DONALD LEWIS,

Plaintiff,

-against-

PIERCE BAINBRIDGE BECK PRICE & HECHT LLP, JOHN MARK PIERCE, DENVER G. EDWARDS, CAROLYNN K. BECK, LITTLER MENDELSON, P.C., SYLVIA JEANINE CONLEY, PUTNEY TWOMBLY HALL & HIRSON LLP, MICHAEL YIM and JANE DOE,

Defendants.

Index No. 155686/2019

MEMORANDUM OF LAW IN SUPPORT OF THE PIERCE BAINBRIDGE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO CPLR 3211(a)(7)

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Defendants Pierce Bainbridge Beck Price & Hecht LLP ("PB" or "the Firm"), John Mark Pierce ("Pierce"), Denver G. Edwards ("Edwards"), and Carolynn K. Beck ("Beck") (collectively the "PB Defendants") respectfully submit this Memorandum of Law in support of their motion to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7).

PRELIMINARY STATEMENT

This case continues the vainglorious litigation soap opera produced and directed by plaintiff Donald Lewis. Lewis worked at PB for a period of four months in 2018 until a female employee of the Firm reported that he sexually assaulted her and threatened to retaliate against her if she reported his conduct. Lewis was placed on leave in October 2018 and the Firm hired outside counsel to investigate the employee's claims. He was formally terminated in November 2018 because he disregarded the Firm's instructions not to interfere with that investigation.

Lewis has turned a basic employment case into a vexatious clutter of far-fetched and incomprehensible allegations spread over two convoluted lawsuits filed in this court. Lewis was fired not because of his threats to make false claims of financial impropriety at the Firm, but because of his own misconduct. Until he was terminated, Lewis, through his sizeable salary, shared without complaint in the Firm's financial largesse, which he now claims to be the product of fraud, and basked in the compliments of his colleagues, whom he now accuses of the most heinous conduct. Now, everyone and everything associated with the Firm is corrupt. Lewis seeks a total of $185 million in damages from the Firm and several of its partners in the two separate lawsuits.[1]

[1] Lewis's first complaint was filed on May 16, 2019, and is styled "Donald Lewis v. Pierce Bainbridge Beck Price & Hecht LLP, *et al.*," Index No. 652931/2019 (N.Y. Cty.) ("*Lewis I*"). It is 96 pages long, contains some 486 paragraphs, names 21 Defendants and asserts 20 causes of action. The Defendants in *Lewis I* have moved to dismiss the complaint. Plaintiff seeks $140 million in damages in that case and another $45 million in damages in this case.

When it was clear that pre-litigation efforts to settle this dispute would fail, and that Lewis was about to go public with his false claims of financial misconduct, the Firm acted to protect its reputation, its client relationships and its economic livelihood by filing a lawsuit against Lewis in California, the state where the Firm is incorporated and where Firm leader John Pierce is based (the "California Complaint"). That lawsuit, which lies at the heart of this New York case, alleges that Lewis's claims of financial misconduct are without merit and that he cooked them up to distract from his own misconduct and to extort a huge pay day from the Firm. The California Complaint asserts claims against Lewis for civil extortion (a cause of action that does not exist in New York), defamation, and intentional and negligent interference with the Firm's ongoing and prospective economic relations.

Lewis has concocted a hodgepodge of claims against the Firm, John Pierce, Denver Edwards, the PB partner who signed the California Complaint, Carolynn Beck, a PB partner and its General Counsel, Putney, Twombly, Hall & Hirson LLP ("Putney Twombly"), the law firm hired to investigate the female employee's allegations against Lewis, Michael Yim, a Putney Twombly partner, Littler Mendelson P.C. ("Littler"), the law firm that represents PB in *Lewis I*, and Jeanine Conley, a Littler partner. Lewis's primary causes of action against the PB Defendants allege that the statements made in the California Complaint, as well as statements made by John Pierce about that action, are defamatory, that the internal investigation into the employee's complaint of sexual abuse and retaliation against Lewis somehow was concocted in order to aid and abet the defamation, and that the PB Defendants' decision to file the California Complaint while, according to Lewis, negotiations to resolve Lewis's employment dispute were still ongoing, was so deceitful that it violated New York Judiciary Law § 487.

Lewis's claims are meritless and the Amended Complaint should be dismissed. The allegations in the California Complaint are entitled to full immunity under bedrock, black letter law and defendant Pierce's public comments are similarly privileged. There are no applicable exceptions to these protections. Nor are the PB Defendants subject to liability under Judiciary Law § 487 for filing the California Complaint. That statute is meant to address chronic, extreme patterns of deceit committed by lawyers acting in their role as counsel – nothing like the kind of conduct alleged by Lewis here. Finally, Lewis's tag-along, aiding and abetting defamation and emotional distress claims against the PB Defendants should be dismissed because those causes of action do not exist under New York law.

The Amended Complaint should be dismissed in its entirety and the Lewis litigation saga should end here.

STATEMENT OF FACTS

A. Plaintiff's Employment

Plaintiff was employed by the Firm pursuant to the terms of a one-page offer letter dated March 15, 2018. *Lewis I* Compl. ¶ 82.[2] The offer set forth Plaintiff's title, compensation, medical and dental benefits and start date but was silent on any end date or any other fixed duration of his employment. *Id.*; Compl. ¶ 86; Mukasey Aff. Ex. B. Although the offer letter gave Plaintiff the title of Equity Partner, there is no allegation (nor could there be) that he ever signed a partnership agreement, that he was entitled to a share of the Firm's profits or responsible for any losses, that he ever made or was required to make any capital contribution, or that he was responsible for any firm liabilities. Nor were there any other indicia that he was an equity partner. He was simply an at-will employee given a "partner" title. Lewis began work at the Firm in June 2018, was placed

[2] The Complaint in *Lewis I* is specifically incorporated into the Amended Complaint in *Lewis II*. *See* Compl. ¶ 3.

on leave in October and was formally terminated in November. Compl. ¶¶ 52, 86; *Lewis I* Compl. ¶ 5.

B. The Investigation Into Claims of Plaintiff's Misconduct

On or about October 4, 2018, a female employee (identified as "Doe" in the *Lewis I* Complaint), reported sexual misconduct involving Plaintiff. Compl. ¶ 4; Compl. Ex. F; *Lewis I* Compl. ¶¶ 197, 224. The Amended Complaint makes clear that Doe claimed that Lewis sexually assaulted her. *See* Compl. Ex. F. In response to Doe's complaint, the Firm retained an outside law firm, Putney Twombly, to investigate Doe's claims. Compl. ¶ 90; *Lewis I* Compl. ¶ 211. Michael Yim, a partner at Putney Twombly, led the investigation. *Id.*

On October 12, 2018, Plaintiff was placed on leave, blocked from the Firm's computer systems and instructed not to communicate with any Firm personnel. *Lewis I* Compl. ¶ 5; Compl. Ex. F. On or about October 15, 2018, he received a written "Summary of Allegations" and, during the course of the investigation, he received additional documentation and information regarding the claims against him. *Lewis I* Compl. ¶¶ 203, 223. Plaintiff submitted a written response to the allegations on October 26, 2018. *Lewis I* Compl. ¶ 229.

C. Plaintiff's Termination

On November 12, 2018, while Plaintiff was still on leave, he e-mailed correspondence to all Firm partners which purportedly detailed the "collective unethical, improper and potentially illegal efforts to conspire to destroy [Plaintiff]'s personal and professional reputation, as well as his career, based on false allegations." *Lewis I* Compl. ¶ 252. The Firm terminated Plaintiff's employment because his letter violated the Firm's instructions not to communicate with Firm personnel while the investigation was proceeding. *Lewis I* Compl. ¶¶ 5, 24, 26; Compl. Ex. F.

D. The Litigation

1. *Lewis I*

The *Lewis I* Complaint names the Firm, 18 individual partners, Putney Twombly, Michael Yim, and even the personal assistant to John Pierce as defendants. The Complaint in *Lewis I*, like the Complaint here, is a raging diatribe colored by Plaintiff's delusions of grandeur. It is 96 pages long, with 486 numbered paragraphs (not including an additional 243 subparagraphs, bullet points, and separately numbered lists), 66 footnotes, 20 causes of action and 5 exhibits (totaling another 24 pages). And, while Plaintiff complains in this case that the California action is false and defamatory because it explains why he was terminated, Plaintiff's own Complaint in *Lewis I* actually says the same thing. *See, e.g.*, *Lewis I* Compl. ¶ 5 (stating that Plaintiff was placed on leave as a result of Doe's allegations); *id.* ¶¶ 24, 26 (explaining that Plaintiff was terminated after contacting Firm partners during his period of leave). The defendants have moved to dismiss that Complaint in its entirety for failure to comply with the pleading requirements of CPLR 3013 and 3014, to strike prejudicial and scandalous matter from the Complaint and to dismiss specific causes of action against a group of peripheral defendants.[3]

2. The California Action

The Firm filed the California Complaint against Lewis on May 15, 2019. It is styled "Pierce Bainbridge Beck Price & Hecht LLP v. Donald Lewis," Case No. 19STCV16890, and is pending in the Superior Court of California, County of Los Angeles.[4] The Complaint asserts claims of civil extortion, defamation, intentional interference with contractual relations, and intentional and negligent interference with prospective economic advantage against Lewis. The

[3] Because Lewis has incorporated the Complaint in *Lewis I* into the instant Complaint, Defendants are incorporating the motion to dismiss the *Lewis I* Complaint here.
[4] The California Complaint is attached to the Affirmation of Marc L. Mukasey as Ex. C and is cited herein as "Cal. Compl."

California Complaint alleges that Lewis's pre-litigation threats to go public with false claims of financial misconduct by filing the *Lewis I* Complaint were intended both to extort a huge pay day from the Firm and to distract from his own misconduct. Cal. Compl. ¶¶ 1-2.[5]

3. *Lewis II*

Plaintiff filed his first Complaint in this case on June 7, 2019, asserting three causes of action against PB, Pierce and Edwards: i) defamation, ii) a violation of Judiciary Law § 487, and iii) intentional infliction of emotional distress. NYSCEF Doc. No. 2. On July 26, 2019, Plaintiff filed the Amended Complaint, adding five new defendants and three new causes of action to this case.

Like the complaint in *Lewis I*, the Amended Complaint is part dime store melodrama and part personal manifesto. It asserts that "Pierce Bainbridge is a teetering financial house of cards – a smoke and mirrors production," (Compl. ¶ 31); proclaims that "[i]f there were a Defamation Hall of Shame," PB "would be a first-ballot unanimous entrant," (*Id.* ¶ 39); and surmises that "the readers . . . may enjoy playing: 'spot the 10 Pierce lies in [a press] quote.'" *Id.* ¶ 170.

Plaintiff asserts six causes of action in the Amended Complaint. First, he claims that PB, Pierce and Edwards defamed him by including false and defamatory allegations in the California Complaint and through comments made by defendant Pierce on social media and to the press about the various lawsuits. *Id*. ¶¶ 223-29.

Second, Plaintiff claims that Beck, Yim and Putney Twombly aided and abetted Pierce's and Edwards' defamation by conducting an improper internal investigation into Doe's claims, and

[5] When PB became aware during pre-litigation settlement discussions that Lewis intended to file the Complaint in *Lewis I*, it commenced an action for emergency relief in this court for an order directing him to file that complaint under seal to prevent disclosure of confidential client information, among other things. PB suspended efforts to get a sealing order after Lewis followed through with his threat and filed the *Lewis I* Complaint. PB has since discontinued that action. *See Pierce Bainbridge Beck Price & Hecht LLP v. Donald Lewis et al*, Index No. 154910/2019 (N.Y. Cty. May 15, 2019).

that Conley and Littler aided and abetted the defamation by deceptively inducing Lewis's counsel to withdraw the *Lewis I* Complaint under the false pretense that such action would result in further settlement efforts from the Firm. *Id.* ¶¶ 230-244.

Third, the Amended Complaint alleges that the Defendants violated Judiciary Law § 487 by including deceptive statements in the California Complaint and fraudulently inducing Plaintiff's counsel to withdraw the *Lewis I* Complaint in order to "'rac[e] to the courthouse' . . . to file the [California Complaint] purely as a public relations ploy. *Id.* ¶¶ 246, 248. Plaintiff further asserts that the Defendants employed this alleged deception "in an effort to deprive the New York Supreme Court of an action properly filed in this jurisdiction to enforce the rights of one [*sic*] its residents." *Id.* ¶ 246.

Plaintiff's remaining three causes of action are generally premised on the same conduct alleged in claims One through Three. Claim Four asserts that all Defendants are liable for intentional infliction of emotional distress, Claim Five asserts that Beck, Yim, Putney Twombly, Conley and Littler aided and abetted Pierce's and Edwards' intentional infliction of emotional distress, and Claim Six asserts that all Defendants are liable for prima facie tort.

As set forth below, Plaintiff's claims are wholly devoid of merit. All of the causes of action against the PB Defendants should be dismissed in their entirety.

ARGUMENT

I. The Defamation Claim Against PB, Pierce and Edwards Should Be Dismissed

The first cause of action alleges that Pierce, Edwards and PB defamed Plaintiff by including false statements in the California Complaint and, in addition, that Pierce defamed Plaintiff by his comments to the press and on social media about the various litigations. None of these statements can serve as the basis for a defamation claim.

A. The Allegations In The California Complaint Are Immune From Defamation Liability

Under New York law, defamation is defined as "the making of a false statement about a person that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society.'" *Frechtman v. Gutterman*, 115 A.D.3d 102, 104 (1st Dep't 2014) (citing *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977)).

However, "a statement, made in open court in the course of a judicial proceeding, is absolutely privileged if, by any view or under any circumstances, it may be considered pertinent to the litigation." *Martirano v. Frost*, 25 N.Y.2d 505, 507 (1969). The term "judicial proceeding" encompasses complaints and the allegations contained therein. *See, e.g.*, *Manhattan Sports Rests. of Am., LLC v. Lieu*, 146 A.D.3d 727, 727 (1st Dep't 2017) ("The alleged defamatory statements made in the complaint . . . are absolutely privileged, because they were made in the course of a judicial proceeding."). However, "[t]he privilege will . . . not attach if the judicial proceeding was maliciously instituted for the sole purpose of circulating the defamatory statement (the '*Williams* exception')." *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, No. 06-CV-1260, 2009 WL 4547792, at *16 (E.D.N.Y. Dec. 1, 2009) (citing *Williams v. Williams*, 23 N.Y.2d 592 (1969)).

In assessing whether a statement is "pertinent," courts are "not limited . . . to the narrow and technical rules normally applied to determine the admissibility of evidence." *Martirano*, 25 N.Y.2d at 508. Instead, "the standard is 'extremely liberal' such that 'any doubts are to be resolved in favor of pertinence.'" *Feist v. Paxfire, Inc.*, No. 11 CIV. 5436, 2017 WL 177652, at *4 (S.D.N.Y. Jan. 17, 2017) (citation omitted); *see also Martirano*, 25 N.Y.2d at 508 (the statement must be "so outrageously out of context" that it could have no purpose other than to defame.); *Grasso v. Mathew*, 164 A.D.2d 476, 479 (3d Dep't 1991) (only the "barest rationality" is required).

The allegations in the California action are covered by the judicial proceedings privilege. Far from being "outrageously out of context," those allegations form the core of the plaintiff's claims in that action; they describe the background and circumstances of the events leading to Lewis's termination, including outside counsel's finding that Doe's complaint against him was credible and his threats to go public with false allegations of financial misconduct if the Firm did not pay him money, and are thus wholly relevant to the Firm's civil extortion claim – namely, that Plaintiff is a disgruntled former employee seeking revenge for an entirely justified termination. *See, e.g.*, Cal Compl. ¶¶ 1-2. Thus, "[i]t cannot reasonably be claimed . . . that the statements were 'impertinent beyond any question.'" *Martirano*, 25 N.Y.2d at 508.[6]

The *Williams* exception is inapplicable because the Amended Complaint alleges that the California action was filed not only to defame Plaintiff, but also, according to Plaintiff, as part of some larger plan to cover-up alleged financial misconduct at the Firm. *See* Compl. ¶¶ 2-4. Thus, by Plaintiff's own admission, the California Complaint was not filed "for the sole purpose of circulating the defamatory statement[s]." *Gristede's Foods*, 2009 WL 4547792, at *16; *see e.g.*, *Egiazaryan v. Zalmayev*, No. 11 CIV. 2670, 2011 WL 6097136, at *9 (S.D.N.Y. Dec. 7, 2011) (the *Williams* exception was inapplicable when the plaintiff alleged that the defendant's "*principal* purpose" in filing the complaint was to defame the plaintiff, but also "for the purpose of harassing, intimidating, punishing, and otherwise maliciously inhibiting the free exercise of speech" (emphasis added)).

In short, the California Complaint cannot serve as the basis for a defamation claim.

[6] In California, extortion is defined as "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear," and is recognized as a civil cause of action. *Flatley v. Mauro*, 139 P.3d 2, 19 (Cal. 2006).

B. Pierce's Public Statements Are Privileged

Under New York Civil Rights Law § 74, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." This privilege "exists because of 'the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice.'" *Branca v. Mayesh*, 101 A.D.2d 872, 873 (2d Dep't 1984), *aff'd*, 63 N.Y.2d 994 (citing *Lee v. Brooklyn Union Pub. Co.*, 209 N.Y. 245, 248 (1913)). "While statutory predecessors to section 74 limited the privilege to members of the media who acted without malice, the privilege now extends to 'any person', whether or not he acts with malice." *Id.* at 873 (citing *Williams*, 23 N.Y.2d at 597); *e.g.*, *Sparrow Fund Mgmt. LP v. MiMedx Grp., Inc.*, No. 18CIV4921, 2019 WL 1434719, at *3 (S.D.N.Y. Mar. 31, 2019) (statement about a pending lawsuit made by a company's CEO in a "publicly-posted letter" was protected by § 74).

"For a report to be characterized as 'fair and true' within the meaning of the statute . . . it is enough that the substance of the article be substantially accurate." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 (1979). In other words, "[w]hen determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision." *Id.* at 68; *see also CBS Broad. Inc. v. Counterr Grp.*, No. 05 CIV. 7946, 2008 WL 11350274, at *13 (S.D.N.Y. Aug. 26, 2008) (the meaning of "fair and true" is "liberally interpreted" by New York courts). "In the end, it is for the court to determine as a matter of law if a publication is a 'fair and true' report under section 74, unless the court determines that an issue of fact remains." *Gristede's Foods*, 2009 WL 4547792, at *16. Moreover, in determining whether a statement is a non-actionable expression of opinion, "courts should look to the over-all context in which the assertions were

made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." *Guerrero v. Carva*, 10 A.D.3d 105, 112 (1st Dep't 2004) (citations omitted).

Here, Pierce's comments were either "fair and true" reports of the *Lewis I* and California actions, and/or were non-actionable opinions. For example, while Plaintiff complains of numerous instances where Pierce publicly accused him of extortion, that is precisely the conduct of which Plaintiff is accused in the California Complaint's first claim against Plaintiff. *See* Cal. Compl. ¶¶ 47-58. Because Pierce's statements directly mirror the allegations in the California Complaint, they cannot support a defamation claim. *See, e.g.*, *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 459 (E.D.N.Y. 2013) ("Defendants assert that Plaintiff's statements accusing them of 'human trafficking' are inaccurate and defamatory. . . . However, the statements made by Plaintiff and Plaintiff's counsel that appear in these articles accurately reflect the allegations in the Complaint.").

Plaintiff also claims that Pierce's use of the phrase "credibly accused sexual predator" is defamatory because the term "sexual predator" is defined by New York Penal Law as "a sex offender who has been convicted of a sexually violent offense . . . and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses." Compl. ¶ 11. But Pierce was not asserting that Lewis was a sexual predator under the New York penal law. He was commenting on the allegations in the California Complaint, *i.e.*, that the Putney Twombly investigation into Lewis's conduct found Doe's claim – that Lewis sexually assaulted her – to be credible. Pierce's statements in this regard are easily within the bounds of fair commentary and should not be analyzed under the Penal Law nor "dissected and analyzed with a lexicographer's precision." *Holy Spirit Ass'n*, 49 N.Y.2d at 67; *see*

also Wexler v. Allegion (UK) Ltd., 374 F. Supp. 3d 302, 312 (S.D.N.Y. 2019) (press release calling former employers "predators" who engaged in dishonesty and shameful practices held to be privileged under Civil Rights Law § 74 because this "rhetorical hyperbole . . . essentially summarize[d] or restate[d] the allegations of the complaint"). Thus, Pierce's statement is protected by Civil Rights Law § 74 given its relation to the allegations in the California Complaint.

Plaintiff's claim that Pierce "falsely label[ed]" him a terrorist should be swiftly rejected as well. The specific comment on Pierce's LinkedIn page about which Plaintiff complains is as follows: "We will NOT negotiate with terrorists, we will NOT be extorted and we are NEVER stopping." Compl. ¶¶ 73, 170. It is abundantly clear from the context of Pierce's statement – made in conjunction with his description of the Firm's unwillingness to settle with Plaintiff – that Pierce was not referring to Plaintiff as a literal terrorist, but was instead using a colloquial phrase to make clear that neither Pierce nor the Firm would be held as litigation hostages as millions of dollars were being sought from them on unlawful grounds. No reasonable person would conclude from Pierce's post that Lewis was an actual terrorist. *See, e.g.*, *Lapine v. Seinfeld*, 918 N.Y.S.2d 313, 328 (Sup. Ct. N.Y. Cty. 2011) (description of plaintiff as a "wacko" and "nut job" was not defamatory because context showed that these were "statements of opinion about the lack of merit of plaintiff's claims"); *LeBlanc v. Skinner*, 103 A.D.3d 202, 213 (2d Dep't 2012) (accusation that plaintiff was a "terrorist" was "not actionable" because "[s]uch a statement was likely to be perceived as 'rhetorical hyperbole, a vigorous epithet'"); *see also Lewis-Gale Med. Ctr., LLC v. Alldredge*, 710 S.E.2d 716, 721–22 (Sup. Ct. Va. 2011) (while calling the plaintiff an "organizational terrorist" was "certainly unwise, unprofessional hyperbole," it was not defamatory when put into proper context); *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152, 156 (Mo. Ct. App. 2005) (similar).

Accordingly, Pierce's public statements concerning the *Lewis I* and California actions cannot serve as the basis for a defamation claim.[7]

II. Plaintiff's Aiding and Abetting Defamation Claim Against Beck Should be Dismissed

The second cause of action asserts that Beck aided and abetted the alleged defamation described above through her participation in Putney Twombly's investigation into Doe's claims. According to Plaintiff, Beck's conduct "allowed, and concluded with, [Putney Twombly's] sham 'credible' finding," which enabled Pierce and Edwards to defame Plaintiff. Compl. ¶ 239. This claim is entirely without foundation and should be swiftly dismissed because aiding and abetting defamation is not a valid cause of action in New York. *See Dennis v. Bailey*, Index No. 154075/2013 (N.Y. Cty. May 9, 2014) (the "*Dennis* Order") ("The court's research indicates that New York does not recognize such a tort.").[8] Moreover, as set forth above, Plaintiff has failed to state a claim for defamation against Pierce and Edwards. Thus, even if aiding and abetting defamation was a legitimate cause of action, Plaintiff's claim would still fail. *See Dickinson v. Igoni*, 76 A.D.3d 943, 945 (2d Dep't 2010) (a claim for aiding and abetting "stands and falls" with the underlying tort).

Plaintiff's aiding and abetting defamation claim against Beck should be dismissed forthwith.

III. Plaintiff Has Failed to State a Claim under Judiciary Law § 487 Against the PB Defendants

A. The Complaint Fails to Allege Actionable Deceit

New York Judiciary Law § 487(1) provides as follows:

> An attorney or counselor who [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . . Is guilty

[7]Attached to the Affirmation of Marc L. Mukasey as Ex. D is a chart that tracks each statement alleged in the Amended Complaint to be defamatory and links it to corresponding allegations in the California Complaint, thus establishing that each of the statements constitutes fair comment on the complaint itself.
[8] The *Dennis* Order is attached to the Affirmation of Marc L. Mukasey as Ex. E.

> of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

"Relief under a cause of action based upon Judiciary Law is not lightly given and requires a showing of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys that caused damages." *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dep't 2015) (citation omitted). "[A]ssertion of unfounded allegations in pleading, even if made for improper purposes, does not provide a basis for liability under Judiciary Law § 487." *Ticketmaster Corp. v. Lidsky*, 245 A.D.2d 142, 143 (1st Dep't 1997); *see also Tacopina v. Kerik*, No. 14CV749, 2016 WL 1268268, at *6 (S.D.N.Y. Mar. 31, 2016) ("[E]ven if [the counterclaimant] were able to assert facts demonstrating that the allegations of defamation against him are 'unfounded,' he still would not have a sufficient basis for a Section 487 claim . . . ."); *Bryant v. Silverman*, 284 F. Supp. 3d 458, 472 (S.D.N.Y. 2018) (same).

Moreover, "[s]ection 487 is aimed at actions by an attorney in his or her role *as an attorney*." *N. Tr. Bank of Fla./Sarasota N.A. v. Coleman*, 632 F. Supp. 648, 650 (S.D.N.Y. 1986) (emphasis added). Thus, "[t]he mere fact that a wrongdoer is an attorney is insufficient to impose liability for treble damages under section 487." *Id.*; *see also Vedder Price P.C. v. US Capital Partners, LLC*, No. 16-CV-6787, 2019 WL 1986737, at *5 (S.D.N.Y. May 6, 2019) (§ 487 does not apply to "a party who is represented by counsel and who, incidentally, is an attorney" (citation omitted)).

Here, the gravamen of the claim is that the PB Defendants acted deceitfully by filing the California action while Littler was negotiating on its behalf with Plaintiff's counsel to resolve the parties' dispute. According to the Complaint, Defendants violated § 487 by "fraudulently inducing Plaintiff to discontinue the [*Lewis I*] Complaint on the false pretense that it would lead to continued

non-judicial settlement efforts." Compl. ¶ 246. This, according to the Amended Complaint, allowed the defendants to "'rac[e] to the courthouse' to file the [California Complaint] purely as a public relations ploy." *Id.*

Plaintiff's claim is premised on a statement Littler purportedly made to Lewis's counsel – not on any actions that the PB Defendants took in their capacities as attorneys – and § 487 does not apply. The PB Defendants cannot be held liable under § 487 simply because they are attorneys. *See Coleman*, 632 F. Supp. at 650; *Vedder Price*, 2019 WL 1986737, at *5. But more importantly, even if true, this is simply not the type of egregious, chronic or extreme pattern of conduct targeted by § 487. *See, e.g.*, *Havell v. Islam*, 292 A.D.2d 210, 210 (1st Dep't 2002) ("The motion court properly dismissed plaintiff's claim for violation of Judiciary Law § 487 since the allegations in the complaint failed to establish a chronic and extreme pattern of legal delinquency . . . ."); *compare Bounkhoun v. Barnes*, No. 15-CV-631-A, 2018 WL 1805552, at *6 (W.D.N.Y. Apr. 17, 2018) (allegations that an attorney engaged in a pattern of hiding settlement offers from a client and took advantage of the fact that the client did not speak English were sufficient to state a claim for § 487).

Plaintiff's other contentions – that the Defendants "us[ed] deceitful tactics in an effort to deprive the New York Supreme Court of an action properly filed in this jurisdiction to enforce the rights of one [*sic*] its residents" and that the Defendants "misrepresent[ed] to the Superior of [*sic*] Court of California the circumstances surrounding the withdrawal of the [*Lewis I* Complaint]" (Compl. ¶ 246) – provide even less support for a § 487 claim. Plaintiff's remedy is to appear in the California action, to deny those allegations he believes to be false and to assert any counterclaims he believes he has. It is not to drag the parties and this Court into a meritless defamation case.

B. Plaintiff Cannot Allege Damages

In order to support a claim under Judiciary Law § 487, a plaintiff "must allege damages that resulted from the defendant's deceit." *Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP*, No. 12 CIV. 9459, 2013 WL 3357921, at *10 (S.D.N.Y. July 2, 2013), *aff'd*, 552 F. App'x 79 (2d Cir. 2014); *see also Jaroslawicz v. Cohen*, 12 A.D.3d 160, 160-61 (1st Dep't 2004) ("The cause of action for statutory treble damages under Judiciary Law § 487 was properly dismissed because there is no pleading . . . of pecuniary damages resulting from alleged wrong.").

Here, without support, the Amended Complaint simply alleges that the Defendants' violation of Judiciary Law § 487 should result in "treble damages in an amount to be determined by the Court." Compl. ¶ 250. Plaintiff fails to provide any facts or details about the extent of his pecuniary damage or how it is calculated. Although Plaintiff contends that the PB Defendants fraudulently induced him to withdraw the *Lewis I* Complaint on May 15, 2019, he concedes that he re-filed the complaint the following morning. Compl. ¶ 3 n.1. That short delay did not, and could not, cause pecuniary damages sufficient to pass muster under section 487. Nor does Plaintiff offer any detail to support his claim that he suffered some undefined disadvantage in the media because he was not first to file.

In short, Plaintiff's § 487 claim should be dismissed because the Amended Complaint fails to allege the pecuniary damages that Plaintiff suffered as a result of any deceit. *See, e.g.*, *Havell*, 292 A.D.2d at 210 (§ 487 claim was properly dismissed when "the allegations in the complaint failed to establish . . . that the actions of the attorney defendants caused plaintiff damage").

IV. Plaintiff Has Failed to State a Claim for Intentional Infliction of Emotional Distress against the PB Defendants

The third cause of action is for intentional infliction of emotional distress against the PB Defendants primarily based on "Pierce and Edwards's attack on Plaintiff," *i.e.*, the filing of the

California Complaint and subsequent related comments Pierce made to the press and on social media. Compl. ¶¶ 253-255. Plaintiff claims that "it was substantially certain that Pierce and Edwards's conduct and actions would cause severe emotional distress" and provides several supporting examples, such as "Pierce frequently directing Partners at the firm to 'assign the most vicious associate' to draft complaints." *Id.* ¶ 256. With respect to Beck, Plaintiff claims that she caused him severe emotional distress when she "stood by [Putney Twombly's] 'credible' finding which was never shared with Plaintiff, was entirely incredible and impossible to find in good faith." *Id.* ¶ 260.

This claim is farcical. Intentional infliction of emotional distress is a "highly disfavored [t]ort under New York law" that should "be invoked only as a last resort." *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 158 (2d Cir. 2014) (citation omitted). To state a claim, a plaintiff must allege "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46, 56 (2016) (citation omitted). "Liability for [IIED claims] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* Thus, "the majority of claims fail because the behavior alleged is almost never sufficiently outrageous." *Brown v. City of New York*, 65 N.Y.S.3d 490 (Sup. Ct. Bronx Cty. 2017), *aff'd*, 170 A.D.3d 596 (1st Dep't 2019). "[C]ourts can and frequently do dismiss [intentional infliction] claims in a pre-answer motion where the conduct alleged, even accepted as true, is not sufficiently outrageous as a matter of law." *Robles v. Cox & Co.*, 841 F. Supp. 2d 615, 632 (E.D.N.Y. 2012).

Here, Plaintiff's claim should be rejected to the extent that it mirrors his claim for defamation, which fails for the reasons set forth above. *See Joseph v. Joseph*, 107 A.D.3d 441, 442 (1st Dep't 2013) (the trial court properly dismissed an intentional infliction claim because it "rest[ed] on the same facts and allegations supporting the alleged defamation claim," which was dismissed due to the judicial proceedings privilege); *Rozanski v. Fitch*, 113 A.D.2d 1010, 1010 (4th Dep't 1985) (stating that if a defamation claim fails, an intentional infliction claim based on the same alleged conduct must also fail). Moreover, "[i]t is doubtful that an action for intentional infliction of emotional distress should be entertained 'where the conduct complained of falls within the ambit of other traditional tort liability.'" *Rozanski*, 113 A.D.2d at 1010 (citing *Fischer v. Maloney*, 43 N.Y.2d 553, 557 (1978)). Thus, even if Plaintiff did adequately state a claim for defamation, his attempt to use the same set of facts to assert a claim for intentional infliction of emotional distress should be rejected. *See id.* (dismissing an intentional infliction claim because it was "redundant of the causes of action for defamation" and thus "damages for emotional distress are recoverable on the defamation causes of action"); *Durepo v. Flower City Television Corp.*, 147 A.D.2d 934, 935 (4th Dep't 1989) (same).

This claim should also be rejected because the conduct of which Plaintiff complains does not come close to a level that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chanko*, 27 N.Y.3d at 56. Indeed, courts have dismissed intentional infliction claims based on conduct far more shocking than tasking a firm's "most vicious associate" with drafting a complaint. *See, e.g.*, *Campoverde v. Sony Pictures Entm't*, No. 01 CIV. 7775, 2002 WL 31163804, at *12 (S.D.N.Y. Sept. 30, 2002) (allegation that the defendants' employees were "abusive" and "threatening" towards the plaintiffs, "kept plaintiffs behind a shut and guarded door

and refused to let them leave," and "threw plaintiffs out onto the street" was not sufficiently outrageous); *Andrews v. Bruk*, 220 A.D.2d 376, 376 (2d Dep't 1995) (allegation that the defendant improperly "obtained two hospital documents showing that the plaintiff underwent a vasectomy" and used them in his divorce action to argue that his wife was having an affair with the plaintiff was not sufficiently outrageous).

Plaintiff's claim that Beck caused him severe emotional distress by "standing by [Putney Twombly's] bogus credible finding" is meritless. Beck's work with outside counsel to investigate a female employee's sexual assault complaint is light years away from the type of heinous conduct required to support an intentional infliction claim. Even claims based on fabricated allegations of assault or other crimes have been dismissed by New York courts. *See, e.g.*, *La Duke v. Lyons*, 250 A.D.2d 969, 973 (3d Dep't 1998) (allegation that employees of a hospital falsely accused a nurse of euthanizing a patient in her care "was not sufficiently outrageous"); *Silver v. Kuehbeck*, No. 05 CIV. 35, 2005 WL 2990642, at *7 (S.D.N.Y. Nov. 7, 2005), *aff'd*, 217 F. App'x 18 (2d Cir. 2007) (allegation that the defendants falsely reported the plaintiff to the police for stalking and harassment was not sufficiently outrageous); *James v. DeGrandis*, 138 F. Supp. 2d 402, 421 (W.D.N.Y. 2001) (allegation that the defendants falsely accused a college soccer coach of having improper sexual relationships with students was not sufficiently outrageous because "[e]ven a false charge of sexual harassment does not rise to the level of outrage required"); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 215 (W.D.N.Y. 2013) (allegation that an individual falsely accused the plaintiff of sexual assault "because she was angry at him for ending their relationship" was not sufficiently outrageous).

Plaintiff's claim for intentional infliction of emotional distress should be swiftly rejected.

V. Plaintiff's Aiding and Abetting Intentional Infliction of Emotional Distress Claim Against Beck Should be Dismissed

Plaintiff's fifth cause of action alleges that Beck aided and abetted Pierce's and Edwards' intentional infliction of emotional distress. Plaintiff bases this claim on the same conduct upon which he relies in asserting his primary intentional infliction claim against Beck. Compl. ¶¶ 270-72.

This claim is a second attempt by Plaintiff to concoct a cause of action that does not exist in New York. *See* Dennis Order at 14, 17 (finding that "New York does not recognize" the tort of aiding and abetting intentional infliction of emotional distress). Moreover, as discussed above, the Amended Complaint fails to state a claim for intentional infliction of emotional distress against Pierce and Edwards. For all of these reasons, any accompanying aiding and abetting claim must also fail. *See Dickinson*, 76 A.D.3d at 945.

VI. Plaintiff Has Failed to State a Claim for Prima Facie Tort Against the PB Defendants

Plaintiff's sixth cause of action asserts a claim of prima facie tort against the PB Defendants based on the alleged defamatory statements published by Pierce and Edwards and the alleged assistance provided to them by Beck.

To state a claim for prima facie tort, a plaintiff must allege: "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful." *Curiano v. Suozzi*, 63 N.Y.2d 113, 117 (1984). The element of special damages is "critical," and requires a plaintiff to show that he "suffered specific and measurable loss." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985); *see also D'Angelo-Fenton v. Town of Carmel*, 470 F. Supp. 2d 387, 401 (S.D.N.Y. 2007) ("[S]pecial damages must be alleged with sufficient particularity to identify actual losses. . . . They must be fully and accurately stated." (citation omitted)). Accordingly, "'[r]ound figures' or a general allegation of

a dollar amount as special damages do not suffice." *Matherson v. Marchello*, 100 A.D.2d 233, 235 (2d Dep't 1984) (citing *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 441 (1960)).

Here, Plaintiff simply claims that the Defendants "caused irreparable harm to [his] personal and professional reputation and have placed his career as an attorney in grave jeopardy," and concludes that he is therefore entitled to compensatory damages of at least $15 million and punitive damages of at least $30 million. Compl. ¶ 285 & Request for Relief. This type of non-itemized estimate plainly fails to satisfy the element of special damages. *See, e.g.*, *Procter & Gamble Co. v. Quality King Distributors, Inc.*, 974 F. Supp. 190, 199 (E.D.N.Y. 1997) ("Quality King failed to itemize its losses but rather approximates its damages in a round figure of approximately $25 million. The Court finds that this is insufficient as a matter of law."); *El Greco Leather Prod. Co. v. Shoe World, Inc.*, 623 F. Supp. 1038, 1045 (E.D.N.Y. 1985), *aff'd*, 806 F.2d 392 (2d Cir. 1986) (allegation that plaintiff suffered "damages to its business, reputation and good will in an amount not less than $42,000,000" was insufficient); *Bradley v. Nat'l R.R. Passenger Corp. (Amtrak)*, 797 F. Supp. 286, 295 (S.D.N.Y. 1992) (similar).[9]

Accordingly, Plaintiff's prima facie tort claim should be dismissed.

[9] Moreover, Plaintiff's prima facie tort claim appears to be largely based on the alleged defamatory statements in the California Complaint and subsequent related statements made by Pierce. Because none of these statements can serve as the basis for a defamation claim, Plaintiff's prima facie tort claim should be dismissed. *See, e.g.*, *Casa de Meadows Inc. (Cayman Islands) v. Zaman*, 76 A.D.3d 917, 920–21 (1st Dep't 2010) ("Defendants may not circumvent the judicial proceedings privilege by pleading prima facie tort.").

CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint in its entirety for failure to state a claim under CPLR 3211(a)(7) and should grant such other and further relief as is just.

Dated: New York, New York
September 5, 2019

Respectfully submitted,

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COMMERCIAL DIVISION RULE 17 WORD COUNT CERTIFICATION

Marc L. Mukasey, an attorney admitted to practice before the New York State Courts, certifies, in accordance with and pursuant to 22 NYCRR 202.70(g)(17), that: the foregoing Memorandum in Support of the PB Defendants' Motion to Dismiss dated September 5, 2019, contains 6950 words, exclusive of the caption, table of contents, table of authorities and signature block; and the certification as to the foregoing relies upon the word count of the word-processing system used to prepare the document, Microsoft Word.

Dated: New York, New York
September 5, 2019

/s/ Marc L. Mukasey
Marc L. Mukasey