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

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

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY, *et al.*

-------------------------------------X

MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS REUTERS AMERICA, LLC AND DAN SLATER TO DISMISS THE COMPLAINT

Civil Action

Index No.: 105573/11

PLAINTIFFS'MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS REUTERS AMERICA, LLC AND DAN SLATER TO DISMISS THE COMPLAINT

Plaintiffs, Joseph Rakofsky and the Rakofsky Law Firm, P.C., submit this Memorandum of Law in opposition to the motion of Defendants Reuters America, LLC (designated in the Complaint and Amended Complaint as "Thomson Reuters") and Dan Slater

(hereinafter referred to collectively as "Reuters") to dismiss the Complaint filed by Plaintiffs for failure to state a cause of action, pursuant to CPLR 3211(a)(7).

INTRODUCTION

This Memorandum of Law is filed in opposition to the motion of Defendants Reuters America, LLC, and Dan Slater (hereinafter sometimes referred to as the "Reuters"), to dismiss the original Complaint filed by Plaintiffs, Joseph Rakofsky and Rakofsky Law Firm, P.C. ("RLF") (not the Amended Complaint filed by Plaintiffs as of right).

Plaintiffs have filed three memoranda of law in opposition to motions to dismiss their Amended Complaint (out of a total of thirteen) that, individually or together, contain all the analysis and arguments of Plaintiffs in opposition to those motions to the extent that they address Plaintiffs' action sounding in defamation, intentional infliction of emotional distress and tortious interference with a business contract. They are the memoranda of law in opposition to the motions filed by **(1)** The Washington Post Company, **(2)** Eric Turkewitz, *et al.*, and **(3)** Reuters. All other memoranda of law filed by Plaintiffs are derivative of those memoranda of law on such causes of action. The Statement of Facts and all Exhibits are identical for all thirteen memoranda of law in opposition to motions to dismiss Plaintiffs' Amended Complaint.

STATEMENT OF FACTS

This action arises from Defendants' deliberate and malicious sliming of Plaintiffs, Joseph Rakofsky, who was admitted to practice as an Attorney-at-Law by the State of New Jersey by the Supreme Court of the State of New Jersey and is a

member of the Bar of New Jersey in good standing, and his law firm, the Rakofsky Law Firm, P.C. (hereinafter referred to as "RLF").

On or about May 3, 2010, Mr. Rakofsky and RLF were approached and requested by members of the family of one Dontrell Deaner (hereinafter referred to as "the client" or "the defendant"), who had been indicted by a grand jury of the District of Columbia and was then awaiting trial, to represent the client in the proceedings in the Superior Court of the District of Columbia on the charges against him, which included First Degree Felony Murder While Armed, the felonies on which said charge was based being an alleged attempted robbery, Conspiracy, Attempt to Commit Robbery (while armed), Possession of a Firearm during the Commission of a Crime of Violence and Carrying a Pistol without a License.

In or about late May 2010, Mr. Rakofsky met with the client in the District of Columbia and Mr. Rakofsky and RLF were retained by the client to represent him in the criminal proceedings against him. The client was made aware, prior to retaining Mr. Rakofsky and RLF, that Mr. Rakofsky had not previously tried any case.

Because Mr. Rakofsky was then a member of the Bar of the State of New Jersey and had not been admitted to practice law in the District of Columbia, Mr. Rakofsky was required to seek admission *pro hac vice* from the presiding Judge in order to represent the client in the proceedings against him in the District of Columbia. For that reason and because the trial of the client was to be the first criminal trial in which Mr. Rakofsky would be lead counsel, Mr. Rakofsky associated himself with Sherlock Grigsby, Esq. (herein after referred to as "Grigsby"), who was admitted to practice in the District of Columbia and who had substantial experience representing persons accused of

committing crimes, including homicide, therein, Mr. Grigsby having been represented to Mr. Rakofsky by an experienced criminal defense lawyer in the District of Columbia.

Pursuant to and in the course of their representation of the client, Mr. Rakofsky and RLF engaged one Adrian Bean as an investigator who was hired to perform services on behalf of the client.

Mr. Rakofsky personally met with the client on numerous occasions during the period following the acceptance by Mr. Rakofsky and RLF of the representation of the client and obtained from him information necessary and useful to defend against charges leveled against him and reviewed matters of record with respect to those charges.

Mr. Rakofsky determined from his review of the documents pertaining to the charges against the client that information had been received by Assistant United States Attorney Vinet S. Bryant (hereinafter referred to as the "AUSA"), to whom the representation of the Government in the prosecution of the charges against the client had been assigned, from four confidential informants ("C.I.'s") whose identities were not disclosed to the client or to Mr. Rakofsky or RLF. Access to the C.I.'s was denied by the AUSA and as a result, Mr. Rakofsky and RLF sought an order from the presiding Judge requiring the disclosure of the identities of the C.I.'s.

As a result of negotiations with the AUSA, Mr. Rakofsky was granted access to two of the C.I.'s, whom he then interviewed. As a result of the interviews, Mr. Rakofsky narrowed down the remaining potential C.I.'s to C.I. #2, whose identity was not disclosed to him prior to the trial of the case and who he, therefore, believed would be an important witness for the Government.

In addition to interviewing two of the C.I.'s identified to him and access to whom was given to him by the AUSA, Mr. Rakofsky made numerous written motions to obtain

disclosure of exhibits and videos made of the crime scene by the District of Columbia Police.

The individual who had committed the murder that resulted in the Felony Murder charge against the client, one Javon Walden, had been allowed by the Government to plead guilty to second-degree murder, a lesser charge than the Felony Murder Charge of Murder in the first degree with which the client was charged. Javon Walden had been allowed by the AUSA to plead guilty to a reduced charge of second degree murder, rather than the original charge of first degree murder, and in return, Javon Walden claimed in his allocution that the shooting of the victim, Frank Elliot (hereinafter referred to as "Elliot") had occurred in the course of an attempted robbery of Elliot. Javon Walden dutifully made the required statement upon pleading guilty to the reduced charge of Murder in the 2nd Degree. However, on at least four prior occasions, Javon Walden had testified as a matter of record that no one attempted to rob Elliot.

As a result of his study of the documents related to the homicide of Elliot, Mr. Rakofsky believed that Elliot had been present at the time and place of the homicide for an unlawful purpose, to commit a robbery of the client and/or others with whom the client had been engaged in gambling at a block party in progress at or near the crime scene, the cash used in such gambling being substantial in amount. In addition, Mr. Rakofsky believed that Elliot had been the aggressor in the incidents leading to his homicide as a result of his having recently ingested Phencyclidine, a chemical commonly known as "PCP," which causes users to become unusually aggressive. In order to adduce proof that Elliot was on PCP and thereby create reasonable doubt in the minds of jurors that Elliot had been robbed, Mr. Rakofsky and RLF engaged an expert witness, William Manion, M.D., who was prepared and qualified to testify at the trial of the client to the

effects of the ingestion of PCP upon Elliot, whose recent use of PCP was revealed by the Toxicology Report accompanying the Autopsy Report.

Approximately one week before the scheduled trial date, the case was reassigned to the Honorable William Jackson (hereinafter referred to as "Judge Jackson"), a Judge of the Superior Court of the District of Columbia.

On March 28, 2011, the day before jury selection would begin, the AUSA, anticipating Mr. Rakofsky 's intended use of the Toxicology Report showing that Elliot was high on PCP at the time of his death, moved the Court to suppress, and thereby conceal from the jury, the reference to Elliot's having recently ingested PCP, a drug which causes its users to behave in a very violent and aggressive manner, even though it had been stated in the Toxicology Report attached to the Medical Examiner's report nearly 3 years earlier. The AUSA waited until literally the eve of trial to make her motion, demonstrating the extent to which the Government was prepared to go in pursuit of a conviction of Mr. Rakofsky's client and that the Government would do anything to win. Nevertheless, Judge Jackson granted the AUSA's motion and ruled that the defendant could not introduce evidence that Elliot was under the effects of PCP and denied to Mr. Rakofsky the right to make any mention of PCP or Phencyclidine at the trial, thereby denying to Mr. Rakofsky the ability to adduce proof that no attempted robbery had occurred and instead that Elliot's death was a result of Javon Walden's retaliation. At the same time, Judge Jackson denied several written motions filed by Mr. Rakofsky seeking to offer (a) testimony on the effect of PCP on the actions of Elliot, (b) evidence of Elliot's commission of domestic violence against his wife (which, like the ingestion of PCP, also reflects Elliot's tendency to behave in an aggressive manner) and (c) evidence of events that caused Elliot to need funds immediately prior to the homicide,

which Mr. Rakofsky planned and intended to present to the jury on the defense's case. Judge Jackson ruled that he would not permit the defense to offer testimony or make any statements to the jury (which had not yet been empanelled) concerning Elliot's use of PCP, Elliot's commission of domestic violence against his wife and of events that caused Elliot to need funds immediately prior to the homicide. With respect to the AUSA's motion to suppress evidence of PCP, in general, Judge Jackson based his ruling, first articulated on the eve of trial as a result of the AUSA's motion to suppress evidence of PCP (that is, a view that neither he nor Judge Leibovitz ever expressed prior to the AUSA's motion to suppress evidence of PCP) upon his newly-adopted view that Dr. Manion was not qualified to offer an expert opinion on the effects of the ingestion of PCP by Elliot. In addition to his repeated references to all of the degrees Dr. Manion held in addition to the degree of Doctor of Medicine, Judge Jackson attempted to denigrate Dr. Manion's qualifications as an expert on the record by pointedly referring to him as "**Mr.** Manion" (emphasis added). The only specific reason for this ruling given on the record by Judge Jackson was the fact that, in addition to holding the degree of Doctor of Medicine, Dr. Manion holds two other degrees, Doctor of Law and Master of Business Administration (a reason Judge Jackson repeated at least twice).

> Judge Jackson: The – and it says here that he is a Juris Doctor, he is a medical doctor, he has a Doctor of Philosophy in Anatomy, and he has a residency in forensic pathology and anatomical and clinical pathology. It doesn't say anything about PCP here. What are his qualifications of PCP? Doesn't say anything about degrees of psychopharmacology or pharmacology or any of that...You can talk about his aggressive behavior, you can talk about anything you want to talk about but not that he had drugs in his system until you lay a predicate for it, all right...
>
> Rakofsky: Your Honor, very respectfully, is there any set of facts that

we could offer that would justify the mentioning of PCP in the opening?

Judge Jackson: Not at this point… You haven't proffered me sufficient credentials for anybody to testify about the effects of PCP on anyone. You haven't. You've given me a curriculum vitae that doesn't mention anything about anybody's basis that he has any degree of pharmacology or anything. You have this person who has a masters in business administration, okay. Who's a forensic pathologist or at least had – at one time was a forensic pathologist. Had a residency training back in 1982 and '86. The most recent – he has a law degree and a masters in business administration, 2001…

Rakofsky: Your Honor, he is a medical doctor. He has years and years and years of experience under his belt.

Judge Jackson: We're not here talking about medicine. We're here talking about the effects of PCP…

Judge Jackson did not elucidate in his ruling the reason the possession of two degrees in addition to that of Doctor of Medicine disqualified Dr. Manion from being qualified to offer an opinion on the effects of PCP, nor did he otherwise specify a reason for his ruling.

In addition, on March 28, 2011, Mr. Rakofsky moved to exclude as inflammatory to the jury several Government photographs, one of which being a photograph depicting Elliot's face after his eyes were opened by a Government agent who may have also photographed Elliot's body. Out of approximately 20 photographs the Government sought to offer into evidence, the only photograph that Judge Jackson excluded was a photograph of Elliot's blood-soaked shirt.

Following the seating of a jury of 14 persons, the AUSA made her opening statement, which was followed by Mr. Rakofsky's opening statement on behalf of the defense, in the course of presenting which Mr. Rakofsky was interrupted repeatedly by

Judge Jackson, in each or nearly each instance without any audible objection by the AUSA. At one point in his opening statement, without ever mentioning "PCP" or "Phencyclidine," Mr. Rakofsky made reference to the Toxicology Report that had been submitted as part of the Government's Medical Examiner's report, which prompted Judge Jackson to interrupt Mr. Rakofsky and to suggest in a sidebar conference that he (Judge Jackson) considered that to be a reference to PCP. (Judge Jackson erroneously stated in the sidebar conference with Mr. Rakofsky that, in ruling on March 28, 2011, that Mr. Rakofsky should not refer to PCP in his opening statement, he had similarly so ruled that Mr. Rakofsky should not refer to the toxicology report in his opening statement; however, an examination of the transcript of March 28, 2011 proves that he referred only to references of PCP and not to references to the toxicology report.) Judge Jackson reproached Mr. Rakofsky for being repetitive, although his need to repeat statements he may have said previously was caused by Judge Jackson's frequent interruptions of his opening statement.

Although Judge Jackson took issue with respect to Mr. Rakofsky's reference to the toxicology report, Judge Jackson acknowledged in open court outside the presence of the jury, following the conclusion of Mr. Rakofsky's opening statement, that his presentation of the opening statement was "skillful" on the part of Mr. Rakofsky. Further, Judge Jackson stated to Mr. Rakofsky: "And I think you, quite honestly, tried to adhere to the Court's ruling. You slipped a couple of times, but you've been trying to adhere to the Court's rulings..."

Following Mr. Rakofsky's opening statement, Judge Jackson summoned the defendant to the bench and conducted an *ex parte* sidebar conversation with the defendant, in which Judge Jackson inquired of the defendant whether he wished to

continue to be represented by Mr. Rakofsky as his lead counsel. On a subsequent occasion on the following day, Judge Jackson repeated the question to the client. On each occasion, the client unequivocally expressed his desire to continue to be represented by Mr. Rakofsky as his lead counsel.

Following the completion of opening statements, the AUSA commenced the presentation of witnesses for the Government. The initial witnesses offered by the AUSA established the chain of custody of evidence and the results of the autopsy performed by the Medical Examiner, who testified that Elliot had been killed by a single bullet, which entered his body through his back. Such testimony was unexceptional and prompted little or no cross- examination.

Despite the fact that Judge Jackson had agreed to exclude only one Government photograph (*i.e.*, a photograph of Elliot's blood-soaked shirt), Judge Jackson nevertheless allowed the Government to offer into evidence, not merely a photograph of the blood-soaked shirt, but the actual shirt itself, which the AUSA displayed to the jury.

On March 31, 2011, following the testimony of the aforementioned witnesses for the Government, the AUSA called Gilberto Rodriguez ("Rodriguez"), who was identified as C.I. #2, the only confidential informant not previously disclosed by the AUSA or otherwise made known to Mr. Rakofsky. His testimony, both on direct examination by the AUSA and on cross-examination by Mr. Rakofsky, suggested strongly that Rodriguez, who claimed to have witnessed the homicide of Elliot by Javon Walden, did not actually witness the homicide, as he testified that Elliot had been shot in the chest, contrary to the expert testimony of the Medical Examiner, who had preceded him as a witness, albeit out of Rodriguez's hearing, that Elliot had been shot in the back by only one bullet.

During the course of Rodriguez's testimony, the client passed to Mr. Rakofsky, on a few occasions, notes he had made on a pad that concerned questions the client felt Mr. Rakofsky should ask of Rodriguez, which Mr. Rakofsky, as the client's counsel, believed were detrimental to the client's defense and interests. Thus, Mr. Rakofsky was faced with the decision whether to ask the client's questions and thereby continue representing the client or to refuse to ask his client's questions and seek to withdraw from representation of the client.

Mr. Rakofsky determined that the conflict with the client on the issue of whether to ask the questions that the client had posed to him required him to seek to withdraw as lead counsel for the client. In arriving at the decision to make such an application, which Mr. Rakofsky believed would inevitably result in a mistrial that would permit the Government to retry his client, Mr. Rakofsky took into consideration the fact that, as a result of the blatant "alliance" between Judge Jackson and the AUSA that resulted in virtually all of Judge Jackson's rulings being in favor of the Government, Mr. Rakofsky's defense of his client had been gutted and had virtually no chance of success. However, should the Government determine to retry the defendant following a mistrial, the attorney who would then be lead counsel for the defendant would likely have a greater possibility of success in defending the defendant using the preparation of the defense of the defendant and the disclosure of the prosecution secrets, including the identities of the 4 C.I.'s, the grand jury transcript of C.I. #2 (Gilberto Rodriguez), the in-court testimony of Gilberto Rodriguez, the grand jury transcripts of the testimony of the lead detective, etc. as a result of Mr. Rakofsky's efforts on behalf of the defendant and the defense strategy laid out by Mr. Rakofsky (but not yet revealed in open court) and would be able to secure the services of a medical expert witness whose qualifications would be acceptable to such

Judge as might be assigned to the retrial of the client, assuming the Government were to decide that, taking into consideration the proceedings that had already transpired in the case and the availability to Mr. Rakofsky's successor as lead counsel for the client of Mr. Rakofsky's defense strategy, should the client be subjected to retrial. Therefore, on Thursday, March 31, 2011, Mr. Rakofsky advanced his motion to withdraw as lead counsel for the client.

Mr. Rakofsky's cross-examination of Rodriguez had been interrupted prior to its conclusion by the Court's recessing for lunch. During the Court's recess, Mr. Rakofsky and his co-counsel met with the client.

Following the resumption of trial, but out of the presence of the jury, Mr. Rakofsky moved orally to Judge Jackson for leave to withdraw from the representation of the client, on the grounds that the client's insistence on asking certain questions the client proposed caused a conflict between Mr. Rakofsky and the client.

> Rakofsky: I feel I'm doing the very best job for him but if it's going to require my asking his question, I cannot do that....And **I'm asking** Your Honor...I just don't think this can be reconciled (emphasis added).

Initially, Judge Jackson refused to grant Mr. Rakofsky's motion to withdraw as lead counsel.

> Judge Jackson: Well, I've asked him twice whether he was satisfied. The issue of – he needs to understand that certain questions, you know – that have to be – what do you mean by bad questions?
>
> Rakofsky: Questions that I think are going to ruin him and I cannot have that.
>
> Judge Jackson: If you need time to talk to him and to explain it to him, because sometimes it's very hard in the middle of examination to explain to him why it's a bad question, and if you want time to talk to him about that, you can go into the back and talk to him.
>
> Rakofsky: Your Honor, respectfully, I think now might be a good time – I

> think it might be a good time for you to excuse me from trying this case…I don't believe there is anybody who could have prepared for this case more diligently than I… in light of this very serious barrier, I think now might be a good opportunity for –
>
> Judge Jackson: We're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial.

However, Mr. Rakofsky persisted and was able to convince Judge Jackson to agree to voire dire the client. Judge Jackson, for a third time, summoned the client to the bench and inquired of the client whether he was in agreement with Mr. Rakofsky's application to withdraw as his lead counsel. As Mr. Rakofsky had anticipated, Judge Jackson explained to the client that if he granted Mr. Rakofsky's request to withdraw, it would result in a mistrial, which would not prevent the Government from retrying the client. When asked by Judge Jackson, the client signified his agreement with Mr. Rakofsky's withdrawal.

> Judge Jackson: [T]here appears to be a conflict that has arisen between counsel and the defendant…[T]his is **not** an issue of manifest necessity (emphasis added)...

Although Judge Jackson might have thought to appoint as lead counsel, Sherlock Grigsby, who was already co-counsel, he did not even inquire of the defendant whether that was acceptable to the defendant, whether because Mr. Rakofsky, speaking in the interest of his client, had intimated to Judge Jackson in his application for withdrawal, that the client did not have a good relationship with Grigsby, or whether Judge Jackson considered Grigsby incompetent to defend the client.

Judge Jackson stated on the record that he reserved decision on Mr. Rakofsky's motion to withdraw until the following day, Friday, April 1, 2011, on which no proceedings in the case had been scheduled.[1]

Aside from the attorney-client conflict on which Mr. Rakofsky based his application to Judge Jackson, Mr. Rakofsky believed that his withdrawal as lead counsel would not be prejudicial to the interest of Mr. Rakofsky 's client, but rather would further the interests of the client even though, as Judge Jackson pointed out to the client before closing proceedings on Thursday, March 31, 2011, the granting of Mr. Rakofsky's application would result in the entry of a mistrial that would not preclude the Government from retrying the client, in that, on any retrial, whether it were to occur before Judge Jackson or before another Judge of the Court, the attorney then representing the client would be able to avail himself of the entire defense strategy that Mr. Rakofsky and **RLF** had formulated (but had not yet revealed).

On the following day, Friday, April 1, 2011, Judge Jackson announced in open court that Mr. Rakofsky had "asked to withdraw midtrial" as lead counsel, due to a conflict that existed between him and his client and Judge Jackson granted the motion to withdraw. Judge Jackson acknowledged and stated, on the record repeatedly that Mr. Rakofsky had himself requested that he be excused.

> Judge Jackson: "Let me say that this arose in the context of counsel, Mr. Rakofsky, approaching the bench and indicating that there was a conflict that had arisen between he [*sic*] and Mr.

---

[1] On Monday, March 28, 2011, AUSA stated to Judge Jackson:

> "I had specifically requested of [the previous Judge] that we not sit on Friday, April 1st because of a personal matter that will take me out of the jurisdiction on that date...she had granted that request of the Government; so I made plans accordingly."

At that time, Judge Jackson replied: "All right...we won't be sitting on Friday."
(*See* Exhibit ___, Page 32, Line 20)

> Deaner. Mr. Deaner, when I acquired [*sic*] of him, indicated that there was, indeed a conflict between he [*sic*] and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial…"

Further, Judge Jackson acknowledged, on the record, that he had personally inquired of Mr. Rakofsky's client (outside the presence of Mr. Rakofsky) whether there was, in fact, a conflict between Mr. Rakofsky and his client and that the client agreed that there was indeed a conflict and agreed to accept a new attorney following Mr. Rakofsky's application to withdraw as lead counsel. Judge Jackson's inquiry of the defendant provided sufficient cause for him to grant Mr. Rakofsky's motion and permit Mr. Rakofsky's withdrawal as lead counsel.

After stating that Mr. Rakofsky 's motion for withdrawal as lead counsel for the defendant was precipitated by a conflict with the defendant which the defendant confirmed, Judge Jackson next uttered several statements in open court that denigrated defense counsels' knowledge of courtroom procedure. The statements were plainly irrelevant to Mr. Rakofsky's motion to withdraw as lead counsel, which Mr. Rakofsky had made on March 31, 2011 and which Judge Jackson then stated he was inclined to grant. Only two days prior, on Wednesday, March 30, 2011, Judge Jackson stated to Mr. Rakofsky: "[E]very attorney makes mistakes during the course of the trial. Every attorney does. It just happens. That's the nature of trials. Judges make mistakes during the courses of trials. That's the nature of trials…" To the extent that Judge Jackson may have been upset by Mr. Rakofsky 's presentation of his client's case, as opposed to the benefits that likely would accrue to the defendant as a consequence of Mr. Rakofsky's withdrawal as lead counsel (including the likelihood of a mistrial) and the appointment of new lead counsel with access to Mr. Rakofsky's work and defense strategy, his anger may have

been prompted by the diligence and zeal with which Mr. Rakofsky conducted his defense in the interest of the client as much as anything else, rather than any shortcoming in defense counsels' knowledge of court procedure, especially as Mr. Rakofsky's highly experienced co-counsel, Grigsby, never sought to "correct" Mr. Rakofsky during the trial; at no time during the trial was there ever a single disagreement between Mr. Rakofsky and Grigsby.

Notwithstanding the foregoing facts, Judge Jackson, likely being aware of the possible presence in the courtroom of a newspaper reporter of the Washington Post, Keith Alexander, and anticipating that news reporters would publish his remarks, Judge Jackson, who had acknowledged that Mr. Rakofsky's motion for withdrawal as lead counsel for the defendant was caused by a conflict with the defendant (which the defendant had confirmed to him on the trial record), gratuitously stated in open court, for reasons that can only be speculated, gratuitously published on the record the statement that he was "astonished" at Mr. Rakofsky's willingness to represent a person charged with murder and at defense counsels' "not having a good grasp of legal procedure.." As Judge Jackson knew when he uttered it, that statement was neither relevant nor germane to any issue before the Court -- in fact, there were no further proceedings in the defendant's case -- nor would it have been germane or relevant had it been made before Judge Jackson admitted the basis for granting Mr. Rakofsky's motion to withdraw as lead counsel.

Judge Jackson then uttered remarks critical of defense counsel, without indicating in his remarks whether he was referring to Mr. Rakofsky or to his experienced co-counsel, Mr. Grigsby, These remarks were followed by a purely hypothetical and suppositious statement as to what he would have done had Mr. Deaner been convicted by

a jury and had he (Judge Jackson) then concluded that Mr. Deaner had not been furnished an adequate defense, which, of course, could not have referred to Mr. Rakofsky, to whose withdrawal as lead counsel for the defendant Judge Jackson had consented.

After granting a motion for a new trial, which no one had made, which was apparently referred to as part of the suppositious future facts that Judge Jackson had theorized, which did not and could not have occurred while Mr. Rakofsky was acting as lead counsel for Mr. Deaner, Judge Jackson referred to a document that had been submitted (but not formally filed) that very day by Bean, one of the "investigators" hired by Mr. Rakofsky to assist him with the case, whom Mr. Rakofsky had previously discharged for incompetence.

In the document, Bean sought to obtain a "voucher," which is a method of compensation made available by the Criminal Justice Act which provides funds issued by the Government and **not** money from Mr. Rakofsky. However, not only had Bean failed to complete any of the four tasks assigned to him by Mr. Rakofsky, he never even *began* to do any work assigned to him whatsoever. In the document, Bean sought to exploit, for the purpose of receiving compensation that was not due him, an email that had been hastily typed by Mr. Rakofsky on a mobile device, which used the ambiguous word "trick" -- 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 -- in memorializing an earlier conversation between Bean and Mr. Rakofsky concerning a **non-witness** in which Mr. Rakofsky had suggested to Bean that he understate the fact that he was employed by the defense while endeavoring to get the non-witness to **repeat**, for a second time, what she had already admitted "a couple of months" earlier to. Rakofsky, Grigsby (*i.e.*, the "2 lawyers" referred to in the email) and the client's mother, and not with respect to

anything concerning the substance of her statements. Although Bean's assignment was never to get that non-witness to *change* anything she had already admitted (to the "2 lawyers" and the client's mother), but, rather, to get that non-witness to *repeat* what she had already admitted (to the "2 lawyers" and the client's mother): she (a) was not present during the shooting and therefore, did not witness the shooting, (b) was not being compensated with money by the Government (unlike other Government witnesses in the client's case) to participate in its prosecution of Mr. Rakofsky's client and (c) was off the premises and gambling at the time of the shooting. Bean submitted in his "motion" (and thereby lied to the Court) that Mr. Rakofsky instructed him to "trick a witness into *changing* her testimony" (emphasis added). Ultimately, an investigator hired subsequent to Bean's termination accomplished the very same tasks previously assigned to Bean quickly, without ever being required to engage in trickery; despite Bean's duplicitous and patently false allegations, there are now 5 individuals who will affirm that the non-witness merely repeated statements (to the subsequent investigator) that she had already admitted "a couple of months" earlier to the "2 lawyers" and the client's mother: (1) non-witness, (2) the subsequent investigator, (3) the client's mother, (4) Grigsby and (5) Mr. Rakofsky.

Had it been submitted and ultimately filed by a faithful provider of services, the only appropriate function of Bean's "motion" would be to obtain a "voucher," paid from funds advanced under the Criminal Justice Act, which would not have been available to Bean or any other provider of services in the case but for the efforts of Mr. Rakofsky. At the time Mr. Rakofsky made his client's application to be approved for Criminal Justice Act funds, the previous Judge asked Mr. Rakofsky whether, in addition to the expert witnesses, investigators, demonstrative evidence, etc. so specified in the application, he

was also requesting that his client be approved for vouchers to compensate RLF and Grigsby, who was not yet affiliated with RLF, the compensation of the defendant's lawyers being an acceptable purpose for the Criminal Justice Act vouchers (yet Mr. Rakofsky declined on the record in open court Criminal Justice Act money when presented with an opportunity to be further compensated).

Bean undertook a persistent course of action to blackmail Mr. Rakofsky and RLF with the baseless allegations contained in his "motion," which he communicated in writing (in emails) and orally to Mr. Rakofsky.

Knowing full well that Bean would attempt to destroy Mr. Rakofsky's reputation if Mr. Rakofsky refused to be complicit in committing fraud under the Criminal Justice Act, Mr. Rakofsky refused to acquiesce to Bean's threats. On March 16, 2011, 2 weeks before Bean filed his "motion," Mr. Rakofsky wrote in an email to Bean: "You repeatedly lied to us and did absolutely no work for us... *file what you need to file* and I will do the same (emphasis added)." [2]

Even though it was not Mr. Rakofsky's money with which any of the investigators were to be paid, Mr. Rakofsky declined to authorize the issuance of a voucher to Bean for the full amount of money Bean demanded (despite many emails and messages sent to Mr. Rakofsky by Bean which sought to blackmail Mr. Rakofsky and RLF) primarily because Bean refused to make any attempt to begin the work assigned to him. Nevertheless, Mr. Rakofsky offered to authorize a voucher for Bean for a lesser amount of money (even though Bean's claim to any "compensation" was specious and amounted to a "shake-down"); however, Bean preferred to engage in his threats to obtain even more money than Mr. Rakofsky was willing to authorize, and ultimately, sought

[2] See Exhibit L.

both to deceive the Court and to extort money to which he was not entitled under the Criminal Justice Act.

All Mr. Rakofsky had to do to avoid controversy with Bean was to give him the voucher; it wasn't even Mr. Rakofsky's money.

Bean attached to his "motion" an email which contained protected, confidential and privileged material concerning defense strategy and tactics.

Bean perpetrated 4 criminal acts: 1) blackmailed Rakofsky and RLF, 2) attempted to defraud the Government and steal from the Criminal Justice Act ("CJA") Fund, 3) misused a pleading to offer false statements to the court by stating (in his delivered document) "Mr. Rakofsky instruct[ed] him to try to 'trick' a witness into changing her testimony" and 4) violated the client's constitutional rights by providing confidential and privileged material concerning defense strategy and tactics to the Court. Consequently, Bean has been suspended by the agency that governs investigators working on criminal cases and is CJA-ineligible.

When the defendant offered, on Thursday, March 31, 2011, to show Judge Jackson his legal pad and thereby prove to Judge Jackson that Mr. Rakofsky had refused to ask questions the client wrote on his legal pad, Judge Jackson stated to him: "Well, I shouldn't look at those notes because those are personal and confidential notes between you and your lawyer and I shouldn't be seeing those..." However, on the following day, Friday, April 1, 2011, Judge Jackson, for reasons unknown to Mr. Rakofsky, gave the AUSA a copy of the email written by Mr. Rakofsky (which was attached to the Bean "motion"), in which Mr. Rakofsky had set forth his defense strategy, notwithstanding that, in so doing, Judge Jackson was exposing Mr. Rakofsky's defense strategy to counsel

for the Government to the possible detriment of the defendant (and any attorney who might replace Mr. Rakofsky as lead counsel for the defendant):

> Judge Jackson: You might want to take a look at this pleading.
>
> AUSA: I was, actually, going to ask, but I don't know if I –
>
> Judge Jackson: Mr. Grigsby and Mr. Rakofsky.
>
> AUSA: May we have copies?
>
> Judge Jackson: I don't know what to do with it. I don't know whether you should see it or not.
>
> AUSA: Okay. Well, I'll accept the Court's –

The document had merely been provided to a different Judge sitting in a different court, who was not the presiding trial judge, who merely provided it to Judge Jackson, but had not been formally filed in the case against the defendant.

> Judge Jackson: There's an email from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues. That's my only copy.
>
> Rakofsky: Is that something you wanted to discuss?
>
> Judge Jackson: No…
>
> AUSA: Your Honor, that was filed in the Court?
>
> Judge Jackson: It was delivered to Judge Leibovitz this morning.

The Washington Post and other Defendants named herein have characterized the Bean document as accusing Mr. Rakofsky of an ethical violation, consisting of Mr. Rakofsky's directing Bean to cause a witness to change her testimony. Although Mr. Rakofsky used an ambiguous shorthand word ("trick"), it is clear from any reading of the email in which it was used that what Mr. Rakofsky was asking Bean to do was merely to get a <u>non-witness</u> to repeat statements already made to Mr. Rakofsky, Mr. Grigsby (the

"2 lawyers") and the client's mother, rather than to change anything she had previously stated to them.

Following Judge Jackson's publication of the nonexistent alleged "ethical issues," Keith Alexander, the reporter from the Washington Post, stopped Mr. Rakofsky in the hallway, asked him whether "Judge Jackson's allegation about the investigator" was true and informed him that he would be reporting about "Judge Jackson's allegation about the investigator."

At that time, Mr. Rakofsky refused to comment. When Alexander persisted. Mr. Rakofsky asked whether he had any respect for Mr. Rakofsky's wish not to give a comment. Alexander replied, in sum or substance: "I'm going to make sure you regret your decision; just wait until everyone reads my article," which constitutes an obvious reckless disregard for truth (Mr. Rakofsky declining to comment) as well as the intention to cause harm to Mr. Rakofsky, constituting "actual malice" as held in *Masson v. New Yorker Magazine Inc.*, 501 U.S. 496 (1991).

As a direct consequence of the statements maliciously published by the Washington Post, a number of defendants, obviously "inspired" by the articles in the Washington Post newspaper and on the Washington Post website published on their own websites, for varying reasons, comments (whether or not actually made in those articles) such as:

(a) "the attorney [Rakofsky] told the investigator via an attached e-mail to 'trick' a government witness into testifying in court that she did not see his client at the murder scene."

(b) “A Friday hearing fell apart when Judge William Jackson declared a mistrial, partially because Rakofsky's investigator filed a motion accusing the lawyer of encouraging him to ‘trick’ a witness.”

(c) “To put it another way, the judge not only found Rakofsky too incompetent to handle the case, but too dishonest.”

(d) “It's not to suggest that every young lawyer is as incompetent or dishonest as Joseph Rakofsky. Few are quite this bad. But many lie about themselves just as this mutt did.”

(e) “In short, a judge declared a mistrial in a murder trial because the defendant’s lawyer, who had never tried a case before, didn't understand the rules of evidence and was caught instructing his private investigator to "trick" one of the government's witnesses.”

(f) “Rakofsky later fired and refused to pay when the investigator failed to carry out his request to “trick” a witness…”

(g) “Joseph Rakofsky's fraud and incompetence raises a serious question of legal ethics. Shouldn't someone so incompetent be suspended from the practice of law?”

(h) “The lawyer [Rakofsky] encouraged his investigator to engage in unethical behavior and then refused to pay the investigator when the investigator failed to comply.”

(i) “Ethics also comes into play with deception, as evidenced by one Joseph Rakofsky, a New York lawyer…”

(j) "[W]as it in-person misrepresentation of his qualifications to the family of the accused? As it turns out, it was all of the above. And more."

(k) This is also a story of a lawyer who blatantly broke ethical rules and promised more than he could deliver..."

(l) "[Rakofsky] solicited himself for the case."

(m) "[Rakofsky] encouraged his investigator to undertake unethical behavior and then refused to pay the investigator,"

(n) "Young and Unethical"

(o) "D.C. Superior Court judge declares mistrial over attorney's competence in murder case,"

(p) "You've probably heard, by now, of this Joseph Rakofsky kid. You know the one ...whose performance was so bad that the judge had to declare a mistrial."

(q) "Lawyer of the Month: April Reader Poll" that "[Rakofsky] litigated a case to a mistrial because of his own incompetence..."

(r) "[Rakofsky] was so incompetent that the trial court ordered a mistrial. In other words, the client was deprived of his constitutional right to a fair trial due to attorney incompetence."

(s) "Mistrial After Judge Is 'Astonished' By Touro Grad's Incompetence."

(t) "the mistrial was because of Rakofsky's blatant ineptitude."

(u) "Many have heard about the recent mistrial in the Dontrell Deaner D.C. murder trial due to the egregious incompetence of Deaner's now former criminal defense lawyer, Joseph Rakofsky."

(v) "If anything had the legal blogosphere going this week, it was Joseph Rakofsky, a relatively recent law grad whose poor trial performance as defense counsel in a murder trial prompted the judge to declare a mistrial

(w) "Rakofsky's performance for the defense, including an opening statement to the jury in which he conceded that he was trying his first case (or at least his first murder case), so dismayed the trial judge that the court declared a mistrial on the spot on the ground that the defendant was receiving patently inadequate representation.

(x) "The attorney did such a poor job that Judge William Jackson, who was overhearing the case, ordered a mistrial and allowed Mr. Deaner to fire his attorney."

(y) "Joseph Rakofsky, an alleged criminal defense lawyer (with all of one whole year of experience) lied and lied and lied and was grossly incompetent...."

(z) "I stand by everything I've written on the matter and I have a longstanding policy of not taking down blog posts..."

(aa) "Badges of honor come in many shapes and sizes...Now, I have mine.... It seems there may be a litigation party for those of us involved."

(bb) "Here's a screen capture of the little snake."

(cc) "think about Joseph Rakofsky. And know that if you do what he did, I will be happy to make sure that people know about it. There are probably a few others who will do so as well. What do you plan to do about those loans when your career is destroyed?"

(dd) "Joseph Rakofsky Rapes Donkeys...'Rape-ofsky."

(ee) "If all works as it should, no client will ever hire Rakofsky again."

As Mr. Rakofsky thought was likely when he determined to move to withdraw as lead counsel for the defendant, on Thursday, March 31, 2011, the Government decided following the granting of Mr. Rakofsky's motion to withdraw by Judge Jackson, not to re-try the defendant on any of the charges, including the first-degree felony murder charges brought against the defendant. Rather, the defendant was offered an opportunity, at some time following Mr. Rakofsky's motion to withdraw, to plead guilty to Involuntary Manslaughter, a greatly reduced charge and on May 4, 2012, was sentenced to a maximum term of 120 months, as opposed to the possible sentence of life imprisonment that might have been imposed upon him had he been found guilty of the charges against him in the proceedings in which he was represented by Plaintiffs. Prior to his motion for withdrawal, such a greatly-reduced charge had been sought by Mr. Rakofsky on numerous occasions, but were denied by AUSA Bryant.

PRELIMINARY STATEMENT

For some perverse reason, Reuters' counsel choose to compound the defamation with which Reuters are charged in Plaintiffs' original Complaint (but not their Amended Complaint) by prefacing their Memorandum of Law in support of their motion to dismiss to call Plaintiffs' Complaint "an affront to the principles of free speech and press," presumably intending thereby to refer to, and claim the protection of, the First Amendment to the United States Constitution for the defamation with which they are charged by Plaintiffs. In truth, it is Defendants' actions, and their legal arguments seeking to justify those actions, that constitute an affront to the First Amendment, which

they shamelessly invoke to justify their attempt, by arrant defamation, to denigrate, and destroy the career of, a newly-minted young lawyer whose only "offense" was to take on, as his first trial, after years of apprenticeship and extracurricular study of trial procedure and with the support of a seasoned criminal trial lawyer as his co-counsel, the defense of one he considered wrongly accused of felony murder, who, with foreknowledge of his lack of prior trial experience, chose to retain him as lead counsel for his defense in the free exercise of the right guaranteed him by the Sixth Amendment to the United States Constitution to be represented by counsel of his own choosing.

Mr. Rakofsky diligently and effectively prepared for the defense of his client and devised a defense strategy that should have, and likely would have, brought him success in his tilting at the windmills of the legal justice system had the playing field been level rather than peopled by a prosecuting attorney aided by a judge whose every action, before and during trial, appeared intended to assist the prosecution's goal of conviction and prevent the facts from being brought out by the defense. Then, after a fortuitous act of the defendant, Dontrell Deaner (hereinafter sometimes referred to as the client, the defendant and Mr. Deaner) that created an attorney-client conflict over the conduct of the defense, necessitated his (defense counsel's) motion to withdraw from his representation, an act that, when taken, would operate to the advantage of his client. Having done all that -- and more than an attorney owes his client -- he sacrificed himself to an attack by the judge -- in completely hypothetical, non-germane and suppositious remarks -- who, possibly having realized the position in which he had placed himself by his response to the fortuitous conflict, defense counsel's response to it and his (the Judge's) own mishandling of his response to it, responded by lashing out against the young defense counsel and his co-counsel apparently in the presence of a news reporter the judge likely

knew would trumpet his remarks far and wide to destroy the career of the the young lawyer for his "transgressions," *i.e,* to the judge's record as a jurist. Though he enabled it, the judge may not have anticipated the grossly inaccurate, distorted and ill-motivated publication of certain remarks His Honor never made by professional journalists such as these Defendants and a host of similarly-motivated non-professional "bloggers," most of them lawyers competing for clients and publicity in a competitive post-recession economy, whom those journalists stimulated and enabled to join what resembled, more than anything else, an old-fashioned lynch mob whose intended prey was the young lawyer, plaintiff Joseph Rakofsky.

Beyond that, Reuters' Memorandum of Law is an affront to this Court and to the duty of candor Defendants' counsel owe to this Court. Indeed, the conduct of Defendants' counsel exceeds their failure to fulfill their duty of candor to this Court. Defendants' counsel presume to read the thought processes of all of the participants in the case that gave rise to the article published by Defendants which is the subject of this action for defamation. As will be seen, they purport to determine the thought processes of the presiding judge from His Honor's assumed demeanor, although it would appear from their Memorandum of Law that no representative of these Defendants, including the individual defendant, Slater, may have been present in the courtroom at the time of the proceedings, which gave rise to the article, which is the subject of this action. They similarly presume to evaluate the conduct of plaintiff Joseph Rakofsky during the course of those proceedings without having been personally present, and then presume to criticize Plaintiffs for exercising their right, after having their professions destroyed by the false and libelous publications of Defendants, to bring this action, which will stand or

fall on the basis of the law and its application to the facts of the case and not on the intemperate remarks of their counsel.

Indeed, Reuters' counsel themselves have the temerity to make plainly defamatory statements in their Memorandum of Law that would, were they to be made other than in a filing with the Court, have furnished ground for an independent action for defamation against counsel.

While Reuters have addressed in their Memorandum of Law the second count of Plaintiffs' complaint as originally filed, which asserts a claim for Reuters' violation of Section 51 of the New York Civil Rights Act, they fail to make any reference in their Memorandum of Law to the fact that Plaintiffs amended their original complaint as of right on May 16, 2011 to set forth two additional counts – for Intentional Infliction of Emotional Distress and Tortious Interference with Business Contracts. Defendants have neither moved with respect to Plaintiffs' Amended Complaint, which the records of the United States Postal Service attest was delivered to Reuters on May 17, 2011. Nor have they addressed it in their present motion and Memorandum of Law, thereby admitting Plaintiffs' entitlement to relief on those counts.

SUMMARY OF ARGUMENT

I. Reuters claim a privilege under Section 74 of the New York Civil Rights Law, which provides that: "A civil action cannot be maintained against any person, firm or corporation, [*sic*] for the publication of a fair and true account of any judicial proceeding..." However, Reuters' publication which is the subject of this action was neither "fair" nor "true," either in detail or in substance. Reuters' publication dealt with two discrete subjects: (1) the reason for which Judge Jackson permitted Mr. Rakofsky to

withdraw as lead counsel for Mr. Deaner and (2) the issue raised by the delivery by Bean of a "document" to a judge who was not the presiding trial judge and who, therefore, was not involved in the case, who subsequently delivered to Judge Jackson (who *was* the presiding trial judge), but which, however, had not, been filed in any court at the time of the so-called "newsworthy event."

As to the matter of the "Bean document," the body of the Reuters article does fairly describe the allegations made by Mr. Bean therein; thus, that description has not been alleged by Plaintiffs to constitute defamation by Reuters. However, Reuters' use of a headline describing Mr. Rakofsky as "Young and Unethical" is, in and of itself, grossly and seriously defamatory and precludes any contention by Reuters that the article that follows is either a fair or a true statement of any remark or finding by Judge Jackson. Judge Jackson confined himself to a statement that the self-serving ex-parte document submitted by Bean, which was first received by Judge Jackson and made known to Mr. Rakofsky the very day of the April 1, 2011 proceeding, "raises ethical issues," which, on its face, it would were Bean's allegations therein true, which they were and are not. Judge Jackson, presumably knowing that there are two sides to every story and that unilateral allegations are not facts, abstained from assuming the truth of Bean's self-serving unilateral allegations. However, since facts and truth do not sell newspapers (or attract advertising dollars), Reuters cynically preferred to accept those obviously self-serving unilateral allegations as true (even though Judge Jackson never had) and chose to defame Mr. Rakofsky by calling him "unethical," thereby prejudging the merits of the issue raised by Bean and doing so against Mr. Rakofsky, giving him no right of rebuttal on his part except in this judicial forum. Having adopted that business-dictated stance, Reuters played it to the hilt, using the "U" word where it would be most likely to have the

maximum effect: an attention-grabbing headline no reader could miss. Greater unfairness and non-truth hath no organ of the press!

The other prong of Reuters' headline – "young" -- played to another, Reuters' admittedly-hyperbolic, attention-getter: that Mr. Rakofsky was "thrown off" the Deaner case "for inexperience." Even Reuters' own counsel had to wince at that one! Beyond the hyperbolic verb, the entire statement suffers from an absence of logic that is manifest. It conflates minimal prior experience with a lack of competence. The assumption is mind-bogglingly simplistic: Because one is young, one cannot be skilled at one's craft. That base canard has been disproven often. As the facts alleged herein show, it has no application to the circumstances in this case, much less as to the circumstances of Mr. Rakofsky's withdrawal from the Deaner case. By his diligent pretrial investigation, Mr. Rakofsky, though in his first trial, ferreted out facts that enabled him to discover the identity of the Government's key witness – concealed from him – whom he skillfully nullified on cross-examination, and concocted a defense the Government required assistance from Judge Jackson to undermine, at least for the moment. These are certainly not your standard notions in inexperience and incompetence, as Judge Jackson's objective statements on the trial record prior to the circumstances that gave rise to the mistrial, which, as we shall point out hereafter, occurred the preceding day, on Thursday, March 31, 2011, and to which Judge Jackson's own actions contributed, and to his purely hypothetical, suppositious and objectively incomprehensible statements on Friday, April 1, 2011.

Further, the Reuters "report" goes on to attribute to Judge Jackson the statement that defense counsel "performed 'below what any reasonable person would expect.'" Although the last quotation from Judge Jackson's statements of April 1, 2011, is an exact

quote, its reproduction by Defendants cannot be viewed as a fair and true statement of the proceedings before Judge Jackson only by applying it to Mr. Rakofsky, as distinguished from his co-counsel, Mr. Grigsby. To do so requires interpolation that is not obvious from Judge Jackson's express statement. Insofar as Reuters describe Judge Jackson's granting of Mr. Rakofsky's motion to withdraw[3] and thereby allowing Mr. Rakofsky to withdraw as lead counsel as his "throwing [Mr. Rakofsky] off the case for inexperience," Defendants' article is neither fair nor true, either *in haec verba* or in substance, inasmuch as Mr. Rakofsky, not Judge Jackson, initiated the withdrawal of Mr. Rakofsky as lead counsel for Mr. Deaner, Mr. Rakofsky's application to withdraw being the result not of "inexperience" or anything other than the existence of a conflict between Mr. Rakofsky and Mr. Deaner with respect to questions Mr. Deaner wished Mr. Rakofsky to ask of the Government's key witness, an alleged eyewitness to the murder of Elliot by Javon Walden.

Contrary to the further contentions of Reuters in Point II.C. of their Memorandum of Law, Reuters' statements concerning Mr. Rakofsky are both defamatory and actionable as such. The failure of Judge Jackson to attribute his vague criticisms of the performance of defense counsel, specifically to Mr. Rakofsky, as distinguished from co-counsel, Mr. Grigsby, and his failure to attribute any failings of that performance to Mr. Rakofsky, compounded the egregious errors and internal inconsistency of Judge Jackson's hypothetical and suppositious comments, which cannot rationally apply to Mr. Rakofsky, the only "sting" lies truly not in Judge Jackson's statements, but in the

[33] *See* Exhibit 5, Page 9, Line 9 and Page 12, Line 10 "I'm inclined to grant your **request**...(emphasis added)." See also Exhibit 5, Page 12, Line 10: "I'm inclined to grant [the mistrial], but I want you to think about it overnight."*See also* Exhibit 6, Page 4, Line 18 ("So I am going to grant Mr. Deaner's request for new counsel.") and Page 5, Line 2 ("I'm going to grant the motion for a [mistrial].") and Page, 5 Line 20 ("So I'm going to grant the motion.")

willingness – nay, the wish -- of Reuters to give substance to their "business-promoting" attribution of incompetence to a young attorney, thereby advancing the first part of their "Young and Unethical" headline.

II. Confronted with their obviously, even wildly, defamatory statements, which surely preclude their hoped-for reliance upon Section 74 of the Civil Rights Law, Reuters invoke the so-called "wire service defense": a form of qualified privilege from liability for defamation unrelated to the truth and fairness required by Section 74 that is supposedly granted to one who republishes the defamation of another. This defense is the antithesis of the well-established common-law rule that one who republishes the defamation of another is as liable for its action as the originator of the defamation. As the famous aria in Rossini's "Il Barbiere di Sivigilia" ("The Barber of Seville") points out, the success (one might say the "sting") of defamation (there slander; here libel) lies in its repetition by others, which, in the cyberworld in which we live in the year 2012 A.D., is enhanced by the ubiquity and power of the Internet in which the traditional media now feed the non-traditional bloggers through links, one to the other.

The wire service defense arose in an era in which local newspapers, financially unable to maintain stables of expensive news-gatherers throughout the world, bought "canned" news stories from the APs, UPs, INSs, and like wire services of the world. Granting such a privilege to a republisher may make (or have made) sense where the republisher actually republishes copy it buys from the originator thereof and credits and relies upon the originating source thereof and its own status as a republisher thereof **without adding its own independent defamatory embellishments** (such as the defamatory "Young and Unethical" Reuters headline in this case) to the copy furnished to it by the originating service, but not otherwise, and not in the case at bar.

Defendants' attempt to justify their defamation of Mr. Rakofsky by having merely republished a summary of an article published in the Washington Post must fail on both the law and facts, because the only reference to the Washington Post article relates to the Washington Post's statement that "Jackson was also angered by Rakofsky's alleged disregard of ethics." That statement is <u>not</u> the basis of Plaintiffs' action against Reuters, the gravamen of Plaintiffs' action against Reuters with respect to the issue raised by the Bean "motion," that being the reference of the "Unethical" in the headline of their article, which, as previously noted, constitute a flat-out accusation that Mr. Rakofsky <u>was</u> "unethical," thereby presuming to prejudge the "ethical issues" raised by Bean's improperly-submitted self-serving *ex-parte* document which <u>neither Judge Jackson nor the Washington Post ever did</u> and which the facts demonstrate incontrovertibly did not exist.

Reuters' reliance upon a claimed republication right fails because they did not republish or summarize the Post article. The Post article may have inspired Reuters to write their own defamatory article, but, except for their saying Judge Jackson was angered by the Bean document, which Plaintiffs have not sued on, Reuters neither republished nor summarized the Post article, rather, Reuters created its own libelous article after reading the Post article. Neither *Karaduman v. Newsday, Inc.*, 51 N.Y. 2d 531 (N.Y. 1980), nor *Rivera v. NYP Holdings, Inc.*, No. 114858/06, 2007 WL 2284607 (Sup. Ct. N.Y. Co. Aug. 2, 2007), is applicable to or justifies their authorship of their uniquely libelous Reuters article.

In sum, Reuters, solely in order to further their crass business interests, knowingly used their assets (newspapers, websites and reader comments) to attract visitors to their website and thereby profit by holding Mr. Rakofsky up to display for acts he did not do

and actions Judge Jackson never attributed to him and by presuming to report and comment on both without investigating the facts to assure the truth and accuracy of their report and comments. To the extent that Reuters posted links on their website enabling visitors to visit other websites that also defamed the Plaintiffs, they created and participated in a calculated and coordinated scheme with those to whom and with whom they offered and participated in a "Link Network."[4] When viewed in that context, Reuters functioned as part of a conspiracy, and the fundamental principle that each participant in a conspiracy is responsible for all of the wrongful acts committed by the other conspirators in furtherance of their agreement, *In re Harvard Knitwear Inc.*, 153 B.R. 617, 627 (E.D.N.Y. 1993), each of the Reuters' arguments must be rejected by this Court.

While Reuters take the position that Plaintiffs' claims for intentional infliction of emotional distress and tortious interference with a business contract are "duplicative" of their defamation claim (and should be dismissed on that basis), the Amended Complaint makes clear that the one cause of action is not duplicative of the others.

For some reason, Reuters have moved to dismiss the Complaint filed by Plaintiffs, but not the Amended Complaint served upon them.[5] Therefore, their motion to dismiss does not address the allegations added in the Amended Complaint; therefore, those allegations should be deemed admitted.

For all of these reasons, this Court should deny the Reuters' Motion to dismiss the Complaint.

ARGUMENT

[4] *See* Alayon Affidavit and Rakofsky's Affidavit.
[5] *See* Exhibit 38.

THE COMPLAINT (AS AMENDED AS OF RIGHT) ALLEGES CLAIMS UPON WHICH RELIEF MAY BE GRANTED; THEREFORE, DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO C.P.L.R. 3211(a)(7) SHOULD BE DENIED.

"Who steals my purse, steals trash, but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed." William Shakespeare, *Othello*

I. Reuters' Report on Plaintiffs' Actions in the Deaner Case Is Not Protected from Liability for Defamation by Either the First Amendment or Section 74 of the New York Civil Rights Law.

Given Reuters counsel's posturing about the freedom of the press, it is perhaps meet to note that the First Amendment to the United States Constitution is not offended by a suit for defamation. If any citation were necessary to establish this principle, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should suffice, albeit factually and legally inapposite to the case at bar in numerous respects, the alleged libel there being of a public official and the holding of the Court being the Court's enunciation, through Justice Brennan, of "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. While actual malice may be shown or inferred in the case at bar, it is not necessary that this be done, Mr. Rakofsky, being neither a public officials nor, as the holding in the case has been extended, a public figure. Mr. Rakofsky, of course, could hardly, as a newly-admitted lawyer, nor could his firm, be said to have been a public figure, or to have become one by taking on the defense of a young African-American defendant, at least not before the Washington Post, Reuters and others of the press painted a target on his back and invited

the denizens of the Internet underworld, in combination and concert with them, to aim their arrows at him.

Even assuming, *arguendo*, that Mr. Rakofsky were to be deemed (wrongly, we respectfully submit) to be a limited public figure, the Reuters' motion must still fail. In any event, that the email message fabricated by the Post may have used words similar to the words used in the authentic message sent by Mr. Rakofsky is irrelevant. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519-520 (1991). The sole issue is whether the fraudulent message placed within quotation marks in the Post article was materially altered from the message actually sent by Mr. Rakofsky. *Id.* And for purposes of constituting "actual malice" where required by *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), "deliberate or reckless falsification that comprises actual malice turns upon words and punctuation . . . Meaning is the life of language. And . . . quotations may be a devastating instrument for conveying false meaning." *Id.* at 518. So are and were they in the case at bar.

The speech of Reuters here is not only false, but its falsity should have been, and surely was, known to Reuters, who failed to make any inquiry whatsoever; yet, despite that fact, they acted in reckless disregard for the truth and published their libelous report anyway.

This case concerns the creation and implementation of a scheme to use the power of the press and the Internet to punish a private citizen – for doing no more than being the subject of an article written by a Washington Post "reporter" whose overtures for an interview were rebuffed by plaintiff. In this regard, while Defendants minimize the significance of what was done to Plaintiff – and essentially tell him to "suck it up" – the

foregoing is a representative sample of some of what was unleashed upon the Plaintiffs by the Defendants in this action:

(1) "Young and Unethical"

(2) "A Friday hearing fell apart when Judge William Jackson declared a mistrial, partially because Rakofsky's investigator filed a motion accusing the lawyer of encouraging him to 'trick' a witness."

(3) "To put it another way, the judge not only found Rakofsky too incompetent to handle the case, but too dishonest."

(4) "It's not to suggest that every young lawyer is as incompetent or dishonest as Joseph Rakofsky. Few are quite this bad. But many lie about themselves just as this mutt did."

(5) "Joseph Rakofsky's fraud and incompetence raises a serious question of legal ethics. Shouldn't someone so incompetent be suspended from the practice of law?"

(6) "In short, a judge declared a mistrial in a murder trial because the defendant's lawyer, who had never tried a case before, didn't understand the rules of evidence and was caught instructing his private investigator to "trick" one of the government's witnesses."

(7) "The lawyer [Rakofsky] encouraged his investigator to engage in unethical behavior and then refused to pay the investigator when the investigator failed to comply."

(8) "the attorney told the investigator via an attached e-mail to 'trick' a government witness into testifying in court that she did not see his client at the murder scene."

(9) "Rakofsky later fired and refused to pay when the investigator failed to carry out his request to "trick" a witness..."

(10) "Ethics also comes into play with deception, as evidenced by one Joseph Rakofsky, a New York lawyer..."

(11) "[W]as it in-person misrepresentation of his qualifications to the family of the accused? As it turns out, it was all of the above. And more."

(12) This is also a story of a lawyer who blatantly broke ethical rules and promised more than he could deliver..."

(13) "[Rakofsky] solicited himself for the case."

(14) "[Rakofsky] encouraged his investigator to undertake unethical behavior and then refused to pay the investigator,"

(15) "Joseph Rakofsky Rapes Donkeys...'Rape-ofsky."

(16) "If all works as it should, no client will ever hire Rakofsky again."

Contrary to Reuters' contentions, there *are* certain acts that, indeed, exceed "all reasonable bounds of decency" and are, therefore, actionable as either a *prima facie* tort or the intentional infliction of emotional distress. Many of these cases are collected in 2 New York Pattern Jury Instructions: Civil, PJI 3:6 at pp. 63-64. We note, in particular, *Long v. Beneficial Finance Co.*, 39 A.D. 2d 11 (4th Dept. 1972)(defendant telephoned plaintiff's home, employer, landlord, relatives and neighbors to collect a debt); *Sullivan v.*

Board of Education, 131 A.D. 2d 836 (2d Dept. 1987) (defendant made false charges and spread false rumors about a high school principal in order to coerce his resignation); *Gill Farms Inc. v. Darrow*, 256 A.D. 2d 995 (3d Dept. 1998) (series of harassing telephone calls); *Flatley v. Hartmann*, 138 A.D. 2d 345 (2d Dept. 1988) (harassing telephone calls); *Halio v. Lurie*, 15 A.D. 2d 62 (2d Dept. 1961) (defendant sent offensive letter to plaintiff, "taunting her with her unsuccessful efforts to marry him.")

It is respectfully submitted that a reasonable jury could easily find that what the Defendants did to Plaintiffs here (*i.e.*, publishing the headline "Young and Unethical") was "extreme and outrageous measured by the reasonable bounds of decency tolerated by a decent society." 2 NYPJI, *supra*, at p. 55. The motions to dismiss should, therefore, be denied. *See also Labozzo v. Brooks Brothers Inc.*, 2002 WL 1275155 at *2-3 (Sup.Ct. N.Y. Cty. 2002).

II.

Reuters' Article Is Neither a Fair Nor a True Report of the Proceedings before Judge Jackson on April 1, 2011, and Is Not Privileged Under Section 74 of the New York Civil Rights Law.

The gravamen of the defamation count of Plaintiffs' Complaint and Amended Complaint is based upon two parts of its report (a term used by Reuters that we adopt for its neutrality). In the order in which they appear therein, they are, first, and perhaps foremost, the headline of its report – "Young and unethical" – and, second, that Judge Jackson "declared a mistrial in [the Deaner] case on Friday, April 1, 2011 after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience."

A.

Taking the two issues in that order, we address first the Reuters headline, "Young and unethical." The obvious defamatory part – or, as Reuters might say, "sting" -- of that headline lies in the description of Mr. Rakofsky as "unethical,"though, as we shall see in discussing, *infra*, the second issue, the description of Mr. Rakofsky as young, which we do not dispute, plays a part in the second issue posed by the Reuters report. The charge that Mr. Rakofsky was "unethical" plainly relates to the so-called "Bean motion," as Reuters makes clear in the fourth and final sentence of their report. Although their statement in the text of their report that the "disregard of ethics" attributed to Mr. Rakofsky in the "Bean Motion" was merely "claimed" by Bean and were "alleged," rather than proven, any benefit that might accrue to Mr. Rakofsky by those words was vitiated, first, by Reuters' failure to report Bean's ulterior motive for impugning Mr. Rakofsky's ethics, which was fraudulently to receive Government-funded compensation for which he did not work, which appear on the face of his "motion" and then by their reporting (albeit by attribution to the Washington Post) that Judge Jackson "was . . . angered" by Bean's allegation, an emotion that could not have been stated as fact-based except by Judge Jackson's words in open court, none of which reflect anger with respect to the allegations by Bean beyond the measured statement to Mr. Rakofsky that the allegations "raise ethical issues," which they would, of course, provided they were true, which they were not, as Plaintiffs' allegations make clear for a variety of reasons, including the fact that the individual involved was indisputably <u>not</u> and never was a witness and that Bean had been asked by Mr. Rakofsky merely to seek to get her to say so, just as she already had to him, Mr. Grigsby, and their client's own mother.

In sum, Bean's self-serving and ex-parte charges against Mr. Rakofsky had no basis in fact; therefore, there was not and could not have been any ethical breach on the part of Mr. Rakofsky, nor even any ethical issue. At most it could be said – as Judge Jackson said on the record on April 1, 2011, in the proceedings of which the Reuters article purports to be a "fair and true" report – that Bean's allegations, standing alone (as they necessarily did, having been given ex parte without any notice to Mr. Rakofsky or opportunity for him to controvert and disprove them) raised an ethical issue. Had Reuters said what Judge Jackson did, their report would have been fair and true. By prejudging the merits of Bean's allegations against Mr. Rakofsky without according him an opportunity to rebut and disprove them and declaring him – in a headline, no less – "unethical" – Reuters flagrantly and maliciously defamed him and flouted the purpose, intent, and express terms of Section 74 of the Civil Rights Act, thereby depriving them of any claim of privilege or defense.

B.

With that we turn to the second prong of Reuters' defamation of Plaintiffs: their statement in the first sentence of the body of their "report," which immediately follows their "Young and unethical" headline and is presumably keyed to the "Young" part of the headline: "Washington D.C. Superior Court Judge William Jackson declared a mistrial in a murder case on Friday after throwing defense attorney Joseph Rakofsky, 33, off the case for inexperience."

Except for the identification of Judge Jackson and Mr. Rakofsky (and his correct age), the quoted sentence contains false statements of fact.

We recognize the stated discomfiture of Reuters' counsel at the grossly hyperbolic verb used in the sentence and shall not advert to it further, except to note that it is of a piece with the headline. Both the adjectives in the headline and the hyperbolic verb in the sentence that follows it express and reflect the extraordinary malice and intention of Reuters to injure and damage Plaintiffs and their business and professional standing and cry out for the imposition of the punitive damages Plaintiffs seek in their Amended Complaint.

Beyond that, the above-quoted sentence and the sentence that follows it are neither a fair nor a true report, whether factually or legally, of the April 1, 2011 proceeding in the Deaner case before Judge Jackson. Let us parse this part of the Reuters report.

In the opening sentence, Reuters state that Judge Jackson "declared a mistrial . . . on Friday" (April 1, 2011). Without being hypertechnical, we defy Reuters to find that word in the transcript of proceedings on that day. We recognize that Judge Jackson did state on the record that he was granting a motion for a new trial, a term used by no one either that day or the preceding day when Mr. Rakofsky moved to withdraw as lead counsel for the defendant, Mr. Deaner. That term is one that would be used following a conviction of a criminal defendant, which, of course, had not occurred in the Deaner case, leading one to suspect that Judge Jackson may, when he used the term, have been thinking of the purely hypothetical and suppositious "alternative scenario" he later described in the course of his speculation as to what he would do if he deemed that manifest necessity arising from the defendant's representation by counsel required it.

That Judge Jackson could not have been referring to Mr. Rakofsky and the Deaner case when he was spinning his hypothetical and suppositious tale is, aside from the fact that Mr. Rakofsky, having withdrawn as lead counsel, could not be representing Mr. Deaner if he were to be convicted following a trial and because Judge Jackson had stated the preceding day (March 31, 2011), following Mr. Rakofsky's motion for withdrawal, that: "[T]here appears to be a conflict that has arisen between counsel and the defendant...[T]his is **not** an issue of manifest necessity (emphasis added)..."

As far as Reuters' reference to Judge Jackson's statement about "throwing [Mr. Rakofsky] off the [Deaner] case" (substituting a non-hyperbolic verb) is concerned, that statement is squarely inconsistent with the statement by Judge Jackson early in his April 1, 2011, speech from the bench, that Mr. Rakofsky had moved to withdraw as lead counsel. Thus, the motive force for his ceasing to represent Mr. Deaner was Mr. Rakofsky's own voluntary motion, rather than his being removed from the case by Judge Jackson. This is not to suggest, as Reuters' counsel would have it, that Mr. Rakofsky's motion to withdraw was, without more, self-implementing. It required some action by two other parties: Mr. Deaner, who possessed a constitutional right, under the Sixth Amendment to the United States Constitution, to be represented by counsel of his own choosing, and Judge Jackson, perhaps the lesser in importance of the two given Mr. Deaner's constitutional right. When Mr. Deaner refused to waive his Sixth Amendment right under questioning by Judge Jackson following Mr. Rakofsky's motion on Thursday, March 31, 2011, his action, as Judge Jackson explained to him, would result – as it did -- in a mistrial that would permit the Government to retry him (although it need not have done so had Judge Jackson merely suggested that Mr. Grigsby, who was already counsel

of record, succeed Mr. Rakofsky, which His Honor refused to do for reasons His Honor did not articulate).

Mr. Rakofsky was fully aware of that likely result of his motion for withdrawal and had made his motion only after being satisfied that the mistrial his motion would likely bring about was in the best interests of his client. Judge Jackson's pre-trial rulings in the interest of the Government had indicated to Mr. Rakofsky that the defense strategy would be frustrated, whereas his cross-examination of Mr. Rodriguez likely would preclude his use as a witness on a retrial, should one occur (which was by no means certain),[6] in which his defense strategy, employed by his successor as counsel for Dr. Deaner, likely would succeed.

Given Mr. Rakofsky's motion and Mr. Deaner's response to Judge Jackson on Thursday, March 31, 2011, confirming the basis for Mr. Rakofsky's motion, a mistrial occurred at that point in time, rendering the hearing on April 1, 2011 pure theater. We cannot know why Judge Jackson staged it (being unable, unlike the writers of the Washington Post and Reuters articles profess to be able, to read Judge Jackson's thoughts and emotions), but we have a reasonable suggestion, which is that he realized, as Mr. Rakofsky had earlier, the consequences of the mistrial he had advanced the day before, on Thursday, March 31, 2011, and was trying to deflect criticism of His Honor's own actions.

We have omitted one word in the opening sentence of the Reuters report: "inexperience." Plainly, that is not and, under the Sixth Amendment, cannot be, a ground for removal of an attorney in a criminal prosecution. Nor does anything Judge Jackson

---

[6] Government did not re-try Dontrell Deaner. Following his trial, the Government finally became willing to offer him a reduced charge of Involuntary Manslaughter. *See* Rakofsky Affidavit, par. 37 – 39.

said on April 1, 2011, suggest that he thought otherwise.[7] One might take that as a surrogate for "incompetence," which still would not trump the Sixth Amendment, though it might provide a basis for a new trial following conviction; hence, Judge Jackson's hypothetical and suppositious ruminations. But that can't and couldn't affect Mr. Rakofaky except in the mind of someone disposed to write and publish intentionally injurious and destructive statements about Mr. Rakofsky and do so without bothering to care for the facts, as the Post and Reuters have shown themselves to be.

One might be prone to sympathize with those publishers of defamation, given that Judge Jackson certainly used words that bespeak an intention to be critical of Mr. Rakofsky, albeit more for what he did for his client than anything else. Judge Jackson did, after all, speak ill of the competence of the defense, implicating one or the other of Mr. Deaner's attorneys. However, it is patently unclear to which lawyer he was referring when he made his gratuitous comments on the record on April 1, 2011. It was not necessarily at Mr. Rakofsky that Judge Jackson directed those comments. Proof of this can be seen by examining the transcript of March 30, 2011, in which Judge Jackson stated that aspects of Mr. Rakofsky's opening statement were "skillful."[8] Needless to say, being "skillful" is antithetical to "performing below what any reasonable person would expect in a murder trial" and should have caused Reuters, and as well the Washington Post, whose article Reuters claim to have republished, to make at least some inquiry as to which lawyer the Judge was referring, although they did not. In addition, the only other part of the trial where Mr. Rakofsky "performed" was in the cross-examination of Gilberto Rodriguez, which was also done very skillfully and which resulted in that key

[7] Granted, he did state that: "I was astonished that someone in a felony murder case who had never tried a case before…" See Exhibit 6, Page 4, Line 4.
[8] *See* Exhibit 3, Page 98, Line 1.

Government witness revealing that he could not have actually been an eyewitness, as he testified that the decedent was shot in the chest even though the Government's own medical examiner testified previously (outside the witness's hearing) that the decedent was actually shot in the back with a single bullet, not in the chest as the witness erroneously testified. This testimony was elicited neither by the AUSA nor by Mr. Grigsby, but rather, was elicited by Mr. Rakofsky. Further, on March 31, 2011, Judge Jackson evidenced that he may have believed Grigsby, not Mr. Rakofsky, was unable to perform one of the key functions of local counsel when he stated to the defendant in a bench conference that he would be willing to appoint "another lawyer to work with [the defendant] and…not necessarily get you new counsel but get another lawyer to advise you about whether or not the level of experience that he has is something that you feel comfortable with."

> Judge Jackson: When he became your counsel in this matter working with Mr. Grigsby, were you aware that this would be his first trial?
>
> Defendant: Yes, that's the first thing I asked him.
>
> Judge Jackson: Okay. And, nonetheless, you were satisfied?
>
> Defendant: Yes.
>
> Judge Jackson: Are you still satisfied?
>
> Defendant: Yes.
>
> Judge Jackson: Now, I could get another lawyer to work with you and talk with you about that if you want. Basically have you – not necessarily get you new counsel but get another lawyer to advise you about whether or not the level of experience that he has is something that you feel comfortable with.
>
> Defendant: You say you can get another lawyer to –

Judge Jackson: Just to talk to.

Defendant: I don't feel there's no need.

In fact, when the defendant was asked by Judge Jackson about the existence of a conflict between him and Mr. Rakofsky, even the defendant stated that "[W]hen I refer to Sherlock [Grigsby], he say he just here just because Joseph can't be here by himself..." Had Mr. Rakofsky "performed" any other part of the trial and perhaps, been criticized by the Judge at such a time, it might be more understandable for the Defendants to have drawn the conclusions they did and to publish them. However, a mistrial created by a conflict of interest between Mr. Rakofsky and the client occurred long before Mr. Rakofsky was ever given an opportunity to "perform" other parts of the trial.

Nevertheless, Reuters failed to make any inquiry whatsoever as to which lawyer Judge Jackson was referring when His Honor stated, "I believe that **the** performance was below what any reasonable person could expect in a murder trial...As I said, it became readily apparent that **the** performance was not up to par under any reasonable standard of competence under the Sixth Amendment (emphasis added)."[9] Despite refusing to make any reasonable inquiry whatsoever as to which attorney Judge Jackson was referring, Reuters, nevertheless published, in reckless disregard for the truth, that it was Mr. Rakofsky whose performance was "not up to par under any reasonable standard of competence under the Sixth Amendment."

Though Reuters in the instant case made absolutely no inquiry whatsoever as to what transpired during the trial, they insisted on writing libelous comments and false statements about Mr. Rakofsky and have refused either to apologize or otherwise to be

[9] *See* Exhibit 6, Page 5, Line 17.

accountable to Mr. Rakofsky. Further, they have consistently rebuffed Mr. Rakofsky's repeated attempts to achieve a settlement in this action. Instead, many of the Defendants herein continued to publish additional defamatory statements about Mr. Rakofsky. Not content to defame Mr. Rakofsky, many of the Defendants used threats and intimidation when Mr. Rakofsky exercised his right to seek legal redress through litigation and have recklessly and vindictively repeated their original defamatory statements.

Further, what one must reflect upon is Reuters' failure to note Judge Jackson's use of hypothetical and suppositious language in saying what he might have done at the end of a full trial had Mr. Deaner been convicted and if a post- trial motion were then made (obviously through new counsel for Mr. Deaner) based upon Mr. Rakofsky's alleged hypothetical incompetence during the trial. That, of course, never happened.

> Judge Jackson made no finding that Mr. Rakofsky was incompetent.[10]
>
> Judge Jackson: [T]here's no allegation here that Mr. Rakofsky or anybody associated with the defense has engaged in anything unethical or has violated any ethics or rules of conduct. And I haven't found any quite frankly. My rulings yesterday concerned – my rulings stand as they did, but I have not in any way, shape or form found that Mr. Rakofsky or Mr. Grigsby engaged in unethical conduct.

Indeed, there was and could be no occasion for him to find Mr. Rakofsky was incompetent, because a conflict of interest occurred while still in the Government's case, causing Mr. Rakofsky then to move to withdraw as lead counsel for the defense before he even began to put on the defense case. Judge Jackson's hypothetical and suppositious language of a motion for a new trial following conviction was simply something that, by definition, did not happen (and could not have happened) because Mr. Rakofsky moved to withdraw as lead counsel as a direct result of a conflict of interest with the defendant.

[10] See Exhibit 4, Page 8, Line 24.

After Mr. Rakofsky made his motion to withdraw as lead counsel and at the moment a conflict of interest was confirmed by the defendant on Thursday, March 31, 2011, signifying he was in agreement with Mr. Rakofsky's motion, and when the defendant expressed his refusal to waive his Sixth Amendment constitutional right, a mistrial occurred and could not have been avoided except by the continuation of the trial with Sherlock Grigsby, Mr. Rakofsky's experienced co-counsel, acting as lead counsel. However, Judge Jackson never suggested that alternative to a mistrial on March 31, 2011, when Mr. Rakofsky moved to withdraw. This is because the defendant demonstrated that: (1) he was entitled to his constitutional right (to representation by an attorney of his choosing) and (2) he refused to waive that Constitutional right.[11]

.

> Judge Jackson: When he became your counsel in this matter working with Mr. Grigsby, were you aware that this would be his first trial?
>
> Defendant: Yes, that's the first thing I asked him.
>
> Judge Jackson: Okay. And, nonetheless, you were satisfied?
>
> Defendant: Yes.
>
> Judge Jackson: Are you still satisfied?
>
> Defendant: Yes.
>
> Judge Jackson: Now, I could get another lawyer to work with you and talk with you about that if you want. Basically have you – not necessarily get you new counsel but get another lawyer to advise you about whether or not the level of experience that he has is something that you feel comfortable with.
>
> Defendant: **<u>You say</u>** you can get another lawyer to (emphasis added) –

[11] After the defendant was offered by Judge Jackson the opportunity to be represented by a new lawyer, the defendant asked Judge Jackson to "see if I can get another lawyer," thereby, demonstrating his intent not to waive his Constitutional right.

Judge Jackson: Just to talk to.

Defendant: I don't feel there's no need.

Judge Jackson: Okay. Are you sure about that?

Defendant: Yes.

Judge Jackson: Okay. And are you satisfied with what he's done for you and the work that he's done for you?

Defendant: Yes.

Judge Jackson: Are you satisfied with the investigation that he's done in this particular case?

Defendant: Yes.

Judge Jackson: All right. Because if you're not, I can get you another lawyer. Do you understand that?

Defendant: Yes.

Judge Jackson: But the time to think about that is now.

Defendant: I'm fine...

Judge Jackson: And so what do you want the Court to do?

Defendant: See if I can get another lawyer.

At that time, no attorney acceptable to Mr. Deaner was available to proceed and, therefore, a mistrial occurred. Note that Judge Jackson did not grant or order a mistrial. Indeed, the verbiage of mistrials is the court declares that a mistrial has occurred. **When Mr. Rakofsky moved to withdraw as lead counsel, Judge Jackson immediately told Mr. Deaner that his withdrawal would result in a mistrial.**[12] Thus, when Mr. Deaner, after stating his continuing satisfaction with Mr. Rakofsky as his lead counsel and Judge

[12] *See* Exhibit 5, Page 7, Line 10.

Jackson did not suggest co-counsel Grigsby as lead counsel, the mistrial was inevitable. There literally was no need for a hearing at all on April 1, 2011, except to permit Mr. Deaner to express a change of heart, which he did not do and waive his right to counsel of his own choosing, even though the defendant had already asked for a new lawyer after he was goaded by Judge Jackson into doing so.

Thus, the statement in the Washington Post article and the embellishment to it added by Reuters in saying that Mr. Rakofsky was "thrown off" the Deaner case for "inexperience"-- a code word for "incompetence" -- was neither a fair nor a true report of the hearing before Judge Jackson. But those articles did their intended pernicious work. They sold papers and gave fodder to the hyenas of the Internet blogging community – most of them lawyers trolling for clients by disparaging their competitors – by attacking Mr. Rakofsky, whether for youth, the recentness of his admission to the Bar, or the ex-parte ethical accusations of a money-seeking investigator, didn't matter.

The fact of the matter is that Mr. Rakofsky, though a young newly-minted lawyer in his first trial, in a perceived exercise of over-confidence, was guilty, if of anything, of over-competence, as Judge Jackson discovered and, having discovered it, sought to take him down. That Defendants offered no criticism of Mr. Rakofsky's true competence cannot be denied. That they published that a mistrial was declared because Mr. Rakofsky was incompetent, is clear. That simply did not happen and was not true. The Defendants' statements that the alleged incompetence of Mr. Rakofsky was a proven fact rather than ramblings by a Judge who may have been upset by Mr. Rakofsky's reference, in his opening statement, to the toxicology report, which His Honor viewed as a surrogate for

the medical expert testimony on the effects of PCP that Mr. Rakofsky planned to offer on the defense case was simply unfair and untrue.[13]

Plaintiffs' Amended Complaint has alleged ample reasons for questioning Judge Jackson's motives. Indeed, the only opportunities that Mr. Rakofsky was given to demonstrate his knowledge of courtroom procedure were in his opening statement and in his cross examinations of only one Government so-called eyewitnesses, which was never completed because a conflict between Mr. Rakofsky and the defendant, which was the sole basis for the mistrial, arose at that time.

For reasons that can only be speculated, Judge Jackson chose to refer to an alternate scenario that could not have occurred once Mr. Deaner agreed to Mr. Rakofsky's withdrawal on Mr. Rakofsky's motion. Once Judge Jackson had confirmed that he had not changed his mind on Friday, April 1, 2011, a mistrial clearly existed at that moment, as it had the preceding day and by definition, there was no further occasion where there could have been any further proceedings in which Mr. Rakofsky would have been involved in that trial.

Even assuming, *arguendo*, that it were a sign of Mr. Deaner's dissatisfaction with Mr. Rakofsky, the basis of that dissatisfaction would have been nothing more than his conflict with Mr. Rakofsky because of Mr. Rakofsky's refusal to ask questions that he, a layman, thought would help his case.

While the effective cause of Mr. Rakofsky decision to withdraw as lead counsel was the conflict of that arose between him and Mr. Deaner, Mr. Rakofsky made his motion knowing that, if the Government sought a retrial, Mr. Rakofsky's successor as

[13] Given those circumstances, it is not unreasonable to assume that Judge Jackson made those statements for reasons other than making a legal finding, none ever having been made.

counsel would likely be in a position to present the defense's plan mapped out by Mr. Rakofsky, which he had strong reason to believe he would not be allowed to use by Judge Jackson, and to use Mr. Rakofsky's undermining of the Government's key alleged eyewitness.

III.

The Amended Complaint States a Valid Claim under Section 51

In the Fourth Cause of Action in the Amended Complaint, Plaintiffs assert a cause of action for invasion of privacy against Thomson Reuters under Section 51 of the Civil Rights Law based upon their unauthorized publication of and/or linking to of Plaintiff's photograph and his websites, advertisements, etc. It would appear that Thomson Reuters moves to dismiss this claim on the grounds that "the use of a person's name or likeness in an article reporting on newsworthy events…is not considered a use for 'advertizing or trade purposes' under Section 51…" "Newsworthiness" "encompass[es] articles…that 'concern political happenings, social trends or any subject of public interest." (Id. at 10, *quoting Messenger v. Grunder & Jahr*, 94 N.Y. 2d 436, 442 (2000)).

The problem for Defendants is that even under the *most* liberal definition of "newsworthiness," their postings about plaintiff fail the test. To be sure, the events that led to the mistrial of Mr. Deaner are plainly matters of public interest. But what is the "public interest" in the details of life of a young and newly-admitted lawyer, let alone his photographs of members of his family on his Facebook or MySpace social networking page? Simply put, there is no relevance. In this regard, the Court of Appeals has held that

the question of "newsworthiness" is to be determined entirely on "the content of the published article." *Freihofer v. Hearst Corp.*, 65 N.Y. 2d 135, 140-41 (1985).]

Separate and apart from the "merits," Defendants object to "the manner" in which Plaintiffs have litigated this case. Frankly, we do not understand how it is evidence of "bad faith" for a plaintiff to exercise his right under CPLR 3025(a) to file an amended complaint in response to a motion to dismiss the original pleading. We would have thought that this is the very purpose of permitting an amendment as of right in response to a motion to dismiss – to evaluate the "merits" of the claims in light of the motion.

More fundamentally, the notion that Plaintiffs pursued this action in a manner that has caused unnecessary additional work for Defendants at every turn is nothing short of Kafkaesque. Plaintiff was a very modestly-paid, young lawyer just beginning his career who has, following a deliberate sliming of his reputation, brought claims against a powerful media company defended by a multi-national law firm, as well as other well-established lawyers and their respective law firms. Yet Defendants would have this Court believe that his "litigation strategy" was to coerce a settlement by driving up Defendants' litigation costs (*Id.* at 20). If this was and is his strategy, it is pretty dumb.

CONCLUSION

For all of the foregoing reasons, respectfully, the motion of the Reuters Defendants to dismiss Plaintiffs' Complaint should be denied.

Respectfully Submitted,

____

Written by:
Joseph Rakofsky, Esq.
RAKOFSKY LAW FIRM, P.C.
4400 US-9
Freehold, NJ 07728
Tel: (877) 401-1529
Fax: (212) 618-1705
JosephRakofsky@gmail.com

Sworn to before me on the
____day of May, 2012

__________/s/__________

Matthew H. Goldsmith, Esq.
ATTORNEY OF RECORD
FOR PLAINTIFFS
Goldsmith & Associates, PLLC
350 Broadway, 10th Floor
New York, NY 10013
Tel: (212) 217-1594
Fax: (212) 226-3224
MHGoldsmith@MGAPLAW.com