518-0001/1656842

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

JOSEPH RAKOFKSY, and
RAKOFKSY LAW FIRM, P.C.,

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REED SMITH
BREAKING MEDIA, LLC
ABOVETHELAW.COM
ELIE MYSTAL
AMERICAN BAR ASSOCIATION
ABAJOURNAL.COM
DEBRA CASSENS WEISS
SARAH RANDAG
MYSHINGLE.COM
CAROLYN ELEFANT
SIMPLE JUSTICE NY, LLC
BLOG. SIMPLE JUSTICE.US
KARVET & VOGEL,
SCOTT H. GREENFIELD
LAW OFFICE OF ERIC L, MEYER
ERIC L. MAYER, *individually*
GAMSO, HELMICK & HOOLAHAN
JEFF GAMSO, *individually*
CRIMEANDFEDERALISM.COM
"JOHN DOE #1"
ORLANDO-ACCIDENT LAWYER.COM
"JOHN DOE #2"
LAW OFFICE OF FARAJI A. ROSENTHALL
FRAHJI A. ROSENTHALL, *individually*
BENNETT AND BENNETT
MARK BENNETT, *individually*
SEDDIQ LAW
MIRRIAM SEDDIQ, *individually*
THE MARTHA SPERRY DAILY
ADVANTAGE ADVOCATES
MARTHA SPERRY; *individually*
ALLBRITTON COMMUNICATIONS
COMPANY
TBD.COM

Index No.: 105573/11

MEMORANDUM OF LAW
ON BEHALF OF THE
DOUDNA DEFENDANTS
IN SUPPORT OF THEIR
MOTION TO DISMISS THE
COMPLAINT AND FOR
SANCTIONS

RESTORINGDIGMTYTOTHELAW.BLOGSPOT.
COM
"J.DOG84@YMAIL.COM"
ADRIAN K. BEAN
HESLEP & ASSOCIATES
KOEHLER LAW
JAMISON KOEHLER, *individually*
THE TURKEWITZ LAW FIRM
ERIC TURKEWITZ, *individually*
THE BEASLEY FIRM, LLC
MAXWELL S. KENNERLY
STEINBERG MORTON HOPE & ISRAEL, LLP
ANTONIN I. PRIBETIC
PALMIERI LAW
LORI D. PALMIERI, *individually*
TANNEBAUM WEISS, PL
BRIAN TANNEBAUM, *individually*
WALLACE, BROWN & SCHWARTZ
GEORGE M. WALLACE, *individually*
DAVID C. WELLS, P.C. and
DAVID C. WELLS, *individually*
ROB MCKINNEY, ATTORNEY-AT-LAW
ROB MCKINNEY, *individually*
THOMSON REUTERS
DAN SLATER
BANNED VENTURES, LLC
BANNINAYION.COM
"TARRANT84"
UNIVERSITY OF ST. THOMAS SCHOOL OF
LAW
DEBORAH K. HACKERSON
LAW OFFICES OF MICHAEL T. DOUDNA
MICHAEL T. DOUDNA, *individually*
MACE J. YAMPOLSKY & ASSOCIATES
MACE J. YAMPOLSKY, *individually*
THE LAW OFFICE OF JEANNE O'HALLERAN,
LLC
JEANNE O'HALLERAN, *individually*
REITER & SCHILLER, PA.
LEAH K. WEAVER
AVVO CORPORATION
JOSHUA KING
ACCELA, INC.
COLIN SAMUELS
THE BURNEY LAW FIRM, LLC and
NATHANIEL BURNEY, *individually*

Defendants.

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LESTER SCHWAB KATZ & DWYER, LLP
Thomas A. Catalano
Attorneys for Defendants Michael T. Doudna,
and Michael T. Doudna, individually
120 Broadway – 38th Floor
New York, New York 10271
(212) 964-6611 (T)
(212) 267-5916 (F)

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of defendants Law Offices of Michael T. Doudna and Michael T. Doudna's (collectively, "Doudna") motion to dismiss the complaint on the grounds that the court lacks personal jurisdiction over Doudna, a California attorney, and for an award of sanctions based upon the commencement of a frivolous action.

STATEMENT OF FACTS

The gravamen of this action as to Doudna is for defamation based upon an internet communication (first claim). Based upon the same publication that underlies the defamation claim, plaintiffs assert additional causes of action for "intentional infliction of emotional harm" (second claim), "intentional interference with a contract" (third claim), and for violation of the right to privacy, as codified by N. Y. Civil Rights Law §§ 50 and 51 (fourth claim).

Plaintiff Joseph Rakofsky, a 2009 graduate of Touro Law Center, was admitted to the bar of the State of New Jersey (¶¶ 85 and 86)[1]. He is the sole shareholder of plaintiff Rakofsky Law Firm, P.C. (¶ 87). (Rakofsky and Rakofsky Law Firm, P.C. will be referred to collectively as "Rakofsky").

On or about May 3, 2010, Rakofsky was retained to represent Dontrell Deaner in a first degree murder trial pending in the Superior Court of the District of Columbia (¶ 88). This was to be the first trial of Rakofsky's professional career (¶ 89).

The trial was commenced before the Honorable William Jackson. A conflict soon arose between Rakofsky and his client regarding whether certain questions should be posed to a trial witness (¶ 108). Rakofsky made an application to be relieved as counsel. Rakofsky felt that

[1] Paragraph references are to the amended complaint filed on May 16, 2011, Exhibit A.

there was a "blatant 'alliance' between Judge Jackson and the [prosecutor] that resulted in virtually all of Judge Jackson's rulings being in favor of the Government," and as a result, the "defense of his client had been gutted and [he] had virtually no chance of success." (¶ 109)

Judge Jackson granted Rakofsky's application to be relieved as counsel. The motion was based, as least in part, on Judge Jackson's perception that Rakofsky was not qualified to defend a murder trial:

> The trial transcript states in relevant part:
>
> THE COURT: I must say that even when I acquired [*sic*][2] of Mr. Deaner, I -- as to whether or not, when the Court found out through opening, at least near end of the opening statement, which went on at some length for over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky --- put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.
>
> It appeared to the Court that there were theories out there -- defense theories out there, but, the inability to execute those theories. It was apparent to Court that there was a -- not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner. And had there been -- If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both - it is a choice that he has knowingly and intelligently made and he understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder trial.
>
> So I'm going to grant the motion for a new trial. And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, received a motion from an investigator in this case who attached an e-mail in this case from Mr. Rakofsky to investigator. I, quite frankly, don't know what to do with this because it contains an allegation by the investigator about what Mr. Rakofsky was asking investigator to do in this case.
>
> . . . But it just seems to me that so, I believe based on my observations and, as I said, not just the fact that lead counsel had not tried a case fore; any case. It wasn't his first murder trial; it was his first trial. And I think the - As I said, it became readily

[2] So in original, probably should be "inquired"

apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment. (Tr. at 3-5)

* * *

THE COURT: There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues. (Tr. at 7)

Deaner Criminal Trial Transcript, Exhibit B (emphasis added).

Rakofsky contends that Judge Jackson, in granting his motion to withdraw, "slandered [his] knowledge of courtroom procedure" (¶ 117, 118).

During the proceeding, as quoted above, Judge Jackson suggested that a certain email from Rakofsky "raises ethical issues." The email, from Rakofsky to his investigator, defendant Adrian K. Bean, dated October 6, 2010, is annexed as Exhibit C. It states in relevant part: "Adrian, Thanks for helping. 1) Please trick [redacted] (old lady) in to admitting a) she did not see the shooting and b) she told 2 lawyers she did not provide the Government any information about the shooting."

Rakofsky does not deny that he authored the email, but claims it "had been hastily typed by [him] on a mobile device, that used an unfortunate choice of the word 'trick' on which, as BEAN knew only too well, was a shorthand word that meant only that Bean should underplay the fact that he worked for the defense [.]" (¶ 120)

On April 1, 2011 the defendant The Washington Post published an article entitled "*D.C. Superior Court judge declares mistrial over attorney's competence in murder case*", a copy of which is annexed as Exhibit D.[3]

On April 4, 2011, the American Bar Association publication, ABA Journal (Online) published an article based upon The Washington Post article, entitled "*Astonished' Judge*

[3] Available online at <http://www.washingtonpost.com/local/dc-superior-court-judge-declares-mistrial-over-attorneys-competence-in-murder-case/2011/04/01/AFlymrJC_print.html>

Declares Murder Mistrial Due to Defense Lawyer Who Never Tried a Case," a copy of which is annexed as Exhibit E.[4]

The ABA Journal article stated:

> A Washington, D.C., judge declared a mistrial in a murder case Friday, saying he was "astonished" at the performance of the defense lawyer who confessed to jurors he'd never tried a case before.
>
> Judge William Jackson said lawyer Joseph Rakofsky did not have a good grasp of legal procedures, citing as an example the attorney's rambling opening statement in which he told of his inexperience, the Washington Post reports. Rakofsky graduated from Touro law school in 2009 and obtained a law license in New Jersey less than a year ago, the story says.
>
> Rakofsky had repeated disagreements with his local D.C. counsel, causing his client, Dontrell Deaner, to become "visibly frustrated," the Post says. On Friday, Deaner told the judge he wanted a new lawyer.
>
> The judge declared a mistrial after reviewing a court filing in which an investigator had claimed Rakofsky fired him for refusing to carry out the lawyer's emailed suggestion to "trick" a witness, the story says. Rakofsky's suggestion allegedly read: "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting."
>
> Afterward, Rakofsky refused to comment and rushed out of the courthouse, the story says

Doudna maintains a blog for his law firm, which includes synopses of newsworthy, law-related articles with a hyperlinks to each source article. The marketing service that maintained the Doundna blog located the ABA Journal article concerning Rakofsky, drafted a synopsis, and placed it on the Doudna blog, along with a hyperlink to the ABA website where the original source article could be viewed. Doudna Aff. and Kenney Aff.

The synopsis of the ABA Journal online article in the Doudna blog stated:

> Rakofsky described his inexperience the jury, saying that "he had never tried a case before". This behavior, as well as other tell-tale signs of inexperience led the judge on this case to declare a mistrial. Another disquieting fact is that Rakofsky fired an

[4] Available online at <http://www.abajournal.com/news/article/astonished_judge_declares_murder_mistrial_cites_inexperienced_lawyer_who_ne/.

> investigator for refusing to get a witness to lie about the crime in question. Talk about a breach of ethics.

Compl. ¶ 187.

Doudna now moves to dismiss the amended complaint on the grounds that this Court lacks personal jurisdiction over him and his law firm. Doudna practices law only in the State of California, and lacks any significant contacts with New York. Under established precedent, a blog such as Doudna's, which merely provides information to the public with very limited interactivity, cannot establish personal jurisdiction in New York.

Doudna also seeks sanctions under CPLR 8303-a and/or 22 NYCRR § 130-1.1(a) on the grounds that plaintiffs had no reasonable basis to conclude that they could obtain personal jurisdiction over Doudna in the State of New York.

ARGUMENT

POINT I

THIS COURT LACKS PERSONAL JURISDICTION OVER DOUDNA, A CALIFORNIA ATTORNEY, WHOSE PRACTICE IS LIMITED TO CRIMINAL DEFENSE PROCEEDINGS AND BANKRUPTCIES IN THE COURTS OF HIS STATE

Because Doudna and his law firm are not New York residents, they cannot be subject to this court's jurisdiction unless they are present in this State, or "unless plaintiffs prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts within the State." *Copp v. Ramirez*, 62 A.D.3d 23, 28, 874 N.Y.S.2d 52, 57 (1 Dept. 2009)

"The burden rests on plaintiffs, as the parties asserting jurisdiction (citation)." *Id.* "On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating satisfaction of the CPLR and due process jurisdictional requirements (citations)." *CRT Investments, Ltd. v. Merkin*, 2010 WL 4340433, 9 (N.Y.Sup. 2010), *aff'd*, 2011 WL

2225050, 1 (1 Dept. June 9, 2011) ("Plaintiffs failed to meet their burden of demonstrating the existence of personal jurisdiction").

Under CPLR 301, New York courts may exercise jurisdiction over nondomiciliaries only if they are engaged in such a continuous and systematic course of "doing business" in New York as to warrant a finding of its "presence" in this jurisdiction. *Delagi v. Volkswagenwerk A.G.,* 29 N.Y.2d 426, 430-31, 328 N.Y.S.2d 653, 655-56 (1972); *Laufer v. Ostrow*, 55 N.Y.2d 305, 313, 449 N.Y.S.2d 456, 460 (1982).

CPLR 301 "general presence" jurisdiction over Doudna is unavailable. Doudna is not admitted to practice in New York, has no office in New York, owns no property in New York, has no employees in New York, and lacks any other kind of contact with New York to be considered "doing business" here. "Plaintiff does not allege any New York State activity of [Doudna] that is sufficiently continuous, permanent, and substantial to subject [Doudna] to jurisdiction under [CPLR] 301." *Pitbull Productions, Inc. v. Universal Netmedia, Inc.,* 2008 WL 1700196, 5 (S.D.N.Y. 2008) (citation and quotation marks omitted).

Doudna's blog cannot be a basis for Section 301 jurisdiction. "It has been repeatedly held that the fact that a foreign corporation has a website accessible to New York is insufficient to confer jurisdiction under CPLR § 301." *Haber v. Studium, Inc.*, 2009 WL 565185, 3 (N.Y.Sup. 2009) (citation and internal quotation marks omitted); *Indemnity Ins. Co. of North America v. K-Line America, Inc.*, 2007 WL 1732435, 6 (S.D.N.Y. 2007).

New York's long arm statute permits the court to exercise jurisdiction over a non-resident who "transacts any business within the state or contracts anywhere to supply goods or services in the state. CPLR 302(a)(1); or "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act," CPLR 302(a)(2) (emphasis added); or

"commits a tortious action without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act [.]"CPLR 302(a)(3) (emphasis added). None of these provisions apply here.

For personal jurisdiction under CPLR 302(a)(1) to arise, the cause of action must arise "out of the transaction of business within the state." *McGowan v. Smith*, 52 N.Y.2d 268, 271, 437 N.Y.S.2d 643, 644 (1981). Here, there was no transaction within the State of New York. Likewise, CPLR 302(a)(2) jurisdiction is unavailable because no tortious act is alleged to have occurred within New York. For this purpose, "the situs of the injury . . . is where the event giving rise to the injury occurred, not where the resultant damages occurred." *Marie v. Altshuler*, 30 A.D.3d 271, 272, 817 N.Y.S.2d 261 (1 Dept 2006). Moreover, by its terms "a cause of action for defamation of character" is specifically excluded from the ambit of CPLR 302(a)(2).

CPLR 302(a)(3) provides for jurisdiction where the party commits a tortious act outside the state which causes injury to persons or property inside the state, if the party (i) regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. In addition, as with subparagraph (a)(2), "a cause of action for defamation of character" cannot be based upon subparagraph (a)(3).

"The rationale for excluding defamation actions from the operation of CPLR 302(a)(2) and (3) . . . "was to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them.' " *Legros v. Irving*, 38 A.D.2d 53, 55, 327 N.Y.S.2d 371, 373 (1 Dept. 1971), *quoting*, 1 Weinstein-Korn-Miller, N.Y.Civ.Prac. par. 302.11.

Although the alleged basis for personal jurisdiction is not explicitly stated in the amended complaint, presumably plaintiffs will contend that jurisdiction was established merely because Doudna maintained a blog on the internet that contained the allegedly defamatory material.

As the affidavits of Doudna and Harmony Kenney make clear, the Doudna blog was a "passive" website that provided information to the general public with very limited interactivity. Although the blog permitted a user to leave a "comment" and provide his email address, this was not the type of "interactive" website that could possibly give rise to personal jurisdiction.

> [T]he courts have identified a spectrum of cases involving a defendant's use of the internet. At one end are cases where the defendant makes information available on what is essentially a "passive" web site. This use of the internet has been analogized to an advertisement in a nationally-available magazine or newspaper, and does not without more justify the exercise of jurisdiction over the defendant. At the other end of the spectrum are cases in which the defendant clearly does business over the internet, such as where it knowingly and repeatedly transmits computer files to customers in other states. Finally, occupying the middle ground are cases in which the defendant maintains an interactive web site which permits the exchange of information between users in another state and the defendant, which depending on the level and nature of the exchange may be a basis for jurisdiction.

Citigroup Inc. v. City Holding Co., 97 F.Supp.2d 549, 565 (S.D.N.Y. 2000) (citations omitted).

"If the foreign company maintains an informational Web site accessible to the general public but which cannot be used for purchasing services or goods, then most courts would find it unreasonable to assert personal jurisdiction over that company (citations)." *Grimaldi v. Guinn*, 72 A.D.3d 37, 48, 895 N.Y.S.2d 156, 165 (2 Dept. 2010). A passive website could possibly provide a basis for personable jurisdiction but only when combined with other business activity. For example, if a website permitted bank customers to apply for loans on-line, print out applications, and "chat" on line with bank employees, and received responses to online inquiries in less than an hour, there would be a sufficient basis to support the court's exercise of personal

jurisdiction over the bank defendant. *Grimaldi*, *quoting*, *Citigroup, Inc. v. City Holding, Co.*, 97 F.Supp.2d 549, 565 (S.D.N.Y. 2000). If a website "provides information, permits access to e-mail communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made in this manner in the forum state, particularly by the injured consumer [will] the assertion of personal jurisdiction may be reasonable." *Grimaldi*, 72 A.D.3d at 50, 895 N.Y.S.2d at 166. The Doudna website had none of these interactive features.

"[I]n order to exercise personal jurisdiction over a non-resident defendant, something more than the mere posting of information on a passive web site is required to indicate that the defendant purposefully directed his activities at the forum state." *Competitive Technologies, Inc. v. Pross*, 2007 WL 283075, 3 (N.Y.Sup. 2007), *cited with approval in Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 251(2nd Cir. 2007)(personal jurisdiction not found based on website).

Universal Grading Service v. eBay, Inc., 2009 WL 2029796, 7 (E.D.N.Y. 2009) involved a minimally interactive website, not unlike the Doudna blog. The court held that the website was insufficient to establish jurisdiction:

> Even when viewed together in the light most favorable to plaintiffs, plaintiffs' allegations do not show that defendant PNG's website "clearly allow [s] defendant to transact business" in New York. Nor do the allegations show that defendant PNG's website is more than minimally interactive. The only way in which plaintiffs allege that website visitors may exchange information with defendant PNG online is by providing PNG with their email addresses, which allows them to receive PNG's newsletter. Other than permitting this modest interaction, PNG's website merely informs visitors of how to contact PNG via telephone or postal mail. In addition, plaintiffs have alleged no facts permitting an inference that PNG's website specifically targets New York residents. Under these circumstances, defendant PNG's website activity does not rise to the level of transacting business in New York within the meaning of § 302(a) (1).

Like the *Universal Grading* website, any interaction between visitors to the Doudna blog and Doudna was limited to permitting the visitor to leave a "comment" and provide his email address, which would ultimately be forwarded to Doudna. Also, like the *Universal Grading* website, Doudna's blog did not target New York residents. Indeed, Doudna's practice is limited to California, where he primarily handles criminal defense and bankruptcy matters.

There is no need to inquire into whether Doudna's purported contacts with New York amount to "minimum contacts" under the U.S. Constitution because long arm jurisdiction is unavailable under CPLR 301 or 302. *Best Van Lines*, 490 F.2d at 242 (2d Cir. 2007). If, however, the court were to make a due process analysis, the rule is that the, "conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *International Shoe v. Washington*, 326 U.S. 310, 317, 66 S.Ct. 154, 159 (1945). Doudna has not engaged even in a single activity in New York. The exercise of jurisdiction over Doudna in this case would violate the constitutional guarantee of due process because it fails to comply with "traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316.

"Under the Due Process clause, where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, (1) the defendant must have 'purposefully directed' its activities to residents of the forum state, (2) the litigation must result from alleged injuries that 'arise out of or relate to' those activities, and (3) the exercise of jurisdiction must be reasonable such that the exercise of jurisdiction would comport with 'fair play and substantial justice.' " *Realuyo v. Villa Abrille*, 2003 WL 21537754, 8 (S.D.N.Y. 2003), *aff'd*, 93 Fed.Appx. 297 (2nd Cir 2004), *quoting*, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 477, 105 S. Ct. 2174 (1985). Jurisdiction over Doudna "would fail the constitutional test

for due process because the defamation claim in this case did not arise out of or relate to any activities the defendants purposefully directed to the residents of New York. Moreover, the exercise of specific jurisdiction also fails to meet the third prong of the due process inquiry-the reasonableness requirement." *Id.*

POINT II

SANCTIONS SHOULD BE IMPOSED AGAINST PLAINTIFFS AND THEIR ATTORNEYS FOR COMMENCING AN ACTION AGAINST DOUDNA WITHOUT ANY GOOD FAITH BASIS TO BELIEVE THAT PERSONAL JURISDICTION COULD BE OBTAINED IN NEW YORK STATE

Plaintiffs have named 79 individual defendants (and two "John Does") apparently without regard to whether personal jurisdiction could be obtained in this State. As to Doudna, the most cursory investigation on plaintiffs' part would have revealed that he practices law only in California. Moreover, the law is well settled that the type of website maintained by Doudna, with only minimal interactivity, could not possibly give rise to personal jurisdictions in New York.

It is obvious that the plaintiffs' strategy is to sue anyone and everyone, regardless of whether there was any good faith basis to haul them into court in New York, in order to exact "nuisance value" settlements. This strategy is made plain by an email from Rakofsky sent to Mr. Doudna on June 9, 2011, before we appeared as his counsel:

> Mr. Doudna,
>
> Earlier this month, I proposed to certain defendants that we entertain discussions of possible settlement. My proposal was that each of the defendants pay a nominal sum of $5,000 in full and complete settlement of the claims asserted against them in my Amended Complaint and refrain from making any further publications that in any way relate to me or my law firm. My offer presumed that each of the defendants who wished to accept my offer and I and my law firm would exchange general releases. I made the offer to be accepted by any defendant who wished to do so within 7 days.

Even though you have thus far failed to make an appearance or to come forward, I will extend to you the same offer. Thank you.

Yours truly,
Joseph Rakofsky

Exhibit F.

If even half of the 79 named defendants paid a "nominal sum" of $5,000, plaintiffs would stand to realize $200,000. Since the costs of moving to dismiss even a frivolous complaint, such as plaintiffs' complaint, would be likely to reach or exceed $5,000, some defendants may be tempted to make a "business decision" to pay plaintiff the $5,000 he seeks.

This is not a legitimate litigation strategy. It is sanctionable conduct. "[P]laintiffs' counsel pursued the action against [defendants] as part of a course of conduct calculated to harass defendants in the lawsuits he filed in [this] court into settlement for the nuisance value of the litigation rather than incurring the full costs of a defense, as opposed to entering into settlements as a means to resolve an honest dispute." *Bello v. Barden Corp.*, 2006 WL 2827091, 10 (D.Conn. 2006), *aff'd in part*, 307 Fed.Appx. 514 (2nd Cir. 2009), *cert. den.*, ___U.S.___, 129 S.Ct. 2836 2009) ("the district court did not abuse its discretion in finding both that Umeugo stated 'explicit[ly] ... that he was planning to use the nuisance value of continued litigation as leverage in his settlement negotiations' ").

Prior to incurring the expense of drafting this motion, we offered to waive our claim for sanctions if plaintiffs discontinued the action against Doudna with prejudice. See letter to Rakofsky *pro se* and his counsel, Exhibit G.

Mr. Rakofsky rejected our offer without an explanation as to the basis for his belief that Doudna is subject to suit in this State. Exhibit H.

CPLR § 8303-a provides that "an action to recover damages for personal injury, injury to property or wrongful death, . . . such action or claim is commenced or continued by a plaintiff . . . and is found . . . to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars." The award may be assessed against the party, his attorneys, or both. CPLR § 8303-a(b). A claim is considered frivolous if the claims was made "bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another" or "commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

It is clear that Rakofsky did not have any good faith, reasonable basis in fact or law to believe that Doudna was subject to jurisdiction in New York. The action, at least as to Doudna, is frivolous. The Courts have held that sanctions are mandatory upon a finding that an action is frivolous. The rule is especially appropriate for frivolous defamation actions, such as the case at bar. "Once there is a finding of frivolousness [under CPLR 8303-a], sanction is mandatory, especially in the wake of frivolous defamation litigation." *Nyitray v. New York Athletic Club in City of New York*, 274 A.D.2d 326, 327, 712 N.Y.S.2d 89, 90 (1 Dept. 2000) (citations omitted, emphasis added). "Interpreting [under CPLR 8303-a] in that manner will accomplish the legislative intent of preventing waste of judicial resources and reducing malpractice and other liability insurance costs by discouraging frivolous claims and defenses (citation). *Id. Linen v. The Hearst Corp.*, 2007 WL 4639418 (N.Y.Sup. 2007) ("Once the court determines frivolous conduct exists, sanctions are mandatory").

The Court rules provide an additional basis for the award of sanctions. Under 22 NYCRR 130–1, "The court, in its discretion, may award to any party or attorney in any civil

action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct [.]" *See, Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 883, 917 N.Y.S.2d 664, 667 (2 Dept. 2011) (in defamation action, sanctions under 22 NYCRR 130–1.1 in the principal sum of $14,098.69 awarded to third-party defendant).

CONCLUSION

For the reasons stated, Doudna's motion to dismiss the amended complaint and for sanctions should be granted.

Dated: New York, New York
June 23, 2011

LESTER SCHWAB KATZ & DWYER, LLP

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Thomas A. Catalano
Attorneys for Defendants Law Offices of Michael T. Doudna and Michael T. Doudna, individually
120 Broadway – 38th Floor
New York, New York 10271
(212) 964-6611

TO:
Joseph Rakofky, Esq.
4400 US-9
Freehold, New Jersey 07728
Plaintiff *pro se*

Richard Borzouye, Esq.
Borzouze Law Firm, P.C.
14 Wall Street, 20th Floor
New York, New York 10005
Attorneys for plaintiffs

Erik M. Turkewitz, Esq.
THE TURKEWITZ LAW FIRM
228 East 45th Street, 17th Floor
New York, New York 10017
Defendants *pro se* and for SCOTT H. GREENFIELD, SIMPLE JUSTICE NY, LLC, BLOG. SIMPLE JUSTICE.US, KARVET & VOGEL, MYSHINGLE.COM, CAROLYN ELEFANT BENNETT AND BENNETT, MARK BENNETT, *individually,* LAW OFFICE OF ERIC L,

MEYER, ERIC L. MAYER, *individually,* THE BURNEY LAW FIRM, LLC, NATHANIEL BURNEY, *individually,* AVVO CORPORATION, JOSHUA KING, GAMSO, HELMICK & HOOLAHAN, JEFF GAMSO, *individually,* WALLACE, BROWN & SCHWARTZ GEORGE M. WALLACE, *individually,* BANNED VENTURES, LLC, BANNINAYION.COM "TARRANT84", TANNEBAUM WEISS, PL, BRIAN TANNEBAUM, *individually,* ACCELA, INC., COLIN SAMUELS, CRIMEANDFEDERALISM.COM, "JOHN DOE #1", STEINBERG MORTON HOPE & ISRAEL, LLP, ANTONIN I. PRIBETIC, BREAKING MEDIA, LLC, ABOVETHELAW.COM, ELIE MYSTAL, BREAKING MEDIA, LLC ABOVETHELAW.COM, DAVID C. WELLS, P.C. and DAVID C. WELLS, *individually*

John H Teschner, Esq.
132 Nassau Street, Suite 900
New York, New York 10038
Attorneys for defendants
MACE J. YAMPOLSKY & ASSOCIATES
MACE J. YAMPOLSKY, *individually*
on behalf of other defendants

David Brickman, Esq.
1664 Western Avenue
Albany, New York 12203
Attorneys for defendants Maxwell S. Kennerly,
The Beasley Firm, LLC, Koehler Law, Jamison Koehler,
and Mirriam Seddig

Mark A. Weisman, Esq.
Herzfeld & Rubin, P.C.
125 Broad Street
New York, New York 1004
Attorneys for defendants Reuters America, LLC
and Dan Slater

No appearance to date:
THE WASHINGTON POST COMPANY, KEITH L. ALEXANDER, JENNIFER JENKINS, CREATIVE LOAFING MEDIA, WASHINGTON CITY PAPER, REED SMITH, AMERICAN BAR ASSOCIATION, ABAJOURNAL.COM, DEBRA CASSENS WEISS, SARAH RANDAG, ORLANDO-ACCIDENT LAWYER.COM, "JOHN DOE #2", LAW OFFICE OF FARAJI A. ROSENTHALL, FRAHJI A. ROSENTHALL, *individually,* THE MARTHA SPERRY DAILY, ADVANTAGE ADVOCATES, MARTHA SPERRY; *individually,* ALLBRITTON COMMUNICATIONS COMPANY, TBD.COM, RESTORINGDIGMTYTOTHELAW.BLOGSPOT.COM, J.DOG84@YMAIL.COM, ADRIAN K. BEAN, HESLEP & ASSOCIATES, PALMIERI LAW, LORI D. PALMIERI, *individually,* ROB MCKINNEY, ATTORNEY-AT-LAW, ROB MCKINNEY, *individually,* UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, DEBORAH K. HACKERSON, THE LAW OFFICE OF JEANNE O'HALLERAN, LLC, JEANNE O'HALLERAN, *individually,* REITER & SCHILLER, PA., LEAH K. WEAVER