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

JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.,	:	Index No. 105573/2011
Plaintiffs,	:	
- against -	:	
THE WASHINGTON POST, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY THE AMERICAN BAR ASSOCIATION, DEBRA CASSENS WEISS, AND SARAH RANDAG FOR COSTS AND REASONABLE ATTORNEY'S FEES

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PRELIMINARY STATEMENT

The American Bar Association, Debra Cassens Weiss, and Sarah Randag (the "ABA Defendants") submit this memorandum in support of their motion, pursuant to CPLR § 8303-a and 22 NYCRR § 130-1.1(a), requesting that this Court order Joseph Rakofsky and the Rakofsky Law Firm P.C. ("Plaintiffs"), and their attorney, Matthew H. Goldsmith and his law firm, Goldsmith & Associates ("Plaintiffs' Counsel"), to pay the costs and reasonable attorney's fees incurred by the ABA Defendants in defending against Plaintiffs' lawsuit. The ABA Defendants request payment (1) by Plaintiffs of the ABA Defendants' costs and reasonable fees incurred from the filing of this lawsuit until the date on which Plaintiffs' Counsel was retained, and (2) by Plaintiffs and Plaintiffs' Counsel of the ABA Defendants' costs and fees incurred from the date of Plaintiffs' Counsel's retention through the date on which the ABA Defendants are dismissed from this matter.

The record in this lawsuit speaks for itself: Plaintiffs brought claims against the ABA Defendants even though Mr. Rakofsky, an attorney, and his law firm knew or should have known that their frivolous claims had no basis in law or fact, and that there was no good faith argument for an extension, modification, or reversal of existing law that might support any of them.[1] Plaintiffs filed their first complaint on May 11, 2011, asserting claims based on a report by *The Washington Post* of a felony murder trial defended by Mr. Rakofsky (the "*Post* Article"), which ended abruptly when Judge Jackson declared a mistrial. *See* November 20, 2012 Affidavit of Mark Harris ("Harris Aff.") ¶ 2.[2] They filed an amended complaint a few days later,

[1] This motion addresses only the frivolousness of Plaintiffs' claims against the ABA Defendants. It does not address Plaintiffs' alleged claims against any of the other defendants named by Plaintiffs in this matter.

[2] Due to the size of Plaintiffs' pleadings, the ABA Defendants are not submitting Plaintiffs' complaints or memoranda of law on this motion, but will readily provide copies of those documents should the Court so desire.

changing none of the allegations substantively, but adding two new causes of action and new defendants – bringing the total number of defendants to almost eighty. Harris Aff. ¶ 3.

As reported in the *Post* Article, before granting the mistrial, Judge Jackson commented on Mr. Rakofsky's poor performance and referred to an email communication in which Mr. Rakofsky asked an investigator to "trick" a witness. Plaintiffs' May 16, 2011 Amended Complaint at ¶¶ 138-39. Given the gravity of the reported events – occurring during a judicial proceeding and within an area of legitimate public concern – many legal news organizations and legal blogs picked up the *Post* Article. *See generally id.* And with those the events involving a potential violation of the defendant's constitutional right to effective assistance of counsel, and thus clearly falling within the ABA's core mission to "promote competence, ethical conduct, and professionalism" in the legal profession,[3] the ABA Defendants reported on the *Post* Article in two articles on defendant ABAJournal.com.[4] *Id.* at ¶¶ 144-45.

On July 28, 2012, the initial trial judge in this matter permitted Plaintiffs' original counsel to withdraw. Harris Aff. ¶ 4 & Ex. 2. Because she ruled that Mr. Rakofsky could not act *pro se* on behalf of his professional corporation, she also stayed proceedings to give Plaintiffs an opportunity to retain new counsel. *Id.* During the eight months that the stay remained in place, Mr. Rakofsky, acting *pro se*, engaged in repeated frivolous motion practice.[5] Harris Aff. ¶¶ 4-11.

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[3] *See* ABA Mission and Goals, available at <www.americanbar.org/utility/about_the_aba/aba-mission-goals.html>. Since 1908, the ABA has developed, issued, and updated model rules for lawyer ethics and regulation, and its Center for Professional Responsibility regularly issues formal opinions on attorney ethics issues. *See* <www.americanbar.org/groups/professional_responsibility html>.

[4] The ABA Defendants note that one of the named defendants—"abajournal.com"—is not a legal entity. Plaintiffs evidently made no effort to research that website before bringing suit, nor did they bother to correct this error in any of their pleadings, including the proposed Second Amended Complaint, after the error was brought to their attention.

[5] Mr. Rakofsky's motions included an October 13, 2011 Order to Show Cause, an October 24, 2011 motion for twelve various orders (including discovery orders and orders to amend the complaint, for

On March 21, 2012, once Plaintiffs were represented by Mr. Goldsmith and his firm, the stay was lifted and a briefing schedule was set. Harris Aff. ¶¶ 10-11. On March 28, 2012, the ABA Defendants filed their motion to dismiss the Amended Complaint. *Id.* ¶ 12. In their supporting papers, the ABA Defendants showed that Plaintiffs did not, and cannot, plead a viable cause of action against them. In particular, the documentary evidence, including the transcript of the criminal proceedings before Judge Jackson and the email Mr. Rakofsky sent to the investigator, demonstrates unequivocally that none of the challenged statements in the ABA articles – even if they are embarrassing or otherwise detrimental to Plaintiffs – provides a legal or factual basis on which Plaintiffs might pursue any of their alleged tort claims against the ABA Defendants.

Plaintiffs and their Counsel, however, were undeterred. Even after having a full opportunity to conduct their own research as to the ABA Defendants' arguments, they served a 65-page response on or about May 16, 2012, in which they still offered nothing that might be legally sufficient to support any of their alleged claims.[6] And days prior, on May 9, 2012, Plaintiffs and their Counsel also filed a Notice of Cross-Motion, which included a request to be allowed to file a 269-page, 1223-paragraph Second Amended Complaint, which did nothing more than increase the number and prolixity of their claims, while further increasing the costs of defense for the ABA Defendants and the approximately 80 other defendants.[7] On June 8, 2012, the ABA Defendants filed their reply memorandum of law, in which they clearly put Plaintiffs

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default judgment, and for sanctions), and a December 23, 2011 Order to Show Cause (which also sought twelve separate orders). Harris Aff. ¶¶ 6-7. When Justice Goodman dismissed the latter motion as "incomprehensible," Mr. Rakofsky filed an application for relief pursuant to CPLR 5704(a) to the First Department. *Id.* ¶ 8. The application was rejected. *Id.* & Ex. 5.

[6] In support of Plaintiffs' May 16, 2012 response, Mr. Goldsmith filed an affirmation stating that he had personal knowledge of the facts set forth therein. Harris Aff., Ex. 7.

[7] In support of Plaintiffs' May 9, 2012 Notice of Cross-Motion, Mr. Goldsmith also filed an affirmation stating that he had personal knowledge of the facts set forth therein. Harris Aff., Ex. 6.

on notice that they believed an award of attorney's fees was warranted. *See* the ABA Defendants' June 8, 2012 Memorandum of Law at 1, 6-7, 13 (arguing that the motion to amend should be denied as frivolous and attorney's fees awarded).

At oral argument on defendants' motions to dismiss on June 28, 2012, Mr. Goldsmith conceded that (1) Judge Jackson believed that Mr. Rakofsky's performance fell below a reasonable standard; and (2) Mr. Rakofsky sent an email to an investigator in which he asked the investigator to "trick" an "old lady." Harris Aff., Ex. 8 (Transcript of the June 28, 2012 oral argument at 54:14-17; 66:7-10). In light of these concessions—which, when compared with the transcript of proceedings before Judge Jackson, are factually incontrovertible—this Court recommended that Mr. Goldstein discuss with Plaintiffs the withdrawal of their claims, or else the Court would "look seriously" at whether sanctions were appropriate. *Id.* (Tr. 90:1-2; 90:26-91:1; 91:15-16).

Still undeterred, Mr. Rakofsky submitted a letter to the Court three days later, over Mr. Goldsmith's signature block, citing three opinions that purportedly showed the propriety of simultaneously pleading both defamation and negligence claims in connection with (as Mr. Goldsmith phrased it at oral argument) "[t]he duty of the defendants to report accurately." Harris Aff., Ex. 8 (Tr. 82:17-18) & Ex. 9. None of these cases is apposite.[8] Nevertheless, in his typical

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[8] Even assuming that cases not involving "the duty of the defendants to report accurately," *id.*, might be responsive to this Court's instruction, none of the opinions cited by Mr. Rakofsky supports a contention that both defamation and negligence may properly be pled based on the same duty of care. In the first case, *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000), consumer-plaintiffs asserted claims of negligence and defamation, but pleaded malice and willful intent, to which the court responded that "under Illinois law, intentional or malicious breaches of ordinary care . . . are inconsistent with an allegation of ordinary negligence."

The second case, *Cincinnati Insurance Co. v. Pro Enterprises, Inc*, 394 F. Supp. 2d 1127 (D.S.D. 2005), was an insurer's declaratory judgment action concerning coverage and a duty to defend claims arising from an alleged breach of a hotel construction contract. At issue were claims of: (1) negligence against the insured based on the insured's representations as to construction costs, budget and timing, and for failing to adequately review, monitor and supervise the work, and (2) defamation, separately based on

fashion of rewriting the facts and misconstruing the law, Mr. Rakofsky asserted: "We were unable to find any cases in which courts held that pleading Defamation and Negligence in the alternative constitutes frivolous conduct. Thus, in the absence of any decisions of New York courts on this point, we believe it proper to consider and rely upon common-law decisions from other jurisdictions." Harris Aff., Ex. 9 at 4.

It is now indisputable that not only did Plaintiffs commence this action against the ABA Defendants in bad faith, but it has been and is being continued by Plaintiffs and their Counsel in bad faith as well. Plaintiffs and their Counsel have had over five months to withdraw their claims since the Court strongly suggested they consider doing so at the last conference. They have evidently decided not to. Accordingly, the ABA Defendants request that this Court find that the claims asserted against them are patently frivolous. As an appropriate sanction for bringing and continuing to prosecute those claims, the ABA further requests that the Court award (1) from Plaintiffs, Defendants' costs and reasonable fees from the filing of this lawsuit until the date on which Counsel was retained, and (2) from Plaintiffs and their Counsel, the costs and reasonable fees incurred from the date of Counsel's retention through the date on which the ABA Defendants are dismissed from this matter.

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statements by the insured, allegedly made with the intent to injure the owner in the relevant communities. *Id.* at 1129-30. Further distinguishing this case from the facts at bar, moreover, is this statement by the court: "Neither libel nor slander, as defined by South Dakota law, require a showing that the publisher of the false publication have knowledge of the falsity of the publication." *Id.* at 1132.

Finally, in the third case, *Hazelwood v. Harrah's,* 862 P.2d 1189 (Nev. 1993), while Hazelwood had alleged both negligence and defamation, the lower court had granted Harrah's motion for judgment notwithstanding the verdict on the defamation claim, "finding that *the requisite publication was not present,*" and, "Hazelwood does not appeal the district court's order . . . as to defamation." *Id.* at 1191 (emphasis added).

ARGUMENT

I. THE ACTION PLAINTIFFS COMMENCED AND HAVE CONTINUED AGAINST THE ABA DEFENDANTS IS PATENTLY FRIVOLOUS.

There can be no question but that the action filed against the ABA Defendants is frivolous. Over more than a year of litigation, protracted motion practice, hundreds of pages of filings, and multiple amendments and attempts to amend their complaint, Plaintiffs have ignored the fundamental and irreparable problem with their claims against the ABA Defendants: *there is no cause of action for allegedly damaging but true statements*. As a result, sanctions are appropriate.

Under New York law, there are two separate sources of authority for a court to award costs and reasonable attorney's fees to one party upon a finding that the other party has engaged in "frivolous" activity. Section 8303-a of the CPLR provides for *mandatory* sanctions upon a court's finding that a plaintiff commenced or continued a frivolous claim in a personal injury action:

> If in an action to recover damages for personal injury, . . . such action or claim is commenced or continued by a plaintiff . . . and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court *shall award* to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

CPLR § 8303-a(a) (emphasis added). The CPLR explicitly provides that the costs and fees awarded under this subsection may be assessed against *either* the party bringing the action or his attorney (or both), depending upon the circumstances of the case. CPLR § 8303-a(b). *See also Linen v. Hearst Corp.*, 2007 N.Y. Slip Op. 34179U (Sup. Ct. N.Y. Cnty. December 13, 2007) (ordering a hearing to determine sanctions to be awarded pursuant CPLR § 8303-a against plaintiffs' counsel for bringing a defamation action where "none of the causes of action pleaded by plaintiffs contained any reasonable basis in law or fact").

Separately, § 130-1.1(a) of the NYCRR provides for a *discretionary* award of costs and reasonable attorney's fees resulting from frivolous conduct:

> The court, in its discretion, *may award* to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engaged in frivolous conduct as defined in this Part . . . .

22 NYCRR § 130-1.1(a) (emphasis added).

Under each provision, the definition of "frivolous" conduct is the same: a frivolous action is one for which there is no genuine basis either in law or fact, nor a good faith argument for a change in the law. CPLR § 8303-a(c)(ii); 22 NYCRR § 130-1.1; *Minister, Elders & Deacons of the Reformed Protestant Dutch Church v. 198 Broadway, Inc.*, 76 N.Y.2d 411 (1990) (applying 22 NYCRR § 130-1.1); *Matter of Sommer v. Harrington*, 201 A.D.2d 570 (2d Dep't 1994) (imposing costs payable by a party and her attorney under 22 NYCRR § 130-1.1).

A classic example of a frivolous action is a suit for defamation when the allegedly defamatory statements are in fact true. It is axiomatic that the truth of a published statement provides a complete and absolute defense to defamation. *Shenkman v. O'Malley*, 2 A.D.2d 567, 572 (1st Dep't 1956). Accordingly, where the challenged statements are true, the plaintiff can have no reasonable basis for bringing such a claim. As the First Department held in another defamation case, "[s]ince the truth of the published statements is a complete defense, plaintiff's contentions are so irrelevant as to be a waste of the Court's and opposing counsel's time." *Hirschfeld v. Daily News L.P.*, 271 A.D.2d 386 (1st Dep't 2000) (awarding costs and reasonable attorney's fees to defendant as sanctions) (internal citations omitted).

Further, sanctions are highly appropriate when a plaintiff "knew or should have known prior to pleading his causes of action [] that there was no reasonable basis for them." *Marcus v. Bressler*, 277 A.D.2d 108, 109 (1st Dep't 2000). Here, it is beyond question that even at the time they filed their complaint and amended complaint, Plaintiffs already knew that the challenged statements were true. For example, even in the Amended Complaint, Plaintiffs asserted that Judge Jackson "slandered RAKOFSKY's knowledge of courtroom procedure," Am. Compl. at ¶ 117; admitted that the judge stated that "he was 'astonished' at RAKOFSKY's willingness to represent a person charged with murder and at his (Rakofsky's) 'not having a good grasp of legal procedures,'" *id.* at ¶ 118; and admitted that the judge stated that the email from Mr. Rakofsky "raises ethical issues," *id.* at ¶ 128. Nevertheless, Plaintiffs somehow rationalized that assertions about Mr. Rakofsky's "poor" performance and about the email were defamatory. *See id.* at ¶ 145.

Further, the uncontradicted documentary evidence – the hearing transcript and the email itself – establishes that the ABA articles were true reports. First, Judge Jackson stated on the record his opinion that Mr. Rakofsky did "not have a good grasp of legal principles and legal procedure . . . to the detriment of [the defendant in that case]," that "[i]f there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial," and that "I believe the performance was below what any reasonable person could expect in a murder trial." Harris Aff., Ex. 1 (April 1, 2010 Tr. at 4:10-17, 4:24-5:1). As the Court pointed out, to label such performance merely "poor" is not defamatory; it is charitable. Harris Aff., Ex. 8 (June 28, 2012 Oral Arg. Tr. 32:11-21). Second, Judge Jackson referred on the record to the email in which Mr. Rakofsky asked an investigator to "trick" an old lady, and said that it "raise[d] ethical issues." Harris Aff., Ex. 1 (April 1, 2010 Tr. at 7:1-3). The email itself

confirms that Mr. Rakofsky used this language, and Mr. Rakofsky conceded the language in his complaint and amended complaint. Am. Compl. at ¶¶ 120, 128.

Since at least March 28, 2012, when the ABA Defendants filed their motion to dismiss, Plaintiffs and their Counsel have been on notice that the truth of these statements was the ABA Defendants' central (but not only) defense. Even if the two challenged statements consisted of opinion, they would still be "impregnable as against a defamation claim," because they merely echo the findings of a court of law. *See Gotbetter v. Dow Jones & Co.*, 259 A.D.2d 335, 335-36 (1st Dep't 1999) (statement that suit was "baseless," in reliance on pronouncements of district court judge, was opinion, and even if factual it could not constitute defamation). Because the characterization of Mr. Rakofsky's performance at trial as "poor" and the statement that Mr. Rakofsky sent an email asking an investigator to "trick" a witness were clearly based on statements made by Judge Jackson on the record, no defamation claim can succeed.

Even more damning than the trial transcript containing these statements is the fact that Plaintiffs' Counsel has *conceded* the truth of both statements before this very Court. At oral argument on June 28, 2012, Mr. Goldsmith stated as follows:

> Judge Jackson *believed that [Mr. Rakofsky's] performance fell below a reasonable standard* . . . . (Harris Aff., Ex. 8 (Tr. 54:14-23)) (emphasis added)
>
> With regard to the e-mail, the characterization of the word trick an old lady, "Please trick the old lady," *yes, that is a fair report of what the e-mail stated.* (*Id.* (Tr. 66:7-12)) (emphasis added)

These admissions establish, beyond any shadow of any doubt, that Plaintiffs and their Counsel are and have been well aware that the claims against the ABA Defendants are factually baseless. And yet, even more remarkably, Plaintiffs and their Counsel have continued in defiance of that knowledge – even after this Court, at the same oral argument, recommended that Mr. Goldsmith

discuss with Plaintiffs the prospect of withdrawing all of Plaintiffs' claims, or else the Court would "look seriously" at whether sanctions were appropriate. Harris Aff., Ex. 8 (Tr. 90:1-2; 90:26-91:1; 91:15-16). It has now been over five months since the oral argument and Plaintiffs have withdrawn none of their claims. To the contrary, in a letter submitted to the Court on or about July 1, 2012, signed by Mr. Rakofsky over Mr. Goldsmith's signature block, Mr. Rakofsky declared his intention to press forward.

The only justification offered by Plaintiffs and their Counsel for continuing this action is as meritless as it is disingenuous. They claim that the *Washington Post*'s article (and hence the ABA's republication) should not have described Judge Jackson's extended discourse on Mr. Rakofsky's concededly inadequate performance and the concededly improper email as the "cause" of the mistrial. Rather, they assert that Judge Jackson had already decided to declare the mistrial for other reasons, and merely mentioned these two reasons "in dicta" or "as a sidenote." Harris Aff., Ex. 8 (Tr. 58:10-15).

But review of the transcript makes plain that Judge Jackson was not offering gratuitous feedback to Mr. Rakofsky as if this were a trial advocacy workshop. And even if the judge had not been discussing his *reasons* for taking the momentous step of declaring a mistrial in a felony murder case, that would not salvage this patently frivolous action. After all, it was the judge's evaluation of Mr. Rakofsky's concededly inadequate performance and the concededly improper email that caused the alleged harm to Mr. Rakofsky's reputation, and there is no cause of action for allegedly damaging but true statements.

II. THE ABA DEFENDANTS ARE ENTITLED TO RECOVER ALL OF THE COSTS AND REASONABLE ATTORNEY'S FEES THEY HAVE INCURRED AND WILL SUBSEQUENTLY INCUR IN DEFENDING AGAINST THIS FRIVOLOUS ACTION.

The statute and court rule described above authorize different types of awards for frivolous conduct. 22 NYCRR § 130-1.1 authorizes the court to award a maximum of $10,000 in sanctions, with no limit for costs. 22 NYCRR § 130-1.2. In this context, "costs" are defined as including "actual expenses reasonably incurred and reasonable attorney's fees." CPLR § 8303-a authorizes a maximum of $10,000 for costs and reasonable attorney's fees, on a per-defendant basis. *Marcus*, 177 A.D.2d at 109; *Entm't Partners Grp., Inc. v. Davis*, 198 A.D. 2d 63 (1st Dep't 1993); 16 Siegel's Prac. Rev. 3.

The ABA Defendants request an award of their full costs and fees pursuant to 22 NYCRR § 130-1.1 as an appropriate sanction against Plaintiffs and their Counsel for having brought and having continued to prosecute this frivolous action – and, perhaps more important, because they have continued undeterred in their attempts to rewrite the facts and misconstrue the law, even after being warned by the Court. Mr. Goldsmith and his firm are included in this request because his name and his firm's name appear in the signature block of Plaintiff's opposition to the ABA Defendants' motion to dismiss, their cross-motion, and the July 1, 2012 letter. *See* Plaintiffs' May 9 and May 16, 2012 Memoranda of Law & Harris Aff., Ex. 9. Further, he argued against the motions to dismiss before this Court. *See* Harris Aff., Ex. 8.

It is axiomatic that a lawyer is responsible for the submissions he makes to a court, whether orally or in writing. *See, e.g.*, Rule 3.3 of the Rules of Professional Conduct, 22 NYCRR § 1200 ("(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); *see also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3,

Comment [2] ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. . . . [T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."); and Comment [3] ("A lawyer is responsible for pleadings and other documents prepared for litigation. . . . [A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").

Mr. Goldsmith cannot hide behind any pretext that he was acting merely as a mouthpiece for Mr. Rakofsky. After he and Plaintiffs had full opportunity to conduct their own research as to the ABA Defendants' arguments in support of their motion to dismiss, Mr. Goldsmith included an affirmation in Plaintiffs' May 16, 2012 response, in which he stated that he had "*personal knowledge* of the facts set forth herein." He did likewise for Plaintiffs' May 9, 2012 notice of cross-motion, which included their proposed 269-page, 1223-paragraph Second Amended Complaint. And even after the Court explained to Mr. Goldsmith in detail many of the legal and factual flaws in Plaintiffs' submissions and his argument, and recommended that he speak with his client about dismissing this lawsuit, the lawsuit has not been dismissed, nor has Mr. Goldsmith withdrawn. If the positions he has taken were frivolous – and they assuredly were – then he shares responsibility with Mr. Rakofsky for taking them.

When fashioning an appropriate sanction against Plaintiffs and their Counsel, the ABA Defendants request that the Court note that, as an organization that strives to foster and uphold

the legal profession's standards, the ABA cannot settle a case of this kind.[9] Since it must continue to defend itself, no matter how meritless the claims against it, it is appropriate for Plaintiffs and their counsel to bear the costs and attorney's fees of that defense.

In the alternative, the ABA Defendants request an award of $30,000 in fees and costs pursuant to CPLR § 8303-a, or $10,000 per defendant. Given the volume of frivolous materials and frivolous arguments against which the ABA Defendants have been required to defend, the maximum amount is appropriate.

CONCLUSION

For the reasons set forth above, the ABA Defendants respectfully request that this Court (1) find that the claims and causes of action Plaintiffs commenced and have continued against the ABA Defendants are frivolous; and (2) as an appropriate sanction against Plaintiffs and their Counsel, order payment of the ABA Defendants' costs and reasonable fees (a) by Plaintiffs from the filing of this lawsuit until the date on which Counsel was retained, and (b) by Plaintiffs and their Counsel from the date of Counsel's retention through the date on which the ABA Defendants are dismissed from this matter. The ABA Defendants also request that this Court enter such other and further relief as may be just and proper.

Dated: November 28, 2012
New York, NY

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[9] It is our understanding that Plaintiffs offered to dismiss the action against any defendant for a payment of $5,000. Harris Aff. ¶ 18. Apparently, several defendants accepted the offer. *Id.*