DAVID BRICKMAN PC

Attorneys at Law

1664 Western Avenue
Albany, New York 12203

Phone: 518-464-6464
Fax: 518-464-6688

davidbrickman@verizon.net

David Brickman
Sarah L. Harrington, of Counsel

June 13, 2011

Richard Borzouye Esq.
14 Wall Street
20th Floor
New York, New York 10005

Re: Rakofsky v Washington Post Company et al (Seddiq)
Index Number: 105573/11
RJI:

Dear Mr. Borzouye,

Enclosed for service is our Notice of Appearance; Notice of Motion; Memorandum of Law on behalf of Defendant Mirriam Seddiq.

Thank you.

Very truly yours,

David Brickman
DB/kb
Enclosure
cc: Jamison Koehler

STATE OF NEW YORK
SUPREME COURT

COUNTY OF NEW YORK

Joseph Rakofsky
Plaintiff,

vs.

The Washington Post Company, et al
and Mirriam Seddiq
Defendant,

Index Number: 105573/11
RJI:

AFFIRMATION OF SERVICE BY FIRST CLASS MAIL

The undersigned, hereby affirms that (s)he caused a copy of a Notice of Appearance; Notice of Motion to Dismiss Returnable 7/12/2011 at 60 Centre Street Room 130; Memorandum of Law to be served on June 13, 2011 by First Class Mail depositing a true copy of the papers, enclosed in a post-paid envelope, in an official depository maintained and exclusively controlled by the US Postal Service, addressed to the attorney at the address set forth herein.

Richard Borzouye Esq.
14 Wall Street
20th Floor
New York, New York 10005

Affirmed this 13th day of June, 2011

David Brickman

DAVID BRICKMAN PC

Attorneys at Law

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Albany, New York 12203

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Fax: 518-464-6688

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David Brickman
Sarah L. Harrington, of Counsel

June 13, 2011

New York County Clerk
Attn: Thomas Hayes
60 Centre Street-
Motion Support - Room 119
New York, New York 10007

Re: Rakofsky v Washington Post Company et al (Seddiq)
Index Number: 105573/11
RJI:

Dear Mr. Hayes:

Enclosed for filing is our Notice of Appearance; Notice of Motion; Memorandum of Law and filing fee on behalf of Defendant Mirriam Seddiq.

Thank you.

Very Truly Yours,

David Brickman
DB/kb
Enclosure

STATE OF NEW YORK
SUPREME COURT

COUNTY OF NEW YORK

Joseph Rakofsky
Plaintiff,

vs.

The Washington Post Company, et al
and Mirriam Seddiq
Defendant,

Index Number: 105573/11
RJI:

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that David Brickman, Esq., an Attorney duly licensed to practice law in the State of New York and maintain an office for the practice of law at 1664 Western Avenue, Albany New York 12203, is appearing on behalf of Defendant Mirriam Seddiq herein.

Dated: June 13, 2011

Yours etc,

DAVID BRICKMAN PC
By: David Brickman
Attorney for Mirriam Seddiq
1664 Western Avenue
Albany, New York 12203
Ph 518-464-6464
Fax 518-464-6688

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

----------X

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

Plaintiffs,

Notice of Motion
Index Number 105573/11

-against

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REND SMITH
BREAKING MEDIA, LLC
ABOVETHELAW.COM
ELIE MYSTAL
AMERICAN BAR ASSOCIATION
ABAJOURNALCOM
DEBRA CASSENS WEISS
SARAH RANDAG
MYSHINGLE.COM
CAROLYN ELEFANT
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SCOTT H. GREENFIELD
LAW OFFICE O•.ERIC L. MAYER
ERIC L. MAYER,. Individually
GAMSO, HELMICK & HOOLAHAN
JEFF GAMSO, individually
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"JOHN DOE #2"
LAW OFFICE OF FARAJI A. ROSENTHALL
FARAJI A. ROSENTHAL, individually
BENNETT AND BENNETT
MARK BENNETT, individually
SEDDIQ LAW
MIRRIAM SEDDIQ, individually
THE MARTHA SPERRY
DAILY ADVANTAGE ADVOCATES
MARTHA SPERRY, individually
ALLBRITTON COMMUNICATIONS COMPANY TBD.COM
RESTORINGDIGNITYTOTHELAW.BLOGSPOT.COM

"J.D0G84@YMAIL.COM"
ADRIAN K. BEAN
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KOEHLER LAW
JAMISON KOEHLER, individually
THE TURKEWITZ LAW FIRM
ERIC TURKEWITZ, individually
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LORI D. PALMIERI, individually
TANNEBAUM WEISS, PL
BRIAN TANNEBAUM, individually
WALLACE, BROWN & SCHWARTZ
GEORGE M. WALLACE, individually
DAVID C. WELLS, P.C.
DAVID C. WELLS, individually
ROB MCKINNEY, ATTORNEY-AT-LAW
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MICHAEL T. DOUDNA, individually
MACE J. YAMPOLSKY & ASSOCIATES
MACE J. YAMPOLSKY, individually
THE LAW OFFICE OF JEANNE O'HALLERAN, LLC
JEANNE O'HALLERAN, individually
REITER & SCHILLER, P.A. LEAH K. WEAVER

Defendants

----------X

PLEASE TAKE NOTICE that upon the annexed affirmation of David Brickman affirmed on June 13, 2011, and the exhibits annexed thereto, including the Amended Complaint, and upon the memorandum of law in support hereof, defendant MIRRIAM SEDDIQ will move this Court at the New York Supreme Court 60 Centre Street, New

York, New York, Motion Submission Part, Room 130, on July 12 2011 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 3211(a)(7) dismissing the Amended Complaint, and granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, are required to be served upon the undersigned not later than July 5, 2011, in accordance with CPLR 2214(b).

Dated: June 13, 2011
Albany, New York

DAVID BRICKMAN, ESQ.
Attorney for Defendant MIRRIAM SEDDIQ
1664 Western Avenue
Albany, NY 12203
(518) 464-6464
Fax: (518) 464-6688

TO:
Richard Borzouye, Esq.
Borzouye Law Firm PC
14 Wall Street, 20th Floor
New York, New York 10005
(212) 618 1459

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

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

Plaintiffs,

AFFIRMATION
Index Number 105573/11

-against-

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REND SMITH
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THE LAW OFFICE OF JEANNE O'HALLERAN, LLC
JEANNE O'HALLERAN, individually
REITER & SCHILLER, P.A. LEAH K. WEAVER
Defendants

David Brickman, Esq., an attorney duly admitted to practice law in the State of New York, affirms the following under penalties of perjury.

1. I am the attorney for the Defendant MIRRIAM SEDDIQ (hereinafter "Seddiq"). I make this affirmation in support of their Motion to Dismiss the Complaint. I am familiar with the facts and circumstances set forth herein.

2. Plaintiff commenced this action by Summons and Complaint dated May 11, 2011 alleging defamation and intentional infliction of emotional distress against Seddiq, among others.

3. Defendant Washington Post Company published a story written by Keith L. Alexander of and concerning the Plaintiff, titled "D.C. Superior Court judge declares mistrial over attorney's competence in murder case" on April 1, 2011 (Ex. A).

4. The report was of a judicial proceeding held April 1, 2011 in DC Superior Court before Judge William Jackson in the case of *U.S. v. Dontrell Deaner* (Exhibit B)

5. Attached as Exhibit "C" is a copy of the e-mail which was the subject of the Washington Post April 1, 2011 article.

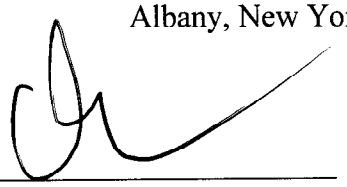
6. The following are links to Defendant Seddiq's published article:

http://notguiltynoway.blogspot.com/search?q=rakofsky&updated-max=2011-04-05T12%3A31%3A00-04%3A00&max-results=20

or

http://www.blogger.com/comment.g?blogID=7942701&postID=6484109744126786917

Dated: June 13, 2011
Albany, New York



DAVID BRICKMAN, ESQ.
Attorney for Defendant Seddiq
1664 Western Avenue
Albany, NY 12203
(518) 464-6464
Fax: (518) 464-6688

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

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

Plaintiffs,

MEMORANDUM OF LAW
Index Number 105573/11

-against-

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REND SMITH
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THE LAW OFFICE OF JEANNE O'HALLERAN, LLC
JEANNE O'HALLERAN, individually
REITER & SCHILLER, P.A. LEAH K. WEAVER

Defendants

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MIRRIAM SEDDIQ'S MOTION TO DISMISS THE COMPLAINT

DAVID BRICKMAN, ESQ.
1664 Western Avenue
Albany, New York 12203
(518) 464-6464

Cases

Statutes

QUESTION PRESENTED

Whether Mirriam Seddiq's published commentaries regarding a published account of a publicized trial as reported in the Washington Post constitutes opinion and/or a fair report of a judicial proceeding which does not give rise to a claim for defamation?

STATEMENT OF FACTS

Plaintiff Radofsky is an inexperienced attorney, who agreed, for money, to represent Dontrell Deaner, a defendant in a murder trial in Washington D.C. before Hon. William Jackson in the case of *U.S. v. Dontrell Deaner*. The trial was Rakofsky's first. After partial completion of the trial, the Court declared a mistrial based upon, among other things, Radofsky's inept handling of the case. As the Honorable William Jackson declared on the record,

> It appeared to the Court that there were theories out there -- defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a -- not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner. And had there been -- If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.
>
> So I am going to grant Mr. Deaner's request for new counsel. I believe both -- it is a choice that he has knowingly and intelligently made and he understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder trial.

See Exhibit "B" to Brickman Affirmation Trial Transcript, p. 4. Plaintiff Rakofsky's Amended Complaint admits that the "slanderous and defamatory words" purportedly at issue in this lawsuit originated with Judge Jackson's remarks on the record. *Amended Complaint*, ¶ 118.

After granting the mistrial based in part upon Plaintiff Rakofsky's representation "below what any reasonable person could expect," the Court further opined that "There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues." *See*

also Amended Complaint, ¶ 128. That email, attached hereto as *Exhibit "C" to Brickman Affirmation*, includes an instruction that Mr. Rakofsky gave to his private investigator to "please trick [redacted] (old lady) into admitting" various facts presumably helpful to Mr. Deaner's defense. Plaintiff Rakofsky's Complaint admits sending the aforementioned email instructing his investigator to "trick" a witness. *Amended Complaint*, ¶ 120.

On April 1, 2011, the Washington Post published an article describing the above events. *Amended Complaint*, ¶ 137. Numerous others soon followed, including, by April 4, 2011 the Washington City Paper and the ABA Journal. *Amended Complaint*, ¶¶ 142–172, 175–194.

Moving Defendant Seddiq's article "A Silver Lining" was published April 5, 2011, which said among other things that ""The story is all around the internet. It's the hot topic of the week and it should be on the lips of every criminal defense practicioner [sic], if not every lawyer who gives a shit about the legal profession - Joseph Rakofsky an alleged criminal defense lawyer (with all of one whole year of experience) lied and lied and lied and was grossly incompetent...."

Rakofsky, incensed at the attention that he brought upon himself, now brings suit against numerous media companies for fair reporting of a judicial proceeding and against dozens of individuals for expressing their protected opinions about those judicial proceedings.

ARGUMENT

Seddiq moves to dismiss the Complaint pursuant to CPLR § 3211(a)(7) on grounds, *inter alia,* that the Complaint alleges comments that are a fair report of a judicial proceeding and because the comments are non-actionable opinion protected under New York and federal constitutional and common law.

APPLICABLE LAW STRONGLY FAVORS EARLY DISMISSAL OF DEFECTIVE DEFAMATION CLAIMS

New York public policy strongly favors early disposition of defamation claims and related causes of action against the press. "To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno, AG.* v. *Moor-Jankowski,* 145 A.D.2d 114, 128 (1st Dep't 1989), *aff'd,* 77 N.Y.2d 235 (1991) (intermediate history omitted). As the Court of Appeals has stressed, dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Armstrong* v. *Simon & Schuster, Inc.,* 85 N.Y.2d 373,379 (1995); *see also Karaduman v. Newsday, Inc.,* 51 N.Y.2d 531, 545 (1980) (noting that "'[t]he threat of being put to the defense of a [defamation] lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself") (citations omitted). Consistent with this policy, courts routinely dismiss defamation claims on motions brought pursuant to CPLR § 3211(a)(7) to protect public debate and safeguard free-speech principles. *See, e.g., Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 1 (N.Y. App. Div. 2011) (granting pre-discovery motion to dismiss libel claims) *Rappaport* v. *VY Publ* 'g *Corp.,* 223 A.D.2d 515 (1st Dep't 1996) (same); *Steadman* v. *Sinclair,* 223 A.D.2d 392 (1st Dep't 1996) (same); *Parks* v. *Steinbrenner, 131* A.D.2d 60, 62 (1st Dep't 1987) (same).

PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION BECAUSE THE IMPLICATIONS AT ISSUE ARE EITHER NON-ACTIONABLE OPINION OR PROTECTED BY THE "FAIR REPORT" ABSOLUTE PRIVILEGE

THE PUBLISHED STATEMENTS

The Washington Post published on April 1, 2011 that:

> "A D.C. Superior Court judge declared a mistrial Friday in a 2008 murder case and allowed the defendant to fire his New York-based attorney, who exhibited what the judge said were numerous signs that he lacked knowledge of proper trial procedure, including telling the jury during his opening statements that he had never tried a case before. Judge William Jackson told attorney Joseph Rakofsky during a hearing Friday that he was "astonished" at his performance and at his "not having a good grasp of legal procedures" before dismissing him. What angered Jackson even more was a filing he received early Friday from an investigator hired by Rakofsky in which the attorney 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..."

Radofsky accuses Judge William Jackson of slander:

> "uttering several statements in open court that slandered RAKOFSKY's knowledge of courtroom procedure, while "likely being aware of the possible presence in the courtroom of a newspaper reporter, ALEXANDER, a so-called newspaper "reporter" from the WASHINGTON POST, and knowing full well that both news reporters and others would publish his slanderous and defamatory words, Judge Jackson, for reasons that can only be speculated, gratuitously published on the record the slanderous, defamatory statement"[s]. (Amended Complaint ¶ 117)

Rakofsky complains of Seddiq's public comments on April 5, 2011 as follows:

> "The story is all around the internet. It's the hot topic of the week and it should be on the lips of every criminal defense practicioner [sic], if not every lawyer who gives a shit about the legal profession - Joseph Rakofsky an alleged criminal defense lawyer (with all of one whole year of experience) lied and lied and lied and was grossly incompetent...." (Amended Complaint ¶ 161)

JUDICIAL NOTICE

This Court should take judicial notice of the record made in *U.S.. v. Dontrell Deaner*, the April 1, 2011 Washington Post publication and Seddiq's April 5, 2011 publication.

New York courts "may, in general, take judicial notice of matters of public record." *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667 (2d Dep't 1989); see also *Siwek v. Mahoney*, 39 N.Y.2d 159, 163 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice."); *American Broadcasting Cos., v. Wolf*, 76 A.D.2d 162, 169 n.2 (1st Dep't 1980) ("Courts may take judicial notice of facts which are part of the general knowledge of the public."), aff'd, 52 N.Y.2d 394 (1981).

Courts may take judicial notice of news articles as confirmation of the fact of media coverage. See, e.g., *Grebow v. City of New York*, 173 Misc.2d 473, 479 (N.Y. Sup. Ct. 1997) ("The court may take judicial notice of newspaper publications."); In re *Merrill Lynch & Co.*, 289 F. Supp.2d 416, 425 n.15 (S.D.N.Y. 2003) ("The Court may take judicial notice of newspaper articles for the fact of their publication without transforming the motion into one for summary judgment,"); *Schwenk v. Kavanaugh*, 4 F. Supp. 2d 116, 118 (N.D.N.Y. 1998) (judicial notice that an article about county prosecutors' wrongdoings had appeared on the front page of the New York Law Journal); *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 n.3 (S.D.N.Y.1998) (taking judicial notice of widespread newspaper coverage and collecting cases on the propriety of taking such notice).

Finally, the Appellate Division, First Department has held that, in assessing defamation claims by online publications, the Court should also look to any links included within the allegedly defamatory article. *Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 9 (N.Y. App. Div. 2011)(holding that hypertext links in an electronic communication are relevant in determining facts disclosed to the reader: "Far from suggesting that the writer knows certain facts that his or her audience does not know, the e-mail is supported by links to the writer's sources."). As such, this Court may also consider any of the articles published by any of the co-

defendants, none of which are reproduced here but are readily available on the internet.

This motion concerns the critical role of the courts in enforcing - before trial - the constitutional guarantees of free speech and a free press. This case should be dismissed under existing legal standards that protect statements of opinion. The governing standard for segregating non-actionable opinion from statements of fact under New York's Constitution requires examination of the language to determine whether or not it has a precise meaning, and whether or not it is provable true or false. The third factor, which separates New York's broader constitutional protection for opinion from that of the First Amendment, is context. Courts are required to examine both the immediate context of the communication at issue, as well as the broader social context. This factor informs courts how readers would understand the statements. The Court of Appeals has spoken repeatedly to the transformative role of context, and demonstrated through its holdings how "'even apparent statements of fact may assume the character of statements of opinion' when viewed in context. *Steinhilher v. Alphonse*, 68 N.Y.2d 283, 295 (1986).

Dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995); *see also Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) ("`[t]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself") (citation omitted).

Justice O'Connor noted in *Waters v. Churchill, 511* U.S. 661, 669 (1994) that it is "important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." This is nowhere more true than with

respect to the procedures mandated by the First Amendment and State Constitution to protect speech. This Court should dismiss these claims by applying the existing safeguards designed to protect speech and to prevent the chilling impact of litigation on free speech. Dismissal is necessary to vindicate the rights of defendant and to affirm the constitutional policy providing for efficient disposition of meritless libel claims at the pre-trial stage.

THE OPINION STATEMENT

Applying the correct standard, the utterance "The story is all around the internet. It's the hot topic of the week and it should be on the lips of every criminal defense practicioner [sic], if not every lawyer who gives a shit about the legal profession - Joseph Rakofsky an alleged criminal defense lawyer (with all of one whole year of experience) lied and lied and lied and was grossly incompetent...." at issue has the indicia of classic, unmistakable opinion.

It is not provable true or false and takes a position in the midst of a highly charged public debate. "Whether a particular statement constitutes an opinion or an objective fact is a question of law" must be resolved by the court. *Mann v. Abel, 10* N.Y.3d 271, 276 (2008) (citing *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 381 (1977)). Precisely because opinion determinations pose a question of law, courts routinely dispose of defamation claims on that basis at the motion to dismiss stage. *See, e.g., Brian v. Richardson,* 87 N.Y.2d 46 (1995) (motion to dismiss on opinion grounds granted and affirmed); *Steinhilber,* 68 N.Y.2d 283 (same); *O'Loughlin v. Patrolmen's Benevolent Ass 'n,* 178 A.D.2d 117 (1st Dep't 1991) (same).

The Court of Appeals long ago recognized that the First Amendment bars libel claims if they are not based on verifiably false facts. In *Rinaldi* v. *Holt, Rinehart* & *Winston, Inc., 42* N.Y.2d 369 (1977), the court explained that "[t]he First Amendment does not recognize the existence of false *ideas,"* so that expressions of opinion, "false or not," are "constitutionally

protected and may not be the subject of private damage actions." *Id.* at 3 79-80 (emphasis added). The U.S. Supreme Court affirmed this First Amendment limitation in *Milkovich,* holding that statements of opinion are protected unless they contain "a provably false factual connotation." 497 U.S. at 20. Thus, for example, the statement that a politician "shows his abysmal ignorance by accepting the teachings of Marx and Lenin" is not actionable under the First Amendment, because it cannot be proven true or false. *Id.*

Just one year after *Milkovich,* the Court of Appeals went one step further, holding that Article 1, Section 8 of the New York Constitution offers even more protection to opinions than the First Amendment. *See Immuno, AG.,* 77 N.Y.2d at 249. New York "has embraced a test for determining what constitutes a non-actionable statement of opinion that is more flexible and is decidedly more protective of the cherished constitutional guarantee of free speech." *Gross,* 82 N.Y.2d at 152 (internal quotations and citation omitted). To determine whether a statement constitutes protected opinion, the Court of Appeals has identified a number of factors to be considered: "(l) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact." *Brian,* 87 N.Y.2d at 51 (internal quotations and citations omitted); *see also Immuno, AG.,* 77 N.Y.2d at 254-55.

Under this analysis, a statement is protected if it has no precise and definite meaning that objectively can be proven true or false. *See, e.g., Steinhilber* v. *Alphonse,* 68 N.Y.2d 283, 293-95 (1986) (statement that plaintiff lacked "talent, ambition, and initiative" too vague to be actionable); *'Loughlin* v. *Patrolmen's Benevolent Assoc.,* 178 A.D.2d 117, 118 (1st Dep't 1991)

(statements that a police officer is a "disgrace to the entire police service" is non-actionable opinion); *Miller* v. *Richman,* 184 A.D.2d 191,193 (4 Dep't 1992) ("statements criticizing plaintiffs performance ... are, as a matter of law, non-actionable expressions of opinion;" "The individual defendants' unfavorable assessments of plaintiff's work are 'incapable of being objectively characterized as true or false.'"); *Hollander* v. *Cayton,* 145 A.D.2d 605, 606 (2d Dep't 1988) (statements that doctor was "immoral" and "unethical" too indefinite and incapable of verification to be actionable).

Similarly, a statement is protected if either the context in which it appears, or the broader social context with which it deals, indicates the statement was intended as an expression of opinion rather than an assertion of fact. *See, e.g., 600 West 1151h St. Corp.,* 80 N.Y.2d at 141-42 (accusation of fraud and illegality at a public hearing, in context, not reasonably understood as an accusation of criminal wrongdoing). "[I]n distinguishing between actionable factual assertions and non-actionable opinion, the courts must consider the content of the communication as a whole as well as its tone and apparent purpose." *Brian,* 87 N.Y.2d at 51. Recently, the Appellate Division, 1st Department recognized that "readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts." *Sandals Resorts Intl. Ltd. v Google, Inc.*, 2011 NY Slip Op 4179, 9 (N.Y. App. Div. 2011).

As such, the bar for Plaintiff Rakofsky is particularly high, indeed insurmountable.

THE "FAIR REPORT" STATEMENTS

The complained of statement was a fair report of the judicial proceeding and had already been published by the Washington Post.

Under New York law, it is for Court, in first instance, to decide whether publication is immune from claim of defamation as a fair report of court documents. *Procter & Gamble Co. v.*

Quality King Distributors, Inc., 1997, 974 F.Supp. 190. Whether the statements at issue in a given case are privileged is a question of law to be decided by the court. *See. e. g., Holy Spirit Ass 'nfor Unification of World Christianity* v *New York Times Co.,* 49 N.Y.2d 63, 67-68 (1979).

The statement is absolutely privileged under the New York "Fair Report" privilege (Section 74 of New York's Civil Rights Law) and cannot be the basis for a defamation action as a matter of law. Section 74 of New York's Civil Rights Law states, in relevant part, that: "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." The privilege "is absolute, and [cannot be] defeated by the plaintiffs allegations of malice or bad faith." *Pelayo* v *Celie,* 270 AD.2d 469,469 (2d Dep't 2000).

A report is "fair and true" if it accurately conveys the gist of what public officials were saying and doing in the context of an official proceeding. *Id.* at 67; *Becher* v. *Troy Publ g Co.,* 183 AD.2d *230,233* (3d Dep't 1992) ("The case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings."). In fact, the publication "need not be a verbatim account or even a precisely accurate report of an official proceeding to be a 'fair and true report' of such a proceeding" covered by the privilege. *Freeze Right Refrigeration* & *Air Conditioning Services, Inc.* v *City of New York,* 101 A.D.2d 175, 183 (1 st Dep't 1984). As one court has explained, "[a]ll that is needed to claim the privilege is that the alleged defamatory material 'may possibly bear on the issues in litigation now or at some future time. '" *The Savage Is Loose Co.* v. *United Artists Theatre Circuit, Inc.,* 413 F. Supp. 555,561 (S.D.N.Y. 1976) (citing *Seltzer* v. *Fields,* 20 AD.2d *60,* 62 (1 st Dep't 1963), *aif'd,* 14 N.Y.2d 624 (1964». In addition, the determination of "'[w]hether or not a particular article constitutes unbalanced

reporting is essentially a matter involving editorial judgment and is not actionable.'" *Gotbetter* v. *Dow Jones & Co.*, 259 A.D.2d 335, 336 (15t Dep't 1999) (citation omitted); *Glendora* v. *Gannett Suburban Newspapers, 201* AD.2d *620, 620* (2d Dep't 1994) (same).

A comparison of the Court record, the Washington Post publication and Seddiq's publications reveal the fatal flaw in the complaint in that it is clearly Judge Jackson's alleged slander and mistreatment of Rakofsky that is at the root of the complaint and of the public discussion. Moving Defendant Seddiq did nothing more than fairly summarize the sources identified and linked by his article, sources that themselves fairly described the court proceeding in which Plaintiff Rakofsky was involved.

THE SEDDIQ STATEMENTS WERE NOT FALSE

"Falsity is a *sine qua non* of a libel claim..." *Brian v. Richardson*, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129 (1995). Plaintiff Rakofsky alleges "falsity" by claiming that Judge Jackson "granted a mistrial solely because RAKOFSKY moved for his own withdrawal" and that "RAKOFSKY **never** requested that an 'investigator' trick a witness." *Amended Complaint*, ¶ 174. Yet, the trial transcript unambiguously demonstrates the Judge Jackson granted a mistrial *both* because Mr. Deaner requested new counsel *and* because "[Judge Jackson] would find that they are based on my observation of the conduct of the trial manifest necessity. [Judge Jackson] believe[d] that the performance was below what any reasonable person could expect in a murder trial." *See Exhibit "B" to Brickman Affirmation, Trial Transcript, p. 4.* Similarly, it is undisputed that Rakofsky instructed his investigator to "trick" a witness; the *Amended Complaint* expressly alleges as much, and admits that Judge Jackson, too, was concerned about the "ethical issues" arising from this instruction. ¶¶ 120, 128.

CONCLUSION

For the reasons stated, the complaint against Mirriam Seddiq should be dismissed with prejudice.

Dated: June 13, 2011
Albany, New York

Respectfully submitted,

DAVID BRICKMAN, ESQ.
Attorney for Defendant Mirriam Seddiq
1664 Western Avenue
Albany, NY 12203
(518) 464-6464
Fax: (518) 464-6688

The Washington Post

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D.C. Superior Court judge declares mistrial over attorney's competence in murder case

By Keith L. Alexander, Published: April 1

A D.C. Superior Court judge declared a mistrial Friday in a 2008 murder case and allowed the defendant to fire his New York-based attorney, who exhibited what the judge said were numerous signs that he lacked knowledge of proper trial procedure, including telling the jury during his opening statements that he had never tried a case before.

Judge William Jackson told attorney Joseph Rakofsky during a hearing Friday that he was "astonished" at his performance and at his "not having a good grasp of legal procedures" before dismissing him.

What angered Jackson even more was a filing he received early Friday from an investigator hired by Rakofsky in which the attorney 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.

According to the filing, Rakofsky had fired the investigator and refused to pay him after the investigator refused to carry out his orders with the witness. The filing included an e-mail that the investigator said was from Rakofsky, saying: "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting." The e-mail came from Rakofsky's e-mail account, which is registered to Rakofsky Law Firm in Freehold, N.J.

After the hearing, Rakofsky, 33, declined to comment on the case as he rushed down the escalators and out of the courthouse.

Rakofsky's Web page on lawsearch.net says he specializes in criminal law, DUIs, traffic law, malpractice law and negligence. He lists his firm's address as 14 Wall St. in Manhattan, but the New York state attorney registration offices have no record of Rakofsky being licensed in New York. Rakofsky, who received his law degree from Touro College in Brooklyn, N.Y., in 2009, has been licensed in New Jersey since April 29, 2010.

Confusion between Rakofsky and his client began early in the case and escalated, according to sources familiar with the case, *U.S. v. Dontrell Deaner*. Deaner, 21, of Southeast Washington, was charged with six counts involving the fatal shooting of Frank J. Elliott, 41, in the 4200 block of Pitts Place SE on June 16, 2008.

News of the mistrial spread throughout the courthouse as observers raced into Jackson's third-floor courtroom Friday to watch the proceedings. The judge, now obviously angry and frustrated, told Rakofsky that his

Ex A

performance in the trial was "below what any reasonable person would expect in a murder trial."

"There was not a good grasp of legal procedures of what was, and was not, allowed to be admitted in trial, to the detriment of Mr. Deaner," Jackson told Rakofsky.

Jackson said the most evident sign of Rakofsky's inexperience came during his rambling opening statements before the jury Wednesday, which lasted more than an hour, more than 30 minutes longer than most attorneys' openings. During his opening statements, Rakofsky repeatedly made reference to children playing "in the projects of Southeast D.C., where there was always gambling, guns and drugs."

"There are drugs in the projects of Southeast D.C. There are guns all the time and drugs," Rakofsky told the jury.

The prosecutor repeatedly objected over the relevance of Rakofsky's statements. Rakofsky said the "children" were a symbol of what his client had endured growing up in that neighborhood. Jackson told Rakofsky to focus on the case, especially because none of the "children" he referred to was scheduled to testify.

Later during his statement, Rakofsky informed the jury that the case was his first trial. The revelation shocked Jackson, the judge revealed at Friday's hearing. "I was astonished someone would represent someone in a murder case who has never tried a case before," the judge said.

Rakofsky did not speak during Friday's hearing.

On Thursday, Deaner became visibly frustrated with Rakofsky's performance after witnessing disagreements between Rakofsky and Sherlock Grigsby. Grigsby is a Washington-based lawyer who Rakofsky hired as local counsel to advise him on D.C. law practices during the trial because Rakofsky is not licensed to practice in the District. On Friday, Deaner told the judge that he wanted a new attorney.

After Friday's hearing, Grigsby said that Deaner's family hired Rakofsky and that he and Rakofsky "disagreed more than a couple of times" on how to proceed with the case. "He was the attorney of record. I would offer what I thought was the best advice, and he wouldn't accept it," Grigsby said.

Jackson said he would appoint a new attorney for Deaner. Jurors were called and told not to report Monday, and a follow-up hearing was scheduled for April 8.

Deaner will remain in the D.C. jail until his next trial, which could take as long as a year.

News researcher Jennifer Jenkins contributed to this report.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

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UNITED STATES OF AMERICA :

v. : Criminal Action No.:

DONTRELL DEANER, : 2008-CF1-30325

Defendant. :

----------X

Washington, D.C.
Friday, April 1, 2011

The above-entitled action came on for a Jury Trial before the **HONORABLE WILLIAM JACKSON**, Associate Judge, and a jury duly impaneled and sworn in, in Courtroom Number 319, commencing at approximately 9:46 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

VINET BRYANT, Esquire
Assistant United States Attorney
Washington, D.C.

On behalf of the Defendant:

JOSEPH RAKOFSKY, Esquire
SHERLOCK GRIGSBY, Esquire
Washington, D.C.

* * * * * * *

Margary F. Rogers, BS, CRI Telephone (202) 879-4635
Official Court Reporter

Ex B

P-R-O-C-E-E-D-I-N-G-S

DEPUTY CLERK: The matter before the Court at this time, United States versus Dontrell Deaner, 2008-CF1-30325.

MS. BRYANT: Vinet Bryant on behalf of the United States Government. Good morning, your Honor.

THE COURT: Good morning.

MR. GRIGSBY: Good morning, your Honor. Sherlock Grigsby on behalf of Mr. Deaner.

THE COURT: Good morning.

MR. RAKOFSKY: Joseph Rakofsky for Dontrell Deaner. Good morning.

THE COURT: Good morning.

(Defendant present.)

THE COURT: Good morning, Mr. Deaner.

DEFENDANT: Good morning.

THE COURT: Mr. Deaner, when we adjourned yesterday -- right before we adjourned yesterday, you said that you wanted a new lawyer in this particular case, and we had -- I had explained to you that if I did give you a new lawyer, we would have to abort the trial, let's say. We will have to dismiss the jury. I also explained to you that the Government would be able to prosecute you again for these charges. And you said you understood that, but you still, nonetheless, wanted

another lawyer.

I also explained to you that it could probably result, more than likely, in your continued detention until this case is actually -- the other -- the case is tried. And you said you understood that. And I asked you to think about it overnight.

Have you had an opportunity to think about that?

DEFENDANT: Yes.

THE COURT: And is it your desire to have a new lawyer?

DEFENDANT: Yes.

THE COURT: 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 and Mr. Deaner. Mr. Deaner, when I acquired of him, indicated that there was, indeed, a conflict between he and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial and appeared -- and according to Mr. Deaner, there was a conflict as well between local counsel, Mr. Grigsby's legal advice and Mr. Rakofsky's legal advice.

I must say that even when I acquired of Mr. Deaner, I -- as to whether or not, when the Court found out through opening, at least near the end of the opening statement, which went on at some length for

over an hour, that Mr. Rakofsky had never tried a case before. And, quite frankly, it was evident, in the portions of the trial that I saw, that Mr. Rakofsky -- put it this way: I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.

It appeared to the Court that there were theories out there -- defense theories out there, but the inability to execute those theories. It was apparent to the Court that there was a -- not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner. And had there been -- If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.

So I am going to grant Mr. Deaner's request for new counsel. I believe both -- it is a choice that he has knowingly and intelligently made and he has understood that it's a waiver of his rights. Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person could expect in a murder

trial.

So I'm going to grant the motion for new trial. And I must say that just this morning, as I said, when all else, I think, is going on in this courtroom, I received a motion from an investigator in this case who attached an e-mail in this case from Mr. Rakofsky to the investigator. I, quite frankly, don't know what to do with this because it contains an allegation by the investigator about what Mr. Rakofsky was asking the investigator to do in this case.

So that's where we are. And I'll figure out what to do about that case. But it just seems to me that -- so, I believe that based on my observations and, as I said, not just the fact that lead counsel had not tried a case before; any case. It wasn't his first murder trial; it was his first trial. And I think that the -- As I said, it became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.

So I'm going to grant the motion. We'll set this over -- Do you want to retain a lawyer, another lawyer or do you want me to appoint you another lawyer?

DEFENDANT: I don't understand the question.

THE COURT: If you cannot afford a lawyer, I will appoint you a lawyer.

DEFENDANT: Okay.

THE COURT: There are some good, competent lawyers who have tried these cases before.

DEFENDANT: Yeah. I would like for you to do that.

THE COURT: Okay. So what I'm going to do is I'm going to have you come back next Friday, and I'll appoint a lawyer, in the meantime, and they will get an opportunity to go over and see you at the jail.

DEFENDANT: Okay.

THE COURT: All right.

MS. BRYANT: That completes our matters before the Court, your Honor. May I be excused?

THE COURT: Yes.

MS. BRYANT: Thank you.

THE COURT: You might want to take a look at this pleading.

MS. BRYANT: I was, actually, going to ask, but I don't know if I --

THE COURT: Mr. Grigsby and Mr. Rakofsky.

MS. BRYANT: May we have copies?

THE COURT: I don't know what to do with it. I don't know whether you should see it or not.

MS. BRYANT: Okay. Well, I'll accept the Court's --

THE COURT: There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues.

That's my only copy.

MR. GRIGSBY: Your Honor, I was just going to look out here and then bring it back, your Honor.

MR. RAKOFSKY: Your Honor, is that something you wanted to discuss?

THE COURT: No. But you might want to discuss it with somebody else.

MS. BRYANT: Your Honor, that was filed in the court?

THE COURT: It was delivered to Judge Leibovitz this morning. She sent it over to me because this case was originally Judge Leibovitz's.

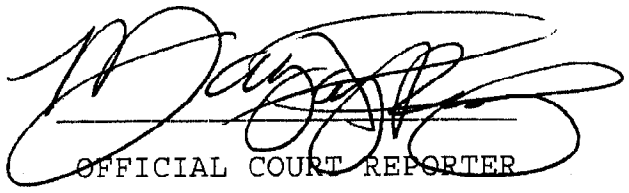
(The proceedings adjourned at 9:55 a.m.)

CERTIFICATE OF REPORTER

I, MARGARY F. ROGERS, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the Jury Trial in the case of the ***UNITED STATES OF AMERICA v. DONTRELL DEANER, Criminal Action No. 2008-CF1-30325*** in said Court on the 1st day of April, 2011.

I further certify that the foregoing 7 pages constitute the official transcript of said proceedings, as taken from said shorthand notes, my computer realtime display, together with the audio sync and tape recording of said proceedings.

In witness whereof, I have hereto subscribed my name, this 12th day of April, 2011.



OFFICIAL COURT REPORTER

[redacted]

From: [redacted]
To: [redacted]
Date: Wed, October 6, 2010 2:28:49 PM
Cc:
Subject: Deaner Murder Case

Adrian,

Thanks for helping.

1) Please trick [redacted] (old lady) into admitting:

a) she told the 2 lawyers that she did not see the shooting and

b) she told 2 lawyers she did not provide the Government any information about shooting.) This happened a couple of months ago.

2) Canvas neighborhood for witnesses

3) Surveillance camera is triggered by a device that is activated by sound.

Get information regarding:
A) how surveillance camera was installed -- this was described to us as a big production
B) how it is supposed to work
C) how it actually works
D) what deficiencies exist
E) where are our opportunities to argue either misconduct or human error

4) we will provide you with a script of questions to ask Lacey, our witness. This must be videotaped. I or Sherlock will probably be with you when this needs to take place.

Thank you.

Joseph [redacted]

Sent from my Verizon Wireless BlackBerry

Ex C

[redacted]