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

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

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY, et al.,

Defendants.

Reply Memo of Law for Motion to Dismiss Under CPLR § 3211 For Lack of Personal Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted

Index # 105573/11

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**REPLY MEMORANDUM OF LAW FOR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

## I. Introduction

This Reply Memo of Law is submitted on behalf of the 35 defendants listed in the Conclusion, who are represented by Marc Randazza (*pro hac vice*) and Eric Turkewitz (local counsel).

Rakofsky's untimely[1] and largely incomprehensible opposition to the motion to dismiss merges stream-of-consciousness writing with overactive hubris in order to attempt to

[1] The defendants' motion to dismiss may be granted simply by default. Rakofsky has neither properly nor timely served his opposition briefs on these defendants and many others, and have intentionally withheld a complete record from defendants' counsel (Turkewitz Aff. ¶¶ 6-10). This is despite repeated attempts to convince him to do so.

Opposing briefs were to be served by May 18th (Ex. V). But plaintiffs only served one of their 13 sets of papers on us by that date. The Washington Post and Reuters briefs were served May 22nd and 10 more briefs were served May 24th (*id*. ¶¶ 6-10). This predictable gaffe is not only problematic, but prejudicial as well - Rakofsky's opposition to the defendants' motion to dismiss incorporates by reference other memoranda of law that the defendants had been neither timely received nor served (Opp. at 2). Plaintiff has thus consented to the defendants' motion to dismiss by virtue of this failure to properly serve its responses. CPLR § 2214(c) ("Only papers served [properly] shall be read in support of, or in opposition to, the motion"); *Traders Co. v. AST Sportswear, Inc.*, 31 A.D.3d 276, 277 (1st Dept. 2006); *Auchampaugh v. Lewis*, 173 A.D.2d 1059, 1060 (3d Dept. 1991). For this reason alone, the Motion to Dismiss should be granted.

communicate one real theme: **Everyone is out to get Joseph Rakofsky**. Rakofsky would have this court believe that the judge presiding over the *U.S. v Deaner* case questioned Rakofsky's competence and ethics because he (the judge) was threatened by Rakofsky's brilliance. (Opp. at 16, 52, 66-67) Once the Court buys that, the Court should then believe that the defendants all conspired to write about the judge's statements as part of an elaborate plan to get rich off the extensive client network he accumulated over his vast time practicing law. (Opp. at 39, 43, 44, 68). Rakofsky's position is unsupportable under any recognized or recognizable theory, and the complaint should be dismissed with Rakofsky sanctioned for bringing such frivolous claims.

A judge made the underlying statements leading to this lawsuit on the record during a murder trial (Ex. E). The Washington Post reprinted them, and the 35 defendants represented in this Reply Brief repeated those official statements and offered their fair comment opinions. Rakofsky concedes this. (Opp. at 56, 58-62; Turkewitz Aff. ¶¶ 2-5, 11)

Under Rakofsky's view, merely linking to this unfavorable coverage is a source of liability because it creates a web. This bizarre theory undermines the World Wide Web's very purpose as a conduit for free information, and has been roundly rejected. *Firth v. State*, 98 N.Y.2d 365 (N.Y. 2002); *Haefner v New York Media, LLC*, 82 A.D.3d 481, 482 (1st Dept. 2011) (linking to allegedly defamatory articles not defamation); *Martin v. Daily News, L.P.*, 35 Misc. 3d 1212A (N.Y. Sup. Ct., N.Y. County 2012) (holding that links sharing a previously available allegedly defamatory article through social media outlets did not constitute defamation); *See Salyer v. Southern Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 918 (W.D. Ky. 2009) ("hyperlinks, while adding a new method of access […] did not restate the allegedly defamatory statements and did not alter the substance of that article in any manner")**;** *Sundance Image Tech.,*

*Inc. v. Cone Editions Press Ltd.*, 35 Media L. Rep. 2451 (S.D. Cal. 2007) (refusing argument that "links to statements already published on the Web, without more, republish[] those statements").

Joseph Rakofsky imperiled Dontrell Deaner's right to a fair trial and competent counsel, and did so to indulge his own selfish fantasy (Rakofsky Aff. ¶ 12; Opp. at 66). When his misdeeds became a matter of national discussion, Rakofsky failed to consider that *perhaps* the reason that the entire legal profession was abuzz with the story of his incompetence and ethical failures in the *Deaner* trial was because he was, indeed, both incompetent and unethical. Incapable of self-reflection, Rakofksy then set his sights on quashing the First Amendment rights of these defendants in order to vindicate his ego (*See Id*.; *see generally* Opp. to Mot. to Dismiss) and trying to extort nuisance settlements from the defendants (Doudna Mot. To Dismiss Ex. F). Joseph Rakofsky has proven himself incapable of learning lessons or respecting constitutional rights. It is now incumbent on this Court to dismiss this litigation and force Rakofsky to accept the latter, though he may be incapable of the former.

## II. Argument

Rakofsky's opposition fails to redeem his case. He refuted none of the legal principles protecting the defendants' exercise of their free speech rights. The case must be dismissed with prejudice and sanctions imposed.

### A. Rakofsky Alleged No Viable Causes of Action.

#### a. Rakofsky has not Alleged a Cause of Action for Defamation.

The frailties of Rakofsky's defamation claim are laid clear by his opposition. While he now concedes that claims of his incompetence are non-actionable statements of opinion (Opp at 47, 52; Turkewitz Aff. ¶¶ 2-5, 11), he nevertheless attempts to recast them as factual statements. Rakofsky attempts to re-center the defamation claims on the defendants' statements that the

*Deaner* case ended in a mistrial for Rakofsky, and that Judge Jackson attacked Rakofsky's competence. But these central themes of his defamation claims are indisputably factually true – and thus cannot support a defamation claim.

The Deaner case did, in fact, end in mistrial. On March 31, 2011, Rakofsky *himself* boasted on his Facebook profile "1st Degree Murder… MISTRIAL!" (Ex. F). Rakofsky swore under oath that he even asked the *Deaner* court to effectuate a mistrial in his October 24, 2011 affidavit submitted to this Court (Rakofsky Aff. of Oct. 24, 2011 ¶ 32). By Rakofsky's logic, he has defamed himself. Rakofsky plays semantics as to what *precisely* ended the Deaner case – though it appears likely that the "conflict" with his client arose from his own incompetence – but the outcome was undoubtedly a mistrial. On April 1, 2011, Judge Jackson "*grant[ed] the motion for new trial*." (Ex. E at 5:2), explaining to Deaner that the consequence of granting the motion would result in "*abort[ing] the trial," "dismiss[ing] the jury*" and his continued detention while the government could re-try him. (*Id*. at 2:17-3:6) Clearly, this is a "mistrial."[2]

Rakofsky admits that the defendants' statements regarding his incompetence are not defamatory, and "*would be a matter of opinion that would be neither provably true nor untrue*." (Opp. at 47, 52) Thus, the defendants' general statements about his competence are non-defamatory opinions. As for statements about Rakofsky's incompetence in the Deaner case, the defendants' statements echo the words of Judge Jackson: He was "*astonished*" by Rakofsky's performance, it was a "*detriment*" to Deaner, and was "*not up to par under any reasonable standard of competence under the Sixth Amendment*." (Ex. E) Evaluations of an attorney's competence can be no clearer, and no more damning than that. Even if the precise word "*incompetent*" did not escape Judge Jackson's lips, it is clear that the judge saw a complete lack

[2] It is a telling testament to Rakofsky's incompetence, which is directly at issue in this case, that Dontrell Deaner knowingly and willfully subjected himself to additional lengthy pretrial detention rather than proceed with Rakofsky as his attorney.

of competence in the Plaintiff. The defendants published a fair and true description of this judicial proceeding. This makes their statements privileged under Civil Rights Law § 74. *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353-54 (N.Y. 1985); *Shiles v. News Syndicate Co.*, 261 N.E.2d 251, 252-53 (N.Y. 1970).

Finally, Rakofsky misapprehends the protections of 47 U.S.C. § 230 provided to defendants Bannination and Banned Ventures, LLC. As neither Bannination nor Banned Ventures LLC authored the content Rakofsky complains of, they are immune from any liability arising from those statements. *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. 2011); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699-700 (S.D.N.Y. 2009). Rakofsky misapprehends the purpose of § 230, which uniformly protects service providers such as Banned Ventures LLC and Bannination from liability for third party postings.

**b. Rakofsky has not Alleged a Cause of Action for Intentional Infliction of Emotional Distress.**

Rakofsky's opposition admits that his grievance with the defendants is the fact that they linked to one another. (Rakofsky Aff. ¶¶ 75-80). Rakofsky objects to this litigation being dubbed "*Rakofsky v. Internet*," but his bizarre theory of liability claims that linking to another journalist or commentator's report and analysis of a public trial constitutes "*extreme and outrageous conduct*" (Opp. at 71). In fact, this new claim that linking to another and forming a web merely reinforces that Rakofsky has, indeed, tried to sue the Internet. It is a remarkable day in legal history when authors are accused of being legally culpable for committing the offense of providing sources and citations to support their positions.

Needless to say, the hyperlinking of news reports and fellow bloggers' commentary by the defendants does not constitute extreme or outrageous conduct under New York law, nor do the defendants' statements in evaluating a botched murder trial and news reports concerning it. *Howell v New York Post Co*., 612 N.E.2d 699, 702 (N.Y. 1993) (finding that article written about defendant was not extreme and outrageous conduct, noting that "of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous"); *Stern v. Burkle*, 36 Media L. Rptr. 2205 (N.Y. Sup. Ct., N.Y. County 2008) (holding that articles in the New York Daily News claiming Plaintiff had demanded protection money from Defendant "is not extreme and outrageous as defined under New York law"); see also *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[we all] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment").[3]

**c. Rakofsky has not Alleged a Cause of Action for Tortious Interference with Contract.**

Rakofsky's argument that he has stated a claim for tortious interference with contract is unavailing and replete with irrelevance. This tort requires the plaintiff to allege that the defendants knew of **specific** contracts Rakofsky had with third parties. Rakofsky fails to allege this fact, and thus his claim fails as a matter of law. *Lama Holding Co. v Smith Barney, Inc*., 668 N.E.2d 1370, (N.Y. 1996); *Vigoda v. D.C.A. Prods. Plus Inc*., 293 A.D.2d 265 (1st Dept. 2002). Rakofsky *admits* that the Amended Complaint fails to allege this cause of action when he writes this: "Defendants are aware *in the abstract* that plaintiffs had contracts with third parties, but

[3] Additionally, Rakofsky's Opposition does not address the deficiency of his Amended Complaint in stating conclusorily that he suffered emotional distress, rather than articulating any actual medical conditions he suffered from due to the Defendants' acts. *Walentas v. Johnes*, 257 A.D.2d 352, 353 (1st Dept. 1999); *Leone v. Leewood Serv. Station*, 212 A.D.2d 669, 672 (2d Dept. 1995).

likely did not know […] the particular facts and circumstances thereof." (Opp. at 73-74) (emphasis added).

Claiming the defendants imputed general knowledge of some mythical contracts is insufficient to fulfill the tort's requirement of specific knowledge. *See Lama*, 668 N.E.2d at 1370; *Vigoda*, 293 A.D.2d at 265. As Defendants' conduct and speech was lawful, there is no intentional, improper conduct that could possibly be the basis of this claim. *Id*. Additionally, Rakofsky's argument that this conduct interfered with "potential" contracts (Opp. at 73-74) is beyond the scope of such claims. *Id*.

Nevertheless, even if the Defendants knew of specific contracts that Rakofsky entered into (presumably terminable-at-will attorney-client relationships that are beyond the scope of this claim[4]), the Defendants' interference in such contracts would be privileged. Given what the Defendants know about Joseph Rakofsky – indeed, given what a substantial composite of the entire American legal profession knows about Rakofsky – they would be remiss in their ethical responsibilities if they did not warn any known Rakofsky clients of the peril they face being represented by someone who has been shown to be both unethical and incompetent.[5]

**d. Rakofsky has not Alleged a Cause of Action for Violations of N.Y Civil Rights Law §§ 50 and 51.**

[4] *Guard-Life Corporation v. S. Parker Hardware Mnfg. Corp.*, 406 N.E.2d 445, 448-49 (N.Y. 1980) (holding that contracts voidable at will constitute only prospective, rather than existing, contractual relationships).

[5] N.Y. Rule Prof. Conduct 8.3(a) (requiring lawyers to report conduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer"); *In re Ropiecki*, 246 A.D. 80, 86 (4th Dept. 1935) (lauding public discipline as it "serves to warn other members of the bar of the fate which awaits those who are recreant to their trust"); *Tronolone v. Bar Ass'n of Erie County*, 39 A.D.2d 496, 498-99 (4th Dept. 1972) (same).

Rakofsky has not alleged a viable cause of action for violation of New York Civil Rights Law §§ 50 and 51. Rakofsky does not address this claim in his opposition brief and is deemed to consent to this claim's dismissal. *See Auchampaugh*, 173 A.D.2d at 1060.

**B. Rakofsky Cannot Establish Personal Jurisdiction Over the Foreign Defendants.**

In order to support the exercise of personal jurisdiction over a website, New York must have a "substantial relationship" with the activities of the website and the pending claim. *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Assn*., 18 N.Y.3d 400 (N.Y. 2012); *Rescuecom Corp. v. Hyams*, 477 F. Supp. 2d 522, 530 (N.D.N.Y. 2006) ("the fact that the subject of the allegedly defamatory online postings is located in New York does not support New York jurisdiction").[6] In *SPCA*, the Court of Appeals found that the action should have been dismissed, as "*the statements were not written in or directed to New York. While they were posted on a medium that was accessible in this State, the statements were equally accessible in any other jurisdiction*." *Id*. at 405 (emphasis added). This outcome is equally applicable to the foreign defendants in this case – to the extent they have not waived their jurisdictional defenses – as they hail from all over the nation and from Canada (*see* Ex C.) and have websites that can be accessed anywhere by virtue of the Internet's global nature. This Court's finding that jurisdiction is improper would comport with New York jurisprudence, as "*courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation*." *Id.* (citing *Best Van Lines, Inc. v Walker*, 490 F3d 239, 248 (2d Cir. 2007)) (emphasis added).

**C. Rakofsky's "Expert" is Unqualified and does not Warrant Credence.**

Rakofsky's "forensic expert" reveals his lack of qualifications within two paragraphs of his affidavit. Specifically, Mr. Alayon claims to be an "expert" in "HTML 5 (which he

[6] Defendants Tannebaum, John Doe # 2, Tarrant84, and Pribetic elect to specifically waive this defense at this time – preferring to receive a decision on the merits.

mysteriously refers to as "hyper treading multi-language") and he claims proficiency in "C+++". (Alayon Aff. ¶ 2) Neither of these languages even exist. HTML 5 is the fifth iteration of the HyperText Markup Language ("HTML") standard, which has been in use since 1990.[7] This is the anchor of the Internet, which allows sites to link to each other.

Alayon places the defendants in the position of proving a negative with respect to his claim that he is an expert in "C+++." (*Id*.) While C, C++ and C# are all recognized computer languages, "C+++" does not exist,[8] and is often the subject of programmer jokes.[9] Normally, discrediting an expert takes some work, but when a professed "expert" actually claims to be proficient in a programming language that only exists in programmer jokes about computer ignoramuses, all of the sport is taken out of the thing. Alayon's errors betray his ignorance in an area where he is supposedly authoritative.

## III. Conclusion

The First Amendment and New York State law entitle the defendants to a full and complete dismissal of this action without delay. The frivolity of this action and the plaintiff's conduct while prosecuting it begs for their costs to be taxed to Rakofsky, which will be sought if not awarded *sua sponte* by the Court under CPLR 8303(a) (frivolous claims) and 22 NYCRR 130-1.1 (frivolous conduct) (Turkewitz Aff. ¶ 12).

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[7] See http://www.goodellgroup.com/tutorial/chapter1.html (last accessed May 31, 2012); W3C, HTML5 differences from HTML4 (Apr. 5, 2011), http://www.w3.org/TR/2011/WD-html5-diff-20110405/#introduction (*last accessed* May 31, 2012).

[8] http://www.w3.org/TR/2011/WD-html5-diff-20110405/#introduction (last accessed May 31, 2012).

[9] Urban Dictionary, C+++, http://www.urbandictionary.com/define.php?term=C%2B%2B%2B (*last accessed* May 31, 2012).

Respectfully submitted this 8th day of June, 2012 on behalf of Defendants (1) Eric Turkewitz, (2) The Turkewitz Law Firm, (3) Scott Greenfield, (4) Simple Justice NY, LLC, (5) blog.simplejustice.us, (6) Kravet & Vogel, LLP, (7) Carolyn Elefant, (8) MyShingle.com, (9) Mark Bennett, (10) Bennett And Bennett, (11) Eric L. Mayer, (12) Eric L. Mayer, Attorney-at-Law, (13) Nathaniel Burney, (14) The Burney Law Firm, LLC, (15) Josh King, (16) Avvo, Inc., (17) Jeff Gamso, (18) George M. Wallace, (19) Wallace, Brown & Schwartz, (20) "Tarrant84", (21) Banned Ventures LLC, (22) BanniNation, (23) Brian L. Tannebaum, (24) Tannebaum Weiss, (25) Colin Samuels, (26) Accela, Inc., (27) Crime and Federalism, (28) John Doe # 1, (29) Antonin I. Pribetic, (30) Steinberg Morton, (31) David C. Wells, (32) David C. Wells P.C., (33) Elie Mystal, (34) AboveTheLaw.com, and (35) Breaking Media, LLC


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