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.
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MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS THE WASHINGTON POST COMPANY, KEITH L. ALEXANDER AND JENNIFER JENKINS TO DISMISS THE AMENDED COMPLAINT

Civil Action

Index No.: 105573/11

PLAINTIFFS'MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS THE WASHINGTON POST COMPANY, KEITH L. ALEXANDER AND JENNIFER JENKINS TO DISMISS THE AMENDED COMPLAINT

Plaintiffs, Joseph Rakofsky and the Rakofsky Law Firm, P.C., submit this Memorandum of Law in opposition to the motion of Defendants The Washington Post Company, Keith L. Alexander and Jennifer Jenkins, (hereinafter referred to collectively

as "Washington Post" or the "Post") to dismiss the Amended 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 The Washington Post Company, Keith Alexander and Jennifer Jenkins (hereinafter sometimes referred to as the "Washington Post Defendants"), to dismiss the Amended Complaint filed by Plaintiffs, Joseph Rakofsky and Rakofsky Law Firm, P.C. ("RLF"), and in support of the motion of Plaintiffs for leave to add as a Defendant Washington Post Company LLC.

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 America, LLC.[1] 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 the Defendants' deliberate and malicious sliming

[1] Reuters America, LLC failed to move to dismiss the Amended Complaint. They moved to dismiss the original Complaint, rather than the Amended Complaint filed as of right.

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.[2] His Honor stated his reason for an

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

additional hearing the following day as being to give the defendant an opportunity overnight to consider and confirm his acquiescence in the mistrial, which His Honor stated repeatedly that he was inclined to grant.

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. Deaner. Mr. Deaner, when I acquired [*sic*] of him,

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"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 2, Page 32, Line 20)

> 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)." [3]

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

[3] *See* Exhibit 12.

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 unfortunate 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 non-witness 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.

SUMMARY OF THE ARGUMENT

Plaintiffs have not charged the Washington Post Defendants with defamation because they stated in their April 1, 2011 article that Mr. Rakofsky was incompetent. That is an opinion they are entitled to hold that, as such, does not give rise to actionable defamation. Nor have Plaintiffs charged them with defamation because the Washington Post Defendants received commercial benefits[4] from other defendants in this action who published that Jews should be exterminated[5] (in a section of their website created by the

[4] See Alayon Affidavit, Exhibit 1 and Exhibit 23.
[5] *See* Exhibit 15 and Alayon Affidavit.

owner or operator of such website to "discuss" Joseph Rakofsky, published in close proximity to a photograph of Plaintiff and an elderly relative wearing yarmulkes).[6]

Plaintiffs allege that the Post Defendants defamed them in their publication in the Washington Post newspaper and website of two specific false statements of fact: (1) that Joseph Rakofsky instructed an investigator he had hired to suborn perjury of a Government witness and thus, in so doing, engaged in witness tampering[7] and (2) that a mistrial in *United States of America v. Dontrell Deaner* was caused on April 1, 2011 by Mr. Rakofsky's incompetence.

From the outset, it must be stated that Mr. Rakofsky was not a "public figure"; he had never involved himself or participated in any way in any press conference (for any of his cases); he had never given any interviews[8]; he was strictly a private lawyer representing a client in the *United States of America v. Dontrell Deaner*, a case that was not a high-profile case and was never the subject of any news article prior to April 1, 2011. *United States of America v. Dontrell Deaner* was a garden-variety murder case, which took place in one of the most dangerous cities in the United States.

Assuming, *arguendo*, that Mr. Rakofsky were to be deemed a limited public figure by his representation of Dontrell Deaner (who also was not a public figure), the allegation and proof of actual malice called for by *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) is, we respectfully submit, adequately shown in the Post's action in forging Mr. Rakofsky's email to his investigator and reporter Keith Alexander's parting remark to Mr. Rakofsky on April 1, 2011, warning him of his intention to defame him in Alexander's article.

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[6] *See* Exhibit 23.
[7] *See* Exhibit 44.
[8] *See* Rakofsky Affidavit par. 20.

A.

In the first false statement of fact, the Post defendants attributed to Mr. Rakofsky instructions in an email to his investigator to "trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting." Those words appear nowhere in any email sent by Mr. Rakofsky to his investigator.

In its April 1, 2011 article, the Washington Post (presumably through its reporter, Keith Alexander) simply fabricated a sentence, placed quotation marks around the sentence -- so that it had the appearance of having been written by Mr. Rakofsky -- and then publicly attributed the sentence to Mr. Rakofsky. There was, indeed, an email from Mr. Rakofsky to his investigator that referred to a woman, identified by Mr. Rakofsky by the sobriquet of "old lady" to protect her privacy, which the reporter obviously had read before writing his article. However, its message was quite different from the one the Washington Post quoted in their article, which was published in its print newspaper and website. As redacted with respect to the name of the "old lady," Mr. Rakofsky's actual email stated:

> "Please trick _____ (old lady) into admitting: a) she told the 2 lawyers that she did not see the shooting and, b) she told 2 lawyers she did not provide the Government any information about shooting.) This happened a couple of months ago."

Mr. Rakofsky's purpose in assigning the investigator to this task was to enable the investigator to impeach testimony Mr. Rakofsky very reasonably feared the "old lady" might offer to the Government for money that would be contrary to what she had already stated to him, his co-counsel (the "2 lawyers" referred to in Mr. Rakofsky's

email) and the mother of their client, Dontrell Deaner, "a couple of months" earlier.[9] The word "trick" was used, as it had been suggested by the investigator, merely to connote that the investigator should understate his connection to the defense. However, it is well established that trickery is permitted in a criminal investigation.[10] Further, defense counsel is given wide latitude when preparing for trial.[11]

Although the Post reporter, Alexander, having access to the Bean document, had access to a copy of the actual email from Mr. Rakofsky to Bean, which was attached thereto, he chose, for obvious reasons, not to quote it. What he did, instead, quite simply and quite obviously, was to forge[12] Mr. Rakofsky's email by substituting for Mr. Rakofsky's words his (Alexander's) own words, by which he intended to, and did, convey a meaning directly contrary to the meaning intended by Mr. Rakofsky's actual words in the email he sent to Bean. Alexander did so by fabricating and placing those words, *i.e.,* Alexander's own words, not Mr. Rakofsky's actual words, within quotation marks in his article to mimic "false reality."

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[9] It was admitted on the record by Detective George Blackwell on January 9, 2009 that Government witnesses in *United States of America v Dontrell Deaner* were being compensated by the Government with money and other inducements for their participation. Detective Blackwell stated in open Court, on the record: "Witness #1has had a working relationship with Metropolitan Police Department for over 20 years (emphasis added)." *See* Exhibit 10, Page 9, Line 19 and Exhibit 42.

[10] The law is clear that the use of tricks and deception is acceptable police conduct. *People v. Colbert*, 60 A.D. 3d 1209 (3d Dept. 2009) Police may generally engage in deception while investigating a crime, with suppression required only where "the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession." *People v. Tarsia*, 50 N.Y.2d 1 , 11, 405 N.E.2d 188, 427 N.Y.S.2d 944 (1980) (citations omitted); *see People v. Dishaw*, 30 A.D.3d 689, 690 (3d Dept. 2006), 816 N.Y.S.2d 235 (3d Dept.), l*eave to app. denied,* 7 N.Y.3d 787, 854 N.E.2d 1281, 821 N.Y.S.2d 817 (2006); *People v. Hines*, 9 A.D.3d 507, 510, 780 N.Y.S.2d 419 (3d Dept. 2004), *leave to app. Denied,* 3 N.Y. 3d 707, 818 N.E.3d 676, 780 N.Y.S.2d 34(2004).

[11] Defense attorneys enjoy wide latitude at the trial level. *People v. Stultz*, 2 N.Y.3d 277 (2004); Counsel should be afforded wide latitude in formulating and tactically implementing his or her peculiar trial strategy...Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited. (*People v Richard R.,* 33 Misc. 3d 1229A (Westchester Cty. Ct. 2011).

[12] *See* Exhibit 9.

Thus, instead of publishing Mr. Rakofsky's words in his actual email to his investigator, the Washington Post published its own sentence as fabricated by Alexander, making it appear that Mr. Rakofsky had written those words to his investigator:

> "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting."

Notably absent from the Washington Post's publication is the statement (which is contained in the original email) that the lady was already questioned by "the 2 lawyers" (*i.e.,* Mr. Rakofsky and Mr. Grigsby) and had already responded to defense counsels' questions "a couple of months ago." Naturally, this intentional omission by the Washington Post was intended to and would create the impression in the mind of a reasonable person that the meeting during which statements were already given to "the 2 lawyers" (and referred to several times in Mr. Rakofsky's actual email) never happened! The Alexander fabrication does, however, incongruously and nonsensically portray Mr. Rakofsky as attempting to conceal the existence of that previous meeting (*i.e.*, "trick the old lady to say that she did not...provide information to the lawyers...").

Thus, Alexander, in his forgery of Mr. Rakofsky's email to his investigator, went to the point of not only omitting the reference to, but eradicating evidence of, the existence of the aforementioned earlier meeting (*that* was stated in Mr. Rakofsky's actual email) that occurred with the "old lady" (who was not a witness, for either the Government or for the defense), Mr. Rakofsky and his co-counsel, Sherlock Grigsby ("the 2 lawyers"), and Ms. LaShawnda Deaner, the client's mother, at which the non-witness expressly stated that (a) she did not see the shooting, (b) she was not participating in the Government's investigation and (c) she was gambling on that night and was off the

premises. Her statements showed that she was *not* a witness, although Alexander intended to make it appear that Mr. Rakofsky was instructing the investigator to learn for the first time whether or not she was a witness and, if she was, to trick her into not assisting the Government at trial.

To top it off, Alexander specifically and purposefully characterized his forged fabrication of Mr. Rakofsky's email as telling the investigator "to 'trick' a Government witness into testifying in court that she did not see his client at the murder scene," which Mr. Rakofsky's email obviously did not say to his investigator, but would, if his email had stated the words fabricated by Alexander, constitute the serious offense of witness-tampering in violation of federal criminal statutes (emphasis added) and constituting defamation *per se*.[13]

What should shock the conscience of this Court even more is the desperate statement of the Post Defendants' counsel that: "one need only compare side-by-side" the words of the authentic email from Mr. Rakofsky to his investigator article in the forged email fabricated by the Post reporters contained in the Post article "to dismiss plaintiffs' allegations." [14] That is tantamount to saying that asking one who was **not** a witness to an event and who so stated previously to two defense lawyers simply to repeat what she said is the same as (allegedly) "tricking" one who **is** "a government witness" -- the exact words of the Washington Post article to testify "in court" falsely that she did not give information to the lawyers or see the defendant at the murder scene, which she presumably didn't, not having been there, though the reader is made to assume the object

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[13] *See Warlock Enterprises v. City Center Associates,* 204 A.D.2d 438, 611 N.Y.S.2d 651 (2d Dept. 1994); *Liberman v. Gelstein,* 80 N.Y.2d 429, 435, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992); *Privitera v. Town of Phelps,* 79 A.D.2d 1, 3, 435 N.Y.S.2d 402 (4th Dept. 1981).

[14] *See* Post Defendants' Memorandum of Law at 7.

is to change true testimony to false testimony! Indeed, if there were no difference between the real email and the phony one forged by the Post reporter, why would Alexander have bothered to forge one when the real one said the same thing?

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.*

Further, not content to erase evidence of the existence of the aforementioned earlier meeting, Alexander erased other events as well. On Friday, April 1, 2011, when Judge Jackson stated that there was an email to the investigator that Mr. Rakofsky "may want to look at," Mr. Rakofsky asked Judge Jackson: "Your Honor, is that something you wanted to discuss?"[15] Judge Jackson stated that His Honor did not wish to discuss it. Instead of reporting that Mr. Rakofsky was prepared to discuss the matter in open court, Alexander, in the April 1, 2011 article, falsely published: "Rakofsky did not speak during Friday's hearing."[16] It is clear that the Washington Post wanted its readers to believe that Mr. Rakofsky could not help but admit that what the investigator alleged was true, so instead, it published he "did not speak."

Last, in the Washington Post April 1, 2011, article, Alexander published: "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." It is undeniable

[15] See Exhibit 6, Page 7, Line 7
[16] *See* Exhibit 7.

that such a published statement is a blatant imputation of witness-tampering and as such, is defamatory *per se*.

Perhaps less significant but no less erroneous is the Post's characterization of the Bean document as a "filing." It is fundamental that, as a non-party to the Deaner proceeding, Bean had no right to file any motion; as such, his delivery of the document to a different Judge's chambers, sitting in a different Court, did not constitute its filing (as Judge Jackson acknowledged); thus, the investigator's report had no status or function in the Deaner case.

While one might be inclined to grant writers, including newspaper reporters, leeway to exercise literary or poetic license, the unambiguous imputation of the commission of a serious crime is neither, nor can it be dismissed as poor journalism, particularly when accomplished by acts that meet the literal definition of Forgery in the Third Degree in Section 170 of New York Penal Law[17] and bespeak actual malice, even though the allegation and proof of actual malice is not required of a plaintiff who, as Mr. Rakofsky, is not a public figure.

It is well settled that the quotation of the original source is only non-defamatory where the original source was free of defamatory taint by the originator. Given the Post's obvious attempt to present its article on Joseph Rakofsky as a commercially-saleable "man bites dog" case and its use of a forged and fabricated email (containing a supposed quotation[18] that was never written by Mr. Rakofsky) to accomplish its objective, it can hardly be considered a fair source for republication. Mr. Rakofsky should not be

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[17] *See* Exhibit 9.

[18] *See* Exhibit 14: "An inaccurate quotation may constitute a libel of the person purportedly being quoted in two ways: by attributing to the Plaintiff a statement that he or she should not have made, or by placing in the Plaintiff's mouth a false and defamatory statement about him or herself." *Sack on Defamation § 2:4.12* (4th ed. 2011). *Also see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

subjected to the imputation of a serious crime by the Washington Post based upon its forgery of Mr. Rakofsky's email.

Without more, this act of defamation shows the Washington Post defendants' April 1, 2011 article to be a report of the judicial proceedings in *United States of America v. Dontrell Deaner* that is both *unfair and untrue* and, therefore, fails to meet the requirements of Section 74 of the New York Civil Rights Law, on which the Post defendants base their sole defense and the sole basis of their motion to dismiss Plaintiffs' Amended Complaint.

B.

The second false statement of fact relates to the cause of the mistrial that resulted in the termination of the trial in *United States of America v. Dontrell Deaner*. In its April 1, 2011 article, the Washington Post attributes it to Mr. Rakofsky's "incompetence," without specifying the nature of that "incompetence" or, indeed, pointing to a single act of incompetence or fact evidencing incompetence that proximately caused the mistrial. It is not without significance, however, that the article is quite firm and definite in placing the occurrence of the mistrial on Friday, April 1, 2011, even though the record of proceedings on that day is completely devoid of the word "mistrial."

All Defendants would have this Court read only the transcript of Friday, April 1, 2011, and nothing else. If one were to ignore everything else that occurred in Dontrell Deaner's trial and, instead, read only the transcript of April 1, 2011, as Defendants wish, then Defendants' argument might seem to be more reasonable than Plaintiffs'. However, we respectfully submit that, to understand this issue, this Court must look to the events of Thursday, March 31, 2011, before it begins to read about the events that followed on,

Friday, April 1, 2011. The Washington Post and every defamation-republishing defendant named herein (*i.e.*, "Copy-cat Defamers") ignored the events of Thursday, March 31, 2011 (either intentionally or negligently), and, further, the trial judge's acknowledgment of those events the following day, Friday, April 1, 2011. For this Court also to ignore the events that precipitated the hearing on Friday (which would never have been scheduled in the first place if it weren't for the events that preceded it on Thursday, March 31, 2011), as Defendants would have this Court do, and then make a decision based upon a small snippet in time, ignoring all else, would be to validate the error, and the resulting wrongful acts, of Defendants.

For example, Defendants would have this Court completely ignore the fact that, on Thursday, March 31, 2011, Mr. Rakofsky moved to withdraw as counsel for Mr. Deaner because of a conflict that had arisen between him and his client. Further, Defendants would have this Court ignore the fact that, on Thursday, March 31, 2011, Judge Jackson stated "[B]ecause **you are asking** for that to happen, that is to say you are asking for a mistrial,"[19] which demonstrates that the mistrial was unilaterally solicited by the defense on Thursday, March 31, 2011. In addition, Defendants would have this Court ignore the fact that, on Thursday, March 31, 2011, the trial judge, Judge Jackson, initially declined to allow Mr. Rakofsky to withdraw as lead counsel (which indicates that Judge Jackson was not dissatisfied with Mr. Rakofsky's performance) until Judge Jackson agreed to *voir dire* the defendant, Mr. Deaner. In addition, Defendants would have this Court ignore the fact that, when Judge Jackson conducted the *voir dire* on Thursday, March 31, 2011, the defendant confirmed the conflict that had arisen between him and

[19] See Exhibit 5, Page 11, Line 6.

Mr. Rakofsky and Judge Jackson so stated on the record.[20] In addition, Defendants would have this Court ignore the fact that, on Thursday, March 31, 2011, Mr. Deaner refused to waive his Sixth Amendment right to be represented by counsel of his choosing and, simultaneously, agreed to waive his Fifth Amendment right against being subjected to Double Jeopardy so that a mistrial could be effectuated. Further, Defendants would have this Court ignore the fact that, on Thursday, March 31, 2011, as a direct result of Mr. Rakofsky's motion to be relieved as counsel, Judge Jackson scheduled a proceeding for Friday, April 1, 2011, a day on which there were no proceedings scheduled in the case until Mr. Rakofsky moved to withdraw as counsel[21] for the sole purpose of giving the defendant the opportunity, overnight, to decide on his decision to enable the effectuation of the mistrial Judge Jackson stated on the record repeatedly he was inclined to grant. Further, Defendants would have this Court ignore the fact that, on Thursday, March 31, 2011, Judge Jackson stated on the record: "There appears to be a conflict that has arisen between counsel and the defendant...[T]his is **not** an issue of manifest necessity..."[22](emphasis added). Further, Defendants would have this Court ignore the fact that, after Mr. Rakofsky moved to withdraw due to the conflict between him and his

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[20] While the record is devoid – on the trial judge's insistence -- of the nature of those questions which caused the conflict between Mr. Rakofsky and Mr. Deaner client, one might speculate that the client's position may have had some relation to Rodriguez's testimony on direct examination by the Government prosecutor that he had had a sexual relationship with Mr. Deaner's mother.

[21] On Monday, March 28, 2011, AUSA Bryant 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 2, Page 32, Line 20)

[22] *See* Exhibit 5, Page 12, Line 2

client, on Thursday, March 31, 2011, Judge Jackson stated on the record: "Mr. Deaner, you had requested that the Court provide a different attorney for you. Is that right?"[23]

In addition, the Defendants would have this Court ignore the fact that, on Friday, April 1, 2011, Judge Jackson summarized the events that occurred the previous day, Thursday, March 31, 2011, and stated on the record:

> 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. Deaner. Mr. Deaner, when I acquired [*sic*] of him, indicated that there was, indeed a conflict between he [*sic*] and Mr. Rakofsky.[24]

Moreover, on Friday, April 1, 2011, Judge Jackson further summarized the events that occurred on the previous day, Thursday, March 31, 2011, and stated:

> Mr. Deaner, **when we adjourned yesterday**...I had explained to you that if I did give you a new lawyer, we would have to abort the trial...And you said you understood that, but you still, nonetheless, wanted another lawyer...And I asked you to think about it overnight. Have you had an opportunity to think about that?[25] (Emphasis added.)

Finally, on April 1, 2011, the defendant confirmed his willingness to have the mistrial go forward.

Despite all of this, the Washington Post falsely and maliciously published: "D.C. Superior Court Judge Declares Mistrial over Attorney's Competence in Murder Case" and the false and defamatory article that followed.

The reporter's motive in isolating his report of the mistrial to April 1, 2011, and excluding the preceding day, is transparent: He did so to take full advantage of the remarks Judge Jackson placed on the record on April 1, 2011, which he felt enabled him

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[23] *See* Exhibit 5, Page 10, Line 10
[24] *See* Exhibit 6, Page 3, Line 12
[25] *See* Exhibit 6, Page 2, Line 17

to cast the mistrial as one for a young lawyer's incompetence in his first trial, which he considered made a more effective "man bites dog" article than the truth – that the direct and proximate cause of the mistrial occurred the day before, Thursday, March 31, 2011, when Mr. Rakofsky moved to withdraw as lead counsel for the defendant that resulted from the conflict presented by his client's demand that Mr. Rakofsky ask Gilberto Rodriguez, the key Government witness (who had testified to a sexual liaison with the client's mother), whose utility to the Government Mr. Rakofsky had destroyed on cross-examination before court recessed, certain questions Mr. Rakofsky considered harmful to his client's defense.

In fact, on Thursday, March 31, 2011, after Judge Jackson was satisfied that a conflict existed between Mr. Rakofsky and his client, Judge Jackson stated to Mr. Deaner:

> If I get another lawyer, it's going to have to start all over again and the only way I could get another lawyer is for you to ask me to get another lawyer, which means that this trial is going to end and a mistrial will be declared and we'll start all over again.[26]

At that time, on Thursday, March 31, 2011, as per Judge Jackson's direction, Mr. Deaner asked Judge Jackson to assign another attorney to represent him. Further, on Thursday, March 31, 2011, Judge Jackson stated on the record that he was "inclined to grant [a mistrial], but want[s] [the defendant] to think about it overnight"[27] after

[26] *See* Exhibit 5, Page 7, Line 10

[27] *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.")

conducting a *voir dire* of the defendant that elicited a waiver of his Double Jeopardy claims.

Because earlier that week, on Monday, March 28, 2011, the AUSA had notified Judge Jackson that she would be unable to appear in Court on Friday, April 1, 2011, no proceedings had then been scheduled. However, because Mr. Rakofsky moved to withdraw on Thursday, March 31, 2011 and Judge Jackson stated on the record that His Honor was "inclined to grant [the motion]," Judge Jackson, therefore, scheduled proceedings for the following day, Friday, April 1, 2011.[28]

When the defendant had no change of mind on the following day, April 1, 2011, Judge Jackson formally granted Mr. Rakofsky's motion to withdraw and the mistrial (which he inaccurately called "a new trial"), interspersing non-germane remarks critical of Mr. Rakofsky for undertaking a Felony Murder case on his first trial. Judge Jackson was critical of the trial performance of defense counsel (who included Mr. Rakofsky's experienced co-counsel) and engaged in a purely hypothetical analogy of the Deaner case to one in which a defendant had been found guilty under factual circumstances of manifest necessity, despite the fact that Mr. Rakofsky's withdrawal occurred during the Government's case and that Judge Jackson negated manifest necessity the preceding day, Thursday, March 31, 2011, which made his statements clearly inappropriate to the scenario as it stood on April 1, 2011.

That Judge Jackson intended, by his remarks, to denigrate Mr. Rakofsky's limited participation in the first days of the trial is undeniable, but his reason for so doing is far from clear. One might venture a number of different reasons, but we shall not presume to

[28] It was on Thursday, March 31, 2011, that Judge Jackson offered to the AUSA, "We'll come back here tomorrow morning. You can get someone to stand in for you, if you wish."

do so, not being gifted with clairvoyance such as the Washington Post defendants appear to claim from their "reading" of Judge Jackson's mind and emotions in their April 1 article. However, it cannot be denied that Mr. Rakofsky moved to withdraw on the day preceding, Thursday, March 31, 2011, when Judge Jackson initially refused to allow Mr. Rakofsky to withdraw, when the Judge confirmed independently, and subsequently stated on the record, that a conflict existed and further, when the client waived his Double Jeopardy interests (so that the mistrial could be completed). The mistrial had nothing to do with "competence" or any lack thereof; it was, pure and simple, the result of a conflict between Mr. Rakofsky and Mr. Deaner and Mr. Rakofsky's motion to withdraw as a consequence thereof.

While reporters may be permitted "poetic license" and need not report a given event exactly as it transpired, for the Washington Post to ignore everything that transpired on Thursday, March 31, 2011 (and even the summary of such events that was provided by Judge Jackson on the record the following day, April 1, 2011) is nothing more than a failure to report truthfully, whether intentional or negligent. However, just as fabricating a sentence is not exercising poetic license, neither is the (intentional or negligent) omission of material facts necessary to make a report both fair and true.

The simple and undeniable fact is that a mistrial occurred on Thursday, March 31, 2011, because (a) Mr. Rakofsky moved to withdraw due to a conflict that existed between Mr. Rakofsky and his client, the defendant, Mr. Deaner; (b) Mr. Deaner confirmed the existence of a conflict to Judge Jackson; and (c) Judge Jackson stated on the record the existence of the conflict between Mr. Rakofsky and his client. At that time, everyone – Judge Jackson, the client, Mr. Deaner, his attorneys, Mr. Rakofsky and Mr. Grigsby, and

even the Assistant United States Attorney – recognized that Mr. Deaner was without representation who would seek to further his interests in the way Mr. Deaner wished and was thereby effectively unrepresented, even though Mr. Deaner expressly requested that he be assigned counsel in light of his conflict with Mr. Rakofsky that prompted Mr. Rakofsky's motion to withdraw from his defense.

Suffice it to say, as we already have said, that Plaintiffs charge libel in the Post's publication of false statements of fact, not in their voicing of opinions. We respectfully submit that we have achieved this objective and, in so doing, demonstrated, as well, the inapplicability of Section 74 of the New York Civil Rights Law to the Post Defendants' report and heading on *United States of America v. Dontrell Deaner.*

ARGUMENT

THE AMENDED COMPLAINT STATES VALID CLAIMS AGAINST DEFENDANTS, AND THEIR MOTION TO DISMISS SHOULD, THEREFORE, BE DENIED.

I. The motion of Defendant The Washington Post Company to dismiss the Amended Complaint on the ground that it is not the proper party defendant is factually and legally flawed and, therefore, should be denied; or, in the alternative, the cross-motion of Plaintiffs to join WP Company LLC as a defendant herein should be granted so that the Court, should it deny the Post Defendants' substantive motions to dismiss and finally determine that Plaintiffs are entitled to relief on their Amended Complaint, can determine against which of said Defendants Plaintiffs are entitled to relief.

Defendant The Washington Post Company (hereinafter sometimes referred to as the "Post Company") has moved for dismissal of Plaintiffs' Amended Complaint against it on the ground that it is not the entity that owns, operates and publishes The Washington

Post newspaper and website (hereinafter referred to together as the "Post"), having transferred its rights therein and thereto to a subsidiary of the Post Company known as WP Company LLC, presumably a limited liability company of which the Post Company is the owner and/or member (hereinafter referred to as the "LLC"), which the Post Company apparently contends is now and has been, at the times referred to in the Amended Complaint herein, the owner and operator of the Post in the place and stead of the Post Company, the previous owner and publisher of the Post.

Plaintiffs contend herein that the Post Company's aforesaid motion should be denied as a matter of fact and law. In support of their contentions in opposition to said motion, Plaintiffs have filed herewith the Affidavit of Plaintiff Joseph Rakofsky attesting to his purchase of a copy of the Post newspaper in the City of New York of date and publication contemporaneous with the pendency of this suit against the Company, the masthead of which refers to the Post Company and contains no reference to the LLC as being either the owner or operator of the Post or having any other relationship to the Post. Mr. Rakofsky's Affidavit further recites his personal visiting of the Post website and the absence of any reference thereon to the LLC or any entity other than the Post Company therein or thereon. Under those circumstances, the factual and legal basis for the Post Company's motion would seem to be contradicted by the Post's own representations to its readers and users.

However, since the Post Company has represented that it has acted to transfer ownership of certain of its rights and assets to the LLC, Plaintiffs, out of a superabundance of caution and prudence, have cross-moved to join the LLC as a defendant so that this Court may sort out the relationship and respective rights,

obligations and liabilities of the Post Company and the LLC *inter se* with respect to the ownership and operation of the Post and, more particularly, with regard to their respective possible and potential liabilities to Plaintiffs.

II. Plaintiffs' First Cause of Action alleges claims for defamation against defendants that are not subject to any privilege against suit under Section 74 of the New York Civil Rights Law – the sole defense asserted by defendants.

A. Introductory

Plaintiffs allege in the First Count of their Amended Complaint that they were defamed by the Post Defendants in articles under the byline of Defendant Keith L. Alexander published in the Washington Post newspaper and website on April 1 and 9, 2011, copies of which articles are appended to the motion to dismiss filed on behalf of the Post Defendants.

The Post Defendants' sole substantive defense to Plaintiffs' defamation claims against them is, as stated in Point I. A. of their Memorandum of Law in support of their motion and summarized in the heading thereof, that Plaintiffs' defamation claims must be dismissed "because the allegedly defamatory statements are protected by the fair report privilege," by which term they refer to and rely upon Section 74 of the New York Civil Rights Law (hereinafter "Section 74"), which provides, in pertinent 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 . . . or for any heading of the report which is a fair and true report of the statement published."

On their face, the articles in question relate to judicial proceedings in the case of the *United States of America v. Dontrell Deaner* in the Criminal Division of the Superior Court of the District of Columbia (the "Deaner proceedings") and purport to be reports

thereof. Indeed, the Post defendants expressly refer to and rely upon the record of the Deaner proceedings. Therefore, for Section 74 to apply to the Post Defendants' articles and the headings (headlines in common newspaper parlance thereof), so as to entitle them to prevail on their motion to dismiss, this Court must determine that each of the Post articles at issue, and the headings of each article, were and are both fair and true with respect to the Deaner proceedings as reflected in the official record of those proceedings.

Plaintiffs contend that the so-called "fair report privilege" granted by Section 74 does not and cannot apply to either of the Post Defendants' articles in question, because they are replete with statements that not only are neither fair nor true reports of statements made during the judicial proceeding at issue, but are, or are based upon, misstatements or fabrications of statements purported to have been made in the official record of the proceeding which were not made as stated by Defendants and of the contents of a document which was a subject of statements made in such record. Those misstatements and fabrications were created and published, knowingly and intentionally, by the Post Defendants to portray falsely statements made, by the presiding judge, in one case, and by Mr. Rakofsky, in the other. We respectfully submit that the Post Defendants' inclusion of such fabricated and fictitious statements in their articles precludes their entitlement to the "fair report privilege" they claim for the publication of such articles under Section 74 of the New York Civil Rights Law.

Although the articles at issue are replete with defamatory misstatements, we cite in particular two specific false statements of fact and acts of deliberate fabrication of statements and documentary matter created and published by the Post defendants in their April 1 article. The first relates directly to the attention-getting headline of that article

(the "heading" referred to in Section 74): "D.C. Superior Court judge declares mistrial over attorney's competence in murder case" and to the statement in the second sentence of the article that "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." (We pass here the patently-untrue last three words of the sentence, to which we shall return *infra.)* The record of the Deaner proceedings of April 1, 2011, on which record the Post Defendants expressly rely and rest their motion, is devoid of any such statement, whether addressed by Judge Jackson directly to Mr. Rakofsky or otherwise.[29]

Although Judge Jackson did use the word "astonished" during the proceeding on April 1, 2011, he did so only in reference generally to one undertaking to "represent someone in a felony murder case who had never tried a case before,"[30] as Mr. Rakofsky had stated to the jury that he had not. The Judge who had admitted Mr. Rakofsky, *pro hac vice*, to represent the defendant in the Deaner proceedings, did not inquire into or express any concern with Mr. Rakofsky's trial experience. As Mr. Deaner repeatedly told Judge Jackson on the record,[31] he knew that Mr. Rakofsky had not previously tried a case when he chose and retained Mr. Rakofsky, a member of the New Jersey Bar, as his counsel, as was his right under the Sixth Amendment to the United States Constitution. The balance of the second sentence of the April 1 Post article following "astonished" was taken by Alexander from another sentence, in which Judge Jackson did not specifically refer to, much less address, Mr. Rakofsky. Indeed, that statement might have referred

[29] In fact, Judge Jackson did not address Mr. Rakofsky at all as to any matter germane to the purpose of the proceedings on April 1, 2011.
[30] *See* Exhibit 6, Page 4, Line 4.
[31] *See* Exhibit 3, Page 97, Line 12 and Exhibit 4, Page 11, Line 1.

more appropriately to Mr. Rakofsky's co-counsel of record, who was experienced in the trial of homicide and other criminal cases in the District of Columbia, particularly given the limited role Mr. Rakofsky had played in the Deaner trial prior to April 1, 2011 – limited, as it was, to his opening statement and his uncompleted cross-examination of the Government's key witness, which cast serious doubt on whether the witness was, as he claimed to be, an eyewitness to the events on which the Deaner prosecution was based, with respect to which he had testified on direct examination.

More to the point, as we shall discuss more fully *infra*, the mistrial to which the Post article refers was expressly the result solely of Mr. Rakofsky's own motion to withdraw as lead counsel for the defendant because of a conflict with the defendant, who, as Judge Jackson found and stated on the record, created the conflict by insisting that Mr. Rakofsky ask questions of the Government's key witness, who had testified to a sexual relationship with the defendant's mother, which Mr. Rakofsky considered "bad questions" to ask of the witness.[32]

The second instance of misstatements and fabrications involved an issue having no direct relationship to the mistrial issue that arose concurrently with the April 1, 2011 proceeding that was the principal subject of the April 1, 2011 Washington Post article. We refer to a document delivered on April 1, 2011, to a judge then having no function in *United States of America v. Dontrell Deaner* by Adrian Bean, a former investigator hired by Mr. Rakofsky that contained an email from Mr. Rakofsky that was the subject of forgery and fabrication by the Washington Post and to false alterations and misstatements of fact in its April 1, 2011 article that were intended to and did falsely accuse Mr. Rakofsky of serious violations of federal witness-tampering laws and that were actuated

[32] *See* Exhibit 5, Page 3, Line 5

by malice against Mr. Rakofsky. These acts on the part of the Washington Post and its reporters are discussed in Part B hereof.

B. Defendants fabricated and forged an email from plaintiff to his investigator in and by which they defamed plaintiff by falsely accusing him of having directed his investigator to engage in subornation of perjury or otherwise tampering with a Government witness, serious crimes under federal law, thereby clearly constituting defamation *per se.*

As unfair as was the Post's creation and attribution to Judge Jackson of a composite statement he never made, the second example of the Post's willingness to engage in the fabrication and forgery of non-facts and documentary matter to attempt to support such non-facts in its report of the Deaner proceedings makes that act pale by comparison. We refer to Post reporter Alexander's fabrication and attribution to Mr. Rakofsky of words he never wrote at all in purporting to quote an e-mail Mr. Rakofsky sent to his former investigator, Adrian Bean, who appended the true e-mail[33] sent by Mr. Rakofsky to an unverified *ex-parte* document the Post defendants referred to as having been filed in the Deaner proceedings when, as the document itself shows, it was merely received on April 1, 2011, in the Chambers of a different judge who was not presiding over the case. As the record of the proceedings in the Deaner case shows, such Judge then had no function in those proceedings and caused the document to be delivered to Judge Jackson just prior to the start of proceedings on April 1, 2011, in an effort by Bean to gain a voucher that would permit Bean to get compensation from Government funds under the Criminal Justice Act, to which he was not entitled.

It is fundamental that, as a non-party to the Deaner proceeding, Bean had no right to file any motion. As such, his underhanded delivery of the document to a different

[33] *See* Exhibit 13.

Judge's chambers, sitting in a different Court, did not constitute its filing (as Judge Jackson recognized).

There can be no question that Mr. Bean, whom Mr. Rakofsky had hired as an investigator in the Deaner case and then dismissed for failure to perform any of his assigned duties, had an axe to grind with Mr. Rakofsky, and grind it he did in the document (hereinafter referred to as the "Bean document"), in which he sought appointment as an investigator and a voucher that would permit him to get compensation from Government funds under the Criminal Justice Act to which he was not entitled.[34] Although the Post's false statement of the filing status of the Bean document is not itself assigned as defamatory, it was clearly a knowing and willful misstatement by Mr. Alexander – among many in his April 1 report – that likely was intended to confer validity upon the Bean document as part of the record so the Post defendants might rely upon it to claim a privilege under Section 74. Neither the Bean document nor the Rakofsky email to which it was annexed was admitted or even offered in evidence in the Deaner proceeding which is the subject of the Post report, having been presented in an unauthorized act by Bean, to a different judge, who had no authority or standing in the case and who merely performed the ministerial act of delivering it to Judge Jackson, who himself performed no official function either in handing it to Mr. Rakofsky or in commenting on it as he did so.

Whatever its standing in the Deaner proceedings, the sudden appearance of the Bean document on April 1, 2011, was not, aside from the timing and manner of its delivery to Judge Jackson, a surprise to Mr. Rakofsky, who had been forewarned

[34] *See* Rakofsky Affidavit, par. 44.

("forethreatened" might be more accurate) by Bean of the likelihood of its appearance.[35] Its intent was obvious and clearly stated: Bean wanted a voucher to get Civil Justice Act funds that Mr. Rakofsky had gained for his client, not intending to profit personally from such funds as Bean sought to do.[36]

Given the obviously one-sided nature and self-serving purpose of the Bean document, one intending to write a report that was fair (passing the conjunctive requirement that it be factually true as well as being fair) of the April 1, 2011 proceedings who knew, as the Post defendants did, that Mr. Rakofsky, against whom both the document and the report were directed, would have had (and did have) no opportunity to rebut it prior to Judge Jackson's receipt of and reference to the Bean document, would either have omitted any reference to it or, at the very least, have noted that fact and the document's *ex- parte* nature and obvious self-serving purpose. But, as the Post defendants' other actions in the preparation and publication of their articles show clearly, they never had any intention of writing a fair report, much less a true one. Therefore, not only did they do neither, but their report on it is replete with deliberate misstatements in and falsification of its contents that make their report untrue as well as unfair and confirm the intention of the writers and publisher of the report not to write and publish a fair or true report.

For instance, on Friday, April 1, 2011, when Judge Jackson stated that there was an email to the investigator that Mr. Rakofsky "may want to look at," Mr. Rakofsky, who was fully prepared to discuss it in open court, asked Judge Jackson: "Your Honor, is that

[35] *See* Exhibit 11 and Rakofsky Affidavit, Par. 48.
[36] *See* Rakofsky Affidavit, Par. 48.

something you wanted to discuss?"[37] Judge Jackson stated that His Honor did not wish to discuss it. Instead of publishing that Mr. Rakofsky offered to discuss the investigator's unilateral accusation with Judge Jackson, Alexander, in the April 1, 2011 article, published: "Rakofsky did not speak during Friday's hearing."[38] Simply, the Washington Post wanted its readers to believe that Mr. Rakofsky could not help but admit that what the Investigator alleged was true and he was consequently, too ashamed to speak, so he "did not speak."

Any doubt there may have been that the Post defendants intended to and did publish, a report of the April 1 proceedings that was neither fair nor true, much less both fair and true, as required by Section 74 of the New York Civil Rights Law to be entitled to the privilege against suit granted therein, surely is dispelled by defendants' blatant and obvious fabrication of two sentences in the Washington Post article that they dishonestly attribute to an "e-mail that [Bean] said was from [plaintiff] Rakofsky."

The sentence, as it was included in the actual e-mail sent by Mr. Rakofsky to Bean on October 6, 2010, that (redacted to obscure the name of the individual referred to therein by the sobriquet "old lady") was attached to the Bean document read as follows (omitting punctuation):

> "Thanks for helping.
>
> "Please trick [name redacted] (old lady) into admitting:
> a) she told the 2 lawyers that she did not see the shooting
> b) and she told 2 lawyers b) she did not provide the Government any information about shooting. This happened a couple of months ago."[39]

[37] *See* Exhibit 6, Page 7, Line 7.
[38] *See* Exhibit 7.
[39] *See* Exhibit 13.

The actual Rakofsky request of Bean was that he get the "old lady"-- the sobriquet used by Mr. Rakofsky to admit to him (Bean) that, "a couple of months" earlier, she had told "the 2 lawyers" – who were Mr. Rakofsky and his co-counsel, Mr. Grigsby – "that she did not see the shooting."

As Mr. Rakofsky and his co-counsel, Sherlock Grigsby, had informed Bean, their purpose in asking Bean to interview the "old lady" was so that, if she were to become a witness, which she was not then, as a result of her telling the police or Government prosecutor, falsely, that she had seen the shooting, Bean, as a lay witness, would be in the position to testify to his conversation with her and thereby impeach her false testimony. The Government was known to be offering monetary and other inducements to fact witnesses for their testimony,[40] as detectives had testified in court and Mr. Rakofsky feared this woman might try to take advantage of that offer. That was the genesis of Mr. Rakofsky's use of the verb "trick," which, as Bean knew, meant that he should conceal from the woman that he was working for the Deaner defense.

The copy of Mr. Rakofsky's email to Bean that Bean appended to the document he delivered to a different Judge on the morning of April 1, 2011, and Her Honor's office delivered to Judge Jackson the same morning, was substantively identical to the email Mr. Rakofsky had sent to Bean on October 6, 2010. Thus, Mr. Alexander, who obviously had access to the Bean document, was well aware of the actual email Mr. Rakofsky had sent to Bean. That truth, however, did not give Alexander or his employer the sensational story he obviously craved to impress his superiors at the Post. Therefore, in the fourth sentence of his article, Alexander completely changed the actual sentence to read as

[40] See Exhibit 10, Page 9, Line 19 and Exhibit 42.

follows, mendaciously placing it within quotations marks to make it appear to be an actual quotation from the Rakofsky e-mail to Bean, which it plainly was not:

> "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting."[41]

The only words in Alexander's forgery that had appeared in Mr. Rakofsky's e-mail are the reference to "the old lady" and the ambiguous verb "trick." The gist and purpose of the Alexander forgery are shown in the fabrication of the operative words that followed, which Alexander intended Post readers to believe were the words of Mr. Rakofsky -- which they were not at all but were rather the words of one or more of the Post defendants that they attributed to him – intending their readers to assume that Mr. Rakofsky was instructing Bean "to 'trick' a government witness into changing her previous testimony to exculpate his client, Mr. Deaner. Alexander then used his nonexistent fabricated version of Mr. Rakofsky's email to Bean to justify Alexander's knowingly false and defamatory statement in his article published in the Post newspaper and on the Post website that Mr. 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."

Virtually every word in the preceding excerpt from Alexander's article is demonstrably false on its face. Nothing in Mr. Rakofsky's actual e-mail asked Bean to get "the old lady" to testify in court, or, indeed, to get her to say anything to Bean other than what she had already told "the two lawyers" -- Mr. Rakofsky and his co-counsel – a couple of months earlier: that she had not been at the murder scene and, therefore, could not have seen Mr. Rakofsky's client there. Therefore, "the old lady" could not have been,

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[41] *See* Exhibit 7.

a "a government witness," as Alexander referred to her in his article, and, in fact, was not a Government witness, as the Government's pre-trial list of witnesses, a matter of public record, would have confirmed had Alexander consulted it, which, of course, he would not have done, since it did not support his scheme to accuse Mr. Rakofsky of subornation of perjury, obstruction of justice, or some other form of witness-tampering, which, being criminal acts, constituted the Post's published recklessly and knowingly false statements libel *per se* of Plaintiffs.[42]

Section 170.05 of New York Penal Law (hereinafter referred to as NYPL) provides that "[a] person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument." [43] It is clear that Mr. Alexander had access to a true copy of Mr. Rakofsky's actual email, which was the "written instrument" forged and that, by placing inside quotation marks a statement attributed to Mr. Rakofsky that Mr. Rakofsky never made in the forged instrument, Mr. Alexander intended to injure Mr. Rakofsky, whom he thereby falsely accused of engaging in an act of criminal witness tampering, as well as to deceive another" (here, the readers of the April 1, 2011 article). He did so willfully and knowingly and for reasons likely motivated by greed and malice,[44] when he unilaterally decided to fabricate his own calculated statement, when simply, he could have very easily

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[42] "Subornation of perjury...constitute[s] defamation *per se*." *Wong v. Lee,* 2008 N.Y. Slip Op. 30044U, 2008 N.Y. MISC. LEXIS 7739 (Sup. Ct. N.Y. Cty. 2008).

[43] *See* Exhibit 9: A "written instrument" is defined as "any instrument or article, including computer data... containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information....

[44] *See* Statement of Facts ("[On April 1, 2011, when Mr. Rakofsky refused to grant Mr. Alexander an interview] 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).

published the statement Mr. Rakofsky actually made. Naturally, Alexander and the Washington Post had no interest in reporting the truth, given that the truth lacked the sensationalism the Washington Post would seem to depend upon to sell advertising space and newspapers. In so doing, pursuant to Section 170.05 of the NYPL, Alexander "falsely made a written instrument." Further, they "alter[ed] a written instrument" (within the meaning of NYPL Section 170.05) because they changed the fundamental meaning of Mr. Rakofsky's statement and, in addition, described a non-witness as a "Government witness," thereby alleging that Mr. Rakofsky engaged in witness tampering. That Mr. Alexander acted with malice and intended to "injure" Mr. Rakofsky pursuant to NYPL Section 170.05 cannot be disputed as evidenced by the threat he made to Mr. Rakofsky on April 1, 2011 as he smothered Mr. Rakofsky while following him down the Courthouse escalator.

It is apparent that Alexander fabricated the substance of Mr. Rakofsky's supposed email so that he could, as he then did, attribute to it a meaning opposite to that objectively and actually intended by Mr. Rakofsky, thereby rendering the Post's report both untrue and unfair and, therefore, not entitled to any privilege under Section 74 of the New York Civil Rights Law in this action. "An inaccurate quotation may constitute a libel of the person purportedly being quoted in two ways: by attributing to the Plaintiff a statement that he or she should not have made, or by placing in the Plaintiff's mouth a false and defamatory statement about him or herself."[45]

The Post's forgery of Mr. Rakofsky's email to his investigator turned Mr. Rakofsky's actual message on its head, turning white into black. As such, it was capable of doing serious damage to Mr. Rakofsky's reputation as a lawyer, much as was the

[45] *See* Exhibit 14.

misquotation in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). Indeed, it has, in fact, been responsible for such damage, both directly and through its inspiration of "copycat defamation" not only by Internet bloggers, but by normally-responsible members of the media, such as Reuters, and the professional community, such as the American Bar Association.

Mr. Alexander is obviously of the "street school" of journalism, which should not be confused with the Columbia School of Journalism or any other legitimate institute of higher learning in journalism based upon facts and truth, nor with the Washington Post of the recent past that boasted iconic figures like Woodward and Bernstein – that believes that "dog bites man" articles don't sell newspapers or advertising in newspapers (or on 21st Century websites such as the Post has) and seeks, therefore, to create a "man bites dog" story, apparently at any cost to the man, to promote the circulation and, therefore, the income, of the newspaper from its readers and advertising customers.

Placing fidelity to his employer and its profit-seeking journalistic practices above truth and fairness, Alexander had no compunctions about taking the words of Mr. Rakofsky's actual e-mail -- he of the school of ethical legal practice he had only recently joined that places fidelity to client above economic advantage to self -- that were intended by him to protect his client against the cynical forces he feared were at work for the prosecution against his client -- and using his forged and fabricated version of Mr. Rakofsky's e-mail to accuse Mr. Rakofsky of witness-tampering.

If anything could be more shocking than the conduct of the Post Defendants in perpetrating this fabrication, falsification and outright forgery of a document – Mr. Rakofsky's e-mail – it is the blatant attempt of their counsel to emulate the proverbial

three wise monkeys by claiming to see no difference between the e-mail actually sent by Mr. Rakofsky and the e-mail fabricated and forged and attributed to him by the Post defendants and published in the Post newspaper and on the Post website to perpetrate a libel *per se* of a member of the Bar and his law firm. It is difficult to determine which institution has been more badly dealt with by the Post Defendants. We leave that to this Court.

We respectfully submit that the two incidents of outright fabrication and forgery perpetrated by the Post defendants in their April 1 article are the very antithesis of the fairness and truthfulness required by Section 74 of the New York Civil Rights Law as a condition to the grant of the "fair report privilege" upon which the Post defendants base their motion to dismiss the First Count of Plaintiffs' Amended Complaint and, without more, require the denial of their motion as to that count of the Amended Complaint. However, since the misdeeds we have just cited are merely the most egregious examples of conduct by the Post defendants that preclude their purported "report" of the Deaner proceedings in their April 1 article from being deemed a "fair and true" report of those proceedings such that the Post defendants have standing to claim a privilege from suit under Section 74 of the New York Civil Rights Law, we shall proceed to demonstrate the further respects in which their April 1 article fails the "fair and true" requirement of Section 74.

It may be an act of supererogation to observe the egregiousness of the Post defendants' abuse of their power of the press and the Internet to defame, and thereby their violation of the "fair and true privilege" on which they rest their sole hoped-for, but vain, defense against liability to Plaintiffs, in their statement in the third paragraph of their

April 1 article that "[w]hat angered Jackson even more was a filing [*sic*] he received from [Bean]." One can only wonder how Mr. Alexander could presume to read the emotions of Judge Jackson and find in them anger that was not expressed in any words of Judge Jackson in the record on which the Post defendants expressly rely, particularly after hearing him describe the Bean document as merely "rais[ing] ethical issues," although he may have viewed it as doing so only as a result of Judge Jackson's eleventh-hour receipt of the unfiled Bean document, Bean's obvious purpose in writing the document, and its unverified and *ex parte* nature, which precluded any response by Mr. Rakofsky.

Were there any doubt that Alexander intended to and did write, and that the Post defendants intended to publish and did publish, a report of the April 1 proceedings that was neither fair nor true, much less both fair and true as required by Section 74 of the New York Civil Rights Law to be entitled to the privilege against suit granted therein, it surely is dispelled by Alexander's completely blatant and obvious fabrication of two sentences in his Post article that he then mendaciously and dishonestly attributes to an "e-mail that [Bean] said was from [plaintiff] Rakofsky."

We should not doubt that there are lawyers venal enough to engage in subornation of perjury and/or obstruction of justice (*i.e.*, witness-tampering), but few likely to inculpate themselves in such acts would shout their intentions in the manner in which Alexander depicted in the fabricated sentence he concocted and attributed to Mr. Rakofsky. Of course, the words in the sentence were not the words of Mr. Rakofsky. They were, rather, words clumsily and deviously fabricated by Alexander to falsely attribute to Mr. Rakofsky guilt of witness-tampering.

There is, of course, a factual flaw in Alexander's evil plan: "the old lady" could not have been, and was not, "a government witness," as Alexander well knew when he wrote the article reporting on the judicial proceedings in the Deaner case which the Post defendants published and now seek to defend before this Court as "fair and true," given her statement to Mr. Rakofsky and his co-counsel that she had not seen the shooting, not to mention the fact that she was not on the list of Government witnesses that was publicly available and part of the record of the case.

But neither Alexander (as his remarks to Mr. Rakofsky at the close of proceedings on April 1, 2011 show) nor his employer was interested in writing a fair and true report about an honest young lawyer protecting his client from perjured testimony – the "dog bites man" type of story. They were interested only in unfairly and untruthfully depicting the lawyer as corrupt – the "man bites dog" story that they and many other unscrupulous reporters and publishers believe will better sell newspapers to their readers and advertising to their advertisers, through the circulation statistics on which their income depend.

It is fundamental that one falsely imputing to another in writing of a criminal act, as both Alexander and the other Washington Post defendants should have been aware, which witness-tampering is in any of its forms, constitutes libel *per se*. Perhaps more to the point, given the "fair and true reporting privilege" defense invoked by the Post defendants as their sole defense to Plaintiffs' defamation claims against them, there is nothing in the actual Bean document or elsewhere in the proceedings before Judge Jackson that can justify that accusation in the Post Defendants' article/report.

Certainly, the Alexander fabrication of Mr. Rakofsky's e-mail to Bean cannot justify the accusation in it as true. Indeed, we respectfully submit that the very existence of that act of fabrication and falsification taints and destroys any attempt by the Post defendants to rely upon Section 74 of the Civil Rights Law, being an act that not only bespeaks a lack of truth in their report but stands independently, and, we submit, conclusively, as an act of unfairness.

C. Defendants defamed plaintiff Joseph Rakofsky by falsely stating that the Deaner trial judge declared a mistrial on April 1, 2011 because and as a result of his incompetence in his representation of the defendant.

Since the report published by the Post defendants is a unitary act that must be both fair and true to be entitled to be privileged from suit for defamation under Section 74 of the New York Civil Rights Law, we could stop here, having shown it to be defamatory *per se* of plaintiff Joseph Rakofsky in relation to its accusation of criminal conduct in his directions to his investigator.

But for the egregiousness of the Post defendants' excursion into the fabrication and forgery of documents that designates that libel, first place in the hierarchy of defamatory reporting would belong to the headline of the April 1 article: "D.C. Superior Court judge declares mistrial over attorney's competence in murder case." The only truth in that headline lies in its final two words, in that the most serious charge against Dontrell Deaner (hereinafter referred to by name, as the defendant or as Mr. Rakofsky's client), the defendant in the case that was the subject of the proceeding addressed in the headline and in the report that followed it, was, indeed, murder, specifically under the so-called Felony Murder Rule. That said, the balance of the headline, the function of which is to

grab the attention of readers, is simply neither true nor fair. Neither, also, are the contents of the article that follow the headline it purports to summarize.

That is so whichever and whatever words either party might choose to parse – whether the words of Judge Jackson by the Post defendants in their April 1 report on the Deaner judicial proceedings or the words of their April 1 report by Plaintiffs in their legal argument herein, and how those words, as parsed, comport with the actions of Judge Jackson, Mr. Rakofsky and the defendant, as reflected in the record of the case on which the Post defendants expressly rest their motion to dismiss. This is of particular importance in determining the truth and fairness of the Post report and its qualification for the privilege from suit upon which the Post defendants rest their defense to the First Count of the Amended Complaint under Section 74 of the New York Civil Rights Law. It is so because, as the record on which defendants purport to rely reflects conclusively, Judge Jackson was not the person who initiated the mistrial in the Deaner prosecution that is reflected in that record, much less that part of the record that encompasses the remarks made by Judge Jackson in the proceedings that took place on April 1, 2011.

The person who did that was Mr. Rakofsky. He did so by moving, on the afternoon of Thursday, March 31, 2011, to withdraw as lead counsel for the defendant, citing an ethical conflict with his client that arose earlier that day as a result of his client's demand that Mr. Rakofsky ask certain questions of a Government witness, Gilberto Rodriguez. Judge Jackson, as the judicial officer presiding over the trial, merely reacted to Mr. Rakofsky's motion and to the circumstances presented to him at that time, first by Mr. Rakofsky in his motion and then by the defendant's confirmation of the grounds for Mr. Rakofsky's motion.

On the morning of March 31, 2011, the Government called Rodriguez as its first substantive witness. Rodriguez was a confidential Government witness whose identity had been carefully concealed from Mr. Rakofsky by AUSA Vinet Bryant prior to the commencement of the trial. He was plainly the Government's "star witness." His testimony on direct examination cast him as an eyewitness to the events surrounding the murder of Frank Elliott by Javon Walden, whose testimony, if believed by the jury, was intended by the Government to support the Government's felony murder charges against defendant Deaner. However, at the very outset of Mr. Rakofsky's cross-examination, Rodriguez testified, in response to questioning by Mr. Rakofsky, that Walden had shot Elliott with a single bullet in the chest. That testimony, however, was in direct conflict with the testimony given the previous day, out of the presence of Rodriguez, by the District of Columbia Medical Examiner, that Elliott had been shot with a single bullet in the back.[46] Thus, Rodriguez's testimony in response to Mr. Rakofsky's interrogation of him on cross-examination cast serious doubt on his original claim, on his direct testimony, to have been an eyewitness to Walden's murder of Elliott and as to the actions of Mr. Deaner in connection with Walden's murder of Elliott that resulted in Mr. Deaner's being charged under the Felony Murder Rule.

Mr. Rakofsky was never to complete his cross-examination of Rodriguez. Judge Jackson interrupted his cross-examination by calling a luncheon recess. When the proceedings resumed following the recess, Mr. Rakofsky stated to Judge Jackson, out of the presence of the jury, that a conflict had arisen between him and his client, Mr. Deaner, who demanded that he ask Rodriguez certain questions that Mr. Rakofsky believed would, were he to ask them, be detrimental to his client's defense of the charges

[46] *See* Exhibit 3, Page 127, Line 5.

against him, and that, as a result of Mr. Deaner's demand, a "communication barrier" had arisen between Mr. Rakofsky and his client. Given that conflict, Mr. Rakofsky moved to be relieved from continuing as lead counsel for the defendant.

In response, Judge Jackson undertook to "*voir dire*" the defendant out of Mr. Rakofsky's presence. He had already done that the preceding day (March 30, 2011), following Mr. Rakofsky's opening statement to the jury, presumably because of Mr. Rakofsky's open disclosure to the jury that the Deaner case was his first trial. At that time, the defendant had stated to Judge Jackson that he knew, before retaining Mr. Rakofsky, that this would be his first trial, as Mr. Rakofsky had stated in his opening statement to the jury. On each occasion on which he was questioned by Judge Jackson, the defendant firmly insisted upon his satisfaction with Mr. Rakofsky and his desire to continue to be represented by him (as was his right under the Sixth Amendment to the United States Constitution).

In the course of Judge Jackson's *ex-parte* questioning of the defendant following Mr. Rakofsky's motion to withdraw as lead counsel for the defendant, Mr. Deaner confirmed to Judge Jackson the existence of a conflict between him and Mr. Rakofsky over the asking of questions of the witness, Rodriguez, as Mr. Rakofsky had reported to Judge Jackson. The defendant told Judge Jackson that Mr. Rakofsky would not ask questions of Rodriguez that he (the defendant) had written down and given to Mr. Rakofsky. Judge Jackson did not accept the defendant's proffer of his notes to Mr. Rakofsky, noting that they were privileged. Although we do not claim the ability to read minds as Alexander apparently does, it may be worthy of note that Rodriguez, the witness the questions to whom prompted the conflict that prompted Mr. Rakofsky's

motion to withdraw as lead counsel, had testified on direct examination by AUSA Bryant that morning that he "used to go to [the Deaner] house to basically see [Mr. Deaner's] mother, to get high with his mother," a relationship that, he testified, "at some point . . . . became sexual . . . after going there for a while."

That day, on Thursdau, March 31, 2011, he defendant told Judge Jackson that "the questions . . . that [Mr. Rakofsky] ask[ed] really don't matter and that "he [Mr. Deaner] knew the case because it's [his] case and [Mr. Rakofsky] won't listen." After explaining that, "If I get another lawyer, it's going to have to start all over again and the only way I can get another lawyer is for you to ask me to get another lawyer, which means this trial is going to end and a mistrial will be declared...(emphasis added), Judge Jackson asked the defendant what he wished the court to do. Having heard Mr. Rakofsky's motion, the defendant responded, "See if I can get another lawyer," which Judge Jackson told him would result in a mistrial being declared and that he would be subject to retrial by the Government.

Although a mistrial could have been avoided if the defendant had agreed to continue the trial with Mr. Rakofsky's co-counsel, Mr. Grigsby, Judge Jackson did not suggest that to the defendant. As a result, Judge Jackson gave the defendant no alternative that would result in the asking of the questions he wished to have asked of Rodriguez. That prompted the defendant, according to Judge Jackson, to agree to sign a waiver of Double Jeopardy. In a colloquy in which AUSA Bryant joined, Judge Jackson stated that he was deferring formal action until the following day, April 1, 2011, when no proceedings had been scheduled, to give the defendant an opportunity to change his mind, which the defendant did not do.

We respectfully submit that it is clear from the foregoing facts of record that the "mistrial" of which Judge Jackson spoke to the defendant on Thursday, March 31, 2011, occurred *de facto* on that day, following, and solely as a direct result of, the conflict that had arisen between Mr. Rakofsky and the defendant, by Mr. Rakofsky's action, acting in his client's interest and pursuant to his ethical and professional duty, in rejecting the defendant's demand that he ask Rodriguez questions Mr. Rakofsky, as his counsel, deemed detrimental to the interest of the defendant, leaving Mr. Rakofsky no alternative but to seek to withdraw as lead counsel for the defendant.

Consistent with his duty to his client, Mr. Rakofsky -- as he alleged in his Amended Complaint[47] -- made his motion only after taking into account the posture of the case as it then stood as a result of his pre-trial investigation, his effective cross-examination of Rodriguez and the likelihood that a successor as lead counsel would (assuming the Government decided to retry the defendant) have a likelihood of success in avoiding a guilty verdict due to Mr. Rakofsky's efforts greater than he was likely to have before Judge Jackson. In making his judgment and his motion to withdraw as lead counsel, Mr. Rakofsky took into consideration Judge Jackson's consistent rulings in favor of the Government, including his arbitrary and capricious rejection of Mr. Rakofsky's medical expert and his ruling, after having first precluded AUSA Bryant from offering a photograph of Elliott's bloodstained shirt, allowing the actual bloodstained shirt in evidence, which permitted AUSA Bryant to pollute and inflame the jury by parading it in front of them.

In sum, the Deaner trial would not have terminated when it did had Mr. Rakofsky not moved for his withdrawal as lead counsel for the defendant for the sole reason that a

[47] *See* Par. 109 of Amended Complaint.

conflict had arisen between him and his client – which Judge Jackson confirmed as a result of his *voir dire* of the defendant and stated on the record clearly and unequivocally – as a result of the defendant's demand that Mr. Rakofsky ask Rodriguez certain questions that Mr. Rakofsky believed were detrimental to his client's defense and, therefore, declined to ask. This appears not only on the record of proceedings on the afternoon of Thursday, March 31, 2011, but also on Friday, April 1, 2011, when Judge Jackson stated on the record, in the presence of Alexander:

> **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. 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**...

Thus, the headline and opening line of Alexander's April 1 article, which, read together and in the context of the assertions that follow, effectively stated that "Judge Jackson declared a mistrial Friday [April 1, 2011] in . . . [the Deaner] murder case over attorney [Joseph Rakofsky]'s competence," simply cannot, on any reading of the record of proceedings, either on March 31, 2011, or April 1, 2011, be considered either a fair or a true report of those proceedings.

In point of fact, if one were to search the record of the proceedings on Friday, April 1, 2011, for references to the word "mistrial," one would find none. That word simply was not used by Judge Jackson at any point in his circuitous and hypothetical monologue from the bench, the surreal factual assumptions of which are suggestive of a case other than the Deaner case. That may simply be attributed to the fact that no mistrial occurred on April 1, 2001, a mistrial having occurred the preceding day. Logical analysis of the facts of record makes such a conclusion unavoidable. Analyzing Judge Jackson's

view of the case in contractual terms, there was no unfulfilled condition precedent to a mistrial that existed when court recessed at the end of the day on March 31, 2011, as Judge Jackson stated on the record to AUSA Bryant. All had fully occurred. There was only a condition subsequent that Judge Jackson imposed upon himself: the possibility that the defendant might have an overnight change of mind about waiving any claim of double jeopardy should the Government determine to retry him following the mistrial (that being a decision to be made by the appropriate officers of the Executive Branch of the Government, not of its Judicial Branch, of which Judge Jackson was one of many members), as Judge Jackson understood Mr. Deaner had indicated under questioning from Judge Jackson in his *ex- parte voir dire* of the defendant..

On Thursday, March 31, 2011, Judge Jackson took the view that the occurrence of a mistrial depended upon the defendant's decision to accept new lead counsel in place of Mr. Rakofsky and waive any claim of Double Jeopardy following Mr. Rakofsky's motion to withdraw as lead counsel for the defendant following their conflict over questions the defendant wanted Mr. Rakofsky to ask. That Judge Jackson stated, "If I get another lawyer, it's going to have to start all over again and... this trial is going to end and a mistrial will be declared" plainly renders untrue both the headline and the body of the Washington Post's April 1 report tying the mistrial to Mr. Rakofsky's competence, as does the fact that it was Mr. Rakofsky's motion to be relieved as lead counsel that initiated Judge Jackson's *voir dire* of the defendant, in which he led the defendant into expressing a desire for new counsel and waiving Double Jeopardy in the first place. The fact that Mr. Rakofsky had first moved to be relieved as lead counsel to avoid having to ask questions of Rodriguez that (by whatever inspired) Mr. Deaner insisted on

Mr.Rakofsky's asking, makes the statement in the opening paragraph of the Post's April 1, 2011 article that Judge Jackson "allowed the defendant to fire his New York-based attorney" particularly neither true nor fair.

Proceeding upon his decision on Thursday, March 31, 2011, to let the defendant decide overnight whether he still wished for new lead counsel and to waive any claim of double jeopardy, Judge Jackson, following the defendant's expression of no change in his decision, stated on the record on April 1, 2011, that Mr. Rakofsky's motion (to be relieved as lead counsel), the only motion before him, "is granted." Thus, it is clear, on the face of the record, which the Post defendants say governs the determination of its claim of right to the privilege afforded under Section 74 of the Civil Rights Law, that Judge Jackson granted Mr. Rakofsky's motion to be relieved as lead counsel solely because he (Judge Jackson) found, upon his *voir dire* of the defendant, that there was a conflict between Mr. Rakofsky and his client (as the defendant had confirmed to Judge Jackson on his *voir dire*) and not for any other reason, including, but not limited to, the competence of either Mr. Rakofsky or his co-counsel, Mr. Grigsby. That, in Judge Jackson's view, expressed March 31, 2011, resulted in a mistrial, whether effective March 31, 2011, or on April 1, 2011. Anything else that was spoken on April 1, 2011, is, we respectfully submit, non-germane *obiter dictum*, having no relation to or effect upon Judge Jackson's action reached on March 31, 2011, and confirmed on April 1, 2011, or upon this Court's decision on the Post Defendants' motion.

In sum, the statements in the headline and opening lines of the Post's April 1, 2011 article are in direct conflict with the incontrovertible facts of record in the Deaner proceedings that the sole event that prompted the termination of those proceedings was

Mr. Rakofsky's motion, on March 31, 2011, to withdraw as lead counsel for the defendant based upon his conflict with his client, both of which were confirmed on the record by Judge Jackson, and that the proceedings were carried over by Judge Jackson to the following day solely to allow the defendant to "sleep on" his decision to accept the mistrial he had agreed to in Judge Jackson's *ex-parte voir dire* that followed Mr. Rakofsky's motion to withdraw as lead counsel for the defendant by requesting a new attorney and waiving a claim of double jeopardy.

Plainly, this conclusion in no way involves a mere "lexicographical" parsing by Plaintiffs of language in the Post report such as the Post defendants imply in their Memorandum of Law. Rather, it goes to the heart of what Judge Jackson said and did on the record on March 31, 2011, following Mr. Rakofsky's motion to withdraw as lead counsel for the defendant. We respectfully submit that the lexicographical parsing shoe is rightfully placed on the foot of the Post defendants, who, in their Memorandum of Law in support of their motion, parse the language of the record of proceedings by which they say they are bound in a manner that portrays Judge Jackson's words in a manner inconsistent with both their natural meaning and the record of proceedings taken as a whole, which the Post defendants agree is what determines whether their report is fair and true within the meaning of Section 74 of the New York Civil Rights Law.

Once again, we could stop here on this issue (which, we respectfully submit, this Court need not even reach), having demonstrated that Alexander's April 1 article is manifestly neither a true nor a fair report of the proceedings in the Deaner case on which it purports to report. However, we recognize that the Post defendants will point to certain of the aforementioned hypothetical and surreal statements by Judge Jackson in the April

1 record not yet addressed in detail herein, in which they may presume to interpolate Mr. Rakofsky's name notwithstanding its absence from those statements and the impossibility of their being applied either to Mr. Rakofsky or to the Deaner proceedings. Indeed, that intention is signaled clearly by another of Mr. Alexander's factual fabrications in his April 1 article. We refer to the second paragraph thereof, on which the headline of the article is based, which, as fabricated deceptively by Mr. Alexander, brazenly misstates that "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."

As we have pointed out *supra,* Alexander simply engrafted upon one word uttered by Judge Jackson -- "astonished" -- that did relate to Mr. Rakofsky the rest of his sentence, which Judge Jackson used without identifying to whom they referred, in the nature of a "legal pastiche," much as he did in fabricating his forgery of the bogus e-mail of his own invention that attributed to Mr. Rakofsky and then quoted in his April 1 article, literally making the sentence out of whole cloth. The words he engrafted that follow "astonished" in his article were not specifically addressed by Judge Jackson to Mr. Rakofsky nor were necessarily applicable to him, being susceptible of application equally, and more logically, to Mr. Rakofsky's experienced local co-counsel.

And, of course, Judge Jackson didn't "dismiss" Mr. Rakofsky, as Alexander's April l article plainly misstates. As Judge Jackson expressly acknowledged on the record during the April 1 proceeding, Mr. Rakofsky "asked to withdraw mid-trial," citing a conflict with the defendant, his client, who acknowledged the conflict, which, as previously noted, related to questions the defendant wanted Mr. Rakofsky to ask

Government witness Rodriguez. It was that motion which Judge Jackson granted on the record on April 1, 2011.

None of the foregoing can be said to be mere "lexicographical" objections to actual words used in the Alexander article in the Post. They are nothing more or other than the falsification of the record of proceedings by the true words of which the Post defendants assert and concede they are bound under Section 74 of the Civil Rights Law and, like Alexander's fabrication of a sentence that he then attributes to Mr. Rakofsky's e-mail to Bean, bespeaks, conclusively, we respectfully submit, the manifest unfairness of the Post report, as well as its untruthfulness.

In the final analysis, it is, quite simply, indisputable that, whatever personal view of Mr. Rakofsky's actions in his conduct of Mr. Deaner's defense – limited, as they were, to his pretrial motions, his opening statement to the jury and his uncompleted cross-examination of Rodriguez – that Judge Jackson may have held on April 1, 2011, it was totally unrelated to the basis on which proceedings in the case terminated on that day. The same is true of when and why Judge Jackson may have come to such a view. He certainly did not express any negative view prior to April 1, 2011, and Mr. Rakofsky's conduct of his uncompleted cross-examination of Rodriguez, and the basis for his motion to withdraw as lead counsel on that date offered no basis for a negative view of the quality of his representation of Mr. Deaner.

D. The hypothetical comments by Judge Jackson that followed his grant of Mr. Rakofsky's motion to withdraw as counsel for Mr. Deaner do not affect the falsity of defendants' defamatory statements in their article of April 1, 2011, that Judge Jackson declared a mistrial as a result of incompetence on the part of Mr. Rakofsky.

As we have stated, we (apparently unlike our opposite numbers, who purport to find "anger" in words that do not express anger) do not pretend to be capable of reading minds and, therefore, refrain from attempting to do so. Thus, we do not attempt to explain precisely why Judge Jackson engaged in ruminating, in purely hypothetical terms, upon what he would have done had there been a conviction in the case. That, of course, was chimerical, given the posture of the Deaner proceedings when they ended, since the cross-examination of Rodriguez had not been concluded, the Government had not yet rested its case, and the defense case had not even begun. Therefore, there could not have been a conviction on Mr. Rakofsky's watch. Neither can we, or need we, attempt to explain Judge Jackson's reference in his rambling stream of consciousness discourse in the hypothetical case he contrived in his mind and his words to a finding of "manifest necessity," which he had expressly dismissed the previous afternoon.

The first and second paragraphs of the Post's April 1 article are not alone in containing unfair and untrue statements about Mr. Rakofsky's defense of his client. Throughout his article, Mr. Alexander, who purports to have knowledge of everything that went on during the trial on March 30 and 31, 2011, delves into mind-reading, as in the eighth paragraph of his article, in which he depicts Judge Jackson as "obviously angry and frustrated," telling Mr. Rakofsky (to whom he addressed his only remarks later, when handing him the Bean document he had been given earlier that morning) "that his performance in the trial was 'below what any reasonable person would expect in a murder trial.'" Those words were nowhere addressed by Judge Jackson to Mr. Rakofsky in the record. Thus, once again, Mr. Alexander is caught in yet another fabrication, this one -- like his attribution of "astonishment" to Judge Jackson -- being of the species of attaching to words actually uttered words other than the words with respect to which they

were uttered. A fair approximation of the words attributed by Mr. Alexander to Judge Jackson does appear at page 4 of the record of proceedings on April 1, 2011. In context, they appear following Judge Jackson's granting of Mr. Rakofsky's motion to withdraw from the case:

> "**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 (emphasis added)."
>
> "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 has 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" (emphasis added)."

The Court will note our emphasis of the words "manifest necessity" in the quoted language of Judge Jackson, which the Post article omitted. (Having disavowed occult powers, we cannot, and, therefore, do not, add "with knowing and willful deception.") That emphasis stems from the fact that, on March 31, 2011, virtually at the conclusion of the hearing on Mr. Rakofsky's motion to withdraw from the case, Judge Jackson stated that "this is **not** an issue of manifest necessity."

The words Judge Jackson used in the preceding excerpt from the record speak for themselves, and this Court will exercise its own judgment in assessing whether the Post's portrayal of it, given Mr. Alexander's knowledge of the proceedings on March 31, 2011, which all of his words indicate, makes their use in the Post article/report fair within the meaning and intendment of Section 74. Both Judge Jackson's quoted words and Mr. Alexander's torturing of those words are completely hypothetical and, in the context of the actions and words of Judge Jackson reflected in the record of the proceedings in the case on March, 31, 2011, as they stood on April 1, 2011, surreal and without foundation. Obviously, there had not been, and could not have been, any conviction in the Deaner proceedings, certainly not while Mr. Rakofsky was representing the defendant, and Judge

Jackson's alternative words in his hypothetical ruminations were simply inconsistent with his words the preceding afternoon. As Judge Jackson took pains to note both at that time and in his words on April 1, 2011, Mr. Rakofsky moved, on March 31, 2011, for his own withdrawal from the case before completing his cross-examination of the Government's first substantive witness, whose testimony elicited by Mr. Rakofsky would seem to have destroyed the witness's utility to the Government and (at least as to Mr. Rakofsky's questions not asked) apparently triggered Mr. Rakofsky's conflict with the defendant, his client, on the issue of questions he wanted Mr. Rakofsky to ask of Rodriguez. While, we claim no ability to read Mr. Deaner's thoughts as Mr. Alexander purports to read those of Judge Jackson, Mr. Deaner's demands of Mr. Rakofsky might have had their origin in Rodriguez's testimony concerning his sexual liaison with Mr. Deaner's mother.

Of course, Mr. Alexander, with his claimed occult powers, had no problem in divining from Judge Jackson's ruminations from the bench on April 1, 2011, *obiter* and hypothetical as they were, that Judge Jackson had found Mr. Rakofsky, who, during the trial, had made an opening statement that may have been longer than the average opening and had placed the Government's case in imminent danger of dismissal by his cross-examination of its star witness, and had yet to call a witness in his client's defense, to be incompetent and, for that reason – rather than because Mr. Rakofsky had moved for his own withdrawal from the case -- had "declared a mistrial" on that day, which he never did. The record, on which the Post defendants rest their claim of privilege under Section 74, contains no basis for conflating Mr. Rakofsky's competence with either his motion for withdrawal or its grant by Judge Jackson.

We respectfully submit that the statements Judge Jackson made during his hypothetical stream-of-consciousness ruminations are not factually relevant to, much less dispositive of, the issue of the fairness or truth of the statements in the Post's April 1 report that Plaintiffs have assigned herein as defamatory. Whatever Judge Jackson may or may not have thought and why he thought as he did cannot be and is not supported by the record, even by using Mr. Alexander's brand of voodoo journalism. The undisputed and indisputable fact is that the proceedings in the Deaner case terminated, on either March 31, 2011 or April 1, 2011, because Judge Jackson granted Mr. Rakofsky's motion to be relieved as lead counsel due to the existence of a conflict between him and the defendant, which the defendant had confirmed to Judge Jackson, that related solely to questions the lay defendant wanted him to ask of Government witness Rodriguez, who had testified to a sexual relationship with the defendant's mother. Judge Jackson made no other findings of fact or conclusions of law; therefore, all else is cant that cannot qualify the Post's report for a privilege from suit under Section 74 of the New York Civil Rights Law, which places the burden upon the Post defendants to establish the truthfulness of their report of April 1, 2011,within the four corners of the record – a report that is demonstrably unfair in both intent and effect, being dictated by commercial advantage and the product of factual fabrications throughout.

It cannot be denied that Judge Jackson was motivated to make remarks on April 1, 2011, that denigrated Mr. Rakofsky. Why he did so we cannot say, being neither clairvoyant nor trained psychiatrists or psychologists. However, we do note that the only accusatory reference to Mr. Rakofsky – indeed, the only clear reference at all to Mr. Rakofsky -- in Judge Jackson's words from the bench on April 1, 2011, related to his

having chosen a murder case for his first trial (which "astonished" Judge Jackson), which suggests that Judge Jackson may have been distressed by the fact that, by moving for his withdrawal, Mr. Rakofsky had escaped the fate Judge Jackson saw for him in his hypothetical tale of a conviction followed by a grant of a new trial base upon inadequate representation.

Under the circumstance, the Government's failure to retry Mr. Deaner on a murder charge combined with its grant of a greatly-reduced charge never offered to him while he was represented by Mr. Rakofsky stands as a vindication for Mr. Rakofsky's heroic self-sacrificing efforts on behalf of his client and the very antithesis of incompetence, no acts of which were ever laid at Mr. Rakofsky's door in any of Judge Jackson's remarks from the bench.

E. The April 9, 2011 Article

Given the Post defendants' sole reliance in their motion upon the privilege accorded by Section 74 of the New York Civil Rights Law to reports of judicial proceedings, Alexander's April 9 article requires little comment, since only three sentences in the article purport to report on the Deaner proceedings while Mr. Deaner was represented by Plaintiffs. The first two are in the seventh and eighth paragraphs of the article. The first states that: "On April 1, three days into Deaner's trial, D.C. Superior Court Judge William Jackson dismissed Rakofsky from the case and declared a mistrial, citing the lawyer's lack of competence." The second, insofar as it purports to report upon the trial, states: "In addition, Rakofsky told the jury during his opening statement that the Deaner case was his first trial . . ."

The first sentence requires little comment beyond what appears in the preceding portions of this Argument. Quite simply and obviously, it is not true, either in its words or in substance. As we have pointed out at length, Judge Jackson never "declared a mistrial" on April 1, 2011, nor did he, then or ever, "dismiss Rakofsky from the case." While Judge Jackson denigrated defense counsels' performance in general (without specifying which defense counsel to which Judge Jackson was referring), he did not specifically "cite [Mr. Rakofsky's] lack of competence" in doing what Judge Jackson did do on April 1, 2011, which was to grant Mr. Rakofsky's own motion, made to withdraw as lead counsel for the defendant, Mr. Deaner, a motion Mr. Rakofsky made the previous day, Thursday, March 31, 2011, which he expressly based upon his conflict with his client over the client's demand that Mr. Rakofsky believed would, were he to ask them, be detrimental to his client's defense of the charges against him, which demand and conflict the defendant then confirmed to Judge Jackson upon his *ex-parte voir dire* of the defendant. Both on Thursday, March 31, and on Friday, April 1, 2011, Judge Jackson confirmed on the record that he was doing so based upon Mr. Rakofsky's motion and the defendant's waiver of any claim of Double Jeopardy rights, without which, it is clear from Judge Jackson's statements on the record, Judge Jackson would not have granted Mr. Rakofsky's motion and terminated the proceedings in the case at bar. Indeed, as Judge Jackson told AUSA Bryant on Thursday, March 31, 2011, Judge Jackson refrained from making a final ruling that day to allow the defendant to sleep on his decision to accept new counsel and waive his Double Jeopardy rights, since no proceedings had been scheduled on April 1, 2011. (Without intending to judge or impugn any of Judge Jackson's motives, he may have been more concerned about the effect of final action on

Thursday, March 31, 2011, on the defendant's waiver of double jeopardy rights, without which a retrial by the Government might not have been possible, than upon the defendant's rights and interest.)

As for the second sentence, to the extent that it reports on the proceedings, its truth cannot be and is not contested. Mr. Rakofsky does not dispute having made the statement to the jury that is attributed to him. However, we can and do dispute its fairness, a conjunctive requirement of the Section 74 privilege claimed by the Post defendants. Its juxtaposition following the untrue statement in the sentence that precedes it bespeaks its unfairness along with that of the following sentence. It is obviously intended as an act showing Mr. Rakofky's lack of competence. On the contrary, as AUSA Byrant's pained reaction to Mr. Rakofsky's remarks to the jury showed her understanding of its potential effect upon the finding of reasonable doubt by the jury, Mr. Rakofsky's disclosure of his having not tried a case before in his opening statement to the jury thus may be viewed as an act showing his competence beyond his lack of prior experience in a jury trial, an act even Judge Jackson admitted was "skillful."[48]

III.

The Amended Complaint Sets Forth a Valid Cause of Action against Some or All of the Defendants herein for Intentional Infliction of Emotional Distress

"I heard Joseph Rakofsky raped and murdered a young girl back in 1990."[49]

New York law recognizes a civil cause of action for intentional infliction of emotional distress ("IIED"), which provides relief from extreme and outrageous

[48] *See* Exhibit 3, Page 98, Line 2 ("skillfully injecting it into the jury...")
[49] *See* Exhibit 40.

intentional or or reckless conduct that causes severe emotional distress to another. The victim of such conduct is entitled to recover damages for psychological or emotional injury even when there is no physical injury, no physical contact, and no fear of harm. There is no specific conduct that constitutes this tort. There is an after-the-fact judgment about the defendant's behavior and its ability to produce a severe emotional disturbance. *Howell* v. *New York Post Co.*, 81 N.Y.2d 115, 122 ff. (1993), first recognized the tort and articulated its elements). The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. *Id.* Surely, the quotation at the head of this argument point more than qualifies as "extreme and outrageous" behavior, particularly when accompanied, as it is, by allusions to and associations with recommendations to exterminate the Jews[50] (which was published by certain defendants in close proximity to a photograph of Plaintiff and an elderly relative wearing a yarmulke) and acts of bestiality.[51]

"The distinction between privileged and non-privileged conduct as it relates to infliction of emotional distress is implicit in our cases . . . ." *Id.* "If an employer has the right to discharge an employee, the exercise of that right cannot lead to a claim for infliction of emotional distress, however distressing the discharge may be to the employee. In the course of discharging the employee, however, an employer's deliberate reprehensible conduct intentionally or recklessly causing severe emotional distress is not within the employer's right, and may support a claim for intentional infliction of emotional distress." Thus, the Court of Appeals recognizes a single form of privileged

[50] *See* Exhibit 15.
[51] *See* Exhibit 22.

conduct that is an exception to this tort in which the actor is privileged to act as he did for which there is no liability. *Id.*

In evaluating the outrageous conduct element, New York appellate courts have found a viable cause of action for IIED only when severe pain and anguish is inflicted through a deliberate and malicious campaign of harassment and intimidation, as distinguished from a single act of aggravating conduct. *Owen* v. *Leventritt,* 174 A.D.2d 471 (1st Dept. 1991); *Roberts* v. *Pollack,* 92 A.D.2d 440 (1st Dept. 1983).

A number of the Defendants herein have expressed the desire to ruin the Plaintiffs and see to it that no one ever retains them again.[52] That has, in fact, been the result of their onslaught. They have not acted once but on multiple occasions to advance that aim.[53] For examples of sufficiently outrageous conduct, see *Esposito-Hilder* v. *SFX Broadcasting Inc.,* 236 A.D.2d 186 (3d Dept. 1997) ("ugliest bride" contest); *Roach* v. *Stern,* 252 A.D.2d 488 (2d Dept. 1998) (discussion re cremated human remains); *Hughes* v. *Pacienza,* 33 Misc. 3d 1208(Sup. Ct. Kings Co. 2011) (U) (installation of surveillance equipment in female employees' bathroom); *Bernat* v. *Williams,* 27 Misc. 3d 1219 (Sup. Ct. Nassau Co. 2010) (U) (Defendant's decedent committed suicide by shotgun blast inside her home on her birthday after end of romantic relationship); *Kamar* v. *AKW Holdings, LLC,* 19 Misc. 3d 1113 (Sup. Ct. Kings Co. 2008) (U) (multiple threats to physical safety).

IV.

The Amended Complaint Sets Forth a Valid and Viable Cause of Action against Some or All of the Defendants herein for Intentional Interference with Contract

[52] *See* Exhibit 17 and 41.
[53] *See* Rakofsky Affidavit par. 59 - 80.

"If all works as it should, no client will ever hire Rakofsky again. Good for clients. Not so much for Rakofsky…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?"[54]

"He's ruined now. I wonder what kind of work he could find after this."[55]

The above quotations are from two Internet postings by Defendants on websites linked to those of other Defendants herein[56] and exemplify the stated intentions and objectives of some or all of the so-called "blogger" Defendants herein.

New York recognizes causes of action for intentional interference with an existing contract ("IIEC") and for intentional interference with prospective economic advantage ("IIPEA"). The former tort relates to existing contracts, and the latter tort relates to contracts that would have been made but for the defendant's tortious conduct. Establishing the former is relatively simple and has a low bar; establishing the latter is relatively complex and has a high bar.

There are four elements to the former: (1) the existence of a contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional inducement of the third party to breach the contract or making performance impossible; and (4) damages to plaintiff.[57]

Defendants are aware in the abstract that plaintiffs had contracts with third parties, but likely did not know – nor did they care to know -- the particular facts and

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[54] *See* Exhibit 17.
[55] *See* Exhibit 41.
[56] *See* Exhibit 1(p.1) - (p.7).
[57] *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993).

circumstances thereof, since all Defendants wished and intended to do was to destroy **all** existing contracts and all potential contracts between Plaintiffs and their clients.[58] They literally wanted to put Plaintiffs out of business.[59] See *Guard-Life Corp.* v. *S. Parker Hardware Mfg. Corp.*, 85 50 N.Y.2d 183 (1980). We respectfully submit that it is and should be sufficient that Defendants knew that contracts probably existed, even if they did not know the particular details thereof, having avowedly set out to destroy them.

The loss of future contracts -- prospective economic advantage -- requires proof of seriously evil behavior. Non-exclusive examples of such conduct are physical violence or threats of it. The misconduct must be more "culpable." Fraud, economic coercion, and other intentional tortious acts will suffice; mere negligence is insufficient. There must be a "wrongful" purpose, or "wrongful" means must be used. Obviously, those future contracts need not (since they cannot) be in present existence.

The conduct must be exclusively for the purpose of harming the plaintiff. A defendant who seeks to advance his own economic interests is usually on safe ground. *See Purgess* v. *Sharrock,* 33 F.3d 134 (2d Cir. 1994) (involving false reports of medical malpractice; liability was sustained).

We respectfully submit that defamation, being an intentional tort, should be deemed and held to be intentional wrongful action sufficient to qualify as intentional tortious interference with future contracts, particularly given the open expression of that intent by and among Defendants acting in combination and concert to destroy Plaintiffs' legal practice.

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[58] *See* Exhibits 17 and 41.
[59] *See* Exhibits 17 and 41.

CONCLUSION

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

Respectfully Submitted,

Sworn to before me on the ____day of May, 2012

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