially certain that that result would follow, or (c) recklessly and with utter disregard of the consequences. *See Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir. 1996). New York sets a high threshold for conduct that is 'extreme and outrageous' enough to constitute intentional infliction of emotional distress." *Id.* Emotional distress is severe when it is of such intensity and duration that no reasonable person should be expected to endure it.

Brewton v. City of New York, 550 F.Supp.2d 355, 369 (E.D.N.Y. 2008).

"Ordinarily, whether the challenged conduct is sufficiently outrageous will be determined as a matter of law." *Nevin v. Citibank, N.A.,* 107 F.Supp.2d 333, 345-46 (S.D.N.Y. 2000), as quoted in *Rizzo v. Edison, Inc.*, 172 Fed.Appx. 391, 396, 2006 WL 759797, p. 4 (2d Cir. 2006). "New York courts routinely dismiss claims for intentional infliction of emotional distress in the employment context, except where such claims were accompanied by allegations of sex discrimination and, more significantly, battery." *Rickard v. Western New York Independent Living Project, Inc.*, 2009 WL 1468459, 7 (W.D.N.Y. 2009) (citation omitted).

Clearly, the allegations in the Complaint fail to meet the strict criteria of this tort and, as such, the fourth count must be dismissed.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the accompanying moving papers, including the Affidavit of Robyn Nelson and the exhibits annexed thereto, it is respectfully requested that the Court grant the within motion in its entirety, and dismiss the complaint, together with such other and further relief as this Court may deem just and proper.

Dated: Mineola, New York
September 11, 2009

Sherri N. Pavloff (SP 5373)
Braden H. Farber (BH 7175)