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

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

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY, et al.,

Defendants.

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

Index # 105573/11

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Eric Turkewitz, being duly sworn, deposes and says:

This Reply Affidavit is based on personal knowledge, and submitted in support of the motion by 15 individuals representing 33 named defendants to admit Marc Randazza *pro hac vice* and for an extension of time to answer or move. (The number of defendants in this group has increased since the time of the initial motion, now comprising 16 people representing 35 defendants as set forth on the Rider.)

There is Little Issue on the Extension of Time to Answer or Move

There does not appear to be much meaningful difference between the parties about granting an extension of time to answer or move for our defendants with respect to the Amended Complaint. The motion was necessitated, however, because we could not agree on a firm date. And the reason we couldn't give a date to plaintiffs' counsel was because we don't know when the Court will rule on the *pro hac vice* motion. Since we anticipate Mr. Randazza authoring our motion to dismiss, we must await a decision by the court before we can submit our substantive papers.

There is little doubt we could have reached a stipulation with Mr. Borzouye regarding this minor procedural matter. Mr. Borzouye, however, was intending to withdraw as counsel, and he no

longer had the consent of the plaintiffs to act on his behalf, thus complicating the issue. And as evidenced by Mr. Rakofsky's claim that we hadn't attempted to procure a stipulation regarding an extension of time, it also appears that they were not communicating much with each other, as we made multiple attempts to reach an accord on this simple issue.

While at first blush we could theoretically discuss this with Mr. Rakofsky as a *pro se* litigant, his professional corporation (The Rakofsky Law Firm, P.C.) is also a plaintiff. But the fact that a corporation may not appear *pro se* under CPLR 321(a) further complicated the issue. Simply put, there was no one to speak with regarding rudimentary procedural issues, as there was no one to who authority to bind the P.C. to any stipulation.

This unusual quirk has hamstrung communications, as I declined to respond directly to the emails Mr. Rakofsky was sending me, and sent responses instead to Mr. Borzouye. A June 10th email that I sent to Mr. Borzouye said, in part:

> I feel deeply uncomfortable talking to Mr. Rakofsky directly while he is represented by counsel. In addition, he is not permitted to speak on behalf of the corporation. So, without any proper CPLR 321 substitution having taken place, you are the only one to deal with.

While Mr. Borzouye clearly wants out from this suit -- he has made a separate motion to be relieved as counsel -- he remains the attorney of record in the interim. He is just not empowered by his clients to actually do anything.

In order to avoid the potential of a default motion against my group of defendants we therefore moved, being mindful of the Court of Appeals holding that a CPLR 2004 motion for an extension of time before a default occurs is a significant factor in deciding these matters.[1]

[1] *Tewari v. Tsoutsouras*, 75 NY2d 1, 12, 550 N.Y.S.2d 572, 577, 549 NE2d 1143, 1148 (1989)

So the only real issue is whether the Court will extend the time for all defendants or just the ones that I represent, and to pick a date after this motion is decided. My moving papers have suggested that, from a purely administrative standpoint, a unified schedule makes sense.

Mr. Rakofsky's Memo of Law Cannot Be Considered by the Court

Moving to the substance of the *pro hac vice* objection, Mr. Rakofsky has submitted a "Memorandum of Law" to the Court. But it is really an unsworn affirmation. There is no law discussed within it, there are no cases cited within it, and it is barren of any New York statutes or court rules. The only legal citations are to the Model Rules for ethics that, as this Court well knows, New York does not use.

The document is filled instead with unsworn factual allegations.

While CPLR 2106 is clear that an attorney can submit an affirmation, it must be "an attorney admitted to practice in the courts of the state," and Mr. Rakofsky is not admitted in New York. The statute is likewise clear that the affirmation cannot be submitted by one who is a party to the action. Mr. Rakofsky is therefore precluded on both grounds from submitting this document, and a court is required to reject it. As the Court of Appeals wrote in *Slavenburg Corp. v. Opus Apparel***,** the rationale is that "the affirmation would be of no probative value because the affirmant would not be answerable for the crime of perjury should he make a false statement."[2] Hence, "even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action."[3]

This concern over false statements is highlighted by the fact Mr. Rakofsky claimed over 20 times in his Amended Complaint -- that he also signed but did not verify -- that "Judge

[2] 53 NY2d 799, fn, 422 NE2d 570 (1981)
[3] *Id.*

Jackson granted RAKOFSKY's motion and a mistrial based *solely* upon RAKOFSKY's motion to withdraw as counsel because a conflict existed between him and his client" and that Judge Jackson "*never* took any action against RAKOFSKY because of his competence or alleged lack thereof" (emphasis added).[4] And this is directly at odds with Judge Jackson's actual statements on the record concerning Mr. Rakofsky's lack of competence in the Dontrell Deaner murder case, which had been cited in my initial affidavit and set forth in the trial transcript, where Judge Jackson concluded:

> **I[t] became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.[5]**

This concern over false statements is further highlighted by Mr. Rakofsky first claiming in his Amended Complaint that he wrote the "trick" email, but that it had been misconstrued,[6] and then going on to claim that "no such email was ever written" by him.[7]

Since this unsworn document is the only opposition to the *pro hac vice* admission, and since it must be disregarded as a matter of law, there is no actual opposition to the implementation of the State's policy to recognize "a party's entitlement to be represented in ongoing litigation by counsel of its choosing."[8] Mr. Borzouye, notably, has not objected. And as evident from Mr. Randazza's Reply Affidavit -- which only needs to be read if the Court were to consider Mr. Rakofsky's document -- Mr. Borzouye has said that he would not object.[9]

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[4] Defendants' Exhibit E. Amended Complaint, ¶¶143, 145, 146, 149, 154-156, 158-162, 164-165, 167, 170-173, 175-176, 180, 184-185, 187
[5] Exhibit F, transcript, p. 5
[6] Defendants' Exhibit E, ¶120
[7] Defendants' Exhibit E, ¶139
[8] *Giannotti v. Mercedes Benz U.S.A., LLC*, 20 AD3d 389, 798 NYS2d 141 (2nd Dept. 2005)
[9] Randazza Reply Affidavit, ¶23

The P.C. Has Not Objected to the Admission *Pro Hac Vice*

Even if the Court were to consider the unsworn document of Mr. Rakofsky as a *pro se* litigant, it could not consider it on behalf of the professional corporation. And that is because, as noted above, a corporation cannot appear *pro se*.[10] The corporation, therefore, has not objected.

A Certificate of Good Standing is Not Required for Local Counsel

Mr. Rakofsky objected to my affidavit moving Mr. Randazza's admission *pro hac vice* because I did not include a certificate of good standing for myself. He asserts that my omission "demonstrate[s] that Mr. Turkewitz is not familiar with the CPLR to the extent necessary to warrant admission of Mr. Randazza *pro hac vice*."

Mr. Rakofsky, of course, fails to cite any CPLR provision for his theory that local counsel needs to provide such a certificate for himself when moving on behalf of an out-of-state attorney. And that is because it doesn't exist. The admission of attorneys to practice law is part of the original jurisdiction of the appellate divisions. *Pro hac vice* is not part of the CPLR except to the extent that Rule 9402 defers to Judiciary Law §90(b) and the rules of the Court of Appeals and appellate divisions on the subject. The citations for those rules are set forth on page 10 of my moving papers: NYCRR §§ 520.11(a)(1) and 602.2(a). Neither the Rules of the Court of Appeals nor the Rules of the First Department require such a certificate from me as local counsel, and my good standing is readily available to all on the OCA website.[11]

[10] CPLR 321(a), see *Mail Boxes Etc. USA v. Higgens, et al.*, 281 AD2d 176, 721 NYS2d 524 (1st Dept. 2001)
[11] http://iapps.courts.state.ny.us/attorney/AttorneySearch

Three Out Of Four Certificates of Good Standing Have Been Received for Mr. Randazza

As noted in my moving papers, Mr. Randazza requested certificates of good standing from the four states where he is admitted. Three of them have now arrived (Arizona, California and Florida). The originals have been mailed to me but not yet received. Scanned copies are attached as Exhibit G. As soon as the last one arrives, the four originals will be furnished to this Court in a supplemental filing.

Mr. Randazza Will Not Impede Settlement Discussions

As the primary argument against Mr. Randazza, the plaintiff asserts that they got into a tiff on the phone – after Mr. Rakofsky revealed that he had been eavesdropping on a May 16th conversation between Mr. Randazza and Mr. Borzouye in violation of the law,[12] and after Mr. Rakofsky repeatedly and excitedly cut off Mr. Randazza as he tried to speak. Mr. Randazza's Reply Affidavit has greater detail on this, as well as on Mr. Rakofsky's election to open the door to previously confidential conversations; an affidavit to be read in reply if the Court were to consider the unsworn claims of Mr. Rakofsky.

Personal animus, however, will not impede settlement discussions. And that is because our group of defendants does not intend to settle, as we've made abundantly clear to Mr. Rakofsky. As Mr. Randazza points out in his Reply Affidavit, Mr. Rakofsky was given his opportunity. He declined. Our group of defendants is clear that the surrender of First Amendment rights would have profound repercussions on those who wish to write about the law and lawyers. It is inconceivable that these lawyer-writer-defendants would simply hand their rights to Mr. Rakofsky.

[12] See Randazza Reply Affidavit

I will be local counsel and have no problem working with the procedural issues of briefing schedules and adjournments once the plaintiffs find counsel to represent them. This is true regardless of whether Mr. Rakofsky drops the corporate plaintiff and proceeds *pro se* individually, or finds an attorney to represent them. I do not anticipate further issues once the matter of the plaintiffs' representation is straightened out, and after 25 years of practice before our courts, am acutely aware that the judiciary has neither the time nor the inclination to deal with the minutia of briefing schedules.

Lastly with respect to *pro hac vice*, in my moving papers I asserted that "[I] is the policy of this State to recognize "a party's entitlement to be represented in ongoing litigation by counsel of its choosing."[13] Mr. Rakofsky has not challenged that point of law.

I Stand By My Blog Post

Mr. Rakofsky has criticized me for a blog post I made before becoming counsel, where I used colorful language to describe his conduct, as well as giving my response to being sued for the first time in my life and my responses to other legal threats I've received over the four years I've blogged on the law.[14]

As noted above, our group of defendants is unwilling to surrender our right to speak freely about Mr. Rakofsky's conduct at the Dontrell Deaner trial in the District of Columbia, or the expertise he claimed to have but didn't, or his efforts to market himself as an attorney in jurisdictions where he is not licensed, or the frivolous and counter-productive nature of this suit. Our group of defendants believe that exposing such conduct benefits the legal profession over

[13] *Giannotti v. Mercedes Benz U.S.A., LLC*, 20 AD3d 389, 798 NYS2d 141 (2nd Dept. 2005)
[14] Eric Turkewitz, Mr. Rakofsky – I Have An Answer For You, *New York Personal Injury Law Blog*, May 18, 2011, http://www.newyorkpersonalinjuryattorneyblog.com/2011/05/joseph-rakofsky-i-have-an-answer-for-you.html (last viewed, June 16, 2011)

the long term as it discourages others from acting in similar fashion, and sets us apart from the public's deep cynicism that comes from law enforcement's Blue Code of Silence[15] and, to some extent, the medical profession's White Coat of Silence.[16]

Bringing suit against us did not magically act as a stay of constitutionally protected rights to speak freely, and in fact, has had the effect of causing the opposite to happen. Such backlash, known as the Streisand Effect, is well known in the digital world.[17]

Most importantly, it is unclear why the plaintiffs believe that the constitutionally protected opinions I expressed on this subject would be relevant in any way to the motion for the relief requested herein.

The Number of Defendants Has Been Updated

The number of defendants for which I am appearing as local counsel has increased since the time of the motion, and I ask that the court exercise its discretion in allowing us to include David C. Wells and David C. Wells, P.C. in the relief that we request. A separate Notice of Appearance will be filed. A full list of the defendants Mr. Randazza and I hope to represent is set forth in the Rider.

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[15] Selwyn Raab, The Dark Blue Code of Silence, *New York Times*, May 2, 1993, http://www.nytimes.com/books/98/02/08/home/15700.html (last viewed June 16, 2011)
[16] Eric Turkewitz, Doctors Refusing to Treat Lawyers (Is The White Coat of Silence Intensifying?), New York Personal Injury Law Blog (September 8, 2008), http://www.newyorkpersonalinjuryattorneyblog.com/2008/09/doctors-refusing-to-treat-lawyers-is-the-white-coat-of-silence-intensifying-updated.html (last viewed June 16, 2011)
[17] see, generally, Charles Arthur, The Streisand effect: Secrecy in the digital age, *The Guardian* (March 19, 2009), http://www.guardian.co.uk/technology/2009/mar/20/streisand-effect-internet-law, (last viewed June 16, 2011)

Dated: New York, New York
June 17, 2011

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Eric Turkewitz, *pro se* and as counsel
to the defendants on the Rider

Sworn to before me on the 20th day of June, 2011:

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Notary Public

Rider

List of Defendants for which Turkewitz is acting as local counsel

Writer/Defendant	Associated Entities	Amended Complaint ¶¶	Jurisdiction, per Amended Complaint	Total Defendants
Eric Turkewitz	The Turkewitz Law Firm	47-48; 172	Washington, DC	2
Scott Greenfield	Simple Justice NY, LLC blog.simplejustice.us Kravet & Vogel, LLP	19-21; 148-152; 212	New York	4
Carolyn Elefant	MyShingle.com	16-17; 146-147; 201	Washington, DC	2
Mark Bennett	Bennett And Bennett	32-33; 160; 206	Texas	2
Eric L. Mayer	Eric L. Mayer, Attorney-at-Law	22-23; 153; 203	Kansas	2
Nathaniel Burney	The Burney Law Firm, LLC	82-83;193-194; 198	New York	2
Josh King	Avvo, Inc.	78-79; 202	Washington State	2
Jeff Gamso		24-25; 154	Ohio	1
George M. Wallace	Wallace, Brown & Schwartz	57-58; 180-181	Florida	2
"Tarrant84"	Banned Ventures Banni	65-67; 185	Colorado	3
Brian L. Tannebaum	Tannebaum Weiss	55-56; 179	Florida	2
Colin Samuels	Accela, Inc.	80-81; 192; 199	California	2
John Doe #1	Crime and Federalism	26-27; 155-157	Unknown	2
Antonin I. Pribetic	Steinberg Morton	51-52; 175; 205	Canada	2
Elie Mystel	AboveTheLaw.com; Breaking Media, LLC	9-11; 143; 200	New York	3
David C. Wells	David C. Wells, P.C.	12-13; 182;	Florida	
16 individuals				35 entities