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.*

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MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS ERIC TURKEWITZ, et al. TO DISMISS THE AMENDED COMPLAINT

Civil Action

Index No.: 105573/11

PLAINTIFFS'MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF DEFENDANTS ERIC TURKEWITZ, et al. 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 Turkewitz Law Firm, *et al.* (designated as being represented by Mr. Turkewitz and Mr. Randazza, hereinafter

referred to collectively as "Turkewitz Defendants") to dismiss the Amended Complaint filed by Plaintiffs.

INTRODUCTION

This Memorandum of Law is filed in opposition to the motion of the Turkewitz Defendants to dismiss the Amended Complaint filed by Plaintiffs, Joseph Rakofsky and Rakofsky Law Firm, P.C. ("RLF").

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. 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.

In Note 1 to the Turkewitz Defendants' Memorandum of Law in support of their motion, they put Plaintiffs and the Court on notice that they "intend to seek sanctions against 'the Plaintiff under 22 NYCRR 130-1.1 and CPLR § 8303-a." Plaintiffs do not address the footnote except to note that the facts and legal arguments of Plaintiffs in this Memorandum of Law demonstrate the manifest inapplicability of the cited provisions and Defendants' lack of objectivity and good faith to this Court.

STATEMENT OF FACTS

This action arises from Defendants' deliberate and malicious sliming of Plaintiffs, Joseph Rakofsky, who was admitted to practice as an Attorney-at-Law by the State of New Jersey by the Supreme Court of the State of New Jersey and is a member of the Bar of New Jersey in good standing, and his law firm, the Rakofsky Law Firm, P.C. (hereinafter referred to as "RLF").

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

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

Because Mr. Rakofsky was then a member of the Bar of the State of New Jersey and had not been admitted to practice law in the District of Columbia, Mr. Rakofsky was required to seek admission *pro hac vice* from the presiding Judge in order to represent the client in the proceedings against him in the District of Columbia. For that reason and because the trial of the client was to be the first criminal trial in which Mr. Rakofsky

would be lead counsel, Mr. Rakofsky associated himself with Sherlock Grigsby, Esq. (herein after referred to as "Grigsby"), who was admitted to practice in the District of Columbia and who had substantial experience representing persons accused of committing crimes, including homicide, therein, Mr. Grigsby having been represented to Mr. Rakofsky by an experienced criminal defense lawyer in the District of Columbia.

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

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

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

As a result of negotiations with the AUSA, Mr. Rakofsky was granted access to two of the C.I.'s, whom he then interviewed. As a result of the interviews, Mr. Rakofsky narrowed down the remaining potential C.I.'s to C.I. #2, whose identity was not disclosed

to him prior to the trial of the case and who he, therefore, believed would be an important witness for the Government.

In addition to interviewing two of the C.I.'s identified to him and access to whom was given to him by the AUSA, Mr. Rakofsky made numerous written motions to obtain disclosure of exhibits and videos made of the crime scene by the District of Columbia Police.

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

As a result of his study of the documents related to the homicide of Elliot, Mr. Rakofsky believed that Elliot had been present at the time and place of the homicide for an unlawful purpose, to commit a robbery of the client and/or others with whom the client had been engaged in gambling at a block party in progress at or near the crime scene, the cash used in such gambling being substantial in amount. In addition, Mr. Rakofsky believed that Elliot had been the aggressor in the incidents leading to his homicide as a result of his having recently ingested Phencyclidine, a chemical commonly

known as "PCP," which causes users to become unusually aggressive. In order to adduce proof that Elliot was on PCP and thereby create reasonable doubt in the minds of jurors that Elliot had been robbed, Mr. Rakofsky and RLF engaged an expert witness, William Manion, M.D., who was prepared and qualified to testify at the trial of the client to the effects of the ingestion of PCP upon Elliot, whose recent use of PCP was revealed by the Toxicology Report accompanying the Autopsy Report.

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

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

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

> Judge Jackson: The – and it says here that he is a Juris Doctor, he is a medical doctor, he has a Doctor of Philosophy in Anatomy, and he has a residency in forensic pathology and anatomical and clinical pathology. It doesn't say anything about PCP here. What are his qualifications of PCP?

Doesn't say anything about degrees of psychopharmacology or pharmacology or any of that...You can talk about his aggressive behavior, you can talk about anything you want to talk about but not that he had drugs in his system until you lay a predicate for it, all right...

Rakofsky: Your Honor, very respectfully, is there any set of facts that we could offer that would justify the mentioning of PCP in the opening?

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

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

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

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

In addition, on March 28, 2011, Mr. Rakofsky moved to exclude as inflammatory to the jury several Government photographs, one of which being a photograph depicting Elliot's face after his eyes were opened by a Government agent who may have also photographed Elliot's body. Out of approximately 20 photographs the Government

sought to offer into evidence, the only photograph that Judge Jackson excluded was a photograph of Elliot's blood-soaked shirt.

Following the seating of a jury of 14 persons, the AUSA made her opening statement, which was followed by Mr. Rakofsky's opening statement on behalf of the defense, in the course of presenting which Mr. Rakofsky was interrupted repeatedly by Judge Jackson, in each or nearly each instance without any audible objection by the AUSA. At one point in his opening statement, without ever mentioning "PCP" or "Phencyclidine," Mr. Rakofsky made reference to the Toxicology Report that had been submitted as part of the Government's Medical Examiner's report, which prompted Judge Jackson to interrupt Mr. Rakofsky and to suggest in a sidebar conference that he (Judge Jackson) considered that to be a reference to PCP. (Judge Jackson erroneously stated in the sidebar conference with Mr. Rakofsky that, in ruling on March 28, 2011, that Mr. Rakofsky should not refer to PCP in his opening statement, he had similarly so ruled that Mr. Rakofsky should not refer to the toxicology report in his opening statement; however, an examination of the transcript of March 28, 2011 proves that he referred only to references of PCP and not to references to the toxicology report.) Judge Jackson reproached Mr. Rakofsky for being repetitive, although his need to repeat statements he may have said previously was caused by Judge Jackson's frequent interruptions of his opening statement.

Although Judge Jackson took issue with respect to Mr. Rakofsky's reference to the toxicology report, Judge Jackson acknowledged in open court outside the presence of the jury, following the conclusion of Mr. Rakofsky's opening statement, that his presentation of the opening statement was "skillful" on the part of Mr. Rakofsky. Further, Judge Jackson stated to Mr. Rakofsky: "And I think you, quite honestly, tried to

adhere to the Court's ruling. You slipped a couple of times, but you've been trying to adhere to the Court's rulings..."

Following Mr. Rakofsky's opening statement, Judge Jackson summoned the defendant to the bench and conducted an *ex parte* sidebar conversation with the defendant, in which Judge Jackson inquired of the defendant whether he wished to continue to be represented by Mr. Rakofsky as his lead counsel. On a subsequent occasion on the following day, Judge Jackson repeated the question to the client. On each occasion, the client unequivocally expressed his desire to continue to be represented by Mr. Rakofsky as his lead counsel.

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

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

On March 31, 2011, following the testimony of the aforementioned witnesses for the Government, the AUSA called Gilberto Rodriguez ("Rodriguez"), who was identified as C.I. #2, the only confidential informant not previously disclosed by the AUSA or otherwise made known to Mr. Rakofsky. His testimony, both on direct examination by the AUSA and on cross-examination by Mr. Rakofsky, suggested strongly that

Rodriguez, who claimed to have witnessed the homicide of Elliot by Javon Walden, did not actually witness the homicide, as he testified that Elliot had been shot in the chest, contrary to the expert testimony of the Medical Examiner, who had preceded him as a witness, albeit out of Rodriguez's hearing, that Elliot had been shot in the back by only one bullet.

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

Mr. Rakofsky determined that the conflict with the client on the issue of whether to ask the questions that the client had posed to him required him to seek to withdraw as lead counsel for the client. In arriving at the decision to make such an application, which Mr. Rakofsky believed would inevitably result in a mistrial that would permit the Government to retry his client, Mr. Rakofsky took into consideration the fact that, as a result of the blatant "alliance" between Judge Jackson and the AUSA that resulted in virtually all of Judge Jackson's rulings being in favor of the Government, Mr. Rakofsky's defense of his client had been gutted and had virtually no chance of success. However, should the Government determine to retry the defendant following a mistrial, the attorney who would then be lead counsel for the defendant would likely have a greater possibility of success in defending the defendant using the preparation of the defense of the defendant and the disclosure of the prosecution secrets, including the identities of the 4

C.I.'s, the grand jury transcript of C.I. #2 (Gilberto Rodriguez), the in-court testimony of Gilberto Rodriguez, the grand jury transcripts of the testimony of the lead detective, etc. as a result of Mr. Rakofsky's efforts on behalf of the defendant and the defense strategy laid out by Mr. Rakofsky (but not yet revealed in open court) and would be able to secure the services of a medical expert witness whose qualifications would be acceptable to such Judge as might be assigned to the retrial of the client, assuming the Government were to decide that, taking into consideration the proceedings that had already transpired in the case and the availability to Mr. Rakofsky's successor as lead counsel for the client of Mr. Rakofsky's defense strategy, should the client be subjected to retrial. Therefore, on Thursday, March 31, 2011, Mr. Rakofsky advanced his motion to withdraw as lead counsel for the client.

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

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

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

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

Judge Jackson: Well, I've asked him twice whether he was satisfied. The issue of

– he needs to understand that certain questions, you know – that have to be – what do you mean by bad questions?

Rakofsky: Questions that I think are going to ruin him and I cannot have that.

Judge Jackson: If you need time to talk to him and to explain it to him, because sometimes it's very hard in the middle of examination to explain to him why it's a bad question, and if you want time to talk to him about that, you can go into the back and talk to him.

Rakofsky: Your Honor, respectfully, I think now might be a good time – I think it might be a good time for you to excuse me from trying this case…I don't believe there is anybody who could have prepared for this case more diligently than I… in light of this very serious barrier, I think now might be a good opportunity for –

Judge Jackson: We're in the middle of trial, jeopardy is attached. I can't sit here and excuse you from this trial.

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

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

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

that the client did not have a good relationship with Grigsby, or whether Judge Jackson considered Grigsby incompetent to defend the client.

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

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

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

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

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

At that time, Judge Jackson replied: "All right...we won't be sitting on Friday."
(*See* Exhibit 2, Page 32, Line 20)

> 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, indicated that there was, indeed a conflict between he [*sic*] and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial..."

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

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

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

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

Judge Jackson then uttered remarks critical of defense counsel, without indicating in his remarks whether he was referring to Mr. Rakofsky or to his experienced co-counsel, Mr. Grigsby, These remarks were followed by a purely hypothetical and

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

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

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

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

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

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

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

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

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

[2] See Exhibit 12.

even more money than Mr. Rakofsky was willing to authorize, and ultimately, sought 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 ARGUMENT

The bulk of the 55 pages of the Turkewitz Defendants' Memorandum of Law in support of their motion to dismiss the Amended Complaint is devoted to arguments *ad hominem* directed against Joseph Rakofsky. Those arguments have two objectives. One is to attack his competence and his ethics as a lawyer – the two subjects of false statements in which Plaintiffs allege Defendants have defamed them. The other is to attempt to cast those statements as mere opinions rather than, as they are, statements of fact, so those Defendants can then argue that all they were doing was expressing their opinions, which cannot be the subject of an action for defamation.

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; 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. The *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.

The vast majority of the Turkewitz Defendants are practicing attorneys who maintain or have access to Internet websites that they use for the commercial advancement of their professional practices as distinguished from the advancement of knowledge to members of the public or the offering of continuing legal education, which constitutes, as the Defendants use the websites or to which they have access as a means of transacting business in the State of New York for purposes of CPLR 302(a)(1). The use of the Internet is the one thing that unites them by its ubiquity and the instantaneity of communication it affords all of the Defendants, permitting them to act with virtual simultaneity and permitting many to act as one, with their numerical strength giving them power no individuals acting separately would have. They have acted in combination and concert through the use of computer links that refer visitors from one website to the websites of other Defendants.

Why they have acted to defame Joseph Rakofsky is difficult to determine beyond the fact that they read an article in the Washington Post on April 1, 2011, presumably in its Internet edition, that blamed a mistrial in a local criminal case upon his alleged incompetence and accused him of instructing his investigator to get a Government

witness to change her testimony and thought they could use it to attract potential clients. Now, this was 2011, in the midst of a recession that has hit the law business hard, perhaps even harder u than the newspaper business, so they galvanize their websites – every self-respecting or simply hungry lawyer has at least one eponymously-named website -- and got together with like-minded hungry lawyers with websites with whom they all exchanged links; it would seem they decided that, by participating in a "Link Network" [3] (that included persons doing and transacting business in the State of New York pursuant to CPLR 302(a)(1)), more people will read their websites, which will translate into more visitors to their websites (i.e., "hits"), which will cause Google, the principal Internet search engine, to promote their websites to a higher position than other websites and, in turn, deliver them even more business, which is the name of the Internet game and the reason for "linking" with other websites. To attract visitors to their website, they simply repeated what they had read without making any effort, prudent or otherwise, to ascertain its truth. Of course, their statements of fact about Joseph Rakofsky were read by his clients and caused them to cease having him represent them, destroying his practice, but what the matter? Their websites have risen in the ranking of Google and can be expected to be seen by potential clients ahead of other websites.

That, of course, left Mr. Rakofsky with no alternative but to do what lawyers are trained to do when seriously injured by tortious conduct: sue the tortfeasors. But hell hath no fury like a lawyer who has been sued, so they publish even more lies about Joseph Rakofsky in responding to his lawsuit, conveniently forgetting that they started the whole thing gratuitously in the first place simply to further their own commercial interests. Some even sink to the depths of publishing child pornography and baselessly associating

[3] *See* Exhibit 1(p.1) - (p.7).

his name and image with it under such website headings as "Joseph Rakofsky Rapes Donkeys...'Rape-ofsky.'" Defendants in this action who are represented by Mr. Turkewitz published that Jews should be exterminated[4] (in a section of their website created by the 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).[5] Further, in so doing, they bestowed commercial benefits upon the Turkewitz Law Firm and other defendants represented by Mr. Turkewitz (as well as upon the Washington Post). Of course, they do so on websites for which they now claim federal protection for so doing. If this sounds like what the Turkewitz Defendants did and for which they're now trying to avoid a day of reckoning, it is not purely coincidental.

Defendants openly conspired with each other, acting in combination and concert, for the purpose of intimidating and destroying the reputation, business and profession of Plaintiffs (a practice hereinafter referred to as "mobbing"). Defendants linked their Internet websites to the Internet websites of their co-conspirators to silence Plaintiff and intimidate him from, and retaliate against him for, resorting to the legal processes available to Plaintiffs under the law, thereby interfering with their legal and constitutional rights, doing so through the use of the Internet (hereinafter referred to as "cyber-bullying"). Indeed, by linking their Internet websites to the Internet websites of their co-conspirators, the Turkewitz Defendants were able to magnify the damage they intended to cause to Plaintiffs.

Now that the Turkewitz Defendants have been called to account in this Court, they seek, through their arguments *ad hominem,* to recharacterize their statements in their

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

website from statements of fact to mere subjective opinions, ignoring the fact that the two very specific statements they made about Joseph Rakofsky on their websites in connection with his representation of Dontrell Deaner were cast, not as opinions, but as statements of fact and, as such, were false and defamatory. In sum, virtually none of counsel's arguments bear upon the issues before this Court, and we and the Court are left with a free-ranging hodge-podge of *ad hominem* attacks upon almost every aspect of Mr. Rakofsky's life and character that are intended merely to besmirch him, but contribute almost nothing that can inform or aid this Court in adjudicating the issue presented by Defendants' motion.

One statement is that a mistrial Defendants say occurred on April 1, 2011, was caused by Mr. Rakofsky's incompetence; the other is that Mr. Rakofsky directed his investigator to trick a Government witness into changing her testimony about Mr. Deaner's presence at the scene of a murder committed by another with which Mr. Deaner was charged under the Felony Murder rule. The first statement raises no issue of Defendants' opinion as to Mr. Rakofsky's competence; it merely raises a question of cause and effect, *i.e.*, of fact. The second statement raises no issue of their opinion as to Mr. Rakofsky's ethics; it merely asks whether he did or did not so instruct his investigator. In each case, the answer can be proven or disproved by reference to the judicial record in the Deaner proceedings: the hallmark of a statement of fact.

The falsity of Defendants' statements is most easily seen in the second case by reference to the actual email in which he instructed his investigator, Adrian Bean, simply to get an individual who had told Mr. Rakofsky and his co-counsel, Mr. Grigsby, that she had not been at the murder scene to repeat that to Bean so that, if the woman were later to

give contrary false testimony to the Government for cash, as he reasonably feared she might, Bean could impeach that testimony. (The Government had already paid cash to some of its other so-called "fact witnesses" in Deaner's case.) By his use of the verb "trick," Mr. Rakofsky merely intended to have Bean conceal from the woman that he was asking on behalf of his client. Defendants were led into making the statement they did by the fabrication of what purported to be, but was not, Mr. Rakofsky's email in the Washington Post article of April 1, 2011, which Defendants were quite willing to believe was genuine without making any effort to see Mr. Rakofsky's actual email, which was readily available to them in the document Bean underhandedly delivered to a different judge (and not the trial judge), sitting in a different court, which is reproduced in Mr. Rakofsky's Affidavit in Opposition. Because they accused Mr. Rakofsky of committing a crime (i.e. witness tampering), the Turkewitz Defendants committed defamation *per se*. Insofar as they are seeking dismissal as to false statements that are defamatory *per se*, they are arguing against well-established law.

Falsity of the first statement is no less provable. The record on April 1, 2011 is devoid of any reference to "mistrial" because the mistrial occurred the preceding day, Thursday, March 31, 2011, when Mr. Rakofsky, following a court recess, moved to withdraw as counsel for Mr. Deaner, citing a conflict that had arisen as a result of his client's demand that he ask of the Government's key witness (who had, on direct examination, testified to a sexual relationship with the defendant's mother) certain questions Mr. Rakofsky believed would damage his client's interests. Prior to the recess, Mr. Rakofsky had impeached the credibility and thereby, the effectiveness of the witness as an eyewitness with one question that disclosed that the witness could not have seen the

shooting. Following the defendant's confirmation to the trial judge of the conflict and his willingness to waive any Double-Jeopardy objections to retrial, the trial judge determined to declare a mistrial based upon the conflict and Mr. Rakofsky's motion, which the trial judge carried over to the next day to permit the defendant to change his mind, which he did not do and so granted. Thus, in point of fact, Mr. Rakofsky's motion and his client's waiver of objections to retrial, not any incompetence by Mr. Rakofsky, was the sole proximate cause of the mistrial.

Defendants fail in their attempt to rely upon the trial judge's words on April 1, 2011, that, "alternatively," he might have found "manifest necessity" in the incompetence of defense counsel to justify granting a new trial. The judge's words were entirely hypothetical and could have occurred only in the context of a conviction of Mr. Deaner, which could not have occurred while Mr. Rakofsky was representing him. (Even more to the point, as we shall see later in this tale of greed and defamation, it could never have occurred at all, as Mr. Deaner has not been and will not be retried, having entered a guilty plea to Involuntary Manslaughter – a far lesser offense than the Felony Murder 1 charge against which Mr. Rakofsky had undertaken Mr. Deaner's defense and a charge Mr. Rakofsky had sought from the Government, but that had been repeatedly denied (before Mr. Rakofsky cross-examined and discredited the Government's star witness at trial). We suggest that the Government's offer to accept such a plea rather than to retry Mr. Deaner on the Felony Murder 1 charge bespeaks Mr. Rakofsky's efforts on his client's behalf, most particularly, his cross-examination of the Government's key witness, and is the direct opposite of incompetence, as the trial judge must have realized and as the

Defendants herein would have realized had they attempted to ascertain the facts before they defamed Mr. Rakofsky to gain more visitors to their websites.

The only defense interposed as such by the Turkewitz Defendants, aside from their failed assumption of the truth of their defamatory charges – that Mr. Rakofsky was a public figure when he undertook to represent Dontell Deaner-- is so absurd as almost not to merit a serious response. If he became such as a result of his representation of Dontrell Deaner, it was after, and only because of the tortious acts against him by the Defendants in the case at bar through the Internet.

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; 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. The *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 (wrongly, we respectfully submit) to be a limited public figure, the Defendants' motion must still fail. In any event, that the email message fabricated by the Post may have used words similar to the words used in the authentic message sent by Mr. Rakofsky is irrelevant. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519-520 (1991). The sole issue is whether the fraudulent message placed within quotation marks in the Post article was "materially altered" from the message actually sent by Mr. Rakofsky. *Id.* And for purposes of constituting actual malice where required by *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), "deliberate or reckless falsification that comprises actual malice turns upon

words and punctuation . . . Meaning is the life of language. And . . . quotations may be a devastating instrument for conveying false meaning." *Id.* at 518. So are and were they in the case at bar.

Although not interposed as a distinct and separate defense, Defendants have cited and relied upon § 74 of the New York Civil Rights Law, which provides that a civil action cannot be maintained against any person for the "publication of a fair and true report" of, *inter alia,* any judicial proceeding (emphasis added). Suffice it to say that the forged and fabricated version of Mr. Rakofsky's email to his investigator that make Defendants' statements herein actionable defamation necessarily precludes any privilege under § 74, even passing any consideration of its fairness.

The Defendants would have this Court believe that Long Arm jurisdiction precludes causes of action in defamation. While it is true that CPLR 302(a)(2) and 302(a)(3) preclude causes of action for defamation, **CPLR 302(a)(1) permits causes of action for defamation**. With respect to Defendants' arguments concerning service of process, on page 20 of their motion, Defendants expressly waive the issue; it should, therefore, be deemed intentionally waived.

ARGUMENT

We state in this Introductory Statement those parts of the Argument in Part IV of the Turkewitz Defendants' Memorandum of Law in support of their motion to dismiss the Amended Complaint that Plaintiff will not, since it need not, meet to defeat their motion to dismiss.

One example, of course, is their comments about alleged flaws in the service of pleadings and process (the distinction between which Defendants' counsel seem not to

recognize), since they have waived any such defects (Defendants' Memorandum of Law at 21). Another relates to Plaintiff's failure to identify two Defendants whose names are not known to Mr. Rakofsky, but obviously are known to Defendants' counsel, who purport to represent them in this action. The latter two non-issues are obviously raised by counsel solely to denigrate Plaintiff as are all of their arguments *ad hominem.*

I.

The First Count of the Amended Complaint States a Cause of Action for Defamation against Defendants.

A. Introductory

With the foregoing preliminary issues out of the way, we turn to examine the heart of Defendants' motion in Subpart 2 of the second Subpart B of Article IV of their Memorandum of Law, beginning at page 22 of their Memorandum of Law, which is headed "Rakofsky Failed to State a Claim for Defamation Against any and All Defendants."

First, however, the *ad hominem* arguments Defendants intersperse throughout their entire Memorandum of Law, not only in their Argument, cry out for notice. The medium used by the Turkewitz Defendants to publish libelous statements against Joseph Rakofsky was not the printed word as such, but the Internet, using websites owned by the Defendants in most cases or available to them in other cases. The broad and instantaneous effect of defamation communicated through the Internet make it the choice of those who would use it to destroy by untrue statements of fact one who did nothing to harm them or any of their clients, as in the present case, makes it an awesome force for destruction of the lives of those against whom it is used. Its effect is virtually

instantaneous, requiring no time between use and effect, and has, when it is used to injure others, great and immediate potential for great and immediate harm. It has technologically and functionally replaced the local lynch mob that was formed to hang one thought – but not proved – to be guilty of a serious misdeed to the community. In past times, one needed a printing press to commit libel. Now all one person needs is an inexpensive and readily available computer (a hand-held device will generally suffice). By having or availing himself of a website, one person can, by using the appropriate software (also inexpensive and readily available) and computer links muster dozens, hundreds, thousands and even tens of thousands of individuals in a process that can – and is intended to -- bestow commercial benefits upon organizer and participant alike. The result is a technological "cyber lynch mob."

Indeed, one is reminded of Justice Clarence Thomas's characterization of the unsuccessful effort mounted against his nomination to the United States Supreme Court as a "technological lynching." While his choice of the particular term likely was dictated by his race and the historical incidence of lynching of blacks by whites, it is no less applicable functionally here. Whether the analogy he used was factually appropriate to his use of it has been the subject of continuing debate, its appropriateness in this case is, we respectfully submit, indisputable.

Mr. Rakofsky was not a "public figure"; he had never involved himself or participated in any way in any press conference (for <u>any</u> of his cases); he had never given any interviews; he was strictly a <u>private</u> lawyer representing a client in the *United States of America v. Dontrell Deaner*, a case that was not a high-profile case.

Assuming, *arguendo*, that Mr. Rakofsky were to be deemed to be a limited public figure (which, we respectfully submit, he was not), the Defendants' motion must still fail. 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.* If the message were deemed to be "materially altered," which, we respectfully submit it was, and if, as altered, the quotation falsely attributed to Mr. Rakofsky was a statement that bespoke criminal conduct (where the actual statement of him did not), then the alteration constituted actionable defamation and fulfilled the *Sullivan* requirement of actual malice. One who republishes, without privilege, the defamatory statements of another is himself or herself guilty of defamation.

In the case at bar, malice virtually pours from all of the arguments *ad hominem* that infest and infect the Defendants' Memorandum of Law. They bespeak the existence of actual malice in the most elemental state of an unreasoning hatred and desire to bring down Mr. Rakofsky. The *Rakofsky v. Internet* sobriquet coined by the Defendants bespeaks such malice, so also does Defendants' introduction of totally-irrelevant issues, all of which were intended to bring Mr. Rakofsky into disrepute, whether by statements of fact or statements of opinion, which bespeak malice even if they are not defamatory *in se*. Stated differently, while one who holds adverse opinions of another may not be guilty of defaming the other when he or she states those opinions, the fact that he holds those opinions is evidentiary of his malice in making false statements of fact concerning the individual. This precisely is what the Turkewitz Defendants have done. Therefore, it

matters not whether Mr. Rakofsky is or is not a public figure, the requirement of actual malice being fulfilled whether he is or is not a public figure.

This Court might wonder why the Turkewitz Defendants have used their Internet websites to defame Mr. Rakofsky and, indeed, why they did so at all. These are not two separate questions, though they may seem to be to one who attained adulthood before the advent of the Internet. More important, they loom large in the understanding of why the Defendants who are charged with defamation through the Internet engaged in the activity they did (and continue to do so even as we write this Memorandum of Law). It is so important a factor in this action that we devote what might seem like an inordinate amount of this Memorandum to their Website Network, which was intentionally formed by the Defendants' "linking" one defendant's website with another.

B. The "Link Network"

The statements made by each of the Turkewitz Defendants were made on Internet websites maintained by each of those Defendants. The rise of the Internet has had an extraordinary impact on the ability of purveyors of goods and services – including, but not limited to attorneys-at-law, such as most, if not all of the Turkewitz Defendants are -- to reach and interact with members of the public who may be valid targets for those goods and services. The legal profession has not missed the trend, although it may be behind the curve.

Such websites function as means and forms of advertising and are intended to attract clients and potential clients to seek the services of the attorney or law firm.[6] Indeed, that is the sole function of such attorney websites. Such websites, let there be no doubt, are not intended to educate or inform the public, either generally or specifically.

[6] *See* Olayon Affidavit.

Insofar as they may incidentally do so, it is incidental to their sole and exclusive purpose, which is to attract persons who may need legal assistance to seek it from the sponsor of the website.

The Defendants in the case at bar created a network of hyperlinks (*i.e.*, "Link Network") which transported the reader from one defamatory article, written by one defendant, to another defamatory article, written by a different defendant.[7] Many of the target articles constituted defamation *per se* because they accused Mr. Rakofsky of committing crimes both under Federal and State law (*i.e.* "witness tampering");[8] other publications published by certain Defendants (or their agents) associated Mr. Rakofsky with Child Pornography[9] and Bestiality[10] and such Defendants provided a hyperlink to the websites of Attorney Turkewitz and the Turkewitz Law Firm, Crime and Federalism and Michael Cernovich, My Shingle and Carolyn Elefant and The Washington Post Company, Keith L. Alexander and Jennifer Jenkins.[11]

Although the primary function of Defendants' websites is to advertise each respective attorney's law practice, the function of the Link Network is two-fold: 1) to advance their own pecuniary and business interests and 2) to silence and intimidate Mr. Rakofsky from, and retaliate against him for, resorting to the legal processes available to him and the Rakofsky Law Firm under the law, thereby interfering with Plaintiffs' legal

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[7] A hyperlink permits the reader of an article on the Internet to click on a phrase in that article -- which is usually highlighted, underlined or in bold-face font – and, automatically, connect to a different article -- "target article"; the reader is immediately transported directly to the target article, without ever being required to know of the target article's existence in the first place, which, in turn, results in many more viewers per article, an increased number of visitors being precisely why Defendants created the Link Network. *See* Alayon Affidavit.

[8] *See* Exhibit 44.

[9] *See* Exhibit 19.

[10] *See* Exhibits 22, which were posted in a dedicated section of Defendants' website specifically created by the owners and operators of such website, who then facilitated a "discussion" of Joseph Rakofsky.

[11] *See* Exhibit 23 and Exhibit 1. Attorney Turkewitz is acting as local counsel for some 35 Defendants in the case at bar.

and constitutional rights, a practice known as "cyber-bullying,"[12] while engaging in an open and notorious act of "mobbing."[13]

When the proprietor of one website acts, his actions are noted almost instantaneously by inestimable numbers of others, who then can, and do, with regularity and frequency -- as shown in Mr. Rakofsky's Affidavit in Opposition to Defendants' Motion to Dismiss the Amended Complaint -- link with and among the other Defendants to defame and injure Mr. Rakofsky, acting in combination and concert bordering on, if not actually constituting, *de facto* and *de jure* conspiracies.

The reason they do this may be difficult for this Court to understand. Mr. Rakofsky became an opportunistic target of their tortious acts. We know and respect the power of pre-trial discovery to unlock secrets litigants believe they have safely placed beyond reach, and once – we should say "if" – this Court denies the motions to dismiss the Amended Complaint made by the Defendants, Plaintiff believes the truth will out, as it so often does.

C. Defendants' false and defamatory statements of fact

Counsel have demonstrated that they will say anything to this Court if it means that their clients will not be held accountable for their acts. On page 30 of Defendants' Memorandum of Law, counsel state: "The Defendants' Accusations of Ethical Violations Are Matters of Opinion, Not Fact, But are [*sic*] True Anyway." Here, counsel seek to convince this Court that Defendants did not publish statements of fact, but instead, published opinions. Mr. Randazza does not seem to understand that an opinion, by

[12] *See* Alayon Affidavit.

[13] Mobbing is a practice in which individuals conspire with each other (as the Defendants did in this case), acting in combination and concert with each other for the purpose of intimidating, injuring grievously and destroying Mr. Rakofsky's reputation, business and profession.

definition, cannot be true or false; thus, due to counsel's statement that "Defendants' Accusations of Ethical Violations...are True," Defendants have used their Memorandum of Law to admit that the statements made by his clients are statements of fact, which can be proven to be true or false.

Again, counsel play fast and loose with their use of words, such that statements in their Memorandum of Law are not trustworthy. In the Introduction to their Memorandum of Law, counsel note, with almost child-like delight at their own perceived cleverness, that: "This case has been dubbed '*Rakofsky v. The Internet*' by the media and has grabbed headlines nationwide, launching a flood of Internet memes." In reality, the so-called "dubbing" was apparently done by Scott Greenfield, one of the attorney-blogger Turkewitz Defendants, whose status as a member of the "media" is nowhere set forth for good reason: he and the Turkewitz Defendants are not the "media," nor will Defendants succeed in their sly effort to bootstrap their way into "the press" under the rubric of "the media" and accordingly, are not entitled to any of the privileges that are afforded to "the press" or "the media.[14] Passing (for the present) the bait thrown out by the use of "media," let us note that, as far as we are aware, the use of this sobriquet has been confined, principally, if not solely, to Defendants in this action, who do not represent, much less constitute, the entire "Internet," the vast majority of the users of which have not joined the Defendants in their defamatory attacks upon Mr. Rakofsky.

In reality, of course, the sobriquet apparently coined by Mr. Greenfield is inappropriate; Mr. Rakofsky is not suing the Internet, *per se*. He is suing a number of

[14] *See* Exhibit 16. "*Rakofsky v. the Internet*" was coined by Scott Greenfield, an attorney-at-law who is one of the Defendants in this suit. What qualifies Mr. Greenfield – or any of the Copycat Defamers who may have thought it a "clever" turn of phrase -- as members of the media is undefined and unclear. More to the point, it does not function as a license to violate the law – a term that clearly includes the law of torts.

parties, almost exclusively either lawyers or service providers to lawyers, the majority of whom used the Internet as the medium of communication through which to mount a verbal attack upon Mr. Rakofsky at a time none of them knew him or had ever met him. (Indeed, the occasions on which he has since met any of them face-to-face have been confined to hearings before this Court.) To the extent that a medium of communication may be used to personify its users, "*The Internet v. Rakofsky*" is a far more appropriate description. He did not seek out the Defendants for any purpose. They sought him out merely because one or more of them, in an organized manner we shall describe, decided it would be to their advantage to hold him up to obloquy and scorn after reading on the Washington Post website (we assume its website, since the vast majority of the "blogger Defendants" appear to have no particular connection to Washington D.C. that would suggest they regularly read its print edition) the April 1, 2011 article that first defamed Mr. Rakofsky in connection with the Deaner mistrial. However their determination to do this may have occurred, they may appropriately be dubbed (since dubbing seems to be in fashion) "Copycat Defamers."

Counsel's use of the Greenfield sobriquet cloaks what would seem to be a peculiar stance on the part of lawyers: One would think that lawyers, particularly those who represent clients in litigation, as Defendants' websites suggest most of them, specifically including Mr. Turkewitz, do, would encourage resort to the judicial mechanism to resolve disputes. However, "*Rakofsky v. The Internet*" is used by counsel for the group of lawyer Defendants as a condemnation of Mr. Rakofsky for commencing a legal action against them to seek recompense for the financial loss visited upon him by Defendants' defamatory attacks upon him. In Defendants' mind, it seems that <u>their</u>

judgment on him declared in their website blogs, should have been accepted by him as though they were a judgment entered by a court of law. Astounding logic for a group of lawyers.

One may wonder why lawyers – the one characteristic shared by most of the Defendants in this action who acted through the Internet – should have taken the time to post comments on the Internet defaming Mr. Rakofsky, not to mention the risk of suit, although they may have convinced themselves that he was a "safe" target for their vicious attacks. We suggest, however, that the cause may lie in the state of the American economy in general, and the legal profession in particular, in 2011. It was "dog eat dog" out there, with law firm jobs few and far between. Indeed, that is the precise reason Mr. Rakofsky formed his own law firm and probably why the Defendants who took the time to attack Mr. Rakofsky had the time to do so, having more time than clients.

This, then, is how the dubbing by these Defendants arose. But there is more to why they decided, on one Spring day in April 2011, to defame and injure Joseph Rakofsky, a young lawyer none of them knew, for what they thought, reading the Washington Post, he had done in a case in that city of no possible interest to them. They had a business interest in doing something in unison on the Internet, and they may have viewed Joseph Rakofsky as manna dropping down on then from heaven[15] for the very reason that he presented a handy and "safe" target. To appreciate why they perceived this as a business opportunity, one must understand the logic of doing business on the Internet.

Being lawyers, Defendants could see an affecting story in what they could say about Mr. Rakofsky's apparent undertaking of a case for which he seemed to have been

[15] *See* Exhibit 45.

ill-prepared and seemed to botch, at the same time apparently acting unethically – all things the Defendants, of course, would not do. Thus, they shined by comparison to Mr. Rakofsky. At the same time, they showed the difference between their rectitude and Mr. Rakofsky's perceived shortcoming, they would, by the links with their fellow bloggers, gain hits for themselves and those acting in combination and concert with them, be moving to the head of the line with Google, thereby gaining position with Google ahead of their rivals.

And it also had argumentative value. The most obvious argumentative value of Defendants' arguments *ad hominem* against Joseph Rakofsky lay in their attempt to convince this Court that Mr. Rakofsky was suing them because they had expressed their negative **opinions,** which cannot give rise to liability for defamation expressed by Defendants as to Mr. Rakofsky's competence as a lawyer and ethics to justify Defendants' use of opposing opinions of his competence and ethics. In sum, they sought to use their arguments *ad hominem* to refocus the Amended Complaint upon opinions when, in fact, they alleged statements of fact, which is the key ingredient of defamation.

However, Defendants' scheme encounters an insurmountable obstacle: Mr. Rakofsky has **not** alleged as the basis for the defamation cause of action asserted in the First Count of his Amended Complaint any statements of opinion by Defendants. He has not made this a battle for the Court's determination of either his competence or ethics. At issue in that cause of action is whether Defendants have made untruthful statements of fact about Joseph Rakofsky they made without any factual basis for making them or any attempt to seek facts that might validate them, by the making of which, they have held

him up to opprobrium in and by the community as a lawyer and have thereby injured him in his profession.

Again, these statements of fact fall into two discrete categories. One category consists of statements that relate to the circumstances under which the trial of Dontrell Deaner in which Mr. Rakofsky represented Mr. Deaner as lead counsel terminated. The other, though peripheral to that issue, consists of statements that falsely accuse Mr. Rakofsky of one or more serious crimes related to witness-tampering and, as such, are defamatory *per se.*

The Turkewitz Defendants' counsel have advised the Court on page 22 of their Memorandum of Law that "New York law sets forth four elements in a defamation cause of action: (1) a false statement of fact; (2) published to a third party without privilege or authorization; (3) with fault amounting to at least negligence, and; [*sic*] that caused special harm or defamation *per se.*" We respectfully submit that the First Count of Plaintiff's Amended Complaint fully meet all these elements to the extent that they may be required by the nature of the libelous statements alleged by Plaintiffs.

Because that is so and counsel know it is so, they have sought, by their expression of their negative and denigrating opinions of Mr. Rakofsky's legal competence in the arguments *ad hominem* that dominate their Memorandum of Law, to reframe the facts that are the basis for the First Count of the Amended Complaint to make it appear that what Mr. Rakofsky alleges therein as defamation by Defendants are their statements of their negative and denigrating opinions in their Memorandum of Law. However, their efforts are all for naught. Mr. Rakofsky has stated with clarity and specificity in the Amended Complaint the statements that he alleges were and are defamatory. They clearly

and unequivocally are statements of fact, not opinions. Moreover, some opinions that are not accompanied by the facts on which they are based may qualify as defamatory under certain circumstances (*see Gross v. New York Times Co.*, 82 N.Y.2d 146, 153-154, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-290, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986)).

Given the clear allegations of the Amended Complaint addressed to acts of the Turkewitz Defendants, we find it difficult to understand the argumentative basis for the devoting by Mr. Turkewitz and his *pro hac vice* co-counsel of the bulk of their Memorandum of Law to an *ad hominem* attack on Mr. Rakofsky's competence as an attorney – granted that it has been of short duration – and his ethics, character and judgment. We should think that they would, as attorneys of much longer duration than Mr. Rakofsky, know that the function of a motion to dismiss a complaint for failure to state a claim is to show that the Plaintiff has failed, in his complaint, to state a claim in which relief can be granted as a matter of law. That is a strictly legal issue, to which the Plaintiffs' prior actions or character bear no relevance except in the rare case in which the issue raised in the complaint is an equitable one to which the Plaintiffs' clean hands may be a relevant consideration. Surely, this is not, by any stretch of the imagination, such a case, the issue posed in the complaint being not the acts of the Plaintiff but the acts of the Defendants who seek the dismissal of the complaint.

As we noted previously, there are two factual subsets. In both, the statements made by Defendants that are alleged as defamatory of Plaintiffs show that they purport to be, and were published by Defendants as, statements of actual fact, provable or disprovable as such by reference to the record of proceedings in the prosecution of

Dontrell Deaner, in or in connection with which they occurred or were recorded, and not as statements of the opinion of Mr Rakofsky held by the Defendants. Although Defendants accompanied their factual statements with opinions of Mr. Rakofsky that were intended to damage and have damaged Mr. Rakofsky in his business and professional affairs, such that they are alleged to be actionable torts, he has not alleged them as a basis for the First Count of his Amended Complaint, recognizing that opinions uttered or published by one about another usually do not constitute actionable defamation.

The first subset of statements of fact made by the Defendants relate to the issue of causation between the mistrial Defendants allege was declared by the trial judge on April 1, 2011, and incompetence on the part of Mr. Rakofsky during the trial of Dontrell Deaner. The statements that Mr. Rakofsky has alleged are untrue and defamatory of him state (a) that a mistrial did, in fact and in law, occur on that date and (b) that it was, in fact, declared (if and when it was) by Judge Jackson and was, in fact, at that time, attributed by Judge Jackson to incompetence on the part of Mr. Rakofsky, assuming such incompetence did in fact occur. Whether Mr. Rakofsky was, in fact, incompetent is not itself an issue as to which Plaintiff alleges he was defamed by Defendants. That would be a matter of opinion that would be neither provably true nor provably untrue. The statements alleged to be defamatory are provably true or false, and thus, are statements of fact.

Just as the bulk of Defendants' counsels' arguments *ad hominem* attack Mr. Rakofsky's competence as a lawyer, so their legal arguments in attempted justification of their clients' alleged defamatory factual statements with respect to Mr. Rakofsky relate

principally to the issue of what caused the mistrial in the Deaner case. However, their more telling defamation lies in the second subset of defamatory statements

That subset of facts relates to a document which, on the morning of April 1, 2011, Mr. Rakofsky's former investigator, Adrian Bean, delivered to a different judge, not Judge Jackson, the trial judge, sitting in a different court, who, in turn, delivered to Judge Jackson (it was never filed at the time of the so-called "newsworthy event," as Defendants have claimed it was). The statements by Defendants about Mr. Rakofsky are false and defamatory, in that he instructed Bean, in an email he sent to Bean, to "trick" a Government witness to change her previous testimony and to testify in court. This is contrary to fact and to her prior testimony or statements, that Mr. Deaner was not at the scene of the shooting and killing of Mr. Elliott by Javon Walden, with which Deaner was charged under the Felony-Murder rule.

It is apparent from the verbiage used by Defendants, as well as their accompanying statements, that most were influenced to make their untrue and defamatory statements of fact by the article published by the Washington Post newspaper on April 1, 2011 (either in its printed edition or, perhaps more likely, given the Turkewitz Defendants' attachment to the Internet and their location outside the District of Columbia and its environs, its online edition). That, however, does not provide them with a defense to Plaintiffs' suit for damages from defamation; nor do they assert such a defense in their motion. It is well-settled that, one who repeats defamatory statements of another is as liable for the publication of such defamatory statements as the original publisher.[16]

So the focus of this subset of Defendants' defamatory statements is clear, Mr. Rakofsky does not dispute that he sent an email to his then-investigator Bean and that it

[16] *See Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (1980)

did use the word "trick." There, however, fact and truth end. A copy of the email Mr. Rakofsky actually sent to Bean, which Bean attached to his April 1, 2011 submission to Judge Lebovitz, is attached to Mr. Rakofsky's affidavit filed in opposition to Defendants' motion.

It is there for all, including these Defendants and this Court, to see. In it, Mr. Rakofsky merely directed Bean to get a woman who had told Mr. Rakofsky and his co-counsel, Sherlock Grigsby, that she hadn't been at the murder scene, to repeat to Bean what she told them. By so doing, Mr. Rakofsky, as he has stated in his Affidavit filed herewith, sought to be able to use Bean as a witness to impeach any inconsistent contrary (and false) testimony the woman might offer to the Government for cash, as Mr. Rakofsky had a reasonable fear she might.[17] Mr. Rakofsky used the verb "trick" in his email to Bean, intending thereby that Bean conceal that he was making contact with the woman on behalf of Dontrell Deaner.

Seizing upon the potential pejorative implications of Mr. Rakofsky's choice of verb, the Washington Post reporters who wrote an article that obviously inspired Defendants' defamatory statements **fabricated** a false version of Mr. Rakofsky's email that contained words never used by Mr. Rakofsky that referred to the woman as a "Government witness" – although she had never been named as such – and purported to direct Bean to get the woman (referred to in the article as "the old lady") to change her testimony – though she had never given any -- to say that Mr. Deaner wasn't at the scene of the murder (which "the old lady," not having been there, could not have said he was or

[17] 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.

wasn't!) This non-existent fact, by whomever conjured it up, was seized upon by the Turkewitz Defendants, who repeated it to defame Mr. Rakofsky without making any effort to ascertain its truth or falsity in fact, as prudent persons should and would have done. It thereby became a direct imputation by those "Copycat Defamers" to Mr. Rakofsky of subornation of perjury or other forms of "witness-tampering," crimes under several provisions of both state and federal law, which was defamatory *per se* of Mr. Rakofsky.[18] Thus, by independently adopting this "copycat" defamation, Defendants became guilty of defamation *per se.*

Mr. Rakofsky did not put the issues of his professional experience, judgment, competence, ethics, or anything else "in play" by alleging that any of these Defendants defamed him by casting aspersion upon any of those qualities in anything they published. To elucidate upon the difference between what he has and what he has not charged as defamatory, we look separately at the two categories of issues set forth above:

The slash-and-burn attack upon Mr. Rakofsky by the Turkewitz Defendants' bespeaks the lack of *any* legal weapons in their arsenal. We have, in passing, disclosed other "tells" that demonstrate the poverty of their argument, *e.g.*, their contention that the statements Plaintiff alleges as defamatory are mere statements of opinion and, as such, enjoy constitutional protection under the First Amendment . As we've pointed out in our delineation of the two categories of issues (on which we will expound further *infra*) the statements of Defendants that Plaintiff assigns as defamatory are highly specific statements of fact that can be (and, we respectfully submit, will be) proved or disproved, the hallmark of facts as opposed to that of opinions.

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[18]"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).

This Court surely recognizes, as Plaintiffs do, the motivation and mindset of Mr. Turkewitz and, therefore, of the co-counsel that he, a trial attorney himself, has brought in from out-of-state. However, the issue raised by the Turkewitz Defendants' motion is one of the legal sufficiency of a pleading, in which this Court is the only relevant expert. Returning to the first sentence of this paragraph, Mr. Turkewitz has been stung by Mr. Rakofsky's having joined him as a defendant. However, when one attacks another where the other lives – and a lawyer lives in his professional status – one should expect the other to defend his turf: the practice of law.

Considering that the principal issue in this action relates to defamation, one would not expect Defendants and their counsel, whether appearing *pro se* or *pro hac vice*, to file a memorandum of law that is replete with insults and denigration that cast aspersions on the Plaintiff's professional ability, probity and just about everything one could think of to demean another. We say this not because Plaintiffs are holy cows immune from criticism as to their motives, any more than are Defendants, but because arguments *ad hominem* are viewed as signaling the absence of valid legal arguments, as they, indeed, do in this case. Mr. Rakofsky probably should consider himself graced by the absence of four-letter words such as those that have marked prior writings of Mr. Turkewitz that referred to Mr. Rakofsky and his co-counsel's first conversation with Mr. Rakofsky.[19]

Considering that the joint authors of the Memorandum of Law are both practicing attorneys, it is strange that they should excoriate Mr. Rakofsky for resorting to litigation to obtain redress for conduct on the part of persons who, by their actions, have caused him profound personal and severe professional damage. Let there be no doubt about that.

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[19] *See* Exhibit 24. In Defendant Turkewitz's article "Joseph Rakofsky – I have an Answer for You," published on his Internet website on May 18, 2011 (after both the Complaint and the Amended Complaint were filed in this Court), he instructs Mr. Rakofsky to "Go shit in a hat [and then] wear the hat."

The ubiquity of the Internet, through which the Turkewitz Defendants and those acting in combination and concert with them, spread their defamatory and poisonous words has provably caused the loss of clients and, in fact, the destruction of Mr. Rakofsky's law practice, leaving him no alternative but to sue them for damages. Indeed, had he failed to do so, he would have been taken to concede the accuracy of the defamation hurled at him by his defamers.

Last, again let it be clear that, when we speak of defamation, we do not confuse unflattering opinions with false statement of fact or conflate one with the other. They are two separate and distinct things, as we tried to express in speaking of the Turkewitz Defendants' denigration of Mr. Rakofsky, either personally or with respect to his professional ability. While it may be more hateful and damaging to a person to be called incompetent than to say that he did some particular act he did not do, an opinion, like beauty, is in the eyes of the beholder. One may question the basis upon which another holds a particular opinion of one and attempt to convince the other to change his opinion or a third party that the opinion is not soundly based, but the holder of the opinion has an absolute right to be wrong , and both the holder of the opinion and the subject of that opinion have absolute rights to express or contest it (or in the latter case, to attack it on its merits or on an *ad hominem* basis) orally or in writing without either being held to have defamed the other. Such is the result of pure logic, though it has been enshrined in the First Amendment.

Though no more need be said to demonstrate that the First Count of the Amended Complaint states a cause of action for defamation against Defendants, we turn to the primary focus of the defamatory statements by Defendants, those concerning the cause of

the mistrial that occurred in the Deaner case. They fare no better than their statements concerning the email sent to Bean by Mr. Rakofsky, although the illustration of the falsity of Defendants' statements attributing the mistrial to incompetence on the part of Mr. Rakofsky as a matter of fact, as distinguished from opinions the Defendants may have held personally, requires the knowledge and understanding of events in the Deaner trial that occurred prior to April 1, 2011. Here, too, the subject of Defendants' alleged defamation of Mr. Rakofsky were statements of fact, the fact as stated by Defendant being that the mistrial occurred because of a determination by the Deaner trial judge that Mr. Rakofsky had been incompetent in his representation of Mr. Deaner, the defendant in that case. Again, whether or not Mr. Rakofsky was incompetent in his representation of Mr. Deaner – a matter calling for an opinion that can neither be proven nor disproved – is not the issue presented by the Amended Complaint. The sole issue presented by Plaintiff's allegations is whether, as Defendants stated on their websites, the mistrial occurred, in point of fact, as the result of a determination by Judge Jackson, the Deaner trial judge, that Mr. Rakofsky had been incompetent in his defense of Mr. Deaner. If that was the fact, *i.e.*, if the trial judge made such a factual determination, which, in fact, led to and caused the mistrial, those statements should not be determined to have been defamatory. Conversely, however, if the mistrial occurred other than as an actual and direct result of such a determination by the trial judge,[20] Defendants' statements on their websites were false in fact and Defendants' motion should be denied. The subjective view of no person, whether Defendants or the trial judge, as to Mr. Rakofsky's competence in the Deaner trial, should be considered in determining the truth of

[20] *See* Exhibit 5, Page 11, Line 6. On Thusrsday, March 31, 2011 (and not on Friday, April 1, 2011), only a few minutes after Plaintiff moved for his own withdrawal and a mistrial, Judge Jackson stated "[B]ecause you are asking for that to happen, that is to say, you are asking for a mistrial..."

Defendants' statement of fact that the mistrial was caused by incompetence on the part of Mr. Rakofsky. Only the trial record can determine the truth or falsity of that statement of fact.

The trial record demonstrates that the acts that proximately resulted in the mistrial in the Deaner case occurred, not on April 1, 2011, as Defendants stated they did, but on March 31, 2011, and that they were set in motion by Mr. Rakofsky's cross-examination of Gilberto Rodriguez, a Government witness whose identity the Government had kept secret until the day of trial. On direct examination, Rodriguez professed to have been an eye-witness to the murder. However, his standing and veracity as such were called into question by Mr. Rakofsky when Rodriguez testified, in response to a question by Mr. Rakofsky, that the victim had been shot in the chest (by one other than Mr. Rakofsky's client), the District of Columbia Medical Examiner having previously testified, out of the presence of the witness, that the victim had been shot in the back. While Rodriguez was still on the witness stand, the court recessed for lunch with Mr. Rakofsky's cross-examination uncompleted. It was apparent by that time, however, that the credibility of Rodriguez 's testimony as an alleged eyewitness had been destroyed and, therefore, that the strength of the Government's case was seriously damaged, if not destroyed as well.

The act that set in motion the mistrial occurred when, during the recess, Mr. Rakofsky's client demanded that he ask questions of Rodriguez that Mr. Rakofsky believed would be damaging to his client's defense. This presented Mr. Rakofsky with an ethical dilemma. After giving the matter some thought, Mr. Rakofsky determined that his proper course of action was to move to withdraw as lead counsel for Mr. Deaner, which he did promptly following the resumption of the trial, informing the trial judge of the

conflict that had arisen between him and his client He realized his motion would likely result in a mistrial, which could result in a retrial of his client, but that it might lead to the best result for his client, since the Government might decide not to retry his client in view of the results of Mr. Rakofsky's cross-examination. If there were a retrial, successor counsel for Mr. Deaner would have the benefit of Mr. Rakofsky's defense strategy, which revolved about the victim's recent ingestion of PCP, which causes aggressiveness and the victim's current need for money, which Mr. Rakofsky believed might convince a jury that the victim went to the scene of the crime to rob Mr. Deaner and other persons gambling there and that there was no attempted robbery of the victim by Mr. Deaner that furnished the premise for the Felony Murder charge against him. The trial judge's pre-trial rulings against Mr.Rakofsky's attempts to offer expert medical evidence on the PCP issue and the victim's need for money foretold to Mr. Rakofsky obstacles to his defense strategy in the ongoing trial before Judge Jackson, as did the judge's action in allowing the prosecutor to ostentatiously wave the victim's bloody shirt to inflame the jury after previously denying her the right to show the jury merely a photograph of that shirt.

Given those rulings, Mr. Rakofsky believed that, even if the Government were to undertake to retry Mr. Deaner notwithstanding Mr. Rakofsky's cross-examination of Rodriguez and his now-revealed trial strategy – his successor as counsel for his client would likely have greater success than Mr. Rakofsky did in implementing his trial strategy. Therefore, on Thursday, March 31, 2011, upon the resumption of the trial following the recess, Mr. Rakofsky approached the bench and moved to withdraw from the defense of Mr. Deaner, citing the conflict with Mr. Deaner relating to questions to Mr. Rodriguez.

The Defendants would have this Court only read the transcript from Friday, April 1, 2011 and nothing else. If one were to ignore everything else that occurred in Dontrell Deaner's trial and instead, only read the transcript from Friday, April 1, 2011, as the Defendants' wish, then the Defendants' argument would, of course, seem to be more reasonable. However, to understand this matter, respectfully, this Court must look to Thursday, March 31, 2011 before it begins to read about the events that followed on the next day, Friday, April 1, 2011. It was the Washington Post and every defamation-republishing defendant named herein who ignored the events of Thursday, March 31, 2011 (either intentionally or negligently) and further, the Judge's acknowledgment of such events on 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)[21] as the Defendants wish and then, to make a decision based upon a small snippet in time and to ignore all else, is to commit the same act as the Defendants perpetrated.

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. 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

[21] AUSA Bryant stated on March 28, 2011 that she would be unable to appear on Friday, April 1, 2011. Consequently, no proceedings were originally scheduled in *United States of America v Dontrell Deaner* on April 1, 2011. *See* Exhibit 2, Page 32, Line 20.

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 Mr. Rakofsky and Judge Jackson so stated on the record;[22] 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[23] 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

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[22] 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.

[23] 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.

defendant...[T]his is **not** an issue of manifest necessity..."[24](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 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?"[25]

In addition, the Defendants would have this Court ignore the fact that on Friday, April 1, 2011, Judge Jackson summarized the events that occurred on 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.[26]

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?[27] (Emphasis added.)

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

Despite all of this, the Copycat Defamers published:

(1) "Rape-ofsky,"

(2) "Joseph Rakofsky rapes donkeys,"

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

(3) "[A] judge declared a mistrial in a murder trial because the defendant's lawyer...was caught instructing his private investigator to "trick" one of the government's witnesses."

(4) "[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."

(5) "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."

(6) "[T]he judge not only found Rakofsky too incompetent to handle the case, but too dishonest."

(7) "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."

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

(9) "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?"

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

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

(12) "[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."

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

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

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

(16) "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."

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

(18) "[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."

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

(20) "the mistrial was because of Rakofsky's blatant ineptitude."

(21) "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."

(22) "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

(23) "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.

(24) "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."

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

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

(27) "Badges of honor[28] come in many shapes and sizes...Now, I have mine.... It seems there may be a litigation party for those of us involved."

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

(29) "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

[28] Many of the Turkewitz Defendants displayed this Badge of Honor on their respective websites. This "badge" is used to celebrate and exult in the defamatory statements published by the Turkewitz Defendants concerning Plaintiffs. *See* Exhibit 43.

others who will do so as well. What do you plan to do about those loans when your career is destroyed?"

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

The trial judge pressed Mr. Deaner to waive any Double-Jeopardy claims and persisted in getting him to seek and accept another lead counsel to replace Mr. Rakofsky, thereby assuming Mr. Rakofsky's withdrawal from the trial (without, however, suggesting that Mr. Rakofsky's co-counsel, Mr. Grigsby, a member of the Distrcit of Columbia Bar experienced in the trial of criminal cases, who Mr. Deaner said had not objected to the questions Mr. Deaner had wanted Mr. Rakofsky to ask Rodriguez, might continue to represent him, thereby obviating the need for a mistrial). The trial judge then conferred with the prosecutor and advised her of his intention to declare a mistrial based upon Mr. Rakofsky's motion to withdraw as lead counsel and Mr. Deaner's waiver of any Double-Jeopardy claim. The trial judge told the prosecutor that, to assure that Mr. Deaner did not have a change of mind as to his action (*i.e.*, waiving a Double-Jeopardy claim), he would postpone formally declaring the mistrial until the next day, April 1, 2011, on which no court proceedings had been scheduled.[29]

When Mr. Deaner did not have a change of mind the following day, April 1, 2011, Judge Jackson granted Mr. Rakofsky's motion – the only motion before him – never, however, using the term "mistrial." Despite the absence of that term in the record on April 1, 2011, the Defendants herein have persisted, even with knowledge of the record in the Deaner proceedings, and even after Mr. Rakofsky had commenced this action, in their statements that the trial judge declared a mistrial on April 1, 2011, and

[29] *See* Exhibit 2, Page 32, Line 20.

that he then did so because of Mr. Rakofsky's incompetence in his representation of Mr. Deaner. However, the facts of record show that a mistrial had occurred the preceding day, March 31, 2011, and had occurred solely because Mr. Rakofsky had then moved to withdraw as counsel because of a conflict with his client, which the client had confirmed to the trial judge and had agreed to waive any Double-Jeopardy claim, which necessarily assumed the granting of Mr. Rakofsky's motion. The proceedings might have continued had the trial judge suggested that Mr. Rakofsky's co-counsel, an experienced member of the D.C. Bar, continue to represent Mr. Deaner in the then-current proceedings).

In the face of all of the foregoing facts of record that show their published statements about the cause of the mistrial to be inconsistent with the facts of record, Defendants attempt to justify their statements by pointing to remarks made by the trial judge after granting Mr. Rakofsky's motion to withdraw in a paragraph beginning "alternatively." What Defendants' counsel now ask this Court to do is to find that their statements that the Deaner mistrial was caused by Mr. Rakofsky's incompetence were true and not false or defamatory, because the trial judge speculated that, if the facts were otherwise than they were and are shown to have been as a matter of judicial record – *i.e.*, if the mistrial had not occurred, as it did in fact and of record the preceding day, when, and because, Mr. Rakofsky had moved to withdraw as lead counsel, the trial judge might have found, "alternatively," that there was "manifest necessity," based upon insufficiency of representation on the part of defense counsel (which consisted of "the 2 lawyers" and not only Mr. Rakofsky), that would justify his granting a new trial were Mr. Deaner convicted.

If the absurdity of both the trial judge's speculative remarks and Defendants' argument based upon them have not already convinced this Court that neither makes any logical, much less legal, sense, let us apply the *coup de grace*. The trial judge's remarks were more than merely speculative. They were hypothetical and not actual and were based upon supposition that morphed into impossibility in the trial judge's imagination. For a "new trial" (the trial judge's term, not ours) to be granted to a criminal defendant based upon manifest necessity arising from insufficiency of his representation, the defendant must first have been convicted, as the trial judge himself recognized in his remarks on April 1, 2011. However poor the trial judge might have thought Mr. Rakofsky's performance at trial to have been, his participation in the trial was limited to his opening statement and his cross-examination of Gilberto Rodriguez – hardly enough time or activity to establish manifest necessity. The Government had barely begun to present its case; the defense of Mr. Deaner had not even begun. Therefore, the consequences of the defendant's subsequent conviction – which never occurred -- could hardly be visited upon Mr. Rakofsky, who left the field of battle before even completing his cross-examination of Government witness Rodriguez (whose survival as a witness he should have effectively ended by his unfinished cross-examination). Someone other than Mr. Rakofsky would have had to be responsible for the conviction, which, perforce, had never and could never have occurred.

Without meaning to suggest any justification of or for the trial judge's remarks, it should be observed that Mr. Rakofsky's name is nowhere to be found in the "alternatively" paragraph on which Defendants' counsel rely in their argument. Those remarks, such as they were, could have been applicable equally to Mr. Rakofsky's

experience co-counsel, Mr. Grigsby. At whomever those remarks were aimed, it's noteworthy to observe that the trial judge failed to state one specific instance of incompetence. This leads us to suggest that the remarks may have been applicable to no one and that the judge may have been "venting." We point to his only remark in the April 1, 2011, record that clearly refers to Mr. Rakofsky (other than his reference to Mr. Rakofsky's having moved to withdraw the preceding day), in which the judge expresses his having been "astonished" that Mr. Rakofsky "would purport to represent someone in a felony murder case who had never tried a case before," as Mr. Rakofsky had stated to the jury in his opening statement, a statement that was the only thing that the prosecuting attorney found upsetting following the opening statement.

Although it is not relevant to the disposition of this motion, Mr. Rakofsky's competence not being an issue raised by the Amended Complaint, surely, it must strike this Court, if not as well the Turkewitz Defendants' counsel, that nowhere did Judge Jackson specify the acts of incompetence on the part of defense counsel that might have given rise to manifest necessity in the hypothetical scenario Judge Jackson suggested.

We suggest that the trial judge's non-germane and non-logical observations in his April 1, 2011 *obiter dicta* may have been born of his reaction to what he may have deemed hubris on the part of Mr. Rakofsky in presuming to make his trial debut in a Felony Murder case in his court, perhaps combined by his realization of what this legal tyro had so effectively accomplished in attaining a mistrial in a case the judge expected him to lose.

Defendants' counsel seek to portray Mr. Rakofsky's undertaking the Deaner trial as a breach of ethics on his part. Passing the fact that this Court is not an appropriate

forum for ruling on the ethics of a member of the bar of another jurisdiction appearing in a proceeding in a third jurisdiction with the express permission of the Court of that jurisdiction, there comes a time when every lawyer will have his first trial. There is no black-letter rule as to what that trial should be. Suffice it to say that the record in the Deaner case shows quite clearly that Mr. Rakofsky did not conceal from Mr. Deaner, his client, the fact that this would be his first trial, just as he did not conceal it from the jury or the trial court. Mr. Deaner stated unequivocally to the trial judge that he was aware from the beginning that Mr. Rakofsky had not previously tried a case.[30] So much for the non-role of ethics in this case.

It's all in the record and, when fairly and properly viewed, quite simple. Yes, this was Mr. Rakofsky's first trial. The opportunity came to him and he didn't lie about it to his prospective client. Why did Mr. Rakofsky take on the case? His Affidavit may provide the answer. He had a dream that he'd had long before he ever attended law school. And it was more than a dream. He spent his law school career training with the big guys in CLE classes and trial lawyer colleges in which he was the only one law student, in court workshops and helping the Legal Aid lawyers work on actual cases. But if you had confidence in your ability and worked hard, you might just take the chance Joseph Rakofsky took.

Did he take it and blow it? It depends upon your viewpoint and what ax you have to grind, but Judge Jackson, even while ruling against him and allowing the Government prosecutor to prejudice the jury by parading a bloody shirt in front of them (after having barred a photograph of the same bloody shirt from being admitted into evidence), praised

[30] *See* Exhibit 3, Page 97, Line 12 and Exhibit 4, Page 11, Line 1.

and empathized with him[31] – that is, until Rakofsky showed he had moxie and effectuated a mistrial based upon a conflict that arose by chance when his client decided he knew more about being a lawyer than Joseph Rakofsky at a point at which the Government had tipped its hand; the hand was empty because Joseph Rakofsky had shown with one question that the Government's star witness, whose identity they had concealed until the day of trial, could not have been an eye witness. When the defendant tried to run the case and take over the further examination of that witness – who had testified to a sexual affair with the defendant's mother -- and Joseph Rakofsky couldn't ethically and wouldn't let it be run into the ground and so moved for his own withdrawal from the case. Then, when Judge Jackson did what he felt he had to (whether or not he actually had to) and granted a mistrial, although he waited until the next day to formally announce it and may have realized, having slept on it, that he may have been out-thought by a first-time trial lawyer who just graduated from law school and was just sworn in. What might a judge do in those circumstances? Perhaps what Judge Jackson did. He had already made his decision on Thursday, March 31, 2011, when the defendant waived any objection to a retrial and had communicated it to the Government prosecutor.[32] What he could do, and did after formalizing his action of the preceding day was to dump on the defense. However, even when he dumped on the defense, he didn't mention Joseph Rakofsky by name, content to

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[31] *See* Exhibit 3, Page 89, Line 20, which reflects that on Wednesday, March 30, 2011, Judge Jackson stated to 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..." In addition, Judge Jackson stated to 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 in that regard..." *See* Exhibit 3, Page 89, Line 5. Further, at a later point in the trial, also occurring on Wednesday, March 30, 2011, Judge Jackson stated to Rakofsky: "And I don't, for one, criticize you for all the hard work you have been doing on this case..." *See* Exhibit 3, Page 92, Line15.

[32] "I'm leaning towards granting the **request**...(emphasis added)" See Exhibit 5, Page 9, Line 10. "I'm inclined to grant [the mistrial], but I want you to think about it overnight." See Exhibit 5, Page 12, Line 10.

excoriate him for the non-crime of hubris (a word he never even used). He left the dirty work to the local newspaper, never figuring that a bunch of lawyers in other jurisdictions would get word of it and decide to exploit it for the purpose of reaping commercial benefits for themselves and their respective law firms, while destroying Joseph Rakofsky's reputation, business and career.

May Mr. Rakofsky's greater sin in Judge Jackson's eyes have been getting his client out on a mistrial in his first trial and thereby averting certain conviction? Certainly, the hindsight result for Dontrell Deaner to which we have alluded earlier in this Memorandum of Law bespeaks an abundance of what is called "moxie" in New York and New Jersey and a dearth of legal incompetence, as does, we might suggest, an objective review of the record, even though false statements of fact and not opinions give rise to defamation.

We think it relevant at this point in our argument to refer to a fact that post-dated the filing of Plaintiffs' complaint in this action. As Mr. Rakofsky's Affidavit has disclosed, there was to be no retrial of Dontrell Deaner, as Mr. Rakofsky speculated in the thought processes that led to his motion to withdraw (whether presciently or hopefully, we do not presume to say) there has not been, nor will there be, a retrial of Dontrell Deaner on Felony Murder charges. On January 13, 2012, Mr. Deaner entered a guilty plea to a reduced charge of Involuntary Manslaughter – a plea deal Mr. Rakofsky had sought on numerous occasions, but one that the Government prosecutors steadfastly refused to offer before the mistrial that resulted from Mr. Rakofsky's motion to withdraw

as counsel. Maybe – just maybe – Judge Jackson saw this as a possibility when he ruminated on April 1, 2011.[33]

All of the foregoing having been said, there remain a few things to be done to conclude Plaintiff's argument in opposition to the motion to dismiss. One is to dispose of the Defendants' sole remaining defense (a partial defense at that): that Joseph Rakofsky is a public figure whose right to recover damages for defamation is circumscribed or limited. The argument defeats itself. Surely, he is now a public figure for limited purposes, but only because of the notoriety as a result of the defamatory publicity the Copycat Defamers in this case have heaped upon him on the Internet, Surely, counsel have been rendered word-blind by their blizzard of words. As a newly-minted attorney just out of law school, there is no way he can be said to have been a public figure at the time he took on the defense of Dontrell Deaner. Nor did that make him a public figure. Only the greed of all of the Defendants in this case accomplished that. To say more is to validate a defense that counsel should have thought once, not twice, before mounting.

Although not presented as a separate defense, Defendants, counsel have cited § 74 of the New York Civil Rights Law, which provides 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." The Turkewitz Defendants' statements about Mr. Rakofsky having been shown to be untrue clearly do not qualify for the protection extended to those who publish "fair and true" reports of judicial proceedings. Certainly

[33] While that "after-the-fact" fact may not dictate the Court's disposition of Defendants' argument, it surely must speak volumes as to its real-world validity; the fact that the Government refused to try Mr. Deaner (for a second time) after Mr. Rakofsky elicited testimony in the trial that vindicated his client, proves that the Government's case was weakened as a result of Rakofsky's efforts; the plea agreed upon by Deaner's subsequent counsel, that of Involuntary Manslaughter, was reduced from First-degree Murder and was not available to Mr. Deaner before the trial.

their statements based upon a forged or fictitious document (the Washington Post's fabrication of Mr. Rakofsky's email to Bean to attribute to it a meaning opposite to that objectively and actually intended by Mr. Rakofsky) cannot be either fair or true, much less both) and therefore, cannot qualify under § 74. In any event, neither the Bean Document, nor the Rakofsky email to which it was annexed was admitted or even offered in evidence in the proceeding, having been presented in a ministerial act by Bean, an officious intermeddler, to one who had no authority or standing in the case and merely delivered the document to Judge Jackson as a ministerial act, and as to which Judge Jackson himself performed no official function either in handing it to Mr. Rakofsky or in commenting on it as he did so.

While the Government's failure to order a retrial of Mr. Deaner is not directly relevant to this Court's disposition of Defendants' motion to dismiss the First Count of the Amended Complaint, we respectfully submit that it is fully consistent with that result.

II.

The Amended Complaint Sets Forth a Valid and 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."[34]

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

[34] *See* Exhibit 40.

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[35] (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.[36]

"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 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.*

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[35] *See* Exhibit 15.
[36] *See* Exhibit 22.

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.[37] That has, in fact, been the result of their onslaught. They have not acted once but on multiple occasions to advance that aim.[38] 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).

III.

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

"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

[37] *See* Exhibit 17 and 41.
[38] *See* Rakofsky Affidavit.

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?"[39]

"He's ruined now. I wonder what kind of work he could find after this."[40]

The above quotations are from two Internet postings by Defendants on websites linked to those of other Defendants herein[41] 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.[42]

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 circumstances thereof, since all Defendants wished and intended to do was to destroy **all**

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

existing contracts and all potential contracts between Plaintiffs and their clients.[43] They literally wanted to put Plaintiffs out of business.[44] 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.

IV.

[43] *See* Exhibits 17 and 41.
[44] *See* Exhibits 17 and 41.

DEFENDANTS ARE SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE PROVISIONS OF CPLR 302(a)(1).

Defendants Motion to Dismiss the Amended Complaint under CPLR 302 is without Any Factual Support and Should Be Denied.

In the first Part B of the Argument in their Memorandum of Law in support of their motion, which begins at page 14 thereof, Defendants contend that CPLR 302, the New York Long-Arm Statute, does not confer jurisdiction on Defendants they identify in their Memorandum of Law as Defendants 7-32, to whom they refer as the "Foreign Defendants." On the face of their submissions to this Court, Defendants have clearly failed to lay a proper factual foundation for their contention and, to that extent, for their motion to dismiss, which relies solely upon an affidavit of James DeVoy, a colleague of Mr. Randazza's, who identifies no direct personal knowledge of any of the facts he purports to establish, relying upon unspecified "research" of what are obviously hearsay sources. Even more to the point of the inadequacy of Defendants' motion, that affidavit, and counsel's argument based on it, assume that the Amended Complaint consists of a single count that sounds in defamation, when it asserts additional tort claims that do not sound in defamation and, as such, fall under CPLR 302(a)(1), 302(a)(2), 302(a)(3) and 302(a)(4).

Attorney Randazza goes on for four full pages about alleged defects in service of process, and then, on page 20, buried in the middle of a nine-line paragraph, he says his clients waive the issue. It should be deemed intentionally waived. Enough said.

Defendants' argument is also deficient in counsel's facile and simplistic assumption, for which they cite no reasoning or authority, that, because the actions of the so-called "Foreign Defendants" complained of in the Amended Complaint" occurred through blog posts, published on the Internet," that fact, without more, immunizes them from suit. We respectfully submit that it does not. The Internet is merely one means of communication by which defamatory written statements can be communicated.

Defendants' counsel compound their failure to provide any direct proof of the "Foreign Defendants" amenability to this Court's jurisdiction in this action by the facile and simplistic' contention as to all the Foreign Defendants that they are not "transacting business" in New York and cannot, as a matter of law, be deemed, as a matter of law, to be doing so as to the Amended Complaint, including, but not limited to, the First Count thereof, by virtue of their maintenance of websites and their use thereof to commit the acts alleged in the Amended Complaint through blog posts published on the Internet. We respectfully submit that is not the present state of the law in New York.

Unlike CPLR 302(a)(2) or (a)(3), which precludes causes of action for defamation, **CPLR 302(a)(1) permits causes of action for defamation**. The general rule under CPLR 302(a)(1) with respect to defamatory material transmitted by way of an Internet website is that "the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transacting business' in New York for the purposes of New York's long-arm statutes." *Henderson v. Phillips*, 2010 N.Y. MISC. LEXIS 3019, 2010 N.Y. Slip Op. 31654U. (Sup. Ct. N.Y. Cty. 2010) (emphasis added). The case at bar, we submit, is one that presents the "more" without which 'the posting of defamatory material on a website accessible in New York does not . . . constitute

'transacting business' in New York for the purposes of New York's long-arm statutes" and thereby does "constitute transacting business in New York" within the intendment of the *Henderson* case.

In *Grimaldi v. Guinn*, 2010 NY Slip Op 926 (2d Dept. 2010), the court noted that:

At one end of the spectrum are situations where a defendant clearly does business over the Internet...At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise (of) personal jurisdiction...The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

In *Montgomery v. Minarcin*, 263 A.D.2d 665 (3d Dept. 1999), the court held that, "while defamation claims are excluded from CPLR 302's tort provisions (*see,* CPLR 302(a)(2),(3)), personal jurisdiction over a nondomiciliary defendant in a defamation action has been sustained under CPLR 302(a)(1) where the action arises out of a defendant's transaction of business in New York (*see, Legros v Irving,* 38 AD2d 53 (1st Dept. 1971), *appeal dismissed* 30 NY2d 653; *see also, Talbot v Johnson Newspaper Corp.,* 71 NY2d 827 (1988); *GTP Leisure Prods. v B-W Footwear Co.,* 55 AD2d 1009, 1010 (4th Dept. 1977); Siegel, NY Prac §§ 86, 87, at 125, 134 [2d ed])." Further to the same effect is *DiBella v. Hopkins*, 187 F.Supp. 2d 192 (S.D.N.Y. 2002), where the court held, that: :"Although certain provisions of New York's long-arm statute specifically

exclude actions for defamation, see N.Y.C.P.L.R. §§ 302(a)(2),(3) (McKinney 2001), no such exclusion exists for cases where the defamation complained of arises from or is connected with the transaction of business within the state. *See* N.Y.C.P.L.R. § 302(a)(1) (McKinney 2001); *see, e.g., Popper v. Monroe*, 1990 U.S. Dist. LEXIS 11302, No. 87 Civ. 0899 (SWK), 1990 WL 129168, at *2 (S.D.N.Y. Aug 29, 1990)."

We do not mean, by responding to defendant's reference to the long-arm jurisdiction provisions of CPLR 302(a)(1), to exclude jurisdiction of defendant under the general jurisdiction provisions of CPLR 301(a), but merely assume, for the sake of argument, that defendant may not be subject to general jurisdiction under CPLR 301(a), at least for the first cause of action sounding in defamation (as opposed to the second, third and fourth causes of action set forth in the Amended Complaint) and thus confine our argument to the availability of long-arm jurisdiction under CPLR 302(a)(1), which permits the exercise of long-arm jurisdiction when the defendant transacts any business within New York or contracts anywhere to supply goods or services in the state. The transaction of business under CPLR 302(a)(1) confers jurisdiction if the cause of action can demonstrate an "articulable nexus" to the transaction of business within the state. *Reyes v. Sanchez-Pena*, 191 Misc. 2d 600, 2002 N.Y. Misc. LEXIS 459 (Bronx Co. 2002).

In *Totero v. World Telegram Corp.*, 41 Misc. 2d 594 (Sup. Ct. N.Y. Co. 1963), the court denied the defendant's motion to dismiss the defamation complaint filed against him by the plaintiff, holding that "the present statute is not rested upon or confined to the theory of defendant's consent to submit to the jurisdiction of the courts where the transaction has occurred. Rather, it is rested upon conditions stated in section 302 as

a necessary adjustment to developments in interstate and in international trade and commerce and the growing complexity of the social scene and technological expansion (emphasis added)." To the same effect is *Vandermark v. Jotomo Corp.*, 2007 NY Slip Op 5875 (App. Div. 4th Dept. 2007), where the court held:

> We conclude on the record before us that there is an issue of fact whether [defendant's] creation and maintenance of a website amounts to the transaction of business in New York, and that issue turns on whether the website has significant commercial elements, which typically are found to constitute the transaction of business (emphasis added)...We therefore reverse the order insofar as appealed from and remit the matter to Supreme Court for an immediate trial...

"Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the totality of the circumstances." *Farkas v. Farkas*, 36 A.D.3d 852, 853, 830 N.Y.S.2d 220 (2d Dept. 2007). In *Cushley v. Wealth Masters Intl.*, 2010 NY Slip Op 52221U (App. Div. 2d Dept. 2010), the court held that: "In determining whether a party has transacted business in New York City, a court must look at the 'totality of the circumstances' concerning that party's interactions with, and activities in, New York City." In *Gary Null & Assoc., Inc. v. Phillips*, 2010 NY Slip Op 20280 (Sup. Ct. N.Y.Co. 2010), the court held that, "In determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of the defendant's activities within the state, to decide if he has transacted business in such a way that it constitutes 'purposeful activity'..."

In *Ehrenfeld v. Bin Mahfouz*, 2007 NY Slip Op 9961 (Ct. App. 2007), the court held:

> The overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within New York. When a defendant engages in purposeful

> activity in New York, personal jurisdiction is proper because it has invoked the benefits and protections of New York's laws and thus should reasonably expect to defend its actions in New York.

Viewing the totality of defendant's activities in New York (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke,* 15 N.Y.2d 443, 457 n 5 (Ct. App. 1965), *cert. denied sub nom. Estwing Mfg. Co. v Singer,* 382 U.S. 905(1965); *Catauro v Goldome Bank For Sav.,* 189 A.D.2d 747, 748 (2d Dept. 1993)), we respectfully submit that the plaintiffs' allegations are sufficient and supported by inferences therefrom as well as evidence, demonstrating that defendant engaged in purposeful activity in New York which is directly related to and forms the "articulable nexus," as enunciated in *Reyes.* Thus, this nexus is the basis of plaintiffs' causes of action, so as to be deemed to have transacted business in New York within the intendment of CPLR 302(a)(1) (*see Talbot v Johnson Newspaper Corp., supra,* at 829; *Legros v Irving, supra,* at 55).

We respectfully submit that, just as the *Totero* court held, personal jurisdiction under CPLR 302(a)(1) should be deemed to exist in the case at bar as a "necessary adjustment to developments in interstate...trade and commerce and the growing complexity of the social scene and technological expansion." Further, the assertion of jurisdiction over defendant under CPLR 302(a)(1) does not excessively inhibit the constitutional freedoms of speech and press which the Legislature sought to protect by excluding defamation actions from the tort provisions of CPLR 302 (a)(2) and (3), where the defamation complained of arises directly from defendant's purposeful and extended transaction of business in New York (*see Legros v Irving, supra,* at 55; 2 Weinstein-Korn-Miller, N.Y. Civ. Prac. P 302.15).

The Turkewitz Defendants transacted business for their advertisers and for themselves. We shall assume, for purposes of this Memorandum of Law, that Defendants have accurately stated that the only medium through which the defamation complained of by plaintiffs was transmitted through their respective websites. That said, they enabled their fellow-patrons to whom they directed their defamatory comments to "follow" them, and, therefore, their defamatory statements (and their advertiser-clients as well) through Twitter and other social and professional networking media, demonstrating the "growing complexity of the social scene and technological expansion" in which Defendants aggressively participated. They built links for each other and visited and then re-visited the websites in the Link Network, all the while, posting comments for each other and thereby, bestowing commercial benefits upon the owner of the website by improving the visibility and position of the websites which contained the defamatory statements.[45] They copied their respective articles and re-published them on related websites. They employed "Quick Search" windows on their websites, to allow the reader to access the defamatory articles more quickly. They posted logos of various Blog Post "awards," which were intended to communicate to the reader that their respective website was "not your average" (passive) website. Some of the websites provided a "user poll," which allowed the reader to rate the defamatory article. They all, of course, provided their own necessary contact information so that a potential client could make contact with them (and frequently, a dedicated form, which, in turn, solicited such information from their readers).

The general rule under CPLR 302(a)(1) with respect to defamatory material transmitted by way of an Internet website is that "the posting of defamatory material on a

[45] *See* Alayon Exhibit.

website accessible in New York does not, *without more*, constitute 'transacting business' in New York for the purposes of New York's long-arm statutes." *Henderson v. Phillips*, 2010 NY Slip OP 31654U. (Sup. Ct. N.Y. Co. 2010) (emphasis added). The case at bar, we submit, is one that presents the "more" without which "the posting of defamatory material on a website accessible in New York does not . . . constitute 'transacting business' in New York for the purposes of New York's long-arm statutes" and thereby *does* "constitute transacting business in New York" within the intendment of the *Henderson* case.

In *Intellect Art Multimedia v. Milewski, 24 Misc. 3d 1248A,(Sup. Ct. N.Y. Co. 2009).* the Appellate Division recently furnished an answer to the question what "more" may be required for the owner of a website to be subject to long arm jurisdiction under CPLR 302(a)(1). "A defendant is more likely to be found to be transacting business within the state vis-à-vis a website if the website is "interactive," thereby permitting the exchange of information between the website users and the defendant, as opposed to 'passive' websites that merely display information and do not permit an exchange thereof." (*See Hollins v. U.S. Tennis Ass'n*, etc. Copy the long list of cases from "transacts business" email.)

Further, the *Grimaldi* court held that even "passive websites, when combined with other business activity, may provide a reasonable basis for the assertion of personal jurisdiction" (*see CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)).

Given the number of New York-based defendants in this action who are charged with publishing defamatory material on their websites, the likelihood of interaction between the bulletin board used by defendant and owners and New York contributors

thereto is increased, as well as other defendants who similarly published defamatory statements about plaintiffs, on many occasions, directed viewers to Defendants' defamatory publications, who, in turn, directed viewers to their website.[46] Thus, to quote the language of *Intellect Art Multimedia,* defendant should have expected to be hailed into court in New York by plaintiffs, knowing from the Washington Post article that spawned defendant's defamation that Mr. Rakofsky was a "New York-based" lawyer. Indeed, pretrial discovery may elicit specific interaction between defendant and others engaged in business of professional activity in New York. When the "totality of the defendant's activities," as held in *Null*, and the totality of the circumstances, are considered, it is clear that defendant, though physically located outside New York, transacted business in New York.

For the purpose of transacting business with clients (both actual and potential), defendants used their presence on the non-passive bulletin board to act in combination and concert with the Washington Post, and with other bloggers for the purpose of intimidating, injuring grievously and destroying the reputation, business and profession of plaintiffs (a practice referred to as "mobbing"), frequently doing so while benefitting commercially as evidenced by an improved position on Google (or another search engine) and by an increased readership and presence as a result of their co-conspirators linking their Internet websites to defendants', thereby magnifying the damage defendants caused and intended to cause to plaintiffs, which defendants and those with whom they acted in combination and concert used to silence plaintiffs and intimidate them from, and retaliate against them for, resorting to the legal processes available to them under the law, thereby interfering with their legal and constitutional

[46] *See* Exhibit 32.

rights, doing so through the use of the Internet (hereinafter referred to as "cyber-bullying"). This is of particular significance in the case at bar, as apparent from the number of persons -- lawyers who reside and/or transact business in New York -- who are among the defendants in this action, who are charged by plaintiffs with defaming plaintiffs and acting in combination and concert with other defendants who operate websites.

In addition, as per CPLR 302(a)(1), the non-resident Defendants are and were "transacting business" in NY as a result of their voluntary and intentional interaction with RLF, which was legally transacting business in NY. Indeed, in almost each instance, as a direct result of the Defendants' defamatory utterances and publications of Plaintiff Rakofsky, such Defendants materially benefitted from their intentional interaction with RLF, which can be evidenced by their improved visibility and position on Google (and other search engines on the Internet) for their respective websites.

For all of the foregoing reasons, Defendants' motion to dismiss as to the "Foreign Defendants" should be denied.

V.

Defendants Motion to Dismiss on Behalf of Defendants Banned Ventures LLC and BanniNation under 47 U.S.C. § 230 Should Be Denied.

In Subpart 1 of the second Subpart B of Part IV of their Memorandum of Law, Defendants seek dismissal of the Amended Complaint on behalf of Defendants Banned Ventures LLC and BanniNation. The heading of Subpart 1 of the second Part B of Part IV of Defendants' Memorandum of Law, beginning at page 20, states that "Defendants Banned Ventures LLC and BanniNation are Immunized From All Liability Under 47

U.S.C. § 230, and thus Cannot be Sued Under Any of the Causes of Action Asserted by Rakofsky." Their contention is grossly overstated and, therefore, wrong as it is advanced.

Although Defendants simply cite 47 U.S.C. § 230, it is apparent from the further discussion in their Memorandum of Law that they are referring specifically to 47 U.S.C. § 230(c)(1), which provides that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." On its face, therefore, 47 U.S.C. § 230(c)(1) will apply to a provider or user of an interactive computer service, as Defendants apparently contend those two Defendants maintain, to relieve such provider or user from liability for material transmitted by that computer service, but only with respect to the "information provided by another information content provider, *i.e.,* "any person or entity that is responsible for the creation or development of information provided through the information." 47 U.S.C. § 230(f)(3). Thus, if, and to the extent that, defamatory material concerning Mr. Rakofsky was provided to Banned Ventures LLC and BanniNation by another "information content provider" – a "person or entity" other than either of those Defendants – then, and only then, will 47 U.S.C. § 230(c)(1) afford those Defendants any protection from liability for defamation.

In *Shiamili v. The Real Estate Group of NY, Inc.*, 7 N.Y.3d 281, 952 N.E.2d 1011, 929 N.Y.S.2d 19 (2011), cited by Defendants, the Court of Appeals made the foregoing limitation in the statute, among others, quite clear. Thus, to contend, as Defendants do, that these two Defendants are, or may be, "insulated from liability" to Plaintiff is premature in the extreme. Moreover, even assuming, *arguendo*, that the defamatory

material complained of by Plaintiff was provided by "another information provider," *i.e.*, one other than the BanniNation website or Banned Ventures LLC, which Defendants' counsel do not even purport to assert in their Memorandum of Law, the section of the website in which such defamatory material appeared, which was under the sole control of Banned Ventures LLC, was entitled "Joseph Rakofsky Rapes Donkeys…'Rape-ofsky,'" itself independently defamatory of Plaintiff.[47]

[47] See Exhibit 22.

CONCLUSION

When viewing the totality of the circumstances, and examining the defendant's purposeful acts, it is obvious that Defendants designed their highly interactive and non-passive website with "commercial elements" so as to maximize interactivity between them, their readers and their (current and potential) advertisers, thus engaging in "trade and commerce" and therefore, transacting business. Thus, the "articulable nexus" as stated in *Reyes* has been clearly demonstrated and Defendants should be subject to personal jurisdiction.

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

Shahid Mahmood
Notary Public, State of New York
No. 01MA6221276
Qualified in Kings County
Commission Expires May 03, 2014

Sworn to before me on the
15 day of May, 2012

Respectfully Submitted,

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