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UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NEW YORK

JOSHUA BRINN

Plaintiff,

09-01151 (TCP)(WDW)

-against-

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

Defendants.

BRIEF ON BEHALF OF PLAINTIFF IN OPPOSITION TO UTICA NATIONAL INS. CO.'s MOTION TO DISMISS

Dated: October 12, 2009

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TABLE OF AUTHORITIES

STATEMENT OF FACTS

The facts are set forth in the Complaint and the Brinn Declaration, submitted herewith. In addition, plaintiff is withdrawing his second cause of action alleging a violation of due process and his fifth cause of action alleging breach of covenants of good faith and fair dealing.

ARGUMENT

POINT I

PLAINTIFF'S CLAIM SETS FORTH PLAUSIBLE CLAIMS OF RELIEF UNDER RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8, Fed.R.Civ.P. This pleading "statement must be concise 'because unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.'" Shabtai v. Levande, 38 Fed. Appx. 684 (2d Cir. 2002)(internal citation omitted). As set forth in Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)(emphasis added):

> The office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. As formulated in Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99 (1957), a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007), the United States Supreme Court held that a plaintiff must "state a claim for relief that is plausible on its face." Further, "[o]n a motion to dismiss or for judgment on the pleadings we

'must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor.'" LaFaro v. New York Cardiothoracic Group, PLLC, 570 F.3d 471, 475 (2d Cir. 2009), citing, Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). As set forth in Bell Atlantic Corp. V. Twombly, 550 U.S. 544 (2007), "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . ." Plaintiff's complaint is a short and plain statement which, drawing all inferences in favor of plaintiff, establishes a plausible claim for relief.

Defendant Utica claims that there is only a single allegation against Utica, and that the complaint "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 duty" (Utica brief, p. 6). As set forth herein, the complaint establishes a plausible claim for relief under Rule 8.

The complaint pleads, in relevant part, as follows:

> 10. At all times herein, defendant SYOSSET PUBLIC LIBRARY was acting under color of law and defendants MORRIS DUFFY ALONSO & FALEY

> and UTICA NATIONAL INSURANCE COMPANY were acting under color of law by participating and/or conspiring in joint activity with the SYOSSET PUBLIC LIBRARY and its agents.
>
> 11. At all times herein, defendants are jointly and severally liable under 42 U.S.C. Section 1983 due to the fact that the Director of the SYOSSET PUBLIC LIBRARY, Judith Lockman, and a Trustee of the SYOSSET PUBLIC LIBRARY, Robert Glick, acted as policymakers, and had authority to set policy for the Library, in coercing defendants UTICA NATIONAL INSURANCE COMPANY and MORRIS DUFFY ALONSO & FALEY to terminate plaintiff.
>
> 12. At all times herein defendants are jointly and severally liable under 42 U.S.C. Section 1983 due to the fact that the all defendants acted maliciously, or displayed a reckless or deliberate indifference, to the exercise of plaintiff's constitutional rights and/or acquiesced, ratified, or condoned the malice or reckless indifference displayed by the other defendants.

Consequently, the complaint alleges that all defendants conspired in a joint activity, and that the State actor, Syosset Public Library, coerced Utica (and Morris Duffy) to terminate plaintiff, and that all defendants violated plaintiff's constitutional rights.

The complaint further pleads as follows:

> 23. Upon information and belief, after receiving the First Notice of Claim, Judith Lockman, Director of the Syosset Public Library, directed Robert Glick, Esq., a Member of the Board of Trustees of the Syosset Public Library, to call plaintiff at

his place of work.

24. On or about January 10, 2008, Glick phoned plaintiff and advised him to drop the First Notice of Claim and also stated that Glick knew the attorneys at MORRIS DUFFY ALONSO & FALEY and that it would be very bad for plaintiff to pursue the Notice of Claim

25. On or about January 11, 2008, Glick made unsolicited phone calls to plaintiff at his workplace, further demanding that plaintiff discontinue the Notice of Claim.

26. Upon information and belief, Glick contacted Kevin Mahon, Esq., a partner at MORRIS DUFFY ALONSO & FALEY to further interfere with plaintiff's employment and demand that the First Notice of Claim be withdrawn.

27. During these conversations, Mr. Glick also disclosed information to a third party about plaintiff's confidential library records.

28. Betty Winkler is a Claims Examiner employed by defendant UTICA NATIONAL INSURANCE COMPANY.

29. On March 19, 2008, at the direction of defendant SYOSSET PUBLIC LIBRARY, and at the direction of her supervisor at UTICA MUTUAL INSURANCE COMPANY, Robin Nelson, Betty Winkler, also contacted partners of defendant MORRIS DUFFY ALONSO & FALEY to exert pressure on plaintiff to withdraw his First Notice of Claim.

30. At various times from March 19, 2008 through April 16, 2008, Faley, Alsono, and DeGennaro, partners of MORRIS DUFFY ALONSO & FALEY, demanded that plaintiff withdraw his

> Notice of Claim against defendant SYOSSET PUBLIC LIBRARY or he would be terminated.
>
> 31. Ultimately, plaintiff withdrew his First Notice of Claim, due to the threats regarding his employment.
>
> 32. On April 16, 2008, Andrea Alonso, Esq. directed plaintiff to sign a partial document which was apparently the signature page of a general release which would waive his claims against the defendant SYOSSET PUBLIC LIBRARY.
>
> 33. Plaintiff refused to sign this document.
>
> 34. Defendant MORRIS DUFFY ALONSO & FALEY terminated plaintiff because he refused to sign the general release.
>
> 35. Subsequently, plaintiff filed the Second Notice of Claim.
>
> 36. Defendants, all acting under color of law, terminated plaintiff for the exercise of his First Amendment Rights, in violation of the First and Fourteenth Amendments to the United States Constitution, and are all liable under 42 U.S.C. Section 1983. This caused plaintiff to suffer economic and non-economic damages.

Consequently, the complaint alleges that agents of the Library phoned plaintiff and threatened that it would be "very bad" for him to pursue his Notice of Claim. Thereafter, Glick contacted a partner at MORRIS DUFFY ALONSO & FALEY, ("Morris Duffy") to further interfere with plaintiff's employment, disclosed confidential library records of plaintiff, and also

contacted defendant Utica Mutual Ins. Co., a client of Morris Duffy, to maliciously interfered with and exert economic pressure upon plaintiff. An agent of Utica (which funneled legal services to plaintiff's employer) also contacted partners at Morris Duffy, and attempted to use its leverage over Morris Duffy to "exert pressure" and coerce Morris Duffy to have the notice of claim withdrawn (¶ 29) and to terminate plaintiff (¶ 11). Plaintiff details the communications between Glick and plaintiff, Morris Duffy, and Utica, gives dates where available, and details the undue coercive pressure that The Library Defendants exerted upon Utica and Morris Duffy to terminate plaintiff because he sought to redress his library suspension in the form of a Notice of Claim. Since defendants urge this Court to consider evidence outside, but referred to, in the pleadings, the Court should also consider the fax cover page sent from the Library's counsel (Spellman Rice) to Defendant Utica National Ins. Co. ("Utica"), to Defendant Morris Duffy, requesting that Morris Duffy "have Mr. Brinn sign the General Release" (Exhibit 1 to Brinn Declaration). In violation of New York Penal Law, the space for plaintiff's signature was pre-notarized, and plaintiff was never shown the complete content of what appeared to be a release (Brinn Declaration). This type of deceit, fraud, and misrepresentation demonstrates that all three defendants conspired to terminate plaintiff because he refused to sign a release in favor of the

Library. Therefore, the pleading plausibly establishes the underlying causes of action.

Plaintiff's pleading, supplemented by the fax cover page and pre-notarized signature page of the Release, details the conversations between Glick and plaintiff, Morris Duffy, and Utica, gives dates where available, and demonstrates the undue coercive pressure and unlawful tactics that Defendants exerted upon plaintiff simply because plaintiff sought to redress his suspension from the Library, and because he would not execute a release in favor of the Library regarding this grievance. These factual and legal allegations are more than speculative; they establish "more than a sheer possibility that a defendant has acted unlawfully," Ashcroft v. Igbal, __ U.S. __, 129 S.Ct. 1937, 1949 (2009), citing, Twombly 550 U.S. at 556, and are sufficient to satisfy the Rule 8 pleading requirement.

POINT II

THE PLEADING ALLEGES A PLAUSIBLE VIOLATION OF THE FIRST AMENDMENT

A. Plaintiff's Grievance Need not Raise a "Matter of Public Concern"

The First Amendment to the United States Constitution prohibits laws abridging freedom of speech and abridging the right to petition the Government for redress of grievances. Utica blithely assumes that plaintiff's First Amendment claim must relate to a "matter of public concern," and cites numerous cases arguing that plaintiff's Notice of Claim does not raise such a matter. At best, Utica misapprehends the law.

Since public employees may express opinions on a variety of matters in the workplace, the First Amendment protects only those matters which are a "matter of public concern." This Pickering test evolved because "a public employer has a distinct interest in regulating the speech of its employees in order to ensure and promote the 'efficiency of the public services it performs.'" Cioffi v. Averill Park Central School District, 444 F.3d 158 (2d Cir. 2006), citing, Rankin v. McPherson, 483 U.S. 378, 384 (1987). However, in the instant case, plaintiff was not a public employee; plaintiff did not work for the Library; he was an associate attorney at Morris Duffy. Consequently, the expression of opinions by an employee in the public workplace, and the efficiency and potential disruption of a public employer's

services are not implicated - the Pickering test does not apply. Where plaintiff is not a public employee at the time of his First Amendment speech, the Second Circuit has ruled that, "[b]ecause [plaintiff] was not a public employee when he criticized [defendant] Bland, his speech need not have been on a matter of public concern for it to fall within the protection of the First Amendment for the purposes of this action." Williams v. Town of Greenburgh, 535 F.3d 71 (2d Cir. 2008). Similarly, as set forth in Wolff v. Town of Mount Pleasant, 2009 WL 1468691 at *6, 06 Civ. 3864 (CS)(LMS)(S.D.N.Y. Apr 27, 2009)(internal citations omitted)(emphases added), the court held that:

> [i]n order to maintain a First Amendment retaliation claim, a **private citizen** complainant must allege that the defendant took some action in response to his or her First Amendment activity that 'effectively chilled the exercise of his [or her] First Amendment right. . . . **Differing from this test, a public employee** plaintiff who claims that he or she was retaliated against for exercising his or her First Amendment rights must show that he defendant implemented an 'adverse employment action' against the plaintiff because of his or her engagement in First Amendment activity **touching upon a matter of public concern.**

Utica fails to apprehend that the "matter of public concern" requirement - upon which it rests its motion to dismiss the First Amendment claim - simply does not apply to a First Amendment retaliation claim brought by a private citizen. As a result, plaintiff's First Amendment retaliation claim should not be

dismissed.

B. Plaintiff Pleads a Valid First Amendment Retaliation Claim because he was Terminated for Petitioning the Government

Plaintiff alleges a First Amendment retaliation claim because, as a private citizen, he exercised his First Amendment right to petition the Library by filing a Notice of Claim. As set forth in Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988):

> The Supreme Court has described the right to petition government for redress of grievances as 'among the most precious of the liberties safeguarded by the Bill of Rights.' See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967). Moreover, the right of petition applies with equal force to a person's right to seek redress from all branches of government.

There is no doubt that the Notice of Claim constitutes a petition to the government for redress of plaintiff's library privileges, which were suspended. Plaintiff's First Amendment retaliation claim, outside the context of employment, must therefore be analyzed as follows:

> To survive dismissal, 'a plaintiff asserting First Amendment retaliation claims must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.'

Collins v. Goord, 428 F. Supp.2d 399, 419 (S.D.N.Y. 2006), citing, Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001),

overruled on other grounds, Swierkiewicz v. Soremna N.A., 534 U.S. 506 (2002).[1] In Collins, the Court held that the first factor was pleaded because the "filing of both lawsuits and administrative grievances is constitutionally protected." Id. Similarly, plaintiff's filing of a Notice of Claim (Complaint, ¶ 13) satisfies this requirement. Plaintiff pleads the second factor by alleging that all defendants took an adverse action against plaintiff, in concert, (Compl. ¶¶ 11, 12, 36) by compelling him to withdraw the First Notice of Claim and then terminating his employment when he refused to sign a document releasing the public Library from liability (Complaint, ¶¶ 33, 34). Plaintiff pleads the third factor by alleging that there was a causal connection between the Notice of Claim and his termination since plaintiff alleges that all defendants terminated him in violation of his Constitutional rights, for filing a Notice of Claim, and refusing to release his claims (Complaint, ¶¶ 19-36). Plaintiff suffered a "chilling effect," as set forth in Collins and Wolff when he was terminated because he exercised his First Amendment right to petition a public Library. Consequently, plaintiff pleads a plausible First

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[1] Put another way, plaintiff must plead that "(i) he has an interest protected by the First Amendment; (ii) the defendant's actions were motivated by or substantially caused by the plaintiff's exercise of that right; and (iii) 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).

Amendment retaliation claim[2] - he was terminated for petitioning the government for redress - whether or not his petition relates to a "matter of public concern."[3]

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[2] Since, plaintiff's retaliation claim under the New York State Constitution is subject to the same analysis, plaintiff's sixth cause of action should also survive defendants' motion to dismiss. Kenney v. Genesee Valley Board of Cooperative Educational Services, 2008 WL 343110 at *3, 97-CV-6442, (W.D.N.Y. Feb. 6, 2008).

[3] Though not relevant, plaintiff's Notice of Claim for refusing him entry and access to a public institution would raise a "matter of public concern." A claim that "at least minimally touch[es] upon a matter of public concern" is sufficient. White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1060 (2d Cir. 1993). Further, "[w]hether or not speech addresses a matter of public concern 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" Sousa v. Roque, 2009 WL 2568949 (2d Cir. 2009), citing, Connick v. Myers, 461 U.S. 138, 147-48 (1983). In the present matter, an individual seeking access to a public institution may raise a matter of public concern, when the form and context of plaintiff's banishment are taken into account, after the record is developed through discovery.

POINT III

THE COMPLAINT ALLEGES SUFFICIENT FACTS TO APPLY 42 U.S.C. § 1983 TO UTICA

In the wake of the Civil War, Congress passed the Civil Rights Act of 1871 to provide a civil remedy for constitutional injuries. While this applies to public entities, "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970), quoting, United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966). As set forth in Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255 (2d Cir. 2008),

> the actions of a nominally private entity are attributable to the state when:
>
> (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 participation 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').

In this case, plaintiff has pled plausible facts for Utica to be

liable under 42 U.S.C. § 1983 under the compulsion test and the joint action test.

In the present matter, plaintiff has pled that the Library defendants "coerc[ed] defendants UTICA NATIONAL INSURANCE COMPANY and MORRIS DUFFY ALONSO & FALEY to terminate plaintiff" (Compl., ¶ 11). More specifically, the Library phoned Utica, a company that hires Morris Duffy, and Utica also pressured plaintiff's employer to have the Notice of Claim withdrawn (Compl., ¶29). In addition, the parties conspired to have plaintiff terminated when plaintiff would not sign a release in favor of the Library (Complaint, ¶¶ 32-36). The Library requested Utica, who had leverage over plaintiff's employer, to coerce Morris Duffy to cause plaintiff to withdraw his First Notice of Claim and terminate plaintiff if he would not sign a general release releasing his claims against the Library. Utica faxed a general release, in favor of the Library, to Morris Duffy for plaintiff to execute (Brinn Declaration).[4] When plaintiff refused to yield to this demand to sign a general release received from Utica, in favor of the Library, he was terminated (Brinn Declaration). Consequently, the pleading establishes that Utica acted on behalf of, and pursuant to, the Library. This is sufficient to plead

[4] The cover letter of the fax from Betty Winkler, an employee of Utica, to Morris Duffy, plaintiff's employer, states, in part, as follows: "Attached please find a copy of the General Release we discuss. Please have Mr. Brinn sign the General Release and have his signature notarized" (Brinn Declaration).

liability under 42 U.S.C. § 1983 pursuant to the compulsion test.

The Library also provided "significant encouragement" to Utica by directing Utica to contact and coerce plaintiff's employer to direct him to withdraw his First Notice of Claim and, ultimately, to terminate plaintiff when he did not sign a general release releasing his claims against the Library. Utica became a "willful participant in joint activity with the State" by jointly conspiring to terminate plaintiff when, at the behest of the Library, it contacted plaintiff's employer and conspired to terminate plaintiff if he would not sign a general release. This pleads §1983 liability under the "joint action" test.

Further, on a motion to dismiss, plaintiff's burden is even lighter. To "survive a motion to dismiss on [a] § 1983 conspiracy claim, [plaintiff] must allege (1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Ciambriello v. County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002). Here, plaintiff has pled that the Library and Utica acted in conflict to coerce plaintiff's employer to terminate him, and Utica took an overt act to further this by phoning plaintiff's employer to cause his termination if he did not withdraw his First Notice of Claim and sign a general release. Damages were caused by plaintiff's termination. Consequently, plaintiff pleads a

plausible cause of action, which should not be dismissed.

Similar circumstances involving private and public entities conspiring to deprive an individual of constitutional rights arose in United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966). In that case, the United States Supreme Court reversed a grant of summary judgment and permitted a 42 U.S.C. § 1983 claim against a restaurant for deprivation of civil rights because the restaurant was alleged to be acting according to a state-enforced custom of segregating races in public eating places. In the present case, Utica and Morris Duffy acted pursuant to the Library's state-enforced attempt to punish plaintiff because he petitioned the Library for redress of his grievance.

In Carroll v. Blinken, 42 F.3d 122 (2d Cir. 1994), the Second Circuit held that where a public institution and NYPIRG, a private institution, unconstitutionally agreed that NYPIRG would receive a portion of a public institution's mandatory student activity fee, both were both liable under § 1983 because both "were joint participants in the unlawful conduct." Similarly, the Library, Utica, and Morris Duffy conspired to punish plaintiff for exercising his First Amendment rights. See, also, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188-89 (2d Cir. 2009)(where the Second Circuit permitted a § 1983 claim against Pfizer and the Nigerian government because the complaint,

"adequately allege[d] that the violations occurred as the result of concerted action between Pfizer and the Nigerian government" under the Alien Tort Statute, which used the same "state action" test as § 1983).

POINT IV

PLAINTIFF PROPERLY PLEADS THAT DEFENDANTS INTENTIONALLY INTERFERED WITH A BUSINESS OPPORTUNITY BY TERMINATING HIM FOR REFUSING TO SIGN A RELEASE IN FAVOR OF THE LIBRARY

To plead tortuous interference with a business opportunity:

> a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff. 'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required.

Snyder v. Sony Music Entertainment, Inc., 252 A.D.2d 294, 300-01, 684 N.Y.S.2d 235 (1st Dep't. 1999). This is true, even where plaintiff is an employee at will. Hoesten v. Best, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40 (1st Dep't. 2006)("As an at-will employee with no written contract, plaintiff could only succeed on his tortious interference claim if he established that Best acted solely to harm him or used wrongful means to achieve the interference"); Taylor v. New York University, 7 A.D.3d 401, 402, 776 N.Y.S.2d 474 (1st Dep't. 2004).

As set forth in Friedman v. Coldwater Creek, Inc., 551 F.Supp.2d 164, 170 (S.D.N.Y. 2008):

> for Defendants' interference to constitute the kind of 'wrongful means' that will support Plaintiff's claim for tortious interference, one of the following must be true: (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.

In the present matter, the pleading establishes that the defendants committed crimes, acted out of malice, and exerted undue economic pressure by having plaintiff terminated from his employment at Morris Duffy because he would not release the Library.

First, the Library Defendants disclosed confidential library records to the other defendants (¶ 27 of Complaint), including plaintiff's employer and an insurance company who were not involved in the Library's suspension of plaintiff's privileges. This violates CPLR 4509, which requires that "Library records . . . shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

Second, all defendants conspired to procure a release by misrepresentation, deceit, fraud, and criminal notary fraud. As set forth in the Brinn Declaration, plaintiff was shown only the signature page of what purported to be a release, which was unlawfully pre-notarized. § 135-a(2) of the Executive Law provides that "[a] notary public or commissioner of deeds, who in the exercise of the powers, or in the performance of the duties

of such office shall practice any fraud or deceit, the punishment for which is not otherwise provided for by this act, shall be guilty of a **misdemeanor**." By offering a pre-notarized partial release to plaintiff, and secreting the fact that the document was a release, defendants engaged in misrepresentation, deceit, fraud, and criminal conduct. This is sufficient to establish tortious interference with plaintiff's business opportunity as an associate attorney at Morris Duffy. See, Williams & Co. v. Collins, Tuttle & Co., 6 A.D.2d 302, 176 N.Y.S.2d 99 (1st Dep't. 1958)(sustaining a complaint for tortious interference with business opportunity where defendants conspired to deprive plaintiff of a real estate commission).

Further, Utica engaged in "interference" because it had no legitimate business interest in plaintiff's employment as an associate attorney with Morris Duffy. Utica's interference in Brinn's employment with Morris Duffy had no relationship to its mission of insuring public employers, and the method of Utica's interference, as set forth above, was tortuous.

In the cases relied upon by defendants, the defendant had a legitimate interest to "interfere" with the plaintiff's employment relationship. In this case, plaintiff's grievance against the Library for his suspension had no relationship to his employment and an insurance company that referred business to plaintiff's employer. Therefore, defendants acted maliciously

and used "unlawful means" to intimidate and coerce Morris Duffy to terminate plaintiff because he would not sign a release in favor of the Library.

For instance, in Lawrence v. Union of Orthodox Jewish Corporations of America, 32 A.D.3d 304, 820 N.Y.S.2d 60 (1st Dept. 2006), plaintiff employee (employed by a kosher slaughterhouse) sued the Orthodox Union (OU), a kosher certifying organization, alleging that the OU threatened to boycott the slaughterhouse if plaintiff were not terminated from the slaughterhouse. Defendant had a legitimate business reason to intervene and ensure that all the requirements of kosher food preparation were complied with at the slaughterhouse. In Snyder v. Sony Music Entertainment, 252 A.D.2d 294, 684 N.Y.S.2d 235 (1st Dep't 1999)(where opposing counsel informed plaintiff's law firm that plaintiff was acting outside the scope of his employment with his law firm) and Taylor v. New York University Medical Center, 7 A.D.3d 401, 776 N.Y.S.2d 474 (2004)(where plaintiff's former employer brought a "conflict of interest" to the attention of plaintiff's current employer), the defendants had legitimate reasons, and used legitimate means, to inform plaintiffs' former employers about plaintiff. Also, in Lobel v. Maimonides Medical Center, 39 A.D. 3d 275, 835 N.Y.S.2d 28 (2007), a co-employee was alleged to have interfered in plaintiff's contract with his employer. The court found that the

co-employee was motivated by his own self interest, stating, "it is clear that any motivation on [the defendant's] part was based on economic self-interest and not for the sole purpose of harming plaintiff." Id. at 277.

These cases are inapposite to the present matter, in which Utica had no legitimate economic self-interest to meddle in plaintiff's employment. Further, the interference was accomplished by criminal means, misrepresentation, and deceit. Utica's interest in obtaining a release from Brinn's constitutional claims (on behalf of the is not "economic self interest" within the purview of governing caselaw. And any "justification" proffered by defendants for its interference raises a jury question, which should not be resolved on a pleading. United Euram Corp. v. Occidental Petroleum Corp., 123 Misc.2d 574, 577-78, 474 N.Y.S.2d 372, 375 (Sup. Ct. 1984).

Since all defendants conspired to dismiss plaintiff because of his constitutional claims, and did so by disseminating confidential records, fraudulently attempting to procure a release, criminally pre-notarizing plaintiff's signature, and having plaintiff terminated when he refused to sign the release, these facts sustain a plausible pleading of intentional interference with a business opportunity.

POINT V

PLAINTIFF PROPERLY PLEADS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To plead a claim of intentional infliction of emotional distress, plaintiff must demonstrate that (i) the defendant engaged in extreme and outrageous conduct; (ii) defendant intended to cause or disregarded a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 596 N.Y.S.2d 350, 353 (1993). Liability is found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983).

In the present matter, plaintiff pleads that, because of his suspension from a Library, the Library defendants, Utica Mutual Insurance Company, and Morris Duffy conspired to terminate him because he would not sign a document releasing the Library from liability. Plaintiff's dispute with the Library had no relation to his employment as an associate attorney with Morris Duffy. Yet the Library defendants enlisted plaintiff's employer, and Utica, which funnels work to plaintiff's employer, to maliciously exert undue economic pressure upon plaintiff. Further the

defendants proffered a signature page of a release, without permitting plaintiff to examine the full document, pre-notarized his signature (which constitutes a misdemeanor), disclosed confidential library records in violation of law, and terminated plaintiff when he would not execute a release in favor of the Library. This is sufficient to plead intentional infliction of emotional distress. Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't. 1961); Sanchez v. Orozco, 178 A.D. 2d 391, 578 N.Y.S.2d 145 (1st Dept. 1991); Atherton v. 21 East 92nd Corp., 149 A.D. 2d 354, 539 N.Y.S.2d 933 (1st Dept. 1989).

CONCLUSION

For the foregoing reasons, plaintiff requests that this Court deny defendant's motion to dismiss, and grant such other and further relief as the Court deems just and equitable.

Dated: October 12, 2009
Mineola, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 10/12/09, I, Raymond Nardo, served by ECF and

XXX mail, first class __ return receipt requested

__ overnite mailed __ faxed

__ served via ECF X electronically mailed

the enclosed:

Brief on Behalf of Plaintiff in Opposition to Defendant's Motion to Dismiss

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10/12/09
DATE