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

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

Plaintiffs,

MEMORANDUM OF LAW
Index Number 105573/11

-against-

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REND SMITH
BREAKING MEDIA, LLC
ABOVETHELAW.COM
ELIE MYSTAL
AMERICAN BAR ASSOCIATION
ABAJOURNALCOM
DEBRA CASSENS WEISS
SARAH RANDAG
MYSHINGLE.COM
CAROLYN ELEFANT
SIMPLE JUSTICE NY, LLC
BLOG.SIMPLEJUSTICE.US
SCOTT H. GREENFIELD
LAW OFFICE O•.ERIC L. MAYER
ERIC L. MAYER,. Individually
GAMSO, HELMICK & HOOLAHAN
JEFF GAMSO, individually
CRIMEANDFEDIRALISM.COM
"JOHN DOE #1"
ORLANDO-ACCIDENTLAWYER.COM
"JOHN DOE #2"
LAW OFFICE OF FARAJI A. ROSENTHALL
FARAJI A. ROSENTHAL, individually
BENNETT AND BENNETT
MARK BENNETT, individually
SEDDIQ LAW
MIRRIAM SEDDIQ, individually
THE MARTHA SPERRY
DAILY ADVANTAGE ADVOCATES
MARTHA SPERRY, individually
ALLBRITTON COMMUNICATIONS COMPANY TBD.COM
RESTORINGDIGNITYTOTHELAW.BLOGSPOT.COM
"J.D0G84@YMAIL.COM"

ADRIAN K. BEAN
HESLEP & ASSOCIATES KOEHLER LAW
JAMISON KOEHLER, individually
THE TURKEWITZ LAW FIRM
ERIC TURKEWITZ, individually
THE BEASLEY FIRM, LLC
MAXWELL S. KENNERLY
STEINBERG MORTON HOPE & ISRAEL, LLP
ANTONIN I. PRIBETIC
PALMIERI LAW
LORI D. PALMIERI, individually
TANNEBAUM WEISS, PL
BRIAN TANNEBAUM, individually
WALLACE, BROWN & SCHWARTZ
GEORGE M. WALLACE, individually
DAVID C. WELLS, P.C.
DAVID C. WELLS, individually
ROB MCKINNEY, ATTORNEY-AT-LAW
ROB MCKINNEY, individually
THOMSON REUTERS
DAN SLATER
BANNED VENTURES, LLC
BANNINATION.COM
"TARRANT84"
UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
DEBORAH K. HACKERSON
LAW OFFICES OF MICHAEL T. DOUDNA
MICHAEL T. DOUDNA, individually
MACE J. YAMPOLSKY & ASSOCIATES
MACE J. YAMPOLSKY, individually
THE LAW OFFICE OF JEANNE O'HALLERAN, LLC
JEANNE O'HALLERAN, individually
REITER & SCHILLER, P.A. LEAH K. WEAVER
Defendants

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KENNERLY'S'AND BEASLEY'S MOTION TO DISMISS THE COMPLAINT

DAVID BRICKMAN, ESQ.
1664 Western Avenue
Albany, New York 12203
(518) 464-6464

Cases

Statutes

QUESTION PRESENTED

Whether Maxwell S. Kennerly's published commentary regarding a published account of a publicized trial as reported in the Washington Post constitutes opinion and/or a fair report of a judicial proceeding which does not give rise to a claim for defamation?

STATEMENT OF FACTS

Plaintiff Radofsky is an inexperienced attorney, who agreed, for money, to represent Dontrell Deaner, a defendant in a murder trial in Washington D.C. before Hon. William Jackson in the case of *U.S. v. Dontrell Deaner*. The trial was Rakofsky's first. After partial completion of the trial, the Court declared a mistrial based upon, among other things, Radofsky's inept handling of the case. As the Honorable William Jackson declared on the record,

> It appeared to the Court that there were theories out there -- defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a -- not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner. And had there been -- If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both -- it is a choice that he has knowingly and intelligently made and he understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder trial.

See Exhibit "D" to Brickman Affirmation Trial Transcript, p. 4. Plaintiff Rakofsky's Amended Complaint admits that the "slanderous and defamatory words" purportedly at issue in this lawsuit originated with Judge Jackson's remarks on the record. *Amended Complaint*, ¶ 118.

After granting the mistrial based in part upon Plaintiff Rakofsky's representation

"below what any reasonable person could expect," the Court further opined that "There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues." *See also Amended Complaint*, ¶ 128. That email, attached hereto as *Exhibit "E" to Brickman Affirmation*, includes an instruction that Mr. Rakofsky gave to his private investigator to "please trick [redacted] (old lady) into admitting" various facts presumably helpful to Mr. Deaner's defense. Plaintiff Rakofsky's Complaint admits sending the aforementioned email instructing his investigator to "trick" a witness. *Amended Complaint*, ¶ 120.

On April 1, 2011, the Washington Post published an article describing the above events. *Amended Complaint*, ¶ 137. Numerous others soon followed, including, by April 4, 2011 the Washington City Paper and the ABA Journal. *Amended Complaint*, ¶¶ 142–172, 175–194.

Moving Defendant Kennerly's article, "The Right To Counsel Includes The Right To Fire Your Lawyer," was published April 5, 2011. The Kennerly article begins with a number of hypertext links to other defendants' articles:

> Since I spent Sunday with my family and Monday working, I'm late **to the Joseph Rakofsky story**[1]. The criminal defense blogosphere has all piled on (**Jamison Koehler**[2], who as a DC lawyer, has a particular interest, **Mark Bennett**[3], **Scott Greenfield**[4], **Eric Mayer**[5]) as did the generalists like **Carolyn Elefant**[6] and reporters like **Elie Mystal**[7] and **Debra Cassens Weiss**[8].

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1 http://www.washingtonpost.com/local/dc-superior-court-judge-declares-mistrial-over-attorneys-competence-in-murder-case/2011/04/01/AFlymrJC_story.html

2 http://koehlerlaw.net/2011/04/inexperienced-lawyer-dismissed-in-d-c-murder-trial/

3 http://blog.bennettandbennett.com/2011/04/the-object-lesson-of-joseph-rakofsky.html

4 http://ga/ [error included in original; the link to Mr. Greenfield was apparently improperly coded in the original post]

5 http://militaryunderdog.com/2011/04/04/lying-piece-of-with-screenshot-as-evidence/

6 http://myshingle.com/2011/04/articles/ethics-malpractice-issues/from-tiny-ethics-mishaps-do-major-missteps-grow/#more-3296

7 http://abovethelaw.com/2011/04/mistrial-declared-when-judge-is-astonished-by-touro-grads-incompetence/

8 http://www.abajournal.com/news/article/astonished_judge_declares_murder_mistrial_cites_inexperienced_lawyer_who_ne/

(Bolding added to indicate where hypertext links were included; hypertext links indicated by footnotes.) As described more fully below, the linking to co-defendants is mentioned here not to imply that the co-defendants are in any way liable to Plaintiff Rakofsky, but to demonstrate the full scope of facts disclosed to readers of the Kennerly article. *See, e.g., Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 9 (N.Y. App. Div. 2011)(holding that hypertext links in an electronic communication are relevant in determining facts disclosed to the reader: "Far from suggesting that the writer knows certain facts that his or her audience does not know, the e-mail is supported by links to the writer's sources.").

Rakofsky, incensed at the attention that he brought upon himself, now brings suit against numerous media companies for fair reporting of a judicial proceeding and against dozens of individuals for expressing their protected opinions about those judicial proceedings.

ARGUMENT

Kennerly moves to dismiss the Complaint pursuant to CPLR § 3211(a)(7) on grounds, *inter alia,* that the Complaint alleges comments that are a fair report of a judicial proceeding and because the comments are non-actionable opinion protected under New York and federal constitutional and common law. Further, as revealed by the Amended Complaint, the "trick" email, and the transcript of the proceedings, Kennerly's comments were not false.

APPLICABLE LAW STRONGLY FAVORS EARLY DISMISSAL OF DEFECTIVE DEFAMATION CLAIMS

New York public policy strongly favors early disposition of defamation claims and related causes of action against the press. "To unnecessarily delay the disposition of a libel action

is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno, AG.* v. *Moor-Jankowski,* 145 A.D.2d 114, 128 (1st Dep't 1989), *aff'd,* 77 N.Y.2d 235 (1991) (intermediate history omitted). As the Court of Appeals has stressed, dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Armstrong* v. *Simon* & *Schuster, Inc.,* 85 N.Y.2d 373,379 (1995); *see also Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 545 (1980) (noting that "'[t]he threat of being put to the defense of a [defamation] lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself") (citations omitted). Consistent with this policy, courts routinely dismiss defamation claims on motions brought pursuant to CPLR § 3211(a)(7) to protect public debate and safeguard free-speech principles. *See, e.g., Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 1 (N.Y. App. Div. 2011) (granting pre-discovery motion to dismiss libel claims) *Rappaport* v. *VY Publ* 'g *Corp.,* 223 A.D.2d 515 (1st Dep't 1996) (same); *Steadman* v. *Sinclair,* 223 A.D.2d 392 (1st Dep't 1996) (same); *Parks* v. *Steinbrenner, 131* A.D.2d 60, 62 (1st Dep't 1987) (same).

PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION BECAUSE THE IMPLICATIONS AT ISSUE ARE EITHER NON-ACTIONABLE OPINION OR PROTECTED BY THE "FAIR REPORT" ABSOLUTE PRIVILEGE

THE PUBLISHED STATEMENTS

The Washington Post published on April 1, 2011 that:

> "A D.C. Superior Court judge declared a mistrial Friday in a 2008 murder case and allowed the defendant to fire his New York-based attorney, who exhibited what the judge said were numerous signs that he lacked knowledge of proper trial procedure, including telling the jury during his opening statements that he had

never tried a case before. Judge William Jackson told attorney Joseph Rakofsky during a hearing Friday that he was "astonished" at his performance and at his "not having a good grasp of legal procedures" before dismissing him. What angered Jackson even more was a filing he received early Friday from an investigator hired by Rakofsky in which 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..."

Radofsky accuses Judge William Jackson of slander:

> "uttering several statements in open court that slandered RAKOFSKY's knowledge of courtroom procedure, while "likely being aware of the possible presence in the courtroom of a newspaper reporter, ALEXANDER, a so-called newspaper "reporter" from the WASHINGTON POST, and knowing full well that both news reporters and others would publish his slanderous and defamatory words, Judge Jackson, for reasons that can only be speculated, gratuitously published on the record the slanderous, defamatory statement"[s]. (Complaint ¶ 117)

Rakofsky complains of Kennerly's public comments, posted on April 5, 2011:

> "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."
>
> "A lawyer who has never tried a case should not start with an unsupervised felony trial, much less a murder trial. There's no gray area here...."

JUDICIAL NOTICE

This Court should take judicial notice of the record made in *U.S.. v. Dontrell Deaner*, the April 1, 2011 Washington Post publication and Kennerly's April 5, 2011 publication.

New York courts "may, in general, take judicial notice of matters of public record." *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667 (2d Dep't 1989); see also *Siwek v. Mahoney*, 39 N.Y.2d 159, 163 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice."); *American Broadcasting Cos., v. Wolf*, 76 A.D.2d 162, 169 n.2 (1st Dep't 1980) ("Courts may take judicial notice of facts which are part of the general knowledge of

the public."), aff'd, 52 N.Y.2d 394 (1981).

Courts may take judicial notice of news articles as confirmation of the fact of media coverage. See, e.g., *Grebow v. City of New York*, 173 Misc.2d 473, 479 (N.Y. Sup. Ct. 1997) ("The court may take judicial notice of newspaper publications."); In re *Merrill Lynch & Co.*, 289 F. Supp.2d 416, 425 n.15 (S.D.N.Y. 2003) ("The Court may take judicial notice of newspaper articles for the fact of their publication without transforming the motion into one for summary judgment,"); *Schwenk v. Kavanaugh*, 4 F. Supp. 2d 116, 118 (N.D.N.Y. 1998) (judicial notice that an article about county prosecutors' wrongdoings had appeared on the front page of the New York Law Journal); *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 n.3 (S.D.N.Y.1998) (taking judicial notice of widespread newspaper coverage and collecting cases on the propriety of taking such notice).

Finally, the Appellate Division, First Department has held that, in assessing defamation claims by online publications, the Court should also look to any links included within the allegedly defamatory article. *Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 9 (N.Y. App. Div. 2011)(holding that hypertext links in an electronic communication are relevant in determining facts disclosed to the reader: "Far from suggesting that the writer knows certain facts that his or her audience does not know, the e-mail is supported by links to the writer's sources."). As such, this Court may also consider the articles published by co-defendants Koehler, Bennett, Mayer, Elefant, Mystal, and Weiss, all of which were linked from the Kennerly article.[9]

Upset by this criticism of his performance by Judge Jackson, and its report in the Washington Post, Rakofsky sues Kennerly for defamation for two utterances, one of which is a

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[9] Co-defendant Greenfield's article was referenced by the Kennerly article but the link was improperly coded.

fair report of a judicial proceeding and one of which is an opinion.

This motion concerns the critical role of the courts in enforcing - before trial - the constitutional guarantees of free speech and a free press. This case should be dismissed under existing legal standards that protect statements of opinion. The governing standard for segregating non-actionable opinion from statements of fact under New York's Constitution requires examination of the language to determine whether or not it has a precise meaning, and whether or not it is provable true or false. The third factor, which separates New York's broader constitutional protection for opinion from that of the First Amendment, is context. Courts are required to examine both the immediate context of the communication at issue, as well as the broader social context. This factor informs courts how readers would understand the statements. The Court of Appeals has spoken repeatedly to the transformative role of context, and demonstrated through its holdings how "'even apparent statements of fact may assume the character of statements of opinion' when viewed in context. *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 295 (1986).

Dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Armstrong v. Simon & Schuster, Inc.,* 85 N.Y.2d 373, 379 (1995); *see also Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 545 (1980) ("'[t]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself") (citation omitted).

Justice O'Connor noted in *Waters v. Churchill, 511* U.S. 661, 669 (1994) that it is "important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." This is nowhere more true than with

respect to the procedures mandated by the First Amendment and State Constitution to protect speech. This Court should dismiss these claims by applying the existing safeguards designed to protect speech and to prevent the chilling impact of litigation on free speech. Dismissal is necessary to vindicate the rights of defendant and to affirm the constitutional policy providing for efficient disposition of meritless libel claims at the pre-trial stage.

THE OPINION STATEMENT

Applying the correct standard, the utterance "A lawyer who has never tried a case should not start with an unsupervised felony trial, much less a murder trial. There's no gray area here...." at issue has the indicia of classic, unmistakable opinion. It is not provable true or false and takes a position in the midst of a highly charged public debate. "Whether a particular statement constitutes an opinion or an objective fact is a question of law" must be resolved by the court. *Mann v. Abel, 10* N.Y.3d 271, 276 (2008) (citing *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 381 (1977)). Precisely because opinion determinations pose a question of law, courts routinely dispose of defamation claims on that basis at the motion to dismiss stage. *See, e.g., Brian v. Richardson,* 87 N.Y.2d 46 (1995) (motion to dismiss on opinion grounds granted and affirmed); *Steinhilber,* 68 N.Y.2d 283 (same); *O'Loughlin v. Patrolmen's Benevolent Ass 'n,* 178 A.D.2d 117 (1st Dep't 1991) (same).

The Court of Appeals long ago recognized that the First Amendment bars libel claims if they are not based on verifiably false facts. In *Rinaldi* v. *Holt, Rinehart* & *Winston, Inc., 42* N.Y.2d 369 (1977), the court explained that "[t]he First Amendment does not recognize the existence of false *ideas,"* so that expressions of opinion, "false or not," are "constitutionally protected and may not be the subject of private damage actions." *Id.* at 3 79-80 (emphasis added). The U.S. Supreme Court affirmed this First Amendment limitation in *Milkovich,* holding

that statements of opinion are protected unless they contain "a provably false factual connotation." 497 U.S. at 20. Thus, for example, the statement that a politician "shows his abysmal ignorance by accepting the teachings of Marx and Lenin" is not actionable under the First Amendment, because it cannot be proven true or false. *Id.*

Just one year after *Milkovich,* the Court of Appeals went one step further, holding that Article 1, Section 8 of the New York Constitution offers even more protection to opinions than the First Amendment. *See Immuno, AG.,* 77 N.Y.2d at 249. New York "has embraced a test for determining what constitutes a non-actionable statement of opinion that is more flexible and is decidedly more protective of the cherished constitutional guarantee of free speech." *Gross,* 82 N.Y.2d at 152 (internal quotations and citation omitted). To determine whether a statement constitutes protected opinion, the Court of Appeals has identified a number of factors to be considered: "(I) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact." *Brian,* 87 N.Y.2d at 51 (internal quotations and citations omitted); *see also Immuno, AG.,* 77 N.Y.2d at 254-55.

Under this analysis, a statement is protected if it has no precise and definite meaning that objectively can be proven true or false. *See, e.g., Steinhilber* v. *Alphonse,* 68 N.Y.2d 283, 293-95 (1986) (statement that plaintiff lacked "talent, ambition, and initiative" too vague to be actionable); *'Loughlin* v. *Patrolmen's Benevolent Assoc.,* 178 A.D.2d 117, 118 (1st Dep't 1991) (statements that a police officer is a "disgrace to the entire police service" is non-actionable opinion); *Miller* v. *Richman,* 184 A.D.2d 191,193 (4 Dep't 1992) ("statements criticizing

plaintiffs performance ... are, as a matter of law, non-actionable expressions of opinion;" "The individual defendants' unfavorable assessments of plaintiff's work are 'incapable of being objectively characterized as true or false.'"); *Hollander* v. *Cayton,* 145 A.D.2d 605, 606 (2d Dep't 1988) (statements that doctor was "immoral" and "unethical" too indefinite and incapable of verification to be actionable).

Similarly, a statement is protected if either the context in which it appears, or the broader social context with which it deals, indicates the statement was intended as an expression of opinion rather than an assertion of fact. *See, e.g., 600 West 115th St. Corp.,* 80 N.Y.2d at 141-42 (accusation of fraud and illegality at a public hearing, in context, not reasonably understood as an accusation of criminal wrongdoing). "[I]n distinguishing between actionable factual assertions and non-actionable opinion, the courts must consider the content of the communication as a whole as well as its tone and apparent purpose." *Brian,* 87 N.Y.2d at 51. Recently, the Appellate Division, 1st Department recognized that "readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts." *Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 9 (N.Y. App. Div. 2011).

As such, the bar for Plaintiff Rakofsky is particularly high, indeed insurmountable. No reasonable reader could interpret Kennerly's statement, "A lawyer who has never tried a case should not start with an unsupervised felony trial, much less a murder trial. There's no gray area here...." as anything other than an expression of opinion.

THE "FAIR REPORT" STATEMENT

The complained of statement "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." was a fair report of the judicial proceeding and had already been published by the Washington Post.

Under New York law, it is for Court, in first instance, to decide whether publication is immune from claim of defamation as a fair report of court documents. *Procter & Gamble Co. v. Quality King Distributors, Inc.,* 1997, 974 F.Supp. 190. Whether the statements at issue in a given case are privileged is a question of law to be decided by the court. *See. e. g., Holy Spirit Ass 'nfor Unification of World Christianity* v *New York Times Co.,* 49 N.Y.2d 63, 67-68 (1979).

The statement is absolutely privileged under the New York "Fair Report" privilege (Section 74 of New York's Civil Rights Law) and cannot be the basis for a defamation action as a matter of law. Section 74 of New York's Civil Rights Law states, in relevant part, that: "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." The privilege "is absolute, and [cannot be] defeated by the plaintiffs allegations of malice or bad faith." *Pelayo* v *Celie,* 270 AD.2d 469,469 (2d Dep't 2000).

A report is "fair and true" if it accurately conveys the gist of what public officials were saying and doing in the context of an official proceeding. *Id.* at 67; *Becher* v. *Troy Publ g Co.,* 183 AD.2d *230,233* (3d Dep't 1992) ("The case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings."). In fact, the publication "need not be a verbatim account or even a precisely accurate report of an official proceeding to be a 'fair and true report' of such a proceeding" covered by the privilege. *Freeze Right Refrigeration & Air Conditioning Services, Inc.* v *City of New York,* 101 A.D.2d 175, 183 (1 st Dep't 1984). As one court has explained, "[a]ll that is needed to claim the privilege is that the alleged defamatory

material 'may possibly bear on the issues in litigation now or at some future time. '" *The Savage Is Loose Co.* v. *United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555,561 (S.D.N.Y. 1976) (citing *Seltzer* v. *Fields,* 20 AD.2d *60,* 62 (1 st Dep't 1963), *aif'd,* 14 N.Y.2d 624 (1964». In addition, the determination of "'[w]hether or not a particular article constitutes unbalanced reporting is essentially a matter involving editorial judgment and is not actionable.'" *Gotbetter* v. *Dow Jones* & *Co.,* 259 A.D.2d 335, 336 (15t Dep't 1999) (citation omitted); *Glendora* v. *Gannett Suburban Newspapers, 201* AD.2d *620, 620* (2d Dep't 1994) (same).

A comparison of the Court record, the Washington Post publication and the Kennerly publication reveal the fatal flaw in the complaint in that it is clearly Judge Jackson's alleged slander and mistreatment of Radofsky that is at the root of the complaint and of the public discussion. Moving Defendant Kennerly did nothing more than fairly summarize the sources identified and linked by his article, sources that themselves fairly described the court proceeding in which Plaintiff Rakofsky was involved.

THE KENNERLY STATEMENTS WERE NOT FALSE

"Falsity is a *sine qua non* of a libel claim..." *Brian v. Richardson*, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129 (1995). Plaintiff Rakofsky alleges "falsity" by claiming that Judge Jackson "granted a mistrial solely because RAKOFSKY moved for his own withdrawal" and that "RAKOFSKY **never** requested that an 'investigator' trick a witness." *Amended Complaint*, ¶ 174. Yet, the trial transcript unambiguously demonstrates the Judge Jackson granted a mistrial *both* because Mr. Deaner requested new counsel *and* because "[Judge Jackson] would find that they are based on my observation of the conduct of the trial manifest necessity. [Judge Jackson] believe[d] that the performance was below what any reasonable person could expect in a murder trial." *See Exhibit "D" to Brickman Affirmation, Trial Transcript, p. 4.* Similarly, it is undisputed

that Rakofsky instructed his investigator to "trick" a witness; the *Amended Complaint* expressly alleges as much, and admits that Judge Jackson, too, was concerned about the "ethical issues" arising from this instruction. ¶¶ 120, 128.

CONCLUSION

For the reasons stated, the complaint against Kennerly and Beasley Firm should be dismissed with prejudice.

Dated: June 4, 2011
Albany, New York

Respectfully submitted,

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