EXHIBIT D

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

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

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY, et al.,

Defendants.

Randazza Reply Affidavit in Support of Motion for Pro Hac Vice Admission and Extension of Time To Answer or Move

Index # 105573/11

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Marc J. Randazza, being duly sworn, deposes and says:

I make the following statements based upon personal knowledge.

1. I was initially approached by a number of the defendants in this action to act as their counsel. This includes Mr. Turkewitz, who is my local counsel in this action.

2. In his Memorandum of Law, Mr. Rakofsky references a telephone conversation on the evening of May 16, 2011. This Affidavit fills in the gaps left by Mr. Rakofsky's recitation of events, in the event the Court reviews his unsworn statement.

3. When I initially spoke to Mr. Borzouye, I disclosed to him that I was not admitted in New York, but that I had been asked by some defendants to come into this matter *pro hac vice* based in my prior experience handling First Amendment matters.

4. While it seemed that Rakofsky's suit seemed so unsupportable as to be sanctionable, and although the defendants all desired to soundly defeat Mr. Rakofsky as an exercise in protecting the First Amendment, I proposed a possible settlement scenario, which could attempt to aid Mr. Rakofsky in the rehabilitation of his public image.

5. My proposal was that Mr. Rakofsky would be given column space in each of the defendants' publications, in which he would be permitted to explain his side of the underlying story, and in which he would engage in self-critique and self-reflection about the matter. Mr. Rakofsky's

name is, currently, synonymous with poor judgment, unethical conduct, and incompetence. However, it was my belief at that time that Mr. Rakofsky could be "saved," in that he could counter the negative public attention heaped upon him after D.C. Superior Court Judge William Jackson called his competence and ethics into question. (*See* Transcript of Deaner Trial, Exhibit F of moving papers.) It was my belief that an act of sincere self-reflection could not only counter the negative public opinion of him, but could place him in a better position than before this entire ordeal began.

6. Having secured the blessing of a number of the defendants to carry this proposal to Mr. Rakofsky, I placed a call to Mr. Borzouye to discuss it, but he was not available.

7. While I was in my San Diego office, Mr. Borzouye called me back (on my Florida cell phone) in the evening of May 16, 2011. He did not indicate that any other individual was on the line – leading me to believe that we were engaged in a private conversation. I had no reason to expect that anyone else was listening, and in my entire career, I have never known an attorney to fail to disclose the identities of all parties on the line.

8. Mr. Borzouye discussed his client's position. After listening to his position, I began to state mine. However, before I could articulate more than a few words, a second voice began to speak in excited tones. This voice identified himself as Mr. Rakofsky.

9. I immediately stated a clear concern that it was both unethical and illegal for Borzouye and Rakofsky to have conducted a lengthy phone call with me, without revealing the fact that there was someone else listening in on the line.

10. As I was in California at the time, California law applies to this conversation. California's wiretapping law is a "two-party consent" law. California makes it a crime to record or eavesdrop on any confidential communication, including a private conversation or telephone

call, without the consent of all parties to the conversation. *See Cal. Penal Code* § 632. However, given that the number Borzouye called was a Florida number, he might have believed that I was in Florida. Nevertheless, Florida's wiretapping law is also a "two-party consent" law. Florida makes it a crime to intercept or record a "wire, oral, or electronic communication" in Florida, unless all parties to the communication consent. See *Fla. Stat.* § 934.03.

11. At this point, before I could finish my thoughts, Mr. Rakofsky spoke, in an agitated manner and at great length about his feelings about the case, and about what he demanded in settlement. He demanded that every defendant remove every single article about him from their publications, issue full and sincere public apologies to him, and that they all pay him an unspecified amount of money.

12. I listened intently and respectfully to him. In fact, I was so silent that at one point, Mr. Rakofsky seemed to think that I had hung up the phone. I explained to him that I was still there and listening to him, and that I would speak when it was my turn.

13. When it was my turn, Mr. Rakofsky interrupted me more than once. Initially, I politely informed him that when he was speaking, I was so respectful that he thought I had hung up – and that now that I had the floor, I wished for the same courtesy.

14. Despite this fact, Mr. Rakofsky continued to interrupt me, and began ranting and raving. I attempted to get him to allow me to speak politely several times, to no avail as he ignored me and continued to rant and rave.

15. I felt it was necessary and proper at that point to get his attention, and at that point I told him to "shut the fuck up."

16. That did have the desired effect. At that point, I again reminded him that when he was speaking, I was so respectful that he thought I had hung up – and that now that I had the floor, I

wished for the same courtesy.

17. With his attention finally gained, I was able to communicate the defendants' position that no monetary payment would be made.

18. At that point, Mr. Rakofsky instructed Mr. Borzouye to hang up and the call disconnected.

19. In the context of that phone call, it is clear that the call was terminated because I told Mr. Rakofsky that none of the defendants would voluntarily pay him any money. Mr. Rakofsky's umbrage at my extreme measures to silence him so that I could get a word in appears to be a post-hoc rationalization.

20. With respect to Mr. Rakofsky's statements in his opposition to my admission *pro hac vice*, it appears that he has confused the sequence of events.

21. As a preliminary matter, every phone call I had with attorney Borzouye after the first call included an insistence by Mr. Borzouye that I agree that the calls were 100% confidential, and that they "never happened." This was at his insistence and he wished for the calls to be not only protected as settlement-privileged conversations, but that I agree to a greater degree of confidentiality for those calls. Out of respect for him, I agreed to these terms. However, it appears that Mr. Rakofsky has now changed that position by disclosing these telephone calls, waived any privilege, and relieved me of any obligation to honor the request of Mr. Borzouye. Allowing a cherry-picked snippet of one conversation is obviously unacceptable.

22. In my second conversation with Mr. Borzouye, on or about May 26, 2011, we spoke for about an hour. During that time, he and I agreed that Mr. Rakofsky's best bet for saving his career was through the employment of public relations strategies, and not litigation. During this call, which was marked with an overwhelming sense of cordiality on both sides, we came up with a

plan, which would be presented to Mr. Rakofsky.

23. During that call, Mr. Borzouye informed me that he had no objection to my admission *pro hac vice*, but that Mr. Rakofsky did. When I asked him what his grounds were, he said that it was 100% because of my single, terse admonishment for Mr. Rakofsky to be quiet while I spoke.

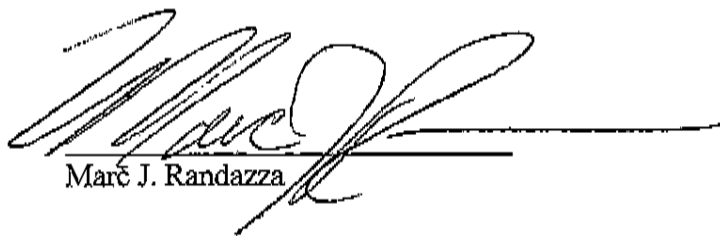
24. When he informed me of this fact, I asked him if he no longer considered the discussion to be settlement privileged. He emphatically stated that he did think it was privileged and not the proper subject for disclosure.

25. I informed him that if Mr. Rakofsky wanted to "break the seal" on the conversation, that it would likely not be to his advantage, as I was quite upset at having been surprised by Mr. Rakofsky illegally eavesdropping on the call. I informed him that I had not considered using that information against anyone criminally or in the grievance process (as much as I thought a violation had occurred) because I thought that it would be improper of me to use any information in a settlement privileged discussion – especially after Mr. Borzouye had made it very clear that he considered all of our conversations to date to have been that type of conversation.

26. I further informed Mr. Borzouye that if Mr. Rakofsky wished to open that door, he should not consider the opening of the conversation to be limited to only the snippet of the conversation Mr. Rakofsky wanted to disclose.

27. I find it both uncomfortable and distasteful to document events that took place in conversations that were explicitly declared to be confidential – and in which Mr. Borzouye insisted that I agree to them being 100% confidential. However, given Mr. Rakofsky's misrepresentations of facts in his opposition to my *pro hac vice* admission, I find it imperative to do so.

Dated: June 17, 2011



Marc J. Randazza

Dated: June ___, 2011

State of Nevada, County of Clark

Sworn to before me on the 17 day of June, 2011

D. San Juan

NOTARY PUBLIC